494 U.S. 872 (1990)

EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON, ET AL.
v.
SMITH ET AL.

No. 88-1213.

Supreme Court of United States.

Argued November 6, 1989
Decided April 17, 1990

CERTIORARI TO THE SUPREME COURT OF OREGON

873 *873 *Dave Frohnmayer,* Attorney General of Oregon, argued the cause for petitioners. With him on the briefs were *James E. Mountain, Jr.,* Deputy Attorney General, *Virginia L. Linder,* Solicitor General, and *Michael D. Reynolds,* Assistant Solicitor General.

Craig J. Dorsay argued the cause and filed briefs for respondents.[*]

874 *874 JUSTICE SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

I

Oregon law prohibits the knowing or intentional possession of a "controlled substance" unless the substance has been prescribed by a medical practitioner. Ore. Rev. Stat. § 475.992(4) (1987). The law defines "controlled substance" as a drug classified in Schedules I through V of the Federal Controlled Substances Act, 21 U. S. C. §§ 811-812, as modified by the State Board of Pharmacy. Ore. Rev. Stat. § 475.005(6) (1987). Persons who violate this provision by possessing a controlled substance listed on Schedule I are "guilty of a Class B felony." § 475.992(4)(a). As compiled by the State Board of Pharmacy under its statutory authority, see § 475.035, Schedule I contains the drug peyote, a hallucinogen derived from the plant *Lophophora williamsii Lemaire.* Ore. Admin. Rule 855-80-021(3)(s) (1988).

Respondents Alfred Smith and Galen Black (hereinafter respondents) were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. When respondents applied to petitioner Employment Division (hereinafter petitioner) for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related "misconduct." The Oregon Court of Appeals reversed that determination, holding that the denial of benefits violated respondents' free exercise rights under the First Amendment.

875 *875 On appeal to the Oregon Supreme Court, petitioner argued that the denial of benefits was permissible because respondents' consumption of peyote was a crime under Oregon law. The Oregon Supreme Court reasoned, however, that the criminality of respondents' peyote use was irrelevant to resolution of their constitutional claim — since the purpose of the "misconduct" provision under which respondents had been disqualified was not to enforce the State's criminal laws but to preserve the financial integrity of the compensation fund, and since that purpose was inadequate to justify the burden that disqualification imposed on respondents' religious practice. Citing our decisions in *Sherbert* v. *Verner,* 374 U. S. 398 (1963), and *Thomas* v. *Review Bd. of Indiana Employment Security Div.,* 450 U. S. 707 (1981), the court concluded that respondents were entitled to payment of unemployment benefits. *Smith* v. *Employment Div., Dept. of Human Resources,* 301 Ore. 209, 217-219, 721 P. 2d 445, 449-450 (1986). We granted certiorari. 480 U. S. 916 (1987).

Before this Court in 1987, petitioner continued to maintain that the illegality of respondents' peyote consumption was relevant to their constitutional claim. We agreed, concluding that "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct." *Employment Div., Dept. of Human Resources of Oregon* v. *Smith,* 485 U. S. 660, 670 (1988) *(Smith I).* We noted, however, that the Oregon Supreme Court had not decided whether respondents' sacramental use of peyote was in fact proscribed by Oregon's controlled substance law, and that this issue was a matter of dispute between the parties. Being "uncertain about the legality of the religious use of peyote in Oregon," we determined that it would not be "appropriate for us to decide whether the
876 practice is protected by the Federal Constitution." *Id.,* at 673. Accordingly, we *876 vacated the judgment of the Oregon Supreme Court and remanded for further proceedings. *Id.,* at 674.

On remand, the Oregon Supreme Court held that respondents' religiously inspired use of peyote fell within the prohibition of the Oregon statute, which "makes no exception for the sacramental use" of the drug. 307 Ore. 68, 72-73, 763 P. 2d 146, 148 (1988). It then considered whether that prohibition was valid under the Free Exercise Clause, and concluded that it was not. The court therefore reaffirmed its previous ruling that the State could not deny unemployment benefits to respondents for having engaged in that practice.

We again granted certiorari. 489 U. S. 1077 (1989).

II

Respondents' claim for relief rests on our decisions in *Sherbert* v. *Verner, supra, Thomas* v. *Review Bd. of Indiana Employment Security Div., supra,* and *Hobbie* v. *Unemployment Appeals Comm'n of Florida,* 480 U. S. 136 (1987), in which we held that a State could not condition the availability of unemployment insurance on an individual's willingness to forgo conduct required by his religion. As we observed in *Smith I,* however, the conduct at issue in those cases was not prohibited by law. We held that distinction to be critical, for "if Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon," and "the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation." 485 U. S., at 672. Now that the Oregon Supreme Court has confirmed that Oregon does prohibit the religious use of peyote, we proceed to consider whether that prohibition is permissible under the Free Exercise Clause.

A

877 The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into *877 the Fourteenth Amendment, see *Cantwell* v. *Connecticut,* 310 U. S. 296, 303 (1940), provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ." U. S. Const., Amdt. 1 (emphasis added). The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such." *Sherbert* v. *Verner, supra,* at 402. The government may not compel affirmation of religious belief, see *Torcaso* v. *Watkins,* 367 U. S. 488 (1961), punish the expression of religious doctrines it believes to be false, *United States* v. *Ballard,* 322 U. S. 78, 86-88 (1944), impose special disabilities on the basis of religious views or religious status, see *McDaniel* v. *Paty,* 435 U. S. 618 (1978); *Fowler* v. *Rhode Island,* 345 U. S. 67, 69 (1953); cf. *Larson* v. *Valente,* 456 U. S. 228, 245 (1982), or lend its power to one or the other side in controversies over religious authority or dogma, see *Presbyterian Church in U. S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U. S. 440, 445-452 (1969); *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94, 95-119 (1952); *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U. S. 696, 708-725 (1976).

But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It
878 would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used *878 for worship purposes," or to prohibit bowing down before a golden calf.

Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. Compare *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 139 (1969) (upholding application of antitrust laws to press), with *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250-251 (1936) (striking down license tax applied only to newspapers with weekly circulation above a specified level); see generally *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 581 (1983).

879 Our decisions reveal that the latter reading is the correct one. We have never held that an individual's religious beliefs *879 excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Ed.* v. *Gobitis*, 310 U. S. 586, 594-595 (1940): "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted)." We first had occasion to assert that principle in *Reynolds* v. *United States*, 98 U. S. 145 (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.,* at 166-167.

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *United States* v. *Lee*, 455 U. S. 252, 263, n. 3 (1982) (STEVENS, J., concurring in judgment); see *Minersville School Dist. Bd. of Ed.* v. *Gobitis*, *supra*, at 595 (collecting cases). In *Prince* v. *Massachusetts*,
880 321 U. S. 158 (1944), we held that a mother could be prosecuted under the child labor laws *880 for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in "excluding [these children] from doing there what no other children may do." *Id.,* at 171. In *Braunfeld* v. *Brown*, 366 U. S. 599 (1961) (plurality opinion), we upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In *Gillette* v. *United States*, 401 U. S. 437, 461 (1971), we sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds.

Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion was *United States* v. *Lee*, 455 U. S., at 258-261. There, an Amish employer, on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. We rejected the claim that an exemption was constitutionally required. There would be no way, we observed, to distinguish the Amish believer's objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes. "If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.,* at 260. Cf. *Hernandez* v. *Commissioner*, 490 U. S. 680 (1989) (rejecting free exercise challenge to payment of income taxes alleged to make religious activities more difficult).

881 *881 The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell* v. *Connecticut,* 310 U. S., at 304-307 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett* v. *McCormick,* 321 U. S. 573 (1944) (same), or the right of parents, acknowledged in *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), to direct the education of their children, see *Wisconsin* v. *Yoder,* 406 U. S. 205 (1972) (invalidating compulsory school-attendance laws

882 as applied to Amish parents who refused on religious grounds to send their children to school).[1] *882 Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley* v. *Maynard,* 430 U. S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education* v. *Barnette,* 319 U. S. 624 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. *Roberts* v. *United States Jaycees,* 468 U. S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed").

The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls. "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." *Gillette* v. *United States, supra,* at 461.

B

Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended

883 to religiously motivated actors, at least the claim for a *883 religious exemption must be evaluated under the balancing test set forth in *Sherbert* v. *Verner,* 374 U. S. 398 (1963). Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. See *id.,* at 402-403; see also *Hernandez* v. *Commissioner,* 490 U. S., at 699. Applying that test we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. See *Sherbert* v. *Verner, supra; Thomas* v. *Review Bd. of Indiana Employment Security Div.,* 450 U. S. 707 (1981); *Hobbie* v. *Unemployment Appeals Comm'n of Florida,* 480 U. S. 136 (1987). We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied, see *United States* v. *Lee,* 455 U. S. 252 (1982); *Gillette* v. *United States,* 401 U. S. 437 (1971). In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all. In *Bowen* v. *Roy,* 476 U. S. 693 (1986), we declined to apply *Sherbert* analysis to a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers. The plaintiffs in that case asserted that it would violate their religious beliefs to obtain and provide a Social Security number for their daughter. We held the statute's application to the plaintiffs valid regardless of whether it was necessary to effectuate a compelling interest. See 476 U. S., at 699-701. In *Lyng* v. *Northwest Indian Cemetery Protective Assn.,* 485 U. S. 439 (1988), we declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities "could have devastating effects on traditional Indian religious

884 practices," 485 U. S., at 451. *884 In *Goldman* v. *Weinberger,* 475 U. S. 503 (1986), we rejected application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes. In *O'Lone* v. *Estate of Shabazz,* 482 U. S. 342 (1987), we sustained, without mentioning the *Sherbert* test, a prison's refusal to excuse inmates from work requirements to attend worship services.

Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. As a plurality of the Court noted in *Roy,* a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment: "The statutory conditions [in *Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, `without good cause,' he had quit work or refused available work. The `good cause' standard created a mechanism for individualized exemptions." *Bowen* v. *Roy, supra,* at 708 (opinion of Burger, C. J., joined by Powell and REHNQUIST, JJ.). See also *Sherbert, supra,* at 401, n. 4 (reading state unemployment compensation law as allowing benefits for unemployment caused by at least some "personal reasons"). As the plurality pointed out in *Roy,* our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason. *Bowen* v. *Roy, supra,* at 708.

Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct. Although, as noted earlier, we have sometimes used the *Sherbert* test to analyze free
885 exercise challenges to such laws, see *United States* v. *885 *Lee, supra,* at 257-260; *Gillette* v. *United States, supra,* at 462, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Lyng, supra,* at 451. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" — permitting him, by virtue of his beliefs, "to become a law unto himself," *Reynolds* v. *United States,* 98 U. S., at 167 — contradicts both constitutional tradition and common sense.[2]

The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the
886 standard that must be met before the government may accord different treatment on the basis of race, see, *e. g.,* *886 *Palmore* v. *Sidoti,* 466 U. S. 429, 432 (1984), or before the government may regulate the content of speech, see, *e. g., Sable Communications of California* v. *FCC,* 492 U. S. 115, 126 (1989), is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields — equality of treatment and an unrestricted flow of contending speech — are constitutional norms; what it would produce here — a private right to ignore generally applicable laws — is a constitutional anomaly.[3]

Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. Cf. *Lyng* v. *Northwest Indian Cemetery Protective Assn.,* 485 U. S.,
887 at 474-476 (BRENNAN, J., dissenting). It is no *887 more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." *United States* v. *Lee,* 455 U. S., at 263 n. 2 (STEVENS, J., concurring). As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez* v. *Commissioner,* 490 U. S., at 699. Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. See, *e. g., Thomas* v. *Review Bd. of Indiana Employment Security Div.,* 450 U. S., at 716; *Presbyterian Church in U. S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U. S., at 450; *Jones* v. *Wolf,* 443 U. S. 595, 602-606 (1979); *United States* v. *Ballard,* 322 U. S. 78, 85-87 (1944).[4]

888 *888 If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld* v. *Brown,* 366 U. S., at 606, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid,* as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would

open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind
889 — ranging from *889 compulsory military service, see, *e. g., Gillette* v. *United States,* 401 U. S. 437 (1971), to the payment of taxes, see, *e. g., United States* v. *Lee, supra;* to health and safety regulation such as manslaughter and child neglect laws, see, *e. g., Funkhouser* v. *State,* 763 P. 2d 695 (Okla. Crim. App. 1988), compulsory vaccination laws, see, *e. g., Cude* v. *State,* 237 Ark. 927, 377 S. W. 2d 816 (1964), drug laws, see, *e. g., Olsen* v. *Drug Enforcement Administration,* 279 U. S. App. D. C. 1, 878 F. 2d 1458 (1989), and traffic laws, see *Cox* v. *New Hampshire,* 312 U. S. 569 (1941); to social welfare legislation such as minimum wage laws, see *Tony and Susan Alamo Foundation* v. *Secretary of Labor,* 471 U. S. 290 (1985), child labor laws, see *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), animal cruelty laws, see, *e. g., Church of the Lukumi Babalu Aye Inc.* v. *City of Hialeah,* 723 F. Supp. 1467 (SD Fla. 1989), cf. *State* v. *Massey,* 229 N. C. 734, 51 S. E. 2d 179, appeal dism'd, 336 U. S. 942 (1949), environmental protection laws, see *United States* v. *Little,* 638 F. Supp. 337 (Mont. 1986), and laws providing for equality of opportunity for the races, see, *e. g., Bob Jones University* v. *United States,* 461 U. S. 574, 603-604 (1983). The First Amendment's protection of religious liberty does not require this.[5]

890 *890 Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. See, *e. g.,* Ariz. Rev. Stat. Ann. §§ 13-3402(B)(1)-(3) (1989); Colo. Rev. Stat. § 12-22-317(3) (1985); N. M. Stat. Ann. § 30-31-6(D) (Supp. 1989). But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

*** * ***

Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug. The decision of the Oregon Supreme Court is accordingly reversed.

