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Religion-Based Antitrust Exemptions: A Religious Motivation Test

Religious freedom, as guaranteed by the first amendment,\(^1\) is a fundamental right in American society. Free market competition, as protected by the Sherman Act,\(^2\) is the cornerstone of the American economic system.\(^3\) In our complex society, conflicts between religious freedom and free market competition are inevitable. Unfortunately, the federal courts have not established a uniform test for deciding when to grant a religious exemption from antitrust regulation. This note examines the conflict between religious freedom and free market competition. Part I examines first amendment exemptions from antitrust regulation, including exemptions based upon an exercise of political rights and religion-based exemptions; Part II discusses religion-based exemptions as they have developed with regard to state law; Part III evaluates the judicial approach toward antitrust exemption claims generally, and religion-based exemption claims in particular; and Part IV proposes a test for determining when to allow a religious exemption from antitrust regulation.

I. First Amendment Exemptions from Antitrust Regulation

A. Right to Petition Clause

1. The Supreme Court

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. (Noerr)*\(^4\), the Supreme Court of the United States granted a political action exemption from the Sherman Act. In *Noerr*, several railroads had conducted a publicity campaign encouraging state legislation

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\(^{1}\) U.S. Const. amend. I. The first amendment provides in relevant part: "Congress shall make no law respecting the establishment of religion nor prohibiting the free exercise thereof."

\(^{2}\) 15 U.S.C. § 1 (1976) provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

\(^{3}\) The Supreme Court described the Sherman Act "as important to . . . free-enterprise . . . as the Bill of Rights is to the protection of our fundamental personal freedoms." United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972).

harmful to the trucking industry. The truckers brought suit alleging antitrust violations grounded on the railroads' exclusively anticompetitive motivation and the railroads' use of a deceptive "third-party" campaign technique. The Supreme Court held that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." The Court established a political activity exemption from the antitrust laws, and applied this exemption notwithstanding the railroads' anticompetitive purpose and deceptive tactics.

The Court in Noerr advanced three reasons for the political activity exemption: (1) the "essential dissimilarity between an agreement jointly to seek legislation . . . and the agreements traditionally condemned by the [Sherman] Act"; (2) the right of the people to petition their elected representatives; and (3) the important constitutional questions raised by a contrary conclusion. The Court stated that a contrary conclusion would "impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act."

In Noerr, the Court also established a "sham exception" to the political activity exemption. The exemption does not apply to conduct, ostensibly directed toward influencing governmental action, which is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor.

United Mine Workers v. Pennington extended the political activity exemption to include attempts to influence administrative agencies. In Pennington, a union and several large coal companies conspired to eliminate smaller coal producing competitors. The union urged the Secretary of Labor to establish a higher minimum wage for employees of coal producers selling coal to the Tennessee Valley Authority (TVA), persuaded the TVA to curtail spot market purchases from smaller coal producers, and waged a price-cutting campaign to drive

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5 This technique involved propaganda material appearing to originate from independent groups, but actually coming from a single, competitive source.
6 365 U.S. at 135.
7 Id. at 136.
8 Id. at 138-39.
9 Id. at 137 (citing Parker v. Brown, 317 U.S. 341 (1943)). Parker held that the language and legislative history of the Sherman Act did not warrant invalidating a state regulatory program as an unlawful trade restraint. The "state action" doctrine of Parker was the first implied antitrust exemption. See notes 122-24 infra and accompanying text.
10 365 U.S. at 144.
small companies out of the spot market. The Supreme Court found that *Noerr* exempted from antitrust regulation any efforts to influence public officials regardless of intent.\(^\text{12}\)

*California Motor Transport Co. v. Trucking Unlimited*\(^\text{13}\) reaffirmed the first amendment right to petition public officials despite antitrust implications. In that case, several interstate truck carriers allegedly conspired to bring state and federal judicial proceedings to oppose their competitors' operating rights. The Supreme Court stressed that the *Noerr* political activity exemption had been based, in part, on the first amendment right to petition the legislature and included the right to petition the courts.\(^\text{14}\)

Nonetheless, the Court in *California Motor Transport* declined to apply the exemption. Because the carrier's activities were solely an attempt to interfere directly with the business relationships of a competitor, rather than a bona fide political activity, the Court invoked the *Noerr* sham exception.\(^\text{15}\) The claimed exercise of the carriers' right to petition constituted a sham and was, therefore, subject to the antitrust laws.

2. The Eighth Circuit

In *Missouri v. National Organization for Women, Inc. (NOW)*,\(^\text{16}\) the defendant organized a campaign to boycott convention sites in states

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\(^{12}\) *Id.* at 670. In discussing the *Noerr* opinion, the Court in *Pennington* stated, "[n]othing could be clearer from the Court's opinion than that anticompetitive purpose did not illegalize the conduct there involved." *Id.* at 669. However, as in *Noerr*, the Court did not specify whether the defendant's antitrust immunity depended on the first amendment or on an interpretation of the Sherman Act.

\(^{13}\) 404 U.S. 508 (1972). The Court in *California Motor Transport* stated it rested its decision in *Noerr* on two grounds: (1) the legislative history of the Sherman Act; and (2) the right of petition. The Court found the "same philosophy governs the approach of citizens or groups of them to administrative agencies . . . and to courts. . . . Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition. See Johnson v. Avery, 393 U.S. 483, 485 (1969); *Ex parte Hull*, 312 U.S. 546, 549 (1941)." 404 U.S. at 510.

\(^{14}\) 404 U.S. at 510-11, 513.

\(^{15}\) *Id.* at 515-16. See text accompanying note 10 supra.

that had not ratified the proposed Equal Rights Amendment. Missouri, alleging economic harm in its convention trade, brought suit for antitrust violations and for tortious infliction of economic harm. On these facts the United States Court of Appeals for the Eighth Circuit upheld the first amendment right to petition where political activity conflicts with the antitrust laws. The Eighth Circuit based its decision on the Noerr doctrine and the Sherman Act's legislative history.