It is so ordered.

891 *891 JUSTICE O'CONNOR, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join as to Parts I and II, concurring in the judgment.[*]

Although I agree with the result the Court reaches in this case, I cannot join its opinion. In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty.

I

At the outset, I note that I agree with the Court's implicit determination that the constitutional question upon which we granted review — whether the Free Exercise Clause protects a person's religiously motivated use of peyote from the reach of a State's general criminal law prohibition — is properly presented in this case. As the Court recounts, respondents Alfred Smith and Galen Black (hereinafter respondents) were denied unemployment compensation benefits because their sacramental use of peyote constituted work-related "misconduct," not because they violated Oregon's general criminal prohibition against possession of peyote. We held, however, in *Employment Div., Dept. of Human Resources of Oregon* v. *Smith,* 485 U. S. 660 (1988) *(Smith I),* that whether a State may, consistent with federal law, deny unemployment compensation benefits to persons for their religious use of peyote depends on whether the State, as a matter of state law, has criminalized the underlying conduct. See *id.,* at 670-672. The Oregon Supreme Court, on remand from this Court, concluded that "the Oregon statute against possession of controlled substances, which include peyote, makes no exception for the sacramental use of peyote." 307 Ore. 68, 72-73, 763 P. 2d 146, 148 (1988) (footnote omitted).

892 *892 Respondents contend that, because the Oregon Supreme Court declined to decide whether the Oregon Constitution prohibits criminal prosecution for the religious use of peyote, see *id.,* at 73, n. 3, 763 P. 2d, at 148, n. 3, any ruling on the federal constitutional question would be premature. Respondents are of course correct that the Oregon Supreme Court may eventually decide that the Oregon Constitution requires the State to provide an exemption from its general criminal prohibition for the religious use of peyote. Such a decision would then reopen the question whether a State may nevertheless deny unemployment compensation benefits to claimants who are discharged for engaging in such conduct. As the case comes to us today, however, the Oregon Supreme Court has plainly ruled that Oregon's prohibition against possession of controlled substances does not contain an exemption for the religious use of peyote. In light of our decision in *Smith I,* which makes this finding a "necessary predicate to a correct evaluation of respondents' federal claim," 485 U. S., at 672, the question presented and addressed is properly before the Court.

II

The Court today extracts from our long history of free exercise precedents the single categorical rule that "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Ante,* at 878 (citations omitted). Indeed, the Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. *Ante,* at 884. To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.

893 *893 ## A

The Free Exercise Clause of the First Amendment commands that "Congress shall make no law . . . prohibiting the free exercise [of religion]." In *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), we held that this prohibition applies to the States by incorporation into the Fourteenth Amendment and that it categorically forbids government regulation of religious beliefs. *Id.,* at 303. As the Court recognizes, however, the "free *exercise*" of religion often, if not invariably, requires the performance of (or abstention from) certain acts. *Ante,* at 877; cf. 3 A New English Dictionary on Historical Principles 401-402 (J. Murray ed. 1897) (defining "exercise" to include "[t]he practice and performance of rites and ceremonies, worship, etc.; the right or permission to celebrate the observances (of a religion)" and religious observances such as acts of public and private worship, preaching, and prophesying). "[B]elief and action cannot be neatly confined in logic-tight compartments." *Wisconsin* v. *Yoder,* 406 U. S. 205, 220 (1972). Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause.

The Court today, however, interprets the Clause to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as that prohibition is generally applicable. *Ante,* at 878. But a law that prohibits certain conduct — conduct that happens to be an act of worship for someone — manifestly does prohibit that person's free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons. It
894 is difficult to deny that a law that prohibits *894 religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns.

The Court responds that generally applicable laws are "one large step" removed from laws aimed at specific religious practices. *Ibid.* The First Amendment, however, does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice. As we have noted in a slightly different context, " `[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides.' " *Hobbie* v. *Unemployment Appeals Comm'n of Florida,* 480 U. S. 136, 141-142 (1987) (quoting *Bowen* v. *Roy,* 476 U. S. 693, 727 (1986) (O'CONNOR, J., concurring in part and dissenting in part)).

To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. See, *e. g., Cantwell, supra,* at 304; *Reynolds* v. *United States,* 98 U. S. 145, 161-167 (1879). Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. See *Hernandez* v.
895 *Commissioner,* 490 U. S. 680, 699 *895 (1989); *Hobbie, supra,* at 141; *United States* v. *Lee,* 455 U. S. 252, 257-258 (1982); *Thomas* v. *Review Bd. of Indiana Employment Security Div.,* 450 U. S. 707, 718 (1981); *McDaniel* v. *Paty,* 435 U. S. 618, 626-629 (1978) (plurality opinion); *Yoder, supra,* at 215; *Gillette* v. *United States,* 401 U. S. 437, 462 (1971); *Sherbert* v. *Verner,* 374 U. S. 398, 403 (1963); see also *Bowen* v. *Roy, supra,* at 732 (opinion concurring in part and dissenting in part); *West Virginia State Bd. of Ed.* v. *Barnette,* 319 U. S. 624, 639 (1943). The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests "of the highest order," *Yoder, supra,* at 215. "Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Roy, supra,* at 728 (opinion concurring in part and dissenting in part).

The Court attempts to support its narrow reading of the Clause by claiming that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Ante,* at 878-879. But as the Court later notes, as it must, in cases such as *Cantwell* and *Yoder* we have in fact interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct. See *Cantwell, supra,* at 304-307; *Yoder,* 406 U. S., at 214-234. Indeed, in *Yoder* we expressly rejected the interpretation the Court now adopts:

> "[O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often
> 896 subject *896 to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability.* . . . .
>
> ". . . A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Id.,* at 219-220 (emphasis added; citations omitted).

The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them "hybrid" decisions, *ante,* at 892, but there is no denying that both cases expressly relied on the Free Exercise Clause, see *Cantwell,* 310 U. S., at 303-307; *Yoder, supra,* at 219-229, and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence. Moreover, in each of the other cases cited by the Court to support its categorical rule, *ante,* at 879-880, we rejected the particular constitutional claims before us only after carefully weighing the competing interests. See *Prince* v. *Massachusetts,* 321 U. S. 158, 168-170 (1944) (state interest in regulating children's activities justifies denial of religious exemption from child labor laws); *Braunfeld* v. *Brown,* 366 U. S. 599, 608-609 (1961) (plurality opinion) (state interest in uniform day of rest justifies denial of religious exemption from Sunday closing law); *Gillette, supra,* at 462 (state interest in military affairs justifies denial of religious exemption from conscription laws); *Lee, supra,* at 258-259 (state interest in comprehensive Social Security system justifies denial of religious exemption from mandatory participation requirement).
897 That we rejected the free exercise *897 claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.

B

Respondents, of course, do not contend that their conduct is automatically immune from all governmental regulation simply because it is motivated by their sincere religious beliefs. The Court's rejection of that argument, *ante,* at 882, might therefore

be regarded as merely harmless dictum. Rather, respondents invoke our traditional compelling interest test to argue that the Free Exercise Clause requires the State to grant them a limited exemption from its general criminal prohibition against the possession of peyote. The Court today, however, denies them even the opportunity to make that argument, concluding that "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling interest] test inapplicable to" challenges to general criminal prohibitions. *Ante,* at 885.

In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. As we explained in *Thomas:*

> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." 450 U. S., at 717-718.

898 *898 See also *Frazee* v. *Illinois Dept. of Employment Security,* 489 U. S. 829, 832 (1989); *Hobbie,* 480 U. S., at 141. A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it "results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution." *Braunfeld, supra,* at 605. I would have thought it beyond argument that such laws implicate free exercise concerns.

Indeed, we have never distinguished between cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct. The *Sherbert* compelling interest test applies in both kinds of cases. See, *e. g., Lee,* 455 U. S., at 257-260 (applying *Sherbert* to uphold Social Security tax liability); *Gillette,* 401 U. S., at 462 (applying *Sherbert* to uphold military conscription requirement); *Yoder,* 406 U. S., at 215-234 (applying *Sherbert* to strike down criminal convictions for violation of compulsory school attendance law). As I noted in *Bowen* v. *Roy:*

> "The fact that the underlying dispute involves an award of benefits rather than an exaction of penalties does not grant the Government license to apply a different version of the Constitution. . . .
>
> ". . . The fact that appellees seek exemption from a precondition that the Government attaches to an award of benefits does not, therefore, generate a meaningful distinction between this case and one where appellees seek an exemption from the Government's imposition of penalties upon them." 476 U. S., at 731-732 (opinion concurring in part and dissenting in part).

See also *Hobbie, supra,* at 141-142; *Sherbert,* 374 U. S., at 404. I would reaffirm that principle today: A neutral criminal law
899 prohibiting conduct that a State may legitimately regulate is, if anything, *more* burdensome than a neutral civil *899 statute placing legitimate conditions on the award of a state benefit.

Legislatures, of course, have always been "left free to reach actions which were in violation of social duties or subversive of good order." *Reynolds,* 98 U. S., at 164; see also *Yoder, supra,* at 219-220; *Braunfeld,* 366 U. S., at 603-604. Yet because of the close relationship between conduct and religious belief, "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell,* 310 U. S., at 304. Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest," *Lee, supra,* at 257-258, or represents "the least restrictive means of achieving some compelling state interest," *Thomas, supra,* at 718. See, *e. g., Braunfeld, supra,* at 607; *Sherbert, supra,* at 406; *Yoder, supra,* at 214-215; *Roy,* 476 U. S., at 728-732 (opinion concurring in part and dissenting in part). To me, the sounder approach — the approach more consistent with our role as judges to decide each case on its individual merits — is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling. Even if, as an empirical matter, a government's criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim. Cf. *McDaniel,* 435 U. S., at 628, n. 8 (plurality opinion) (noting application of *Sherbert* to general criminal prohibitions and the "delicate balancing required by our decisions in" *Sherbert* and *Yoder*). Given the range of conduct that a State might

900 legitimately make *900 criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment *never* requires the State to grant a limited exemption for religiously motivated conduct.

Moreover, we have not "rejected" or "declined to apply" the compelling interest test in our recent cases. *Ante,* at 883-884. Recent cases have instead affirmed that test as a fundamental part of our First Amendment doctrine. See, *e. g.,* Hernandez, 490 U. S., at 699; *Hobbie, supra,* at 141-142 (rejecting Chief Justice Burger's suggestion in *Roy, supra,* at 707-708, that free exercise claims be assessed under a less rigorous "reasonable means" standard). The cases cited by the Court signal no retreat from our consistent adherence to the compelling interest test. In both *Bowen* v. *Roy, supra,* and *Lyng* v. *Northwest Indian Cemetery Protective Assn.,* 485 U. S. 439 (1988), for example, we expressly distinguished *Sherbert* on the ground that the First Amendment does not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development . . . . The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Roy, supra,* at 699; see *Lyng, supra,* at 449. This distinction makes sense because "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Sherbert, supra,* at 412 (Douglas, J., concurring). Because the case *sub judice,* like the other cases in which we have applied *Sherbert,* plainly falls into the former category, I would apply those established precedents to the facts of this case.

Similarly, the other cases cited by the Court for the proposition that we have rejected application of the *Sherbert* test outside the unemployment compensation field, *ante,* at 884, are distinguishable because they arose in the narrow, specialized
901 contexts in which we have not traditionally required *901 the government to justify a burden on religious conduct by articulating a compelling interest. See *Goldman* v. *Weinberger,* 475 U. S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society"); *O'Lone* v. *Estate of Shabazz,* 482 U. S. 342, 349 (1987) ("[P]rison regulations alleged to infringe constitutional rights are judged under a `reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights") (citation omitted). That we did not apply the compelling interest test in these cases says nothing about whether the test should continue to apply in paradigm free exercise cases such as the one presented here.

The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result in a "constitutional anomaly," *ante,* at 886, the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a "constitutional nor[m]," not an "anomaly." *Ibid.* Nor would application of our established free exercise doctrine to this case necessarily be incompatible with our equal protection cases. Cf. *Rogers* v. *Lodge,* 458 U. S. 613, 618 (1982) (race-neutral law that " `bears more heavily on one race than another' " may violate equal protection) (citation omitted); *Castaneda* v. *Partida,* 430 U. S. 482, 492-495 (1977) (grand jury selection). We have in any event recognized that the Free Exercise Clause protects values distinct from those protected by the Equal Protection
902 Clause. See *Hobbie,* 480 U. S., at 141-142. As the language of the *902 Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity. See, *e. g.,* McConnell, Accommodation of Religion, 1985 S. Ct. Rev. 1, 9 ("[T]he text of the First Amendment itself `singles out' religion for special protections"); P. Kauper, Religion and the Constitution 17 (1964). A law that makes criminal such an activity therefore triggers constitutional concern — and heightened judicial scrutiny — even if it does not target the particular religious conduct at issue. Our free speech cases similarly recognize that neutral regulations that affect free speech values are subject to a balancing, rather than categorical, approach. See, *e. g., United States* v. *O'Brien,* 391 U. S. 367, 377 (1968); *Renton* v. *Playtime Theatres, Inc.,* 475 U. S. 41, 46-47 (1986); cf. *Anderson* v. *Celebrezze,* 460 U. S. 780, 792-794 (1983) (generally applicable laws may impinge on free association concerns). The Court's parade of horribles, *ante,* at 888-889, not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests.