In its analysis of the prior case law, the court in NOW relied on the Supreme Court's decision in *Klor's v. Broadway-Hale Stores*. In *Klor's*, the plaintiff, an appliance store, alleged that a competitor had conspired with manufacturers and distributors to stop selling appliances to the store. The Court stressed the distinction between those restraints subject to a rule of reason test and those restraints which by their "nature or character" were unduly restrictive, and hence [per se] forbidden by both the common law and the statute. The Court, holding for the plaintiff, found that group boycotts constitute per se violations of the Sherman Act. In dicta, however, the Court noted that commercial boycotts could possibly be distinguished from

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17 The proposed Equal Rights Amendment provides:

Section 1: Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2: The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3: This amendment shall take effect two years after the date of ratification.

19 See *Restatement* (Second) of Torts §§ 766B, 767 (1977).
20 *620 F.2d at 1311, 1319.*
21 *359 U.S. 207 (1959).*
22 The rule of reason test, proposed in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), instructs courts to consider the nature of the circumstances surrounding a particular restraint to determine if it is "unreasonably restrictive." See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918). In *Chicago Board of Trade*, Justice Brandeis stated that to determine a restraint's legality, the court must consider the "facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Id.* at 238.
23 *359 U.S. at 211* (quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 58, 65 (1911)). Restraints labeled unduly restrictive due to their nature or character are governed by the per se rule. The Court has described the per se rule: "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). See also *Continental T.V., Inc. v. GTE Sylvania*, Inc., 433 U.S. 36 (1977).
non-commercial boycotts.\textsuperscript{24}

The Eighth Circuit interpreted the \textit{Klor's} dicta as an indication that “the focus of the Sherman Act is upon commercial-business activities, and that the organization and objectives involved can make a difference in the application of the Act.”\textsuperscript{25} The court in \textit{NOW} distinguished \textit{NOW} from \textit{Klor's} by noting that \textit{NOW} concerned politically motivated conduct attempting to influence legislation, while \textit{Klor's} involved a commercial boycott among competitors.

The Eighth Circuit next cited \textit{Noerr} to support its decision. Although recognizing factual distinctions between \textit{Noerr} and \textit{NOW}, such as “the use of a boycott and the injury of a noncompetitor (Missouri) by a noncompetitor (NOW),”\textsuperscript{26} the Eighth Circuit found the distinctions to be irrelevant in assessing the Sherman Act’s applicability. The determinative issue was the political purpose behind the \textit{NOW} boycott.\textsuperscript{27} The court characterized the boycott as a political tool for influencing the government in the same manner as the publicity campaign in \textit{Noerr}. Any harm which the boycott caused to Missouri’s convention industry was merely incidental to \textit{NOW}’s attempt to influence legislation. The Eighth Circuit held that \textit{NOW}’s activities were not within the intended scope of the Sherman Act.\textsuperscript{28} The court concluded that Congress “indicated” that the Sherman Act concerned “competitors in commerce . . . not noncompetitors motivated socially or politically in connection with legislation.”\textsuperscript{29}

In rejecting Missouri’s intentional tort claim, the Eighth Circuit found \textit{NOW}’s boycott to be a valid exercise of the first amendment right to petition: “We . . . find sufficient support in \textit{Noerr} and the subsequent cases of the Supreme Court which refer to \textit{Noerr} to support the conclusion that the right to petition is of such importance that it is not an improper interference even when exercised by way of a boycott.”\textsuperscript{30} Although the court stated that it relied upon the Sher-

\textsuperscript{24} 359 U.S. at 213 n.7.
\textsuperscript{25} 620 F.2d at 1311. However, the court stated, “we do not rest our decision in this case upon the basis that the boycott was noncommercial and non-economic. Our decision is based upon the right to use political activities to petition the government, as was the underlying factor in \textit{Noerr}.” \textit{Id.} at 1315 n.16.
\textsuperscript{26} \textit{Id.} at 1315-16.
\textsuperscript{27} The court stated, “the crux of the issue is that \textit{NOW} was politically motivated to use a boycott to influence ratification of the ERA.” \textit{Id.} at 1314. The court determined that the political motivation of the \textit{NOW} boycott brought it within the overriding policy considerations of \textit{Noerr}. \textit{Id.} at 1316.
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.} at 1309.
\textsuperscript{30} \textit{Id.} at 1317.
man Act's legislative history to find NOW's activities exempt from antitrust regulation, its holding on the tort claim indicated its concurrent reliance on the first amendment right to petition.  

In a dissenting opinion, Judge Gibson contended that Noerr must be narrowly construed and stated that the factual distinctions between Noerr and NOW "mandate that the court . . . undertake a more comprehensive balancing of the important issues." He stressed that Noerr should not be interpreted to automatically exempt politically motivated boycotts from antitrust regulation. Finally, Judge Gibson found that the majority opinion ignored the most critical issue by assuming, without sufficient analysis, that NOW's actions constituted an exercise of first amendment rights.

B. Free Exercise of Religion Clause

1. The Ninth Circuit

In Swan v. First Church of Christ, Scientist, the Ninth Circuit found that disseminating religious writing had "no resemblance to the various activities which have been recognized as 'trade or commerce' under the [Sherman Act]." A writer of religious works had claimed that the Christian Scientist Church, its board of directors, and publishing society conspired to prevent circulation of his book to church members. The court held that "[a]ll religious organizations

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31 Id. at 1316. The court's language in its concluding paragraph appears to apply the first amendment to both claims. Id. at 1319.

32 Id. at 1324 (Gibson, C.J., dissenting). Judge Gibson emphatically stated, "Noerr simply does not imply the conclusion that the first amendment immunizes politically motivated boycotts against antitrust attack." Id. (footnote omitted). See Note, Political Boycott Activity and the First Amendment, 91 HARV. L. REV. 659 (1978).

33 Id. at 1320 (Gibson, C.J., dissenting). In a footnote, the dissent stated: "The District Court states: [T]he issue in this case . . . is whether NOW's actions, which are themselves an exercise of first amendment rights, constitute a violation of the Sherman Act.' . . . Indeed, this formulation of the issue would almost seem rhetorical. Obviously, first amendment protected activities cannot be outlawed by Congress." Id. at 1320 n.3 (Gibson, C.J., dissenting).

34 225 F.2d 745 (9th Cir. 1955). See Watch Tower Bible and Tract Soc. v. Dougherty, 337 Pa. 286, 11 A.2d 147 (1940). Watch Tower Bible, a common law antitrust decision, involved a secondary boycott. Plaintiff conducted programs over a radio station owned by a department store. The defendants, Catholic clergy, found the programs offensive and organized protests against the store. The station then refused to renew plaintiff's contract. The court, denying plaintiff's claim for damages, stated that "[a] right of action does not arise merely because a group withdraws its patronage or threatens to do so and induces others to do likewise where the objects sought to be obtained are legitimate." 337 Pa. at 288, 11 A.2d at 148. Because the court did not discuss the religion clauses, this case does not control the present conflict. See Kuryer Pub. Co. v. Messmer, 162 Wis. 565, 156 N.W. 948 (Wis. 1916).

35 225 F.2d at 751 (citing United States v. Shubert, 348 U.S. 222, 226-27 (1955)). Shubert discussed the broad interpretation given to "trade or commerce."
claim the unrestricted right to designate which writings shall be accepted by their members. In this they are protected from State interference by the first amendment."\(^{36}\) Therefore, the court concluded that conduct motivated solely by religious concerns is exempt from antitrust regulation.

2. The D.C. Circuit

Twenty-five years after *Swan*, in *Costello Publishing Co. v. John E. Rotelle*,\(^ {37}\) the United States District Court for the District of Columbia followed *Swan* and refused to apply the antitrust laws to religiously motivated conduct.\(^ {38}\) In *Costello*, a publishing company declined to comply with the mandatory Episcopal liturgical text approval process. Episcopal officials then asked Catholic book dealers not to distribute the unapproved book. The publishing company contended that the Episcopal officials’ conduct had violated the Sherman Act. However, the district court rejected that contention, and cited *NOW* as holding that “the antitrust laws are intended to apply solely within a commercial competitive framework.”\(^ {39}\) The court held the defendant’s actions, motivated exclusively by religious concerns, had no commercially competitive design. “Such religiously motivated conduct,” stated the court, “is not the type which falls within the realm of the antitrust laws . . . .”\(^ {40}\)

On appeal, the United States Court of Appeals for the D.C. Circuit reversed the district court and held that no blanket religious antitrust exemption exists.\(^ {41}\) The D.C. Circuit based its decision on statutory and constitutional considerations. In its statutory analysis, the court stressed that only actions producing an anticompetitive effect violate the antitrust laws. Since the trial court had granted summary judgment, this issue had not yet been explored.

With respect to the constitutional issues, the D.C. Circuit con-

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\(^{36}\) 225 F.2d at 750-51.
\(^{37}\) No. 76-1930 (D.D.C. August 22, 1980).
\(^{38}\) Id., slip op. at 3-4. The Court also concluded that the free exercise clause prohibited review of ecclesiastical decisions (citing Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)). See note 108 infra.
\(^{39}\) Id. at 4.
\(^{40}\) Id.
\(^{41}\) Costello Pub. Co. v. John E. Rotelle, 670 F.2d 1035 (D.C. Cir. 1981). In a footnote, the court stated the antitrust issues “might seem easier” if the case did not involve a religious publication and an organization affiliated with the Roman Catholic Church. The court believed the case appeared more difficult because the Church’s market power derives in large part from religious rather than economic factors. Nevertheless, the court contended, “setting an exchange rate between religious and economic factors is theoretically no more difficult than putting a price on advertising.” Id. at 1047 n.22.
sidered both the Noerr and Wisconsin v. Yoder line of cases and determined that neither required an absolute antitrust exemption for religiously-motivated conduct. The court recognized that Costello involved first amendment issues similar to those in Noerr. The court distinguished Costello from Noerr on the grounds that the first amendment issue in Costello was "double-edged." While the "political participatory rights guaranteed by the [f]irst [a]mendment all seek to further political activity . . . the religious rights guaranteed seek to protect religious liberties, but prohibit state establishment of religion." Although Noerr and Costello involved actions concerning the first amendment, the court stated that the extent to which the actions do concern the first amendment is uncertain. The court also noted that "the countervailing economic considerations depend upon the extent to which the concerns of the antitrust laws are implicated by the activity challenged." Thus, according to the D.C. Circuit, religious freedom and competition must be placed on a continuum and carefully balanced to resolve properly any conflict between these two important interests.

The D.C. Circuit criticized the trial court for basing its decision solely on the defendant's motives. It determined that while courts must consider the nature of the motivation in granting an antitrust exemption, a "good motive" finding is not conclusive. The circuit court stated:

[T]he district court must initially determine if the economic pressure brought by the church is legitimately geared to the church's protection of its liturgy rather than its survival in the marketplace of religious books . . . . But even assuming that the Church's activity is a genuine expression of the right to exercise

42 406 U.S. 205 (1972). The court, using a balancing test, granted a religious exemption from compulsory education for members of the Amish faith. See text accompanying notes 91-96 infra.

Unlike the district court, the circuit court did not discuss Swan v. First Church of Christ, Scientist, 225 F.2d 745 (9th Cir. 1955).

43 The court also cited NOW and Allied Int'l, Inc. v. International Longshoremen's Ass'n, AFL-CIO, 492 F. Supp. 334 (D. Mass. 1980) (hereinafter ILA). In ILA, the court held a concerted refusal to load ships engaged in trade with the U.S.S.R. because of the Soviet Union's invasion of Afghanistan did not violate the antitrust laws.

44 670 F.2d at 1048.

45 Id.

46 Id. (comparing California Motor Transport, 404 U.S. at 511-15, with Noerr, 365 U.S. at 127).

47 670 F.2d at 1049 (citing NOW, 620 F.2d at 1312).

48 670 F.2d at 1049.