Finally, the Court today suggests that the disfavoring of minority religions is an "unavoidable consequence" under our system of government and that accommodation of such religions must be left to the political process. *Ante,* at 890. In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the

Amish. Indeed, the words of Justice Jackson in *West Virginia State Bd. of Ed.* v. *Barnette* (overruling *Minersville School Dist.* v. *Gobitis,* 310 U. S. 586 (1940)) are apt:

903 *903 "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." 319 U. S., at 638.

See also *United States* v. *Ballard,* 322 U. S. 78, 87 (1944) ("The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views"). The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a "luxury," *ante,* at 888, is to denigrate "[t]he very purpose of a Bill of Rights."

III

The Court's holding today not only misreads settled First Amendment precedent; it appears to be unnecessary to this case. I would reach the same result applying our established free exercise jurisprudence.

A

There is no dispute that Oregon's criminal prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion. Peyote is a sacrament of the Native American Church and is regarded as vital to respondents' ability to practice their religion. See O. Stewart, Peyote Religion: A History 327-336 (1987) (describing modern status of
904 peyotism); E. Anderson, Peyote: The Divine Cactus 41-65 (1980) (describing peyote ceremonies); Teachings from *904 the American Earth: Indian Religion and Philosophy 96-104 (D. Tedlock & B. Tedlock eds. 1975) (same); see also *People* v. *Woody,* 61 Cal. 2d 716, 721-722, 394 P. 2d 813, 817-818 (1964). As we noted in *Smith I,* the Oregon Supreme Court concluded that "the Native American Church is a recognized religion, that peyote is a sacrament of that church, and that respondent's beliefs were sincerely held." 485 U. S., at 667. Under Oregon law, as construed by that State's highest court, members of the Native American Church must choose between carrying out the ritual embodying their religious beliefs and avoidance of criminal prosecution. That choice is, in my view, more than sufficient to trigger First Amendment scrutiny.

There is also no dispute that Oregon has a significant interest in enforcing laws that control the possession and use of controlled substances by its citizens. See, *e. g., Sherbert,* 374 U. S., at 403 (religiously motivated conduct may be regulated where such conduct "pose[s] some substantial threat to public safety, peace or order"); *Yoder,* 406 U. S., at 220 ("[A]ctivities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare"). As we recently noted, drug abuse is "one of the greatest problems affecting the health and welfare of our population" and thus "one of the most serious problems confronting our society today." *Treasury Employees* v. *Von Raab,* 489 U. S. 656, 668, 674 (1989). Indeed, under federal law (incorporated by Oregon law in relevant part, see Ore. Rev. Stat. § 475.005(6) (1987)), peyote is specifically regulated as a Schedule I controlled substance, which means that Congress has found that it has a high potential for abuse, that there is no currently accepted medical use, and that there is a lack of accepted safety for use of the drug under medical supervision. See 21 U. S. C. § 812(b)(1). See generally R. Julien, A Primer of Drug Action 149 (3d ed. 1981). In light of our recent decisions
905 holding that the governmental *905 interests in the collection of income tax, *Hernandez,* 490 U. S., at 699-700, a comprehensive Social Security system, see *Lee,* 455 U. S., at 258-259, and military conscription, see *Gillette,* 401 U. S., at 460, are compelling, respondents do not seriously dispute that Oregon has a compelling interest in prohibiting the possession of peyote by its citizens.

B

Thus, the critical question in this case is whether exempting respondents from the State's general criminal prohibition "will unduly interfere with fulfillment of the governmental interest." *Lee, supra,* at 259; see also *Roy,* 476 U. S., at 727 ("[T]he Government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means"); *Yoder, supra,* at 221; *Braunfeld,* 366 U. S., at 605-607. Although the question is close, I would conclude that uniform application of Oregon's criminal prohibition is "essential to accomplish," *Lee, supra,* at 257, its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance. Oregon's criminal prohibition represents that State's judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous. Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them. Cf. *State* v. *Massey,* 229 N. C. 734, 51 S. E. 2d 179 (denying religious exemption to municipal ordinance prohibiting handling of poisonous reptiles), appeal dism'd *sub nom. Bunn* v. *North Carolina,* 336 U. S. 942 (1949). Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon's stated interest in preventing any possession of
906 peyote. Cf. *Jacobson* v. *906 Massachusetts,* 197 U. S. 11 (1905) (denying exemption from small pox vaccination requirement).

For these reasons, I believe that granting a selective exemption in this case would seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens. Under such circumstances, the Free Exercise Clause does not require the State to accommodate respondents' religiously motivated conduct. See, *e. g., Thomas,* 450 U. S., at 719. Unlike in *Yoder,* where we noted that "[t]he record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society," 406 U. S., at 234; see also *id.,* at 238-240 (WHITE, J., concurring), a religious exemption in this case would be incompatible with the State's interest in controlling use and possession of illegal drugs.

Respondents contend that any incompatibility is belied by the fact that the Federal Government and several States provide exemptions for the religious use of peyote, see 21 CFR § 1307.31 (1989); 307 Ore., at 73, n. 2, 763 P. 2d, at 148, n. 2 (citing 11 state statutes that expressly exempt sacramental peyote use from criminal proscription). But other governments may surely choose to grant an exemption without Oregon, with its specific asserted interest in uniform application of its drug laws, being *required* to do so by the First Amendment. Respondents also note that the sacramental use of peyote is central to the tenets of the Native American Church, but I agree with the Court, *ante,* at 886-887, that because " `[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith,' " quoting *Hernandez, supra,* at 699, our determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of
907 the particular *907 religious practice at issue. This does not mean, of course, that courts may not make factual findings as to whether a claimant holds a sincerely held religious belief that conflicts with, and thus is burdened by, the challenged law. The distinction between questions of centrality and questions of sincerity and burden is admittedly fine, but it is one that is an established part of our free exercise doctrine, see *Ballard,* 322 U. S., at 85-88, and one that courts are capable of making. See *Tony and Susan Alamo Foundation* v. *Secretary of Labor,* 471 U. S. 290, 303-305 (1985).

I would therefore adhere to our established free exercise jurisprudence and hold that the State in this case has a compelling interest in regulating peyote use by its citizens and that accommodating respondents' religiously motivated conduct "will unduly interfere with fulfillment of the governmental interest." *Lee, supra,* at 259. Accordingly, I concur in the judgment of the Court.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.[1]

908 *908 Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a "constitutional anomaly." *Ante,* at 886. As carefully detailed in JUSTICE O'CONNOR's concurring opinion, *ante,* p. 891, the majority is able to arrive at this view only by mischaracterizing this Court's precedents. The Court discards leading free exercise cases such as *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940),

and *Wisconsin* v. *Yoder,* 406 U. S. 205 (1972), as "hybrid." *Ante,* at 882. The Court views traditional free exercise analysis as somehow inapplicable to criminal prohibitions (as opposed to conditions on the receipt of benefits), and to state laws of general applicability (as opposed, presumably, to laws that expressly single out religious practices). *Ante,* at 884-885. The Court cites cases in which, due to various exceptional circumstances, we found strict scrutiny inapposite, to hint that the Court has repudiated that standard altogether. *Ante,* at 882-884. In short, it effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution. One hopes that the Court is aware of the consequences, and that its result is not a product of overreaction to the serious problems the country's drug crisis has generated.

This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free
909 exercise of religion is a "luxury" that a well-ordered society *909 cannot afford, *ante,* at 888, and that the repression of minority religions is an "unavoidable consequence of democratic government." *Ante,* at 890. I do not believe the Founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty — and they could not have thought religious intolerance "unavoidable," for they drafted the Religion Clauses precisely in order to avoid that intolerance.

For these reasons, I agree with JUSTICE O'CONNOR's analysis of the applicable free exercise doctrine, and I join parts I and II of her opinion.[2] As she points out, "the critical question in this case is whether exempting respondents from the State's general criminal prohibition `will unduly interfere with fulfillment of the governmental interest.' " *Ante,* at 905, quoting *United States* v. *Lee,* 455 U. S. 252, 259 (1982). I do disagree, however, with her specific answer to that question.

I

In weighing the clear interest of respondents Smith and Black (hereinafter respondents) in the free exercise of their religion against Oregon's asserted interest in enforcing its drug laws, it is important to articulate in precise terms the state interest
910 involved. It is not the State's broad interest *910 in fighting the critical "war on drugs" that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote. See *Bowen* v. *Roy,* 476 U. S. 693, 728 (1986) (O'CONNOR, J., concurring in part and dissenting in part) ("This Court has consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector `is essential to accomplish an overriding governmental interest,' " quoting *Lee,* 455 U. S., at 257-258); *Thomas* v. *Review Bd. of Indiana Employment Security Div.,* 450 U. S. 707, 719 (1981) ("focus of the inquiry" concerning State's asserted interest must be "properly narrowed"); *Yoder,* 406 U. S., at 221 ("Where fundamental claims of religious freedom are at stake," the Court will not accept a State's "sweeping claim" that its interest in compulsory education is compelling; despite the validity of this interest "in the generality of cases, we must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exemption"). Failure to reduce the competing interests to the same plane of generality tends to distort the weighing process in the State's favor. See Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327, 330-331 (1969) ("The purpose of almost any law can be traced back to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue. To measure an individual interest directly against one of these rarified values inevitably makes the individual interest appear the less significant"); Pound, A Survey of Social Interests, 57 Harv. L. Rev. 1, 2 (1943) ("When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane . . . [or else] we may decide the question in advance in our very way of putting it").

911 The State's interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, *911 cannot be merely abstract or symbolic. The State cannot plausibly assert that unbending application of a criminal prohibition is essential to fulfill any compelling interest, if it does not, in fact, attempt to enforce that prohibition. In this case, the State actually has not evinced any concrete interest in enforcing its drug laws against religious users of peyote. Oregon has never sought to prosecute respondents, and does not claim that it has made significant enforcement efforts against other religious users of peyote.[3] The State's asserted interest thus amounts only to the symbolic preservation of an unenforced prohibition. But a government interest in "symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs," *Treasury Employees* v. *Von Raab,* 489 U. S. 656, 687 (1989) (SCALIA, J., dissenting), cannot suffice to abrogate the constitutional rights of individuals.

Similarly, this Court's prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded evidentiary support for a refusal to allow a religious exception. See *Thomas,* 450 U. S., at 719 (rejecting State's reasons for refusing religious exemption, for lack of "evidence in the record"); *Yoder,* 406 U. S., at 224-229 (rejecting State's argument concerning the dangers of a religious exemption as speculative, and unsupported by the record); *Sherbert v. Verner,* 374 U. S. 398, 407 (1963) ("[T]here is no proof whatever to warrant such fears . . . as those which the [State] now advance[s]"). In this case, the State's justification for refusing to recognize an exception to its criminal laws for religious peyote use is entirely speculative.

The State proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It
912 offers, however, no evidence that the religious use of peyote *912 has ever harmed anyone.[4] The factual findings of other courts cast doubt on the State's assumption that religious use of peyote is harmful. See *State* v. *Whittingham,* 19 Ariz. App. 27, 30, 504 P. 2d 950, 953 (1973) ("[T]he State failed to prove that the quantities of peyote used in the sacraments of the Native American Church are sufficiently harmful to the health and welfare of the participants so as to permit a legitimate intrusion under the State's police power"); *People* v. *Woody,* 61 Cal. 2d 716, 722-723, 394 P. 2d 813, 818 (1964) ("[A]s the Attorney General . . . admits, . . . the opinion of scientists and other experts is `that peyote . . . works no permanent deleterious injury to the Indian' ").

The fact that peyote is classified as a Schedule I controlled substance does not, by itself, show that any and all uses of peyote, in any circumstance, are inherently harmful and dangerous. The Federal Government, which created the classifications of unlawful drugs from which Oregon's drug laws are derived, apparently does not find peyote so dangerous
913 as to preclude an exemption for religious use.[5] Moreover, *913 other Schedule I drugs have lawful uses. See *Olsen* v. *Drug Enforcement Admin.,* 279 U. S. App. D. C. 1, 6, n. 4, 878 F. 2d 1458, 1463, n. 4 (medical and research uses of marijuana).