49 Id. The court failed to distinguish adequately between a "good" motive and a "religious" motive.
freely, there are still limits on the tactics that may be used to accomplish its ends.\footnote{50}

The court first noted that while the freedom to believe is absolute, the freedom to act in pursuit of religious beliefs remains subject to regulation.\footnote{51} Relying on \textit{Yoder}, the D.C. Circuit found that "neither religious (free exercise) nor social (antitrust) interests are totally free from a 'balancing process.'"\footnote{52} The D.C. Circuit held that where religious expression conflicts with antitrust law, a court must balance the nature and extent of the antitrust violations against the religious motivation in determining whether to grant an antitrust exemption.\footnote{53}

\section*{II. Religion-Based Exemptions in Perspective}

\subsection*{A. Defining Religion Under the First Amendment}

\subsubsection*{1. Established Religions v. Personal Conscience}

The Supreme Court has not specifically outlined a standard for determining a legitimate claim of exemption based upon the free exercise of religion. From rather narrow early definitions of religion,\footnote{54}
the Court expanded the definition to its broadest application in *United States v. Seeger.* In *Seeger,* the Court granted a conscientious objector religious exemption from military service. The Court used an "objective" test for defining religion: "[D]oes the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?"6 While the *Seeger* court only interpreted the term "religious belief" as used in the Selective Service Act, it adopted personal philosophy and morality as the functional equivalent to religion.

Recent decisions have placed greater emphasis on established churches than on individual beliefs, suggesting that the Court is again narrowing its definition of religion. In *Wisconsin v. Yoder,* the Court indicated it favored the beliefs of established churches over personal conscience beliefs.59 In *Yoder,* Chief Justice Burger stated:

> [I]f [religious organizations assert] their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social

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55 See *Torasco v. Watkins,* 367 U.S. 488, 495 (1961), where the Court stated that "neither a State nor the Federal Government can force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Id.* at 495. In a footnote, the Court included Buddhism, Taoism, Ethical Culture, and Secular Humanism as examples of religions which do not teach what would generally be considered a belief in God's existence. *Id.* at 495 n.11.


57 380 U.S. at 184.

58 Universal Military Training and Service Act § 6(j), 50 U.S.C. § 456 (j) (1970). This Act exempts from combat service individuals who are conscientiously opposed to participation in war by reason of their "religious training and belief." The Act states that "religious training and belief" does not include essentially political, sociological, or philosophical views or a merely personal moral code. While the Court stated that Congress, in using the expression "Supreme Being" rather than "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views, the Court's definition allows personal beliefs to be treated identically to religious beliefs. 380 U.S. at 165.

Justice Douglas recognized the Court's broad definition of religion in both *Seeger* and *Welsh* in his *Yoder* dissenting opinion. He criticized the *Yoder* majority for "retreating" from that broad "philosophical and personal" religious definition. *Wisconsin v. Yoder,* 406 U.S. 205, 247-49 (1972) (Douglas, J., dissenting). See text accompanying note 62 infra.

59 See Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religion Clause,* 75 W. Va. L. Rev. 213 (1973). Professor Kurland discusses the Court's "devotion to the rights of churches rather than the rights of individual conscience" and advocates a compromise. He contends that if the two religion clauses were read separately, "the freedom clause [could speak] for the protection of individual conscience and the establishment clause [could speak] for a ban on assistance, not to individuals, but to churches." *Id.* at 241.
values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such a belief does not rise to the demands of the [r]eligion [c]lauses.60

In his dissent, Justice Douglas interpreted the majority opinion as both broadening and limiting religious freedom. Noting the Court's increasing support for religion-based claims, he stated: "What we do today . . . opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time Reynolds will be overruled."61 Justice Douglas argued that the Court retreated when, in reference to Henry David Thoreau, it stated his choice was philosophical rather than religious and thus not protected by the religion clauses. He found this contrary to the Court's decision in Seeger.62 Justice Douglas argued that while the Court was broadening free exercise protections, it was narrowing the definition of religion which was the basis for applying those protections.

2. Importance, Sincerity, and Historical Basis of Religious Beliefs

Because the Supreme Court has not clearly defined "religion," courts consider any of three factors when analyzing religious claims. The courts evaluate the importance, sincerity, and historical basis of the religious belief.63

In the importance analysis, courts distinguish between activities central to a religious belief and those characterized as merely incidental.64 For example, in Sherbert v. Verner,65 the Supreme Court labeled the Sabbath observance as a "cardinal principle" of the Seventh-Day Adventist faith.66 Similarly, in sustaining a religious exemption from state drug laws, the California decision in People v.
Woody noted that: (1) peyote (a controlled substance) played a "central role" in the religious organization's ceremony and practice; and (2) the "ceremony marked by the sacramental use of peyote, composes the cornerstone of the peyote religion." On the other hand, the Fifth Circuit has held that marijuana does not constitute a central tenet of Hinduism.

Courts also examine the sincerity of the claimant's belief. In United States v. Seeger, the Supreme Court stated: "[W]e . . . emphasize that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case."

In Yoder, the Supreme Court also inquired into the historical and organizational basis of the religion. Yoder stressed that the Amish were "[a]ided by a history of three centuries as an identifiable sect and a long history as a successful and self-sufficient segment of American society . . . ."

B. Evolution of Religious Exemptions From State Law

In 1878, the Supreme Court decided Reynolds v. United States, its first religious exemption claim case. Reynolds, a practicing Mormon, sought an exemption from a state law forbidding polygamy. The Mormon Church, under certain conditions, advocated polygamy as part of its religious practices. The Supreme Court rejected the proposed first amendment exemption from state law for religiously motivated polygamy. It held that only religious beliefs, not religiously motivated actions, warranted constitutional protection.

Although the Constitution guaranteed individuals absolute freedom in their religious beliefs, the state possessed the power to regulate an individual's religious conduct.\textsuperscript{74}

Forty years later, however, the Court eroded the belief-action distinction.\textsuperscript{75} The Court granted religious exemptions based not on the free exercise clause but on the free speech clause.\textsuperscript{76} In \textit{Board of Education v. Barnette},\textsuperscript{77} the Court upheld the Jehovah's Witnesses' right not to be compelled to participate in flag salute exercises. Jehovah's Witnesses brought suit seeking to restrain enforcement of a compulsory flag salute regulation. The Witnesses, believing the law of God is superior to all laws enacted by government, also believe man should not serve any other symbol or image. Because they consider the flag an "image," they refuse to salute it. The Court invalidated the regulation.\textsuperscript{78} It framed the issue as a general constitutional question and denied the relevancy of the religious issue.\textsuperscript{79} However, upholding the Jehovah's Witnesses' claim required the Court to overrule an earlier compulsory flag salute decision which had rejected a claim based on religious beliefs.\textsuperscript{80} Although for the next twenty years the Court accorded religious expression protection under the free speech clause, it continually emphasized the importance of protecting religious freedom.\textsuperscript{81}

In \textit{Braunfeld v. Brown},\textsuperscript{82} the Supreme Court considered the claim

\textsuperscript{74} Cantwell v. Connecticut, 310 U.S. 296 (1940), restated the belief-action distinction: "[T]he Amendment embraces two concepts — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." \textit{Id.} at 303-04.

\textsuperscript{75} See, e.g., Schneider v. New Jersey, 408 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

\textsuperscript{76} See Pfeffer, \textit{The Supremacy of Free Exercise}, 61 GEO. L.J. 1115, 1124-1130 (1973). Professor Pfeffer contends that a free exercise claim, unsupported by other first amendment claims, did not merit protection.


In his concurring opinion in \textit{Fowler}, Justice Frankfurter rejected the free exercise clause as the basis for invalidating a law discriminating against a particular religious group, stating that the equal protection clause of the fourteenth amendment condemned it. 345 U.S. at 70 (Frankfurter, J., concurring).

\textsuperscript{78} 319 U.S. at 633.

\textsuperscript{79} \textit{Id.} at 632.


\textsuperscript{82} 366 U.S. 599 (1961).
of Orthodox Jews seeking a religious exemption from compulsory Sunday closing laws. The Orthodox Jewish faith requires its members to close business on Saturday. The claimants argued the Sunday closing laws interfered with their religious freedom by subjecting them to serious economic disadvantages. Denying the exemption, the Court distinguished between legislation which makes the religious practice itself illegal and legislation which imposes only an indirect restriction on religious freedom. The Court held that legislation which imposes an indirect burden is constitutional unless the state can accomplish its purpose by a less restrictive alternative.\textsuperscript{83}

In \textit{Sherbert v. Verner}\textsuperscript{84} the Supreme Court rendered its first decision upholding a free exercise claim not supported by the free speech clause. The Court found that a state could not constitutionally deny unemployment compensation to a Sabbatarian who refused to accept employment requiring him to work on Saturday.\textsuperscript{85} The 1963 opinion held that only a compelling state interest could justify imposing a burden on the free exercise of religion.\textsuperscript{86}

In the 1970 Supreme Court decision in \textit{Walz v. Tax Commission},\textsuperscript{87} a property owner contended that property tax exemptions granted to religious organizations violated the establishment clause.\textsuperscript{88} Recognizing the inevitable struggle in seeking a neutral course between the two religion clauses,\textsuperscript{89} the Court noted that constitutional neutrality

\textsuperscript{83} \textit{Id.} at 607.
\textsuperscript{84} 374 U.S. 398 (1963).
\textsuperscript{85} Justice Brennan, a dissenter in \textit{Braunfeld}, wrote the opinion in \textit{Sherbert}. He attempted to distinguish the two decisions on the grounds that a compelling state interest existed in \textit{Braunfeld} in providing a uniform day of rest while no compelling state interest existed in \textit{Sherbert}. \textit{Id.} at 408. Justice Brennan also noted that granting the exemption in \textit{Braunfeld} would have presented a difficult administrative problem or allowed the exempted class a great competitive advantage. \textit{Id.} at 408-09.
\textsuperscript{86} \textit{Id.} at 403.

\textsuperscript{87} 397 U.S. 664 (1970).

\textsuperscript{88} The Court noted that the tax exemption statute did not single out one particular church or religious group or even churches in general. Rather, it granted exemption to all religious houses within a broad class of property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical and patriotic groups. \textit{Id.} at 672-73.

\textsuperscript{89} The Court recognized that in attempting to articulate the scope of the two religion clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. \textit{Id.} at 668.
in the area could not be an absolutely straight line. The Court adopted a new standard, "benevolent neutrality," and held that an exemption indirectly benefitting religion does not violate the establishment clause.90

In *Wisconsin v. Yoder*,91 the Supreme Court faced a conflict between Amish religious beliefs and state compulsory education laws. The Court adopted a balancing test92 but required a compelling state interest in order to overcome the religious claim.93 Holding for the Amish defendant, the court noted that the state had not shown a compelling state interest.

The Court in *Yoder* also rejected arguments against a religious exemption based on the neutrality concept94 and the establishment clause.95 The court stated:

A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion . . . . The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the [e]stablishment [c]lause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection

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90 *Id.* at 669.

The Court explained the "benevolent neutrality" standard:

Each value judgment under the [r]eligion [c]lauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the [e]stablishment and [f]ree [e]xercise [c]lauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.

*Id.* at 669-70.


93 *See* notes 84-86 *supra* and accompanying text.

94 *See* text accompanying notes 89-90 *supra*.

95 The establishment clause requires that statutes have a secular legislative purpose, have a principal or primary effect that neither advances nor inhibits religion, and not foster excessive entanglement with religion. Wolman v. Walter, 433 U.S. 229, 235-36 (1977).
of values promoted by the right of free exercise.\footnote{96}

III. Judicial Approaches to Antitrust Exemption Claims: 
A Critique

The debate continues among commentators and within the 
courts concerning the proper judicial standard for antitrust exemp-
tion claims. The conflict is between an absolutist approach and a 
balancing approach.

The absolutist approach adopted in \textit{Noerr} holds that a concerted 
attempt to influence legislation through a publicity campaign merits 
an antitrust exemption. NOW may establish a doctrine independent 
of \textit{Noerr} and accord political boycotts absolute antitrust immunity 
when the boycott's sole purpose is to influence governmental ac-
tion.\footnote{97} An alternative judicial response might distinguish between 
commercial and noncommercial boycotts and apply separate rules to 
the two different boycott types.\footnote{98} Although one commentator main-
tains that all boycotts, regardless of their motivation, should be con-
sidered per se violations of the Sherman Act,\footnote{99} the lower courts have 
held that only commercial boycotts are illegal per se.\footnote{100} Several com-
mentators have concluded that noncommercial group boycotts may 
not merit per se treatment\footnote{101} and NOW suggests that noncommercial

\footnote{96} 406 U.S. at 220-21 (citing Walz v. Tax Comm'n., 397 U.S. 664 (1970); Sherbert v. 
Verner, 374 U.S. 398 (1963)).