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs.[6] The Native American Church's internal restrictions on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns. See *id.,* at 10, 878 F. 2d, at 1467 (" `The Administrator [of the Drug Enforcement Administration (DEA)] finds that . . . the Native American Church's use of peyote is isolated to specific ceremonial occasions,' " and so " `an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies' " (quoting DEA Final Order)); *id.,* at 7, 878 F. 2d, at 1464 ("[F]or members of the Native American Church, use of peyote outside the ritual is sacrilegious"); *Woody,* 61 Cal. 2d, at 721, 394 P. 2d, at 817 ("[T]o use peyote for nonreligious purposes is sacrilegious"); R. Julien, A Primer of Drug Action 148 (3d ed. 1981) ("
914 [P]eyote is seldom abused by members of the Native American *914 Church"); Slotkin, The Peyote Way, in Teachings from the American Earth 96, 104 (D. Tedlock & B. Tedlock eds. 1975) ("[T]he Native American Church . . . refuses to permit the presence of curiosity seekers at its rites, and vigorously opposes the sale or use of Peyote for non-sacramental purposes"); Bergman, Navajo Peyote Use: Its Apparent Safety, 128 Am. J. Psychiatry 695 (1971) (Bergman).[7]

Moreover, just as in *Yoder,* the values and interests of those seeking a religious exemption in this case are congruent, to a great degree, with those the State seeks to promote through its drug laws. See *Yoder,* 406 U. S., at 224, 228-229 (since the Amish accept formal schooling up to 8th grade, and then provide "ideal" vocational education, State's interest in enforcing its law against the Amish is "less substantial than . . . for children generally"); *id.,* at 238 (WHITE, J., concurring). Not only does the church's doctrine forbid nonreligious use of peyote; it also generally advocates self-reliance, familial responsibility, and abstinence from alcohol. See Brief for Association on American Indian Affairs et al. as *Amici Curiae* 33-34 (the church's "ethical code" has four parts: brotherly love, care of family, self-reliance, and avoidance of alcohol (quoting from the church membership card)); *Olsen,* 279 U. S. App. D. C., at 7, 878 F. 2d, at 1464 (the Native American Church, "for all purposes
915 other than the special, stylized ceremony, reinforced the state's prohibition"); *915 *Woody,* 61 Cal. 2d, at 721-722, n. 3, 394 P. 2d, at 818, n. 3 ("[M]ost anthropological authorities hold Peyotism to be a positive, rather than negative, force in the lives of its adherents. . . the church forbids the use of alcohol . . ."). There is considerable evidence that the spiritual and social support provided by the church has been effective in combating the tragic effects of alcoholism on the Native American population. Two noted experts on peyotism, Dr. Omer C. Stewart and Dr. Robert Bergman, testified by affidavit to this effect on behalf of respondent Smith before the Employment Appeal Board. Smith Tr., Exh. 7; see also E. Anderson, Peyote: The Divine Cactus 165-166 (1980) (research by Dr. Bergman suggests "that the religious use of peyote seemed to be directed in an ego-strengthening direction with an emphasis on interpersonal relationships where each individual is assured of his own significance as well as the support of the group"; many people have " `come through difficult crises with the help of this religion . . . . It provides real help in seeing themselves not as people whose place and way in the world is gone, but as people whose way can be strong enough to change and meet new challenges' " (quoting Bergman 698)); Pascarosa &

Futterman, Ethnopsychedelic Therapy for Alcoholics: Observations in the Peyote Ritual of the Native American Church, 8 J. of Psychedelic Drugs, No. 3, p. 215 (1976) (religious peyote use has been helpful in overcoming alcoholism); Albaugh & Anderson, Peyote in the Treatment of Alcoholism among American Indians, 131 Am. J. Psychiatry 1247, 1249 (1974) ("[T]he philosophy, teachings, and format of the [Native American Church] can be of great benefit to the Indian alcoholic"); see generally O. Stewart, Peyote Religion 75 *et seq.* (1987) (noting frequent observations, across many tribes and periods in history, of correlation between peyotist religion and abstinence from alcohol). Far from promoting the lawless and
916 irresponsible use of drugs, Native American Church members' spiritual *916 code exemplifies values that Oregon's drug laws are presumably intended to foster.

The State also seeks to support its refusal to make an exception for religious use of peyote by invoking its interest in abolishing drug trafficking. There is, however, practically no illegal traffic in peyote. See *Olsen,* 279 U. S. App. D. C., at 6, 7, 878 F. 2d, at 1463, 1467 (quoting DEA Final Order to the effect that total amount of peyote seized and analyzed by federal authorities between 1980 and 1987 was 19.4 pounds; in contrast, total amount of marijuana seized during that period was over 15 million pounds). Also, the availability of peyote for religious use, even if Oregon were to allow an exemption from its criminal laws, would still be strictly controlled by federal regulations, see 21 U. S. C. §§ 821-823 (registration requirements for distribution of controlled substances); 21 CFR § 1307.31 (1989) (distribution of peyote to Native American Church subject to registration requirements), and by the State of Texas, the only State in which peyote grows in significant quantities. See Texas Health & Safety Code Ann. § 481.111 (1990 pamphlet); Texas Admin. Code, Tit. 37, pt. 1, ch. 13, Controlled Substances Regulations, §§ 13.35-13.41 (1989); *Woody,* 61 Cal. 2d, at 720, 394 P. 2d, at 816 (peyote is "found in the Rio Grande Valley of Texas and northern Mexico"). Peyote simply is not a popular drug; its distribution for use in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country.

Finally, the State argues that granting an exception for religious peyote use would erode its interest in the uniform, fair, and certain enforcement of its drug laws. The State fears that, if it grants an exemption for religious peyote use, a flood of other claims to religious exemptions will follow. It would then be placed in a dilemma, it says, between allowing a patchwork of exemptions that would hinder its law enforcement efforts, and risking a violation of the Establishment Clause by arbitrarily
917 limiting its religious exemptions. This *917 argument, however, could be made in almost any free exercise case. See Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933, 947 (1989) ("Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe"). This Court, however, consistently has rejected similar arguments in past free exercise cases, and it should do so here as well. See *Frazee* v. *Illinois Dept. of Employment Security,* 489 U. S. 829, 835 (1989) (rejecting State's speculation concerning cumulative effect of many similar claims); *Thomas,* 450 U. S., at 719 (same); *Sherbert,* 374 U. S., at 407.

The State's apprehension of a flood of other religious claims is purely speculative. Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found
918 themselves overwhelmed by claims to other religious exemptions.[8] Allowing an exemption for religious peyote use *918 would not necessarily oblige the State to grant a similar exemption to other religious groups. The unusual circumstances that make the religious use of peyote compatible with the State's interests in health and safety and in preventing drug trafficking would not apply to other religious claims. Some religions, for example, might not restrict drug use to a limited ceremonial context, as does the Native American Church. See, *e. g., Olsen,* 279 U. S. App. D. C., at 7, 878 F. 2d, at 1464 ("[T]he Ethiopian Zion Coptic Church . . . teaches that marijuana is properly smoked `continually all day' "). Some religious claims, see n. 8, *supra,* involve drugs such as marijuana and heroin, in which there is significant illegal traffic, with its attendant greed and violence, so that it would be difficult to grant a religious exemption without seriously compromising law enforcement efforts.[9] That the State might grant an exemption for religious peyote use, but deny other religious claims arising in different circumstances, would not violate the Establishment Clause. Though the State must treat all religions equally, and not favor one over another, this obligation is fulfilled by the uniform application of the "compelling interest" *test* to all free exercise claims, not by reaching uniform *results* as to all claims. A showing that religious peyote use does not unduly interfere with the State's interests is "one that probably few other religious groups or sects could make," *Yoder,* 406 U. S., at 236; this does not mean that an exemption limited to peyote use is tantamount to an establishment of religion. See
919 *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 144-145 (1987) ("[T]he government may (and *919 sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause"); *Yoder,* 406 U. S., at 220-221 ("Court must not ignore the danger that an exception from a general [law] . . . 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.,* at 234, n. 22.

II

Finally, although I agree with JUSTICE O'CONNOR that courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is "central" to the religion, *ante,* at 906-907, I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion. Cf. *Yoder,* 406 U. S., at 219 (since "education is inseparable from and a part of the basic tenets of their religion. . . [, just as] baptism, the confessional, or a sabbath may be for others," enforcement of State's compulsory education law would "gravely endanger if not destroy the free exercise of respondents' religious beliefs").

Respondents believe, and their sincerity has *never* been at issue, that the peyote plant embodies their deity, and eating it is an act of worship and communion. Without peyote, they could not enact the essential ritual of their religion. See Brief for Association on American Indian Affairs et al. as *Amici Curiae* 5-6 ("To the members, peyote is consecrated with powers to heal body, mind and spirit. It is a teacher; it teaches the way to spiritual life through living in harmony and balance with the forces of the Creation. The rituals are an integral part of the life process. They embody a form of worship in which the sacrament Peyote is the means for communicating with the Great Spirit"). See also O. Stewart, Peyote Religion 327-330
920 (1987) (description of peyote ritual); *920 T. Hillerman, People of Darkness 153 (1980) (description of Navajo peyote ritual).

If Oregon can constitutionally prosecute them for this act of worship, they, like the Amish, may be "forced to migrate to some other and more tolerant region." *Yoder,* 406 U. S., at 218. This potentially devastating impact must be viewed in light of the federal policy — reached in reaction to many years of religious persecution and intolerance — of protecting the religious freedom of Native Americans. See American Indian Religious Freedom Act, 92 Stat. 469, 42 U. S. C. § 1996 (1982 ed.) ("[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites").[10] Congress recognized that certain substances, such as peyote, "have religious significance because they are sacred, they have power, they heal, they
921 are necessary to the exercise of *921 the rites of the religion, they are necessary to the cultural integrity of the tribe, and, therefore, religious survival." H. R. Rep. No. 95-1308, p. 2 (1978).

The American Indian Religious Freedom Act, in itself, may not create rights enforceable against government action restricting religious freedom, but this Court must scrupulously apply its free exercise analysis to the religious claims of Native Americans, however unorthodox they may be. Otherwise, both the First Amendment and the stated policy of Congress will offer to Native Americans merely an unfulfilled and hollow promise.

III

For these reasons, I conclude that Oregon's interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents' right to the free exercise of their religion. Since the State could not constitutionally enforce its criminal prohibition against respondents, the interests underlying the State's drug laws cannot justify its denial of unemployment benefits. Absent such justification, the State's regulatory interest in denying benefits for religiously motivated "misconduct," see *ante,* at 874, is indistinguishable from the state interests this Court has rejected in *Frazee, Hobbie, Thomas,* and *Sherbert.* The State of Oregon cannot, consistently with the Free Exercise Clause, deny respondents unemployment benefits.

I dissent.

[*] Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro* and *John A. Powell;* for the American Jewish Congress by *Amy Adelson, Lois C. Waldman,* and *Marc D. Stern;* for the Association on American Indian Affairs et al. by *Steven C. Moore* and *Jack Trope;* and for the Council on Religious Freedom by *Lee Boothby* and *Robert W. Nixon.*

[1] Both lines of cases have specifically adverted to the non-free-exercise principle involved. *Cantwell,* for example, observed that "[t]he fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged." 310 U. S., at 307. *Murdock* said:

"We do not mean to say that religious groups and the press are free from all financial burdens of government. . . . We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a

tax from him for the privilege of delivering a sermon. . . . Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation." 319 U. S., at 112.

Yoder said that "the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a `reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." 406 U. S., at 233.

[2] JUSTICE O'CONNOR seeks to distinguish *Lyng* v. *Northwest Indian Cemetery Protective Assn.,* 485 U. S. 439 (1988), and *Bowen* v. *Roy,* 476 U. S. 693 (1986), on the ground that those cases involved the government's conduct of "its own internal affairs," which is different because, as Justice Douglas said in *Sherbert,* " `the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' " *Post,* at 900 (O'CONNOR, J., concurring in judgment), quoting *Sherbert* v. *Verner,* 374 U. S. 398, 412 (1963) (Douglas, J., concurring). But since Justice Douglas voted with the majority in *Sherbert,* that quote obviously envisioned that what "the government cannot do to the individual" includes not just the prohibition of an individual's freedom of action through criminal laws but also the running of its programs (in *Sherbert,* state unemployment compensation) in such fashion as to harm the individual's religious interests. Moreover, it is hard to see any reason in principle or practically why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, *Lyng, supra,* or its administration of welfare programs, *Roy, supra*.

[3] JUSTICE O'CONNOR suggests that "[t]here is nothing talismanic about neutral laws of general applicability," and that all laws burdening religious practices should be subject to compelling-interest scrutiny because "the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a `constitutional nor[m],' not an `anomaly.' " *Post,* at 901 (opinion concurring in judgment). But this comparison with other fields supports, rather than undermines, the conclusion we draw today. Just as we subject to the most exacting scrutiny laws that make classifications based on race, see *Palmore* v. *Sidoti,* 466 U. S. 429 (1984), or on the content of speech, see *Sable Communications of California* v. *FCC,* 492 U. S. 115 (1989), so too we strictly scrutinize governmental classifications based on religion, see *McDaniel* v. *Paty,* 435 U. S. 618 (1978); see also *Torcaso* v. *Watkins,* 367 U. S. 488 (1961). But we have held that race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause, see *Washington* v. *Davis,* 426 U. S. 229 (1976) (police employment examination); and we have held that generally applicable laws unconcerned with regulating speech that have the *effect* of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment, see *Citizen Publishing Co.* v. *United States,* 394 U. S. 131, 139 (1969) (antitrust laws). Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.

[4] While arguing that we should apply the compelling interest test in this case, JUSTICE O'CONNOR nonetheless agrees that "our determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of the particular religious practice at issue," *post,* at 906-907 (opinion concurring in judgment). This means, presumably, that compelling-interest scrutiny must be applied to generally applicable laws that regulate or prohibit *any* religiously motivated activity, no matter how unimportant to the claimant's religion. Earlier in her opinion, however, JUSTICE O'CONNOR appears to contradict this, saying that the proper approach is "to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling." *Post,* at 899. "Constitutionally significant burden" would seem to be "centrality" under another name. In any case, dispensing with a "centrality" inquiry is utterly unworkable. It would require, for example, the same degree of "compelling state interest" to impede the practice of throwing rice at church weddings as to impede the practice of getting married in church. There is no way out of the difficulty that, if general laws are to be subjected to a "religious practice" exception, *both* the importance of the law at issue *and* the centrality of the practice at issue must reasonably be considered.

Nor is this difficulty avoided by JUSTICE BLACKMUN's assertion that "although . . . courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is `central' to the religion, . . . I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion." *Post,* at 919 (dissenting opinion). As JUSTICE BLACKMUN's opinion proceeds to make clear, inquiry into "severe impact" is no different from inquiry into centrality. He has merely substituted for the question "How important is X to the religious adherent?" the question "How great will be the harm to the religious adherent if X is taken away?" There is no material difference.

[5] JUSTICE O'CONNOR contends that the "parade of horribles" in the text only "demonstrates . . . that courts have been quite capable of . . . strik[ing] sensible balances between religious liberty and competing state interests." *Post,* at 902 (opinion concurring in judgment). But the cases we cite have struck "sensible balances" only because they have all applied the general laws, despite the claims for religious exemption. In any event, JUSTICE O'CONNOR mistakes the purpose of our parade: it is not to suggest that courts would necessarily permit harmful exemptions from these laws (though they might), but to suggest that courts would constantly be in the business of determining whether the "severe impact" of various laws on religious practice (to use JUSTICE BLACKMUN's terminology, *post,* at 919) or the "constitutiona[l] significan[ce]" of the "burden on the specific plaintiffs" (to use JUSTICE O'CONNOR's terminology, *post,* at 899) suffices to permit us to confer an exemption. It is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.