\footnote{97} A recent commentator on the NOW decision interpreted NOW in this manner. Comment,
First Amendment - Political Boycotts are Beyond the Scope of the Sherman Act and Privileged Under 
the First Amendment, 56 Notre Dame Law. 326, 330 (1980).

\footnote{98} Some commentators contend that group boycotts in a non-commercial context may 
not be per se violations of the Sherman Act. See Bauer, \textit{Per Se Illegality of Concerted Refusals to 
Deal: A Rule Ripe for Reexamination}, 79 Colum. L. Rev. 685 (1979); McCormick, \textit{Group Boycott 
- Per Se or Not Per Se, That Is the Question}, 7 Seton Hall L. Rev. 685 (1979); Comment, Protest 
Boycotts Under the Sherman Act, 128 U. Pa. L. Rev. 1131 (1980). However, one commentator 
argues that all boycotts merit per se treatment regardless of their motivation. See Bird, 

Per se violations of the Sherman Act “are certain agreements or practices which because 
of their pernicious effect on competition and lack of any redeeming virtue are conclusively 
presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise 
harm they have caused or the business excuse for their use.” Continental T.V., Inc. v. GTE 
5 (1958)).

\footnote{99} See Bird, supra note 98.

\footnote{100} See, e.g., Smith v. Pro Football, Inc., 593 F.2d 1173, 1177-91 (D.C. Cir. 1978); Feminist 
Women's Health Center v. Mohammad, 586 F.2d 530, 546-47 (5th Cir. 1978), cert. denied, 444 
U.S. 924 (1979); Worthen Bank & Trust Co. v. National Bank Americard, Inc., 485 F.2d 119, 
127-30 (8th Cir. 1973), cert. denied, 415 U.S. 918 (1974); United States v. Insurance Bd., 188 F. 

\footnote{101} See Bauer, supra note 98; McCormick, supra note 98; Comment, supra note 98.
boycotts should be treated differently than commercial boycotts. The issue, however, is not yet settled.

In contrast to the absolute exemption from antitrust regulation which the Noerr and NOW cases establish, the dissents in NOW and Costello argue for a traditional first amendment balancing test. Support for balancing first amendment rights against governmental interests can be found in various Supreme Court decisions. Judge Gibson, dissenting in NOW, contended the balancing analysis is necessary "to assure consistent evaluation of similar claims."

A. Problems With a Balancing Test

Because applying a balancing test to religion-based antitrust exemptions allows the courts to reach unpredictable and inconsistent results, courts should adopt a different test. While courts have granted various religion-based exemptions using a balancing test, they have also drawn questionable distinctions in these decisions. The compelling state interest found in Braunfeld, yet not in Sherbert, exemplifies this problem.

Applying the rationale behind these distinctions in subsequent cases is difficult. A balancing test also provides little guidance to lower courts. Courts might follow the trend favoring political action antitrust exemptions and religion-based exemptions from other laws, but this does not eliminate the need for an articulated standard. A growing number of religious organizations and a volatile economy suggest the possibility of increased litigation in this area. Lower courts need specific legal standards to judge claims of religion-based exemptions from antitrust laws. A balancing test leads to subjective evaluations rather than application of objective standards.

Another problem with the balancing test suggested in Costello is that the more successful religion-based boycotts have a greater chance of being declared illegal. The Costello test requires courts to assess the market impact of the antitrust violations in balancing them

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103 620 F.2d at 1324.
105 See note 85 supra and accompanying text.
106 Professor Giannella, however, contends that an ad hoc judgment can be subjected to "more or less objective criteria." See Giannella, supra note 73, at 1384.
against the religious goal. A well-organized boycott will more strongly affect the market than a disorganized one. The resulting success may tip the balance toward the antitrust regulation and away from the religious exemption. Subjecting one religious group to antitrust regulation solely because of its organizational capabilities, while exempting a more disorganized religious group, creates equal protection problems and infringes upon an individual’s personal religious choice.

B. Problems With Current Standards For Classifying Religions

The judiciary’s current approach for evaluating religion-based exemption claims remains unsettled. Although the Supreme Court has adopted a balancing test, its initial evaluation of the importance, sincerity, and historical basis of the religious claim presents problems. Under any exemption analysis, courts must determine when religious interests are present. Yet, courts currently exceed reasonable inquiry and attempt to classify religions without articulating an objective standard.

In the importance analysis, the inquiry into centrality necessarily involves an evaluation of vague doctrinal beliefs. The centrality distinction, one commentator correctly notes, is “beyond the practical and institutional competence of courts.” Even dedicated church leaders have difficulty articulating their religion’s “cardinal principles.” Certainly, courts, unfamiliar with the detailed principles of various religions, should not be expected to make this evaluation.

107 See 670 F.2d at 1050.
109 See Kurland supra note 59.
110 See Note supra note 92, at 360.
111 Professor Konvitz notes that sometimes there are disputes within a religion as to what constitutes a central tenet. M. Konvitz, RELIGIOUS LIBERTY AND CONSCIENCE 77-79 (1968).
112 The Supreme Court recently recognized that intrafaith differences concerning required beliefs and practices “are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. . . . [T]he guarantee of free exercise is not limited to beliefs which are shared by all members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and . . . competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbi-
A court must also inquire into the religious claimants' sincerity; allowing an exemption for an insincere claim dilutes the fundamental importance attached to religious freedom. However, distinguishing what is believed from what is believable requires a judgment likely to be determined by the judge's personal religious convictions. The sincerity issue, therefore, should be considered only after the court has recognized the existence of a valid religious claim and not as a factor in that existence.

Lastly, the Court's inquiry into the historical and organizational basis of the religion may be criticized for favoring established religions and restricting the church's right to change or interpret its doctrine.