[*] Although JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join Parts I and II of this opinion, they do not concur in the judgment.

[1] See *Hernandez* v. *Commissioner,* 490 U. S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden"); *Hobbie* v. *Unemployment Appeals Comm'n of Fla.,* 480 U. S. 136, 141 (1987) (state laws burdening religions "must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest"); *Bowen* v. *Roy,* 476 U. S. 693, 732 (1986) (O'CONNOR, J., concurring in part and dissenting in part) ("Our precedents have long required the Government to show that a compelling state interest is served by its refusal to grant a religious exemption"); *United States* v. *Lee,* 455 U. S. 252, 257-258 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest"); *Thomas* v. *Review Bd. of Indiana Employment Security Div.,* 450 U. S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); *Wisconsin* v. *Yoder,* 406 U. S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); *Sherbert* v. *Verner,* 374 U. S. 398, 406 (1963) (question is "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right").

[2] I reluctantly agree that, in light of this Court's decision in *Employment Division, Dept. of Human Resources of Ore.* v. *Smith,* 485 U. S. 660 (1988), the question on which certiorari was granted is properly presented in this case. I have grave doubts, however, as to the wisdom or propriety of deciding the constitutionality of a criminal prohibition which the State has not sought to enforce, which the State did not rely on in defending its denial of unemployment benefits before the state courts, and which the Oregon courts could, on remand, either invalidate on state constitutional grounds, or conclude that it remains irrelevant to Oregon's interest in administering its unemployment benefits program.

It is surprising, to say the least, that this Court which so often prides itself about principles of judicial restraint and reduction of federal control over matters of state law would stretch its jurisdiction to the limit in order to reach, in this abstract setting, the constitutionality of Oregon's criminal prohibition of peyote use.

[3] The only reported case in which the State of Oregon has sought to prosecute a person for religious peyote use is *State* v. *Soto,* 21 Ore. App. 794, 537 P. 2d 142 (1975), cert. denied, 424 U. S. 955 (1976).

[4] This dearth of evidence is not surprising, since the State never asserted this health and safety interest before the Oregon courts; thus, there was no opportunity for factfinding concerning the alleged dangers of peyote use. What has now become the State's principal argument for its view that the criminal prohibition is enforceable against religious use of peyote rests on no evidentiary foundation at all.

[5] See 21 CFR § 1307.31 (1989) ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law"); see *Olsen* v. *Drug Enforcement Admin.,* 279 U. S. App. D. C. 1, 6-7, 878 F. 2d 1458, 1463-1464 (1989) (explaining DEA's rationale for the exception).

Moreover, 23 States, including many that have significant Native American populations, have statutory or judicially crafted exemptions in their drug laws for religious use of peyote. See 307 Ore. 68, 73, n. 2, 763 P. 2d 146, 148, n. 2 (1988) (case below). Although this does not prove that Oregon must have such an exception too, it is significant that these States, and the Federal Government, all find their (presumably compelling) interests in controlling the use of dangerous drugs compatible with an exemption for religious use of peyote. Cf. *Boos* v. *Barry,* 485 U. S. 312, 329 (1988) (finding that an ordinance restricting picketing near a foreign embassy was not the least restrictive means of serving the asserted government interest; existence of an analogous, but more narrowly drawn, federal statute showed that "a less restrictive alternative is readily available").

[6] In this respect, respondents' use of peyote seems closely analogous to the sacramental use of wine by the Roman Catholic Church. During Prohibition, the Federal Government exempted such use of wine from its general ban on possession and use of alcohol. See National Prohibition Act, Title II, § 3, 41 Stat. 308. However compelling the Government's then general interest in prohibiting the use of alcohol may have been, it could not plausibly have asserted an interest sufficiently compelling to outweigh Catholics' right to take communion.

[7] The use of peyote is, to some degree, self-limiting. The peyote plant is extremely bitter, and eating it is an unpleasant experience, which would tend to discourage casual or recreational use. See *State* v. *Whittingham,* 19 Ariz. App. 27, 30, 504 P. 2d 950, 953 (1973) (" `[P]eyote can cause vomiting by reason of its bitter taste' "); E. Anderson, Peyote: The Divine Cactus 161 (1980) ("[T]he eating of peyote usually is a difficult ordeal in that nausea and other unpleasant physical manifestations occur regularly. Repeated use is likely, therefore, only if one is a serious researcher or is devoutly involved in taking peyote as part of a religious ceremony"); Slotkin, The Peyote Way, in Teachings from the American Earth 96, 98 (D. Tedlock & B. Tedlock eds. 1975) ("[M]any find it bitter, inducing indigestion or nausea").

[8] Over the years, various sects have raised free exercise claims regarding drug use. In no reported case, except those involving claims of religious peyote use, has the claimant prevailed. See, *e. g., Olsen* v. *Iowa,* 808 F. 2d 652 (CA8 1986) (marijuana use by Ethiopian Zion Coptic Church); *United States* v. *Rush,* 738 F. 2d 497 (CA1 1984) (same), cert. denied, 470 U. S. 1004 (1985); *United States* v. *Middleton,* 690 F. 2d 820 (CA11 1982) (same), cert denied, 460 U. S. 1051 (1983); *United States* v. *Hudson,* 431 F. 2d 468 (CA5 1970) (marijuana and heroin use by Moslems), cert denied, 400 U. S. 1011 (1971); *Leary* v. *United States,* 383 F. 2d 851 (CA5 1967) (marijuana use by Hindu), rev'd on other grounds, 395 U. S. 6 (1969); *Commonwealth* v. *Nissenbaum,* 404 Mass. 575, 536 N. E. 2d 592 (1989) (marijuana use by Ethiopian Zion Coptic Church); *State* v. *Blake,* 5 Haw. App. 411, 695 P. 2d 336 (1985) (marijuana use in practice of Hindu Tantrism); *Whyte* v. *United States,* 471 A. 2d 1018 (D. C. App. 1984) (marijuana use by Rastafarian); *State* v. *Rocheleau,* 142 Vt. 61, 451 A. 2d 1144 (1982) (marijuana use by Tantric Buddhist); *State* v. *Brashear,* 92 N. M. 622, 593 P. 2d 63 (1979) (marijuana use by nondenominational Christian);

State v. *Randall*, 540 S. W. 2d 156 (Mo. App. 1976) (marijuana, LSD, and hashish use by Aquarian Brotherhood Church). See generally Annotation, Free Exercise of Religion as Defense to Prosecution for Narcotic or Psychedelic Drug Offense, 35 A. L. R. 3d 939 (1971 and Supp. 1989).

[9] Thus, this case is distinguishable from *United States* v. *Lee*, 455 U. S. 252 (1982), in which the Court concluded that there was "no principled way" to distinguish other exemption claims, and the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.,* at 260.

[10] See Federal Agencies Task Force, Report to Congress on American Indian Religious Freedom Act of 1978, pp. 1-8 (Aug. 1979) (history of religious persecution); Barsh, The Illusion of Religious Freedom for Indigenous Americans, 65 Ore. L. Rev. 363, 369-374 (1986).

Indeed, Oregon's attitude toward respondents' religious peyote use harkens back to the repressive federal policies pursued a century ago:

"In the government's view, traditional practices were not only morally degrading, but unhealthy. `Indians are fond of gatherings of every description,' a 1913 public health study complained, advocating the restriction of dances and `sings' to stem contagious diseases. In 1921, Commissioner of Indian Affairs Charles Burke reminded his staff to punish any Indian engaged in `any dance which involves . . . the reckless giving away of property. . . frequent or prolonged periods of celebration . . . in fact, any disorderly or plainly excessive performance that promotes superstitious cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare.' Two years later, he forbid Indians under the age of 50 from participating in any dances of any kind, and directed federal employees `to educate public opinion' against them." *Id.,* at 370-371 (footnotes omitted).

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)

Justia Opinion Summary and Annotations

Annotation

Primary Holding

Students may not be required to salute the American flag or recite the Pledge of Allegiance at public schools if it is contrary to their religious beliefs.

Facts

In 1942, the West Virginia Board of Education required public schools to include salutes to the flag by teachers and students as a mandatory part of school activities. The Board provided a detailed definition of what the salute should look like: keeping the right hand raised with upturned palm in a stiff-arm salute while the individual recited the pledge of allegiance. Students who refused to obey this requirement were subject to expulsion as part of school rules against insubordination and would not be readmitted until they complied. As a result, the children and their families could be charged with a crime based on the child's unlawful absence from school, which could expose parents to jail time.

The children in a family of Jehovah's Witnesses refused to perform the salute and were sent home from school each day for non-compliance. This was based on their core spiritual belief that the laws of God rise above any laws of a secular government. Like other children who refused to salute the flag, however, they were threatened with reform schools used for criminally active children, and their parents faced prosecutions for causing juvenile delinquency.

Opinions

Majority

- Robert Houghwout Jackson (Author)
- Harlan Fiske Stone
- Hugo Lafayette Black
- William Orville Douglas
- Frank Murphy
- John Rutledge

Jackson found that the First Amendment cannot countenance efforts to enforce a unanimity of opinion on any topic, and national symbols like the flag should not receive a level of deference that trumps constitutional protections. He argued that curtailing or eliminating dissent was not only an improper but also an ineffective way of producing true unity, using historical examples. Jackson rejected an earlier opinion by Justice Felix Frankfurter that objectors like Jehovah's Witnesses should use the legislative rather than the judicial process to assert their rights. He found that some minority groups would not be able to access their protections under the Bill of Rights without resorting to the courts.

Concurrence

- Hugo Lafayette Black (Author)
- William Orville Douglas

Black and Douglas wrote to repudiate their earlier opinions in First Amendment decisions and voice an especially enthusiastic support for its protections.

Concurrence

- Frank Murphy (Author)

Dissent

- Felix Frankfurter (Author)

Concerned about exceeding the scope of the judicial role, Frankfurter was skeptical that religious beliefs freed citizens from the obligation to obey rules. In a controversial passage, he argued that his Jewish heritage made him particularly sensitive to the importance of constitutional protections, so his views should be taken seriously. (This was mostly a response to critics of his earlier decision on the Free Exercise Clause, which allowed states to restrict the rights of individuals to exercise their religious beliefs.) He pointed out that the Court is essentially acquiring a legislative function when it strikes down a law with

which it disagrees, and the absence of a check on its power to do so means that it should be careful when overriding the democratic process.

Dissent

- Owen Josephus Roberts (Author)
- Stanley Forman Reed

Roberts and Reed did not write opinions to explain why they dissented.

Case Commentary

If there is no imminent danger caused by the free expression of religious beliefs, the Constitution supports diversity and does not allow the state to coerce citizens into patriotic gestures. Issues like these are deeply personal and cannot be brought into forced conformity. This decision remains one of the most expansive visions of First Amendment protections in the Court's jurisprudence, and it preceded several other cases that created religious exemptions for members of various sects.

Syllabus **Case**

U.S. Supreme Court

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)

West Virginia State Board of Education v. Barnette

No. 591

Argued March 11, 1943

Decided June 14, 1943

319 U.S. 624

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

Syllabus

1. State action against which the Fourteenth Amendment protects includes action by a state board of education. P. 319 U. S. 637.

2. The action of a State in making it compulsory for children in the public schools to salute the flag and pledge allegiance -- by extending the right arm, palm upward, and declaring, "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all" -- violates the First and Fourteenth Amendments. P. 319 U. S. 642.

So *held* as applied to children who were expelled for refusal to comply, and whose absence thereby became "unlawful," subjecting them and their parents or guardians to punishment.

3. That those who refused compliance did so on religious grounds does not control the decision of this question, and it is unnecessary to inquire into the sincerity of their views. P. 319 U. S. 634.

4. Under the Federal Constitution, compulsion as here employed is not a permissible means of achieving "national unity." P. 319 U. S. 640.

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5. *Minersville School Dist. v. Gobitis,* 310 U. S. 586, overruled; *Hamilton v. Regents,* 293 U. S. 245, distinguished. Pp. 319 U. S. 642, 319 U. S. 632.

47 F.Supp. 251, affirmed.

APPEAL from a decree of a District Court of three judges enjoining the enforcement of a regulation of the West Virginia State Board of Education requiring children in the public schools to salute the American flag.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Following the decision by this Court on June 3, 1940, in *Minersville School District v. Gobitis,* 310 U. S. 586, the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State

"for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government."

Appellant

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Board of Education was directed, with advice of the State Superintendent of Schools, to "prescribe the courses of study covering these subjects" for public schools. The Act made it the duty of private, parochial and denominational schools to prescribe courses of study "similar to those required for the public schools." [Footnote 1]

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's *Gobitis* opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils

"shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly. [Footnote 2] "

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The resolution originally required the "commonly accepted salute to the Flag," which it defined. Objections to the salute as "being too much like Hitler's" were raised by the Parent and Teachers Association, the Boy and Girl

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Scouts, the Red Cross, and the Federation of Women's Clubs. [Footnote 3] Some modification appears to have been made in deference to these objections, but no concession was made to Jehovah's Witnesses. [Footnote 4] What is now required is the "stiff-arm" salute, the saluter to keep the right hand raised with palm turned up while the following is repeated:

"I pledge allegiance to the Flag of the United States of

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America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."

Failure to conform is "insubordination," dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile, the expelled child is "unlawfully absent," [Footnote 5] and may be proceeded against as a delinquent. [Footnote 6] His parents or guardians are liable to prosecution, [Footnote 7] and, if convicted, are subject to fine not exceeding $50 and Jail term not exceeding thirty days. [Footnote 8]

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says:

"Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them."