C. Supreme Court Trend Favoring Religious Exemption Claims

Although the Supreme Court has not adopted an acceptable standard for evaluating religious exemption claims, its decisions in Sherbert, Walz, and Yoder clearly indicate a trend favoring religious exemptions.

The Supreme Court's decision in Sherbert extends its earlier Braunfeld decision. The Braunfeld religious exemption required no affirmative action by the state. In contrast, the grant of a religious exemption in Sherbert required that the state pay benefits. By granting an exemption in Sherbert, the Court imposed an affirmative duty on the state. Notwithstanding Braunfeld's contrary precedent, the Court in Sherbert strongly supported the religious exemption. Thus, Sherbert is the first indication of the Supreme Court's recognition of religious exemptions' importance.

113 Justice Jackson, in a dissenting opinion, criticized the majority for undertaking a sincerity inquiry:

As a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer.


114 Professor Pfeffer labeled Sherbert as the "turning point" in the ranking of values between free exercise and free speech interests. He contended that until Yoder was decided, it was not certain whether Sherbert was an isolated opinion. See Pfeffer, supra note 76 at 1139-40.
The Waz decision is also important precedent favoring a religious exemption from antitrust regulation. First, Waz severely weakens any argument that a religious antitrust exemption violates the establishment clause. In his majority opinion, Chief Justice Burger declared: "[T]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the free exercise clause. To equate the two would be to deny a national heritage with roots in the Revolution itself." Thus, the Chief Justice noted the historical importance of the religion clauses and recognized that the importance should continue. The opinion further indicated that the free exercise of religion be accorded great weight when the possibility of state interference with free exercise arises.

Secondly, in Waz, the Supreme Court expressly approved a religious exemption in a traditionally heavily regulated economic area. Although the legislative history in Waz specifically provided for a tax exemption, the discussions in Noerr and NOW of the Sherman Act's legislative history support an analogous implied antitrust exemption. In Noerr, the Supreme Court noted the Sherman Act was not intended to regulate political activity. The Court stated that the right to petition is protected by the Bill of Rights and courts cannot "lightly impute to Congress an intent to invade these freedoms." This rationale applies equally well to the right of religious freedom. In NOW, the Eighth Circuit examined the legislative history and quoted Mr. Sherman, the Act's sponsor: "[S]uch an association [churches, schools, or any other kind of moral or education association] is not in any sense a combination or arrangement made to inter-

The Supreme Court recently affirmed the Sherbert decision. The Court held that denying unemployment benefits to a claimant who terminated his job because his religious beliefs forbade participation in arms production violated the first amendment right to free exercise of religion. Thomas v. Review Bd. of Ind. Employment Sec., 101 S. Ct. 1425 (1981).


116 N.Y. Const. Art. 16, § 1 provides in relevant part:

Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit.

117 However, the Supreme Court has held there is a presumption against implied exclusions from antitrust regulation. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); text accompanying notes 122-24 infra.

118 365 U.S. at 138.
fere with [the Sherman Act] . . . .” The court in NOW recognized that the legislative history provided an “indication” that the Act applied to “competitors in commerce . . . not noncompetitors motivated socially or politically in connection with legislation.”

Admittedly, the Supreme Court has held there is a presumption against implied exemptions from antitrust regulation. Yet, the Court has expressly recognized two categories of implied exemptions: state action and political action. In discussing implied antitrust exemptions, the Court recently stated, “[c]ommon to the [exemptions] was potential conflict with policies of signal importance in our national traditions and governmental structure of federalism.” Religious freedom certainly falls into this category.

The Supreme Court reiterated its policy favoring religious exemptions in Yoder. Yoder stressed the fundamental importance of a free exercise religious exemption and the relative unimportance of establishment clause neutrality. While it also narrowed, as Justice Douglas’ dissent noted, the guidelines for defining religion, this

120 Id.
121 Id.
124 435 U.S. at 400. The Court pointed out, however, that even the recognized exclusions have been unavailing to prevent antitrust enforcement which, though implicating fundamental policies, did not severely impinge upon them. Id. (citing Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)). The Court in Lafayette also stated that it is necessary to demonstrate “countervailing policies which are sufficiently weighty to overcome the presumption.” 435 U.S. at 400.
125 406 U.S. at 220-21. In Yoder, the Court stated, “[w]e must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise.” Id.
126 See text accompanying notes 61-62 supra. In a recent free exercise exemption case, the Court avoided the “difficult and delicate task” of determining what constitutes a religious belief by adopting the lower tribunal's finding that the petitioner acted pursuant to religious convictions. However, the Court did state that resolving what constituted a religious belief must not "turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent or comprehensible to others to merit First Amendment protection." Thomas v. Review Bd. of Ind. Employment Sec., 101 S. Ct. 1425, 1430 (1981).
change is unimportant in the antitrust area. A religious antitrust exemption will be claimed for the entire organization, not merely one individual asserting a "personal conscience" claim. A Sherman Act violation requires two elements: (1) sufficient agreement to constitute a "contract, combination . . . or conspiracy"; and (2) a restraint of trade.\textsuperscript{127} However, pursuant to the Supreme Court's decision in \textit{Standard Oil Co. v. United States},\textsuperscript{128} the Act prohibits only those agreements that impose an \textit{unreasonable} restraint of trade.\textsuperscript{129} One individual or even a small religious group will not meet these threshold antitrust violation elements and will not require an exemption.\textsuperscript{130}

IV. A Proposed Test

Combining the current judicial attitude favoring religious exemptions with the Supreme Court's support for first amendment political action antitrust exemptions suggests the judiciary should sustain a religion-based antitrust exemption. The \textit{Yoder} decision reflects the Supreme Court's commitment to religious freedom. The \textit{Noerr} doctrine, although stressing the importance of the Sherman Act, provides that certain politically motivated claims must be granted antitrust exemptions. Religiously motivated claims should receive the same treatment because both political freedom and religious freedom are fundamental rights in our system. In \textit{Swan}, the Ninth Circuit accorded religious freedom the same deference as political freedom and held that religiously motivated claims do require an antitrust exemption.\textsuperscript{131} Although the Supreme Court has never considered a religious antitrust exemption, it should recognize that \textit{Swan} correctly decided the religion-antitrust conflict.