They consider that the flag is an "image" within this command. For this reason, they refuse to salute it.

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Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted, and are threatened with prosecutions for causing delinquency.

The Board of Education moved to dismiss the complaint, setting forth these facts and alleging that the law and regulations are an unconstitutional denial of religious freedom, and of freedom of speech, and are invalid under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Federal Constitution. The cause was submitted on the pleadings to a District Court of three judges. It restrained enforcement as to the plaintiffs and those of that class. The Board of Education brought the case here by direct appeal. [Footnote 9]

This case calls upon us to reconsider a precedent decision, as the Court, throughout its history, often has been required to do. [Footnote 10] Before turning to the *Gobitis* case, however, it is desirable to notice certain characteristics by which this controversy is distinguished.

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce

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attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

As the present CHIEF JUSTICE said in dissent in the *Gobitis* case, the State may

"require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country."

310 U.S. at 310 U. S. 604. Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected [Footnote 11] route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan.. [Footnote 12] This issue is not prejudiced by

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the Court's previous holding that, where a State, without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution. It was held that those who take advantage of its opportunities may not, on ground of conscience, refuse compliance with such conditions. *Hamilton v. Regents,* 293 U. S. 245. In the present case, attendance is not optional. That case is also to be distinguished from the present one, because, independently of college privileges or requirements, the State has power to raise militia and impose the duties of service therein upon its citizens.

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short cut from mind

of flag to symbolize some system, idea, institution, or personality is a short-cut from mind to mind. Causes and nations, political parties, lodges, and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas, just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a

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symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Over a decade ago, Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. *Stromberg v. California,* 283 U. S. 35. Here, it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication, when coerced, is an old one, well known to the framers of the Bill of Rights. [Footnote 13]

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony, or whether it will be acceptable if they simulate assent by words without belief, and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here, the power of compulsion

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is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute, we are required to say that a Bill of Rights which guards the individual's right to speak his own mind left it open to public authorities to compel him to

utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. [Footnote 14] If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence, validity of the asserted power to force an American citizen publicly to profess any statement of belief, or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Nor does the issue, as we see it, turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views

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hold such a compulsory rite to infringe constitutional liberty of the individual. [Footnote 15] It is not necessary to inquire whether nonconformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The *Gobitis* decision, however, *assumed,* as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. [Footnote 16] The question which underlies the

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flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine, rather than assume existence of, this power, and, against this broader definition of issues in this case, reexamine specific grounds assigned for the *Gobitis* decision.

1. It was said that the flag salute controversy confronted the Court with

"the problem which Lincoln cast in memorable dilemma: 'Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?', and that the answer must be in favor of strength. *Minersville School District v. Gobitis, supra,* at 310 U. S. 596."

We think these issues may be examined free of pressure or restraint growing out of such considerations.

It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the State to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority, and would require us to override every liberty thought to weaken or delay execution of their policies.

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and, by making us feel safe to live under it, makes for its better support. Without promise of a limiting Bill of Rights, it is

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doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

The subject now before us exemplifies this principle. Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or, failing that, to weaken, the influence of the educational system. Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise.

2. It was also considered in the *Gobitis* case that functions of educational officers in States, counties and school districts were such that to interfere with their authority "would in effect make us the school board for the country." *Id.* at 310 U. S. 598.

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Such Boards are numerous, and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account.

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The action of Congress in making flag observance voluntary [Footnote 17] and respecting the conscience of the objector in a matter so vital as raising the Army [Footnote 18] contrasts sharply with these local regulations in matters relatively trivial to the welfare of the nation. There are village tyrants, as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution.

3. The *Gobitis* opinion reasoned that this is a field "where courts possess no marked, and certainly no controlling, competence," that it is committed to the legislatures, as well as the courts, to guard cherished liberties, and that it is constitutionally appropriate to

"fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies, rather than to transfer such a contest to the judicial arena,"

since all the "effective means of inducing political changes are left free." *Id.* at 310 U. S. 597-598, 310 U. S. 600.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

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In weighing arguments of the parties, it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the

principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that, while it is the Fourteenth Amendment which bears directly upon the State, it is the more specific limiting principles of the First Amendment that finally govern this case.

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls, and only the mildest supervision

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over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of noninterference has withered, at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability, and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence, but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

4. Lastly, and this is the very heart of the *Gobitis* opinion, it reasons that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures toward "national unity" are constitutional. *Id.* at 310 U. S. 595. Upon the verity of

this assumption depends our answer in this case.

National unity, as an end which officials may foster by persuasion and example, is not in question. The problem is whether, under our Constitution, compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good, as well as by evil, men. Nationalism is a relatively recent phenomenon, but, at other times and places, the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity.

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As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure, but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous, instead of a compulsory routine, is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism

intellectual individualism

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and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

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, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. [Footnote 19]

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power, and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in *Minersville School District v. Gobitis,* and the holdings of those few per curiam decisions which preceded and foreshadowed it, are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is

Affirmed.

MR. JUSTICE ROBERTS and MR. JUSTICE REED adhere to the views expressed by the Court in *Minersville School*

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District v. Gobitis, 310 U. S. 586, and are of the opinion that the judgment below should be reversed.

[Footnote 1]

§ 134, West Virginia Code (1941 Supp.):

"In all public, private, parochial and denominational schools located within this state there shall be given regular courses of instruction in history of the United States, in civics, and in the constitutions of the United States and of the State of West Virginia, for the purpose of

teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government of the United States and of the state of West Virginia. The state board of education shall, with the advice of the state superintendent of schools, prescribe the courses of study covering these subjects for the public elementary and grammar schools, public high schools and state normal schools. It shall be the duty of the officials or boards having authority over the respective private, parochial and denominational schools to prescribe courses of study for the schools under their control and supervision similar to those required for the public schools."

[Footnote 2]

The text is as follows:

"WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amendment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and"

"WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected, whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but"

"WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellow man; that conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibility, and"

"WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity

transcending all internal differences, however large, within the framework of the Constitution; that the Flag is the symbol of the Nation's power; that emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and"

"WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported."

"Therefore, be it RESOLVED, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States -- the right hand is placed upon the breast, and the following pledge repeated in unison: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all' -- now becomes a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute, honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly."

[Footnote 3]

The National Headquarters of the United States Flag Association takes the position that the extension of the right arm in this salute to the flag is not the Nazi-Fascist salute,

"although quite similar to it. In the Pledge to the Flag, the right arm is extended and raised, palm UPWARD, whereas the Nazis extend the arm practically *straight to the front* (the finger tips being about even with the eyes), *palm* DOWNWARD, and the Fascists do the same, except they raise the arm slightly higher."

James A. Moss, The Flag of the United States: Its History and Symbolism (1914) 108.

[Footnote 4]

They have offered, in lieu of participating in the flag salute ceremony "periodically and

publicly," to give the following pledge:

"I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray."

"I respect the flag of the United States, and acknowledge it as a symbol of freedom and justice to all."

"I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible."

[Footnote 5]

§ 1851(1), West Virginia Code (1941 Supp.):

"If a child be dismissed, suspended, or expelled from school because of refusal of such child to meet the legal and lawful requirements of the school and the established regulations of the county and/or state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from school during the time he refuses to comply with such requirements and regulations, and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school."

[Footnote 6]

§ 4904(4), West Virginia Code (1941 Supp.).

[Footnote 7]

See Note 5 *supra*.

[Footnote 8]

§§ 1847, 1851, West Virginia Code (1941 Supp.).

[Footnote 9]

§ 266 of the Judicial Code, 28 U.S.C. § 380.

[Footnote 10]

See authorities cited in *Helvering v. Griffiths,* 318 U. S. 371, 318 U. S. 401, note 52.

[Footnote 11]

See the nationwide survey of the study of American history conducted by the New York Times, the results of which are published in the issue of June 21, 1942, and are there summarized on p. 1, col. 1, as follows:

"82 percent of the institutions of higher learning in the United States do not require the study of United States history for the undergraduate degree. Eighteen percent of the colleges and universities require such history courses before a degree is awarded. It was found that many students complete their four years in college without taking any history courses dealing with this country."

"Seventy-two percent of the colleges and universities do not require United States history for admission, while 28 percent require it. As a result, the survey revealed, many students go through high school, college and then to the professional or graduate institution without having explored courses in the history of their country."

"Less than 10 percent of the total undergraduate body was enrolled in United States history classes during the Spring semester just ended. Only 8 percent of the freshman class took courses in United States history, although 30 percent was enrolled in European or world history courses."

[Footnote 12]

[Footnote 13]

Early Christians were frequently persecuted for their refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority. The story of William Tell's sentence to shoot an apple off his son's head for refusal to salute a bailiff's hat is an ancient one. 21 Encyclopedia Britannica (14th ed.) 911-912. The Quakers, William Penn included, suffered punishment, rather than uncover their heads in deference to any civil authority. Braithwaite, The Beginnings of Quakerism (1912) 200, 229-230, 232-233, 447, 451; Fox, Quakers Courageous (1941) 113.

[Footnote 14]

For example: use of "Republic," if rendered to distinguish our government from a "democracy," or the words "one Nation," if intended to distinguish it from a "federation," open up old and bitter controversies in our political history; "liberty and justice for all," if it must be accepted as descriptive of the present order, rather than an ideal, might to some

seem an overstatement.

[Footnote 15]

Cushman, Constitutional Law in 1939-1940, 35 American Political Science Review 250, 271, observes:

"All of the eloquence by which the majority extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public."

For further criticism of the opinion in the *Gobitis* case by persons who do not share the faith of the Witnesses, *see:* Powell, Conscience and the Constitution, in Democracy and National Unity (University of Chicago Press, 1941) 1; Wilkinson, Some Aspects of the Constitutional Guarantees of Civil Liberty, 11 Fordham Law Review 50; Fennell, The "Reconstructed Court" and Religious Freedom: The *Gobitis* Case in Retrospect, 19 New York University Law Quarterly Review 31; Green, Liberty under the Fourteenth Amendment, 27 Washington University Law Quarterly 497; 9 International Juridical Association Bulletin 1; 39 Michigan Law Review 149; 15 St. John's Law Review 95.

[Footnote 16]

The opinion says

"That the flag salute is an allowable portion of a school program *for those who do not invoke conscientious scruples is surely not debatable*. But for us to insist that, *though the ceremony may be required, exceptional immunity must be given to dissidents* is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise."

(Italics ours.) 310 U.S. at 310 U. S. 599-600. And, elsewhere, the question under consideration was stated,

"When does the constitutional guarantee *compel exemption* from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good?"

(Italics ours.) *Id.* at 310 U. S. 593. And again,

". . . whether school children, like the Gobitis children, must be *excused from conduct required of all the other children* in the promotion of national cohesion. . . ."

required of all the other children in the promotion of national cohesion. . . .

(Italics our.) *Id.* at 310 U. S. 595.

[Footnote 17]

Section 7 of House Joint Resolution 359, approved December 22, 1942, 56 Stat. 1074, 36 U.S.C. (1942 Supp.) § 172, prescribes no penalties for nonconformity, but provides:

"That the pledge of allegiance to the flag, 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all,' be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. . . ."

[Footnote 18]

§ 5(a) of the Selective Training and Service Act of 1940, 50 U.S.C. (App.) § 307(g).

[Footnote 19]

The Nation may raise armies and compel citizens to give military service. *Selective Draft Law Cases,* 245 U. S. 366. It follows, of course, that those subject to military discipline are under many duties, and may not claim many freedoms that we hold inviolable as to those in civilian life.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, concurring:

We are substantially in agreement with the opinion just read, but, since we originally joined with the Court in the *Gobitis* case, it is appropriate that we make a brief statement of reasons for our change of view.

Reluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought inimical to the public welfare was the controlling influence which moved us to consent to the *Gobitis* decision. Long reflection convinced us that, although the principle is sound, its application in the particular case was wrong. *Jones v. Opelika,* 316 U. S. 584, 316 U. S. 623. We believe that the statute before us fails to accord full scope to the freedom of religion secured to the appellees by the First and Fourteenth Amendments.

The statute requires the appellees to participate in a ceremony aimed at inculcating respect for the flag and for this country. The Jehovah's Witnesses, without any desire to show disrespect for either the flag or the country, interpret the Bible as commanding, at the risk

of God's displeasure, that they not go through the form of a pledge of allegiance to any flag. The devoutness of their belief is evidenced by their willingness to suffer persecution and punishment, rather than make the pledge.

No well ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave

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and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity. Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one, and, in meeting it, we cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation. Such a statutory exaction is a form of test oath, and the test oath has always been abhorrent in the United States.

Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.

Neither our domestic tranquillity in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes for their errors. The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution. As such, it is inconsistent with our Constitution's plan and purpose.

MR. JUSTICE MURPHY, concurring:

I agree with the opinion of the Court and join in it.

The complaint challenges an order of the State Board of Education which requires teachers and pupils to participate in the prescribed salute to the flag. For refusal to conform with the requirement, the State law prescribes expulsion

requirement, the State law prescribes expulsion.

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The offender is required by law to be treated as unlawfully absent from school, and the parent or guardian is made liable to prosecution and punishment for such absence. Thus, not only is the privilege of public education conditioned on compliance with the requirement, but noncompliance is virtually made unlawful. In effect, compliance is compulsory, and not optional. It is the claim of appellees that the regulation is invalid as a restriction on religious freedom and freedom of speech, secured to them against State infringement by the First and Fourteenth Amendments to the Constitution of the United States.

A reluctance to interfere with considered state action, the fact that the end sought is a desirable one, the emotion aroused by the flag as a symbol for which we have fought and are now fighting again -- all of these are understandable. But there is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that, as a judge, I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches.

The right of freedom of thought and of religion, as guaranteed by the Constitution against State action, includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society -- as in the case of compulsion to give evidence in court. Without wishing to disparage the purposes and intentions of those who hope to inculcate sentiments of loyalty and patriotism by requiring a declaration of allegiance as a feature of public education, or unduly belittle the benefits that may accrue therefrom, I am impelled to conclude that such a requirement is not essential to the maintenance of effective government and orderly society. To many, it is deeply distasteful to join in a public chorus of affirmation of private belief. By some, including

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the members of this sect, it is apparently regarded as incompatible with a primary religious obligation, and therefore a restriction on religious freedom. Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the "severest contests in which I have ever been engaged."

I am unable to agree that the benefits that may accrue to society from the compulsory flag

I am unable to agree that the benefits that may accrue to society from the compulsory flag salute are sufficiently definite and tangible to justify the invasion of freedom and privacy that is entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination. The trenchant words in the preamble to the Virginia Statute for Religious Freedom remain unanswerable:

". . . all attempts to influence [the mind] by temporal punishments, or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, . . ."

Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.

* *See* Jefferson, Autobiography, vol. 1, pp. 53-59.

MR. JUSTICE FRANKFURTER, dissenting:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant, I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing, as they do, the thought and

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action of a lifetime. But, as judges, we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution, and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court, I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could, in reason, have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly

legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

Not so long ago, we were admonished that

"the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books, appeal lies not to the courts, but to the ballot and to the processes of democratic government. "

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United States v. Butler, 297 U. S. 1, 297 U. S. 79 (dissent). We have been told that generalities do not decide concrete cases. But the intensity with which a general principle is held may determine a particular issue, and whether we put first things first may decide a specific controversy.

The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. The Constitution does not give us greater veto power when dealing with one phase of "liberty" than with another, or when dealing with grade school regulations than with college regulations that offend conscience, as was the case in *Hamilton v. Regents,* 293 U. S. 245. In neither situation is our function comparable to that of a legislature, or are we free to act as though we were a super-legislature. Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. There is no warrant in the constitutional basis of this Court's authority for attributing different roles to it depending upon the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom. In no instance is this Court the primary protector of the particular liberty that is invoked. This Court has recognized what hardly could be denied, that all the provisions of the first ten Amendments are "specific" prohibitions, *United States v. Carolene Products Co.,* 304 U. S. 144, 304 U. S. 152, n. 4. But each specific Amendment, insofar as embraced within the Fourteenth Amendment, must be equally respected, and the function of this

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Court does not differ in passing on the constitutionality of legislation challenged under different Amendments.

When Mr. Justice Holmes, speaking for this Court, wrote that

"it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts,"

Missouri, K. & T. Ry. Co. v. May, 194 U. S. 267, 194 U. S. 270, he went to the very essence of our constitutional system and the democratic conception of our society. He did not mean that for only some phases of civil government this Court was not to supplant legislatures and sit in judgment upon the right or wrong of a challenged measure. He was stating the comprehensive judicial duty and role of this Court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether, within the broad grant of authority vested in legislatures, they have exercised a judgment for which reasonable justification can be offered.

The framers of the federal Constitution might have chosen to assign an active share in the process of legislation to this Court. They had before them the well known example of New York's Council of Revision, which had been functioning since 1777. After stating that "laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed," the state constitution made the judges of New York part of the legislative process by providing that "all bills which have passed the senate and assembly shall, before they become laws," be presented to a Council, of which the judges constituted a majority, "for their revisal and consideration." Art. III, New York Constitution of 1777. Judges exercised this legislative function in New York

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for nearly fifty years. *See* Art. I, § 12, New York Constitution of 1821. But the framers of the Constitution denied such legislative powers to the federal judiciary. They chose instead to insulate the judiciary from the legislative function. They did not grant to this Court supervision over legislation.

The reason why, from the beginning, even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the

legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use.

The precise scope of the question before us defines the limits of the constitutional power that is in issue. The State of West Virginia requires all pupils to share in the salute to the flag as part of school training in citizenship. The present action is one to enjoin the enforcement of this requirement by those in school attendance. We have not before us any attempt by the State to punish disobedient children or visit penal consequences on their parents. All that is in question is the right of the State to compel participation in this exercise by those who choose to attend the public schools.

We are not reviewing merely the action of a local school board. The flag salute requirement in this case comes before us with the full authority of the State of West Virginia. We are, in fact, passing judgment on "the power of the State as a whole." *Rippey v. Texas,* 193 U. S. 504, 193 U. S. 509; *Skiriotes v. Florida,* 313 U. S. 69, 313 U. S. 79. Practically, we are passing upon the political power of each of the forty-eight states. Moreover, since the First Amendment has been read into the Fourteenth, our problem is precisely the same as it would be if we had before us an Act of Congress for the District of Columbia. To suggest that we are here concerned

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with the heedless action of some village tyrants is to distort the augustness of the constitutional issue and the reach of the consequences of our decision.

Under our constitutional system, the legislature is charged solely with civil concerns of society. If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures, and cannot stand. But it by no means follows that legislative power is wanting whenever a general nondiscriminatory civil regulation, in fact, touches conscientious scruples or religious beliefs of an individual or a group. Regard for such scruples or beliefs undoubtedly presents one of the most reasonable claims for the exertion of legislative accommodation. It is, of course, beyond our power to rewrite the State's requirement by providing exemptions for those who do not wish to participate in the flag salute or by making some other accommodations to meet their scruples. That wisdom might suggest the making of such accommodations, and that school administration would not find it too difficult to make them, and yet maintain the ceremony for those not refusing to conform, is outside our province to suggest. Tact, respect, and generosity toward variant

views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling submission to a general law. But the real question is, who is to make such accommodations, the courts or the legislature?

This is no dry, technical matter. It cuts deep into one's conception of the democratic process -- it concerns no less the practical differences between the means for making these accommodations that are open to courts and to legislatures. A court can only strike down. It can only say "This or that law is void." It cannot modify or qualify, it cannot make exceptions to a general requirement.

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And it strikes down not merely for a day. At least the finding of unconstitutionality ought not to have ephemeral significance unless the Constitution is to be reduced to the fugitive importance of mere legislation. When we are dealing with the Constitution of the United States, and, more particularly, with the great safeguards of the Bill of Rights, we are dealing with principles of liberty and justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental" -- something without which "a fair and enlightened system of justice would be impossible." *Palko v. Connecticut,* 302 U. S. 319, 302 U. S. 325; *Hurtado v. California,* 110 U. S. 516, 110 U. S. 530, 110 U. S. 531. If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure, and they should be made directly responsible to the electorate. There have been many, but unsuccessful, proposals in the last sixty years to amend the Constitution to that end. *See* Sen.Doc. No. 91, 75th Cong., 1st Sess., pp. 248-251.

Conscientious scruples, all would admit, cannot stand against every legislative compulsion to do positive acts in conflict with such scruples. We have been told that such compulsions override religious scruples only as to major concerns of the state. But the determination of what is major and what is minor itself raises questions of policy. For the way in which men equally guided by reason appraise importance goes to the very heart of policy. Judges should be very diffident in setting their judgment against that of a state in determining what is, and what is not, a major concern, what means are appropriate to proper ends, and what is the total social cost in striking the balance of imponderables.

What one can say with assurance is that the history out of which grew constitutional provisions for religious equality

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and the writings of the great exponents of religious freedom -- Jefferson, Madison, John Adams, Benjamin Franklin -- are totally wanting in justification for a claim by dissidents of exceptional immunity from civic measures of general applicability, measures not, in fact, disguised assaults upon such dissident views. The great leaders of the American Revolution were determined to remove political support from every religious establishment. They put on an equality the different religious sects -- Episcopalians, Presbyterians, Catholics, Baptists, Methodists, Quakers, Huguenots -- which, as dissenters, had been under the heel of the various orthodoxies that prevailed in different colonies. So far as the state was concerned, there was to be neither orthodoxy nor heterodoxy. And so Jefferson and those who followed him wrote guaranties of religious freedom into our constitutions. Religious minorities, as well as religious majorities, were to be equal in the eyes of the political state. But Jefferson and the others also knew that minorities may disrupt society. It never would have occurred to them to write into the Constitution the subordination of the general civil authority of the state to sectarian scruples.

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. Religious loyalties may be exercised without hindrance from the state, not the state may not exercise that which, except by leave of religious loyalties, is within the domain of temporal power. Otherwise, each individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws.

The prohibition against any religious establishment by the government placed denominations on an equal footing

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-- it assured freedom from support by the government to any mode of worship and the freedom of individuals to support any mode of worship. Any person may therefore believe or disbelieve what he pleases. He may practice what he will in his own house of worship or publicly within the limits of public order. But the lawmaking authority is not circumscribed by the variety of religious beliefs -- otherwise, the constitutional guaranty would be not a protection of the free exercise of religion, but a denial of the exercise of legislation.

The essence of the religious freedom guaranteed by our Constitution is therefore this: no

religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience. Much that is the concern of temporal authority affects the spiritual interests of men. But it is not enough to strike down a nondiscriminatory law that it may hurt or offend some dissident view. It would be too easy to cite numerous prohibitions and injunctions to which laws run counter if the variant interpretations of the Bible were made the tests of obedience to law. The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong.

An act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad. But an act promoting good citizenship and national allegiance is within the domain of governmental authority, and is therefore to be judged by the same considerations of power and of constitutionality as those involved in the many

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claims of immunity from civil obedience because of religious scruples.

That claims are pressed on behalf of sincere religious convictions does not, of itself, establish their constitutional validity. Nor does waving the banner of religious freedom relieve us from examining into the power we are asked to deny the states. Otherwise, the doctrine of separation of church and state, so cardinal in the history of this nation and for the liberty of our people, would mean not the disestablishment of a state church, but the establishment of all churches, and of all religious groups.

The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples. Compulsory vaccination, *see Jacobson v. Massachusetts,* 197 U. S. 11, food inspection regulations, *see Shapiro v. Lyle,* 30 F.2d 971, the obligation to bear arms, *see Hamilton v. Regents,* 293 U. S. 245, 293 U. S. 267, testimonial duties, *See Stansbury v. Marks,* 2 Dall. 213, compulsory medical treatment, *see People v. Vogelesang,* 221 N.Y. 290, 116 N.E. 977 -- these are but illustrations of conduct that has often been compelled in the enforcement of legislation of general applicability even though the religious consciences of particular individuals rebelled at the exaction.

Law is concerned with external behavior, and not with the inner life of man. It rests in large

measure upon compulsion. Socrates lives in history partly because he gave his life for the conviction that duty of obedience to secular law does not presuppose consent to its enactment or belief in its virtue. The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws. The state is not shut out from a domain because the individual conscience may deny the state's claim. The individual conscience

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may profess what faith it chooses. It may affirm and promote that faith -- in the language of the Constitution, it may "exercise" it freely -- but it cannot thereby restrict community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way, either openly or by stealth. One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's belief. Compelling belief implies denial of opportunity to combat it and to assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action while denying its wisdom or virtue, and with ample opportunity for seeking its change or abrogation.

In *Hamilton v. Regents,* 293 U. S. 245, this Court unanimously held that one attending a state-maintained university cannot refuse attendance on courses that offend his religious scruples. That decision is not overruled today, but is distinguished on the ground that attendance at the institution for higher education was voluntary, and therefore a student could not refuse compliance with its conditions, and yet take advantage of its opportunities. But West Virginia does not compel the attendance at its public schools of the children here concerned. West Virginia does not so compel, for it cannot. This Court denied the right of a state to require its children to attend public schools. *Pierce v. Society of Sisters,* 268 U. S. 510. As to its public schools, West Virginia imposes conditions which it deems necessary in the development of future citizens precisely as California deemed necessary the requirements that offended the student's conscience in the *Hamilton* case. The need for higher education and the duty of the state to provide it as part of a public educational system, are part of the democratic faith of most of our states. The right to secure such education in institutions not maintained by public funds is unquestioned.

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But the practical opportunities for obtaining what is becoming in increasing measure the conventional equipment of American youth may be no less burdensome than that which parents are increasingly called upon to bear in sending their children to parochial schools

because the education provided by public schools, though supported by their taxes, does not satisfy their ethical and educational necessities. I find it impossible, so far as constitutional power is concerned, to differentiate what was sanctioned in the *Hamilton* case from what is nullified in this case. And, for me, it still remains to be explained why the grounds of Mr. Justice Cardozo's opinion in *Hamilton v. Regents, supra,* are not sufficient to sustain the flag salute requirement. Such a requirement, like the requirement in the *Hamilton* case,

"is not an interference by the state with the free exercise of religion when the liberties of the constitution are read in the light of a century and a half of history during days of peace and war."

293 U.S. 245, 293 U. S. 266. The religious worshiper,

"if his liberties were to be thus extended, might refuse to contribute taxes . . . in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government."

Id. at 293 U. S. 268.

Parents have the privilege of choosing which schools they wish their children to attend. And the question here is whether the state may make certain requirements that seem to it desirable or important for the proper education of those future citizens who go to schools maintained by the states, or whether the pupils in those schools may be relieved from those requirements if they run counter to the consciences of their parents. Not only have parents the right to send children to schools of their own choosing, but the state has no right to bring such schools "under a strict governmental control" or give

"affirmative direction

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concerning the intimate and essential details of such schools, entrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum, and textbooks."

Farrington v. Tokushige, 273 U. S. 284, 273 U. S. 298. Why should not the state likewise have constitutional power to make reasonable provisions for the proper instruction of children in schools maintained by it?