For the reasons discussed above,\textsuperscript{132} religion-based antitrust exemption claims should not be subject to a balancing test. Instead, courts should evaluate these claimed exemptions under a "religious motivation" test:\textsuperscript{133} if the conduct constituting the alleged antitrust

\begin{footnotes}
\item \textsuperscript{127} 15 U.S.C. § 1 (1976).
\item \textsuperscript{128} 221 U.S. 1 (1911).
\item \textsuperscript{129} \textit{Id.} at 58.
\item \textsuperscript{130} \textit{See} note 71 \textit{supra}.
\item \textsuperscript{131} The district court in \textit{Costello} also indicated that religious claims require an antitrust exemption. No. 76-1930 (D.D.C. August 22, 1980).
\item \textsuperscript{132} \textit{See} notes 104-07 \textit{supra} and accompanying text.
\item \textsuperscript{133} This test is similar to one recently proposed in the political boycott area. \textit{See} Comment, \textit{supra} note 97, at 330.
\end{footnotes}
violation is primarily motivated by religion, courts must grant an antitrust exemption.

A. Defining Religion

Before courts can apply a religious motivation test, they must define religion. In the area of religious exemptions from antitrust laws the federal courts should adopt the following definition: religion is a belief in the existence of a Supreme Being or other authoritative supernatural influence along with an adherence to a set of principles based on this authoritative source. The authoritative supernatural influence may be strengthened by, but is not simply equivalent to, personal conscience. Thus, the definition clearly encompasses religious traditions which believe in a single God such as Catholicism and Judaism. It also encompasses nontheistic religions such as Buddhism. It does not, however, include cults contending that their "authoritative supernatural influence" is another human being who requires adherence to particular philosophical beliefs.

Religion may be defined even more specifically in the negative. Religion is not commercial activity. A religious claim may have commercial overtones analogous to the commercial overtones in NOW; however, these commercial goals will not negate the ultimate religious objective. Thus, even religious claims with commercial overtones fall within this definition of religion.

B. Religious Motivation Test

Once courts adopt a definition of religion, determining whether the conduct is religiously motivated will not be difficult. This step requires an evaluation of the claimant's "actual motivation" but not the religious claim's importance or historical basis. An exclusive inquiry into motivation avoids the difficult centrality distinction currently employed. 135

Expressly separating the motivational question from the definitional question enables the court to evaluate more objectively the claimed religious motivation. The court must question not whether the belief is sincerely held but whether the conduct is sincerely moti-

134 A definition appropriate for evaluating religion-based antitrust exemptions might differ from a definition applied to other claims under either the free exercise or establishment clause. The Court should specify the applicability of its definition. See L. Tribe, AMERICAN CONSTITUTIONAL LAW § 14-6, at 827-28.

135 See notes 109-12 supra and accompanying text.
vated by religious belief. For these purposes, the religion involved is assumed legitimate.

Essentially, this "actual motivation" evaluation is analogous to the sham exception in antitrust. If the conduct, although falling within the court's definition of religion, clearly indicates, "nothing more than an attempt to interfere with the business relationship of a competitor," the court must not grant an antitrust exemption. However, if the court determines that the claimant's conduct is motivated primarily by religious rather than commercial considerations, an antitrust exemption should be granted.

C. Application of the Test

The effect of the proposed test on religion-based antitrust exemption cases can be demonstrated by applying that test to Costello. The Costello result would then be altered because both factors in the proposed test are met. First, Catholicism falls within the suggested definition of religion. Catholics believe in the existence of a Supreme Being and adhere to a Biblical set of principles. Second, the necessary religious motivation was present. The District Court specifically found the requisite religiously motivated conduct and lack of a commercially competitive motive. Thus, application of the proposed test would have resulted in a religious antitrust exemption.

D. Benefits of the Test

The proposed test uses current case law in both the antitrust exemption and religious exemption areas to alleviate the problems inherent in the balancing test. First, using the proposed test, courts can avoid the unnecessary extensive intrusion into religious beliefs. The inquiry into the religious claim need only consider whether the claim is based on religion, not whether the claim is "central" to the religion.

136 See text accompanying note 10 supra.
137 365 U.S. at 144.
138 See text accompanying notes 133-34 supra.
139 No. 80-2147, slip op. at 4.
142 See notes 104-07 supra and accompanying text.
143 See notes 109-12 supra and accompanying text.
Second, by adopting the proposed definition of religion, the federal courts will be able to make principled decisions on claims for religious exemptions. It remains difficult for courts to legitimately evaluate religious claims without first articulating a definite standard on which to base their evaluations.

Third, the new test substantially eliminates the excessive subjectivity currently resulting from the balancing test.\textsuperscript{144} The test will protect religious organizations' constitutionally required freedom while decreasing the likelihood of biased decisions. Although evaluating the "existence of a Supreme Being" might require a degree of subjectivity, this degree will be comparatively small.

Fourth, the proposed test will not make the success of a boycott or other religiously motivated activity the determinative issue in assessing the exemption claims.\textsuperscript{145} Thus, well-organized religions will not receive preferential treatment in the religion-antitrust conflict.

Finally, the proposed test, unlike the balancing test, specifically recognizes the possibility of fraudulent religious antitrust exemption claims. If claims, although falling with the definition of religion, qualify as "sham transactions",\textsuperscript{146} the test requires these claims not be exempt from antitrust regulation.

V. Conclusion

In our increasingly complex society, religion and competition will continue to conflict. Precedent and policy dictate that religiously motivated conduct be exempt from antitrust regulation. When religiously motivated conduct infringes upon antitrust regulation, however, the two must not be subjected to a balancing test. Rather, courts should employ a test in which they first determine whether a religion is involved, then determine whether the conduct is religiously motivated. By using a religious motivation test courts will avoid the numerous problems inherent in a balancing test.

\textit{Daria K. Nacheff}

\textsuperscript{144} See note 113 \textit{supra} and accompany text.
\textsuperscript{145} See note 107 \textit{supra} and accompanying text.