When dealing with religious scruples, we are dealing with an almost numberless variety of doctrines and beliefs entertained with equal sincerity by the particular groups for which they satisfy man's needs in his relation to the mysteries of the universe. There are, in the United States, more than 250 distinctive established religious denominations. In the State of Pennsylvania, there are 120 of these, and, in West Virginia, as many as 65. But if religious scruples afford immunity from civic obedience to laws, they may be invoked by the religious beliefs of any individual even though he holds no membership in any sect or organized denomination. Certainly this Court cannot be called upon to determine what claims of conscience should be recognized, and what should be rejected as satisfying the "religion" which the Constitution protects. That would, indeed, resurrect the very discriminatory treatment of religion which the Constitution sought forever to forbid. And so, when confronted with the task of considering the claims of immunity from obedience to a law dealing with civil affairs because of religious scruples, we cannot conceive religion more narrowly than in the terms in which Judge Augustus N. Hand recently characterized it:

"It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race, and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason

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as a means of relating the individual to his fellow men and to his universe. . . . [It] may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is, for many persons at the present time, the equivalent of what has always been thought a religious impulse."

United States v. Kauten, 133 F.2d 703, 708.

Consider the controversial issue of compulsory Bible reading in public schools. The educational policies of the states are in great conflict over this, and the state courts are divided in their decisions on the issue whether the requirement of Bible reading offends constitutional provisions dealing with religious freedom. The requirement of Bible reading has been justified by various state courts as an appropriate means of inculcating ethical precepts and familiarizing pupils with the most lasting expression of great English literature. Is this Court to overthrow such variant state educational policies by denying states the right to entertain such convictions in regard to their school systems because of a belief that the King James version is, in fact, a sectarian text to which parents of the Catholic and Jewish faiths and of some Protestant persuasions may rightly object to having their children exposed? On the other hand, the religious consciences of some parents may

their children exposed? On the other hand, the religious consciences of some parents may rebel at the absence of any Bible reading in the schools. *See Washington ex rel. Clithero v. Showalter,* 284 U.S. 573. Or is this Court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula? The religious consciences of some parents may be offended by subjecting their children to the Biblical account of creation, while another state may offend parents by prohibiting a teaching of biology that contradicts such Biblical account. *Compare Scopes v. State,* 154 Tenn. 105, 289 S.W. 363. What of conscientious

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objections to what is devoutly felt by parents to be the poisoning of impressionable minds of children by chauvinistic teaching of history? This is very far from a fanciful suggestion, for, in the belief of many thoughtful people, nationalism is the seed-bed of war.

There are other issues in the offing which admonish us of the difficulties and complexities that confront states in the duty of administering their local school systems. All citizens are taxed for the support of public schools, although this Court has denied the right of a state to compel all children to go to such schools, and has recognized the right of parents to send children to privately maintained schools. Parents who are dissatisfied with the public schools thus carry a double educational burden. Children who go to public school enjoy in many states derivative advantages, such as free textbooks, free lunch, and free transportation in going to and from school. What of the claims for equality of treatment of those parents who, because of religious scruples, cannot send their children to public schools? What of the claim that, if the right to send children to privately maintained schools is partly an exercise of religious conviction, to render effective this right, it should be accompanied by equality of treatment by the state in supplying free textbooks, free lunch, and free transportation to children who go to private schools? What of the claim that such grants are offensive to the cardinal constitutional doctrine of separation of church and state?

These questions assume increasing importance in view of the steady growth of parochial schools, both in number and in population. I am not borrowing trouble by adumbrating these issues, nor am I parading horrible examples of the consequences of today's decision. I am aware that we must decide the case before us, and not some other case. But that does not mean that a case is dissociated from the past, and unrelated to the future. We must decide this

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case with due regard for what went before and no less regard for what may come after. Is it really a fair construction of such a fundamental concept as the right freely to exercise one's religion that a state cannot choose to require all children who attend public school to make the same gesture of allegiance to the symbol of our national life because it may offend the conscience of some children, but that it may compel all children to attend public school to listen to the King James version although it may offend the consciences of their parents? And what of the larger issue of claiming immunity from obedience to a general civil regulation that has a reasonable relation to a public purpose within the general competence of the state? *See Pierce v. Society of Sisters,* 268 U. S. 510, 268 U. S. 535. Another member of the sect now before us insisted that, in forbidding her two little girls, aged nine and twelve, to distribute pamphlets, Oregon infringed her and their freedom of religion in that the children were engaged in "preaching the gospel of God's Kingdom." A procedural technicality led to the dismissal of the case, but the problem remains. *McSparran v. Portland,* 318 U.S. 768.

These questions are not lightly stirred. They touch the most delicate issues, and their solution challenges the best wisdom of political and religious statesmen. But it presents awful possibilities to try to encase the solution of these problems within the rigid prohibitions of unconstitutionality.

We are told that a flag salute is a doubtful substitute for adequate understanding of our institutions. The states that require such a school exercise do not have to justify it as the only means for promoting good citizenship in children, but merely as one of diverse means for accomplishing a worthy end. We may deem it a foolish measure, but the point is that this Court is not the organ of government to resolve doubts as to whether it will fulfill its purpose. Only if there be no doubt that any reasonable

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mind could entertain can we deny to the states the right to resolve doubts their way, and not ours.

That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the conscience of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority.

We are told that symbolism is a dramatic but primitive way of communicating ideas.

Symbolism is inescapable. Even the most sophisticated live by symbols. But it is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings, particularly if the state happens to see fit to utilize the symbol that represents our heritage and our hopes. And surely only flippancy could be responsible for the suggestion that constitutional validity of a requirement to salute our flag implies equal validity of a requirement to salute a dictator. The significance of a symbol lies in what it represents. To reject the swastika does not imply rejection of the Cross. And so it bears repetition to say that it mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader. To deny the power to employ educational symbols is to say that the state's educational system may not stimulate the imagination because this may lead to unwise stimulation.

The right of West Virginia to utilize the flag salute as part of its educational process is denied because, so it is argued, it cannot be justified as a means of meeting a "clear and present danger" to national unity. In passing, it deserves to be noted that the four cases which unanimously

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sustained the power of states to utilize such an educational measure arose and were all decided before the present World War. But to measure the state's power to make such regulations as are here resisted by the imminence of national danger is wholly to misconceive the origin and purpose of the concept of "clear and present danger." To apply such a test is for the Court to assume, however unwittingly, a legislative responsibility that does not belong to it. To talk about "clear and present danger" as the touchstone of allowable educational policy by the states whenever school curricula may impinge upon the boundaries of individual conscience is to take a felicitous phrase out of the context of the particular situation where it arose and for which it was adapted. Mr. Justice Holmes used the phrase "clear and present danger" in a case involving mere speech as a means by which alone to accomplish sedition in time of war. By that phrase, he meant merely to indicate that, in view of the protection given to utterance by the First Amendment, in order that mere utterance may not be proscribed,

"the words used are used in such circumstances, and are of such a nature, as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Schenck v. United States, 249 U. S. 47, 249 U. S. 52. The "substantive evils" about which he

was speaking were inducement of insubordination in the military and naval forces of the United States and obstruction of enlistment while the country was at war. He was not enunciating a formal rule that there can be no restriction upon speech, and, still less, no compulsion where conscience balks, unless imminent danger would thereby be wrought "to our institutions or our government."

The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs.

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Saluting the flag suppresses no belief, nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow, as publicly as they choose to do so, the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution.

I am fortified in my view of this case by the history of the flag salute controversy in this Court. Five times has the precise question now before us been adjudicated. Four times the Court unanimously found that the requirement of such a school exercise was not beyond the powers of the states. Indeed, in the first three cases to come before the Court, the constitutional claim now sustained was deemed so clearly unmeritorious that this Court dismissed the appeals for want of a substantial federal question. *Leoles v. Landers,* 302 U.S. 656; *Hearing v. State Board of Education,* 303 U.S. 624; *Gabrielli v. Knickerbocker,* 306 U.S. 621. In the fourth case, the judgment of the district court upholding the state law was summarily affirmed on the authority of the earlier cases. *Johnson v. Deerfield,* 306 U.S. 621. The fifth case, *Minersville District v. Gobitis,* 310 U. S. 586, was brought here because the decision of the Circuit Court of Appeals for the Third Circuit ran counter to our rulings. They were reaffirmed after full consideration, with one Justice dissenting.

What may be even more significant than this uniform recognition of state authority is the fact that every Justice

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-- thirteen in all -- who has hitherto participated in judging this matter has at one or more

times found no constitutional infirmity in what is now condemned. Only the two Justices sitting for the first time on this matter have not heretofore found this legislation inoffensive to the "liberty" guaranteed by the Constitution. And among the Justices who sustained this measure were outstanding judicial leaders in the zealous enforcement of constitutional safeguards of civil liberties -- men like Chief Justice Hughes, Mr. Justice Brandeis, and Mr. Justice Cardozo, to mention only those no longer on the Court.

One's conception of the Constitution cannot be severed from one's conception of a judge's function in applying it. The Court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and from the deflections of worldly ambition, will become able to take a view of longer range than the period of responsibility entrusted to Congress and legislatures. We are dealing with matters as to which legislators and voters have conflicting views. Are we as judges to impose our strong convictions on where wisdom lies? That which three years ago had seemed to five successive Courts to lie within permissible areas of legislation is now outlawed by the deciding shift of opinion of two Justices. What reason is there to believe that they or their successors may not have another view a few years hence? Is that which was deemed to be of so fundamental a nature as to be written into the Constitution to endure for all times to be the sport of shifting winds of doctrine? Of course, judicial opinions, even as to questions of constitutionality, are not immutable. As has been true in the past, the Court will from time to time reverse its position. But I believe that never before these Jehovah's Witnesses

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cases (except for minor deviations subsequently retraced) has this Court overruled decisions so as to restrict the powers of democratic government. Always heretofore it has withdrawn narrow views of legislative authority so as to authorize what formerly it had denied.

In view of this history, it must be plain that what thirteen Justices found to be within the constitutional authority of a state, legislators cannot be deemed unreasonable in enacting. Therefore, in denying to the states what heretofore has received such impressive judicial sanction, some other tests of unconstitutionality must surely be guiding the Court than the absence of a rational justification for the legislation. But I know of no other test which this Court is authorized to apply in nullifying legislation.

In the past, this Court has from time to time set its views of policy against that embodied in legislation by finding laws in conflict with what was called the "spirit of the Constitution." Such undefined destructive power was not conferred on this Court by the Constitution.

Such undefined destructive power was not conferred on this Court by the Constitution. Before a duly enacted law can be judicially nullified, it must be forbidden by some explicit restriction upon political authority in the Constitution. Equally inadmissible is the claim to strike down legislation because, to us as individuals, it seems opposed to the "plan and purpose" of the Constitution. That is too tempting a basis for finding in one's personal views the purposes of the Founders.

The uncontrollable power wielded by this Court brings it very close to the most sensitive areas of public affairs. As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more, and not less, important, lest we unwarrantably enter social and political domains wholly outside our concern. I think I appreciate fully the objections to the law before us. But to deny that it presents a question upon which men might reasonably

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differ appears to me to be intolerance. And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State of West Virginia.

Jefferson's opposition to judicial review has not been accepted by history, but it still serves as an admonition against confusion between judicial and political functions. As a rule of judicial self-restraint, it is still as valid as Lincoln's admonition. For those who pass laws not only are under duty to pass laws. They are also under duty to observe the Constitution. And even though legislation relates to civil liberties, our duty of deference to those who have the responsibility for making the laws is no less relevant or less exacting. And this is so especially when we consider the accidental contingencies by which one man may determine constitutionality and thereby confine the political power of the Congress of the United States and the legislatures of forty-eight states. The attitude of judicial humility which these considerations enjoin is not an abdication of the judicial function. It is a due observance of its limits. Moreover, it is to be borne in mind that, in a question like this, we are not passing on the proper distribution of political power as between the states and the central government. We are not discharging the basic function of this Court as the mediator of powers within the federal system. To strike down a law like this is to deny a power to all government.

The whole Court is conscious that this case reaches ultimate questions of judicial power and its relation to our scheme of government. It is appropriate, therefore, to recall an utterance as wise as any that I know in analyzing what is really involved when the theory of this Court's function is put to the test of practice. The analysis is that of James Bradley

Thayer:

". . . there has developed a vast and growing increase of judicial interference with legislation. This is a very different

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state of things from what our fathers contemplated, a century and more ago, in framing the new system. Seldom, indeed, as they imagined, under our system, would this great, novel, tremendous power of the courts be exerted -- would this sacred ark of the covenant be taken from within the veil. Marshall himself expressed truly one aspect of the matter, when he said in one of the later years of his life:"

"No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed."

"And again, a little earlier than this, he laid down the one true rule of duty for the courts. When he went to Philadelphia at the end of September, in 1831, on that painful errand of which I have spoken, in answering a cordial tribute from the bar of that city, he remarked that, if he might be permitted to claim for himself and his associates any part of the kind things they had said, it would be this, that they had 'never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required.'"

"That is the safe two-fold rule; nor is the first part of it any whit less important than the second; nay, more; today, it is the part which most requires to be emphasized. For just here comes in a consideration of very great weight. Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence -- the power of the judiciary to disregard unconstitutional legislation -- it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. If the decision in *Munn v. Illinois* and the '*Granger Cases,*' twenty-five years ago, and in the '*Legal Tender Cases*' nearly thirty years

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ago, had been different, and the legislation there in question, thought by many to be unconstitutional and by many more to be ill-advised, had been set aside, we should have been saved some trouble and some harm. But I venture to think that the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, from the infiltration through every part of the population of sound ideas and sentiments, from the rousing into activity of opposite elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience that came out of it all -- that all this far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature."

"The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people and to deaden its sense of moral responsibility. It is no light thing to do that."

"What can be done? It is the courts that can do most to cure the evil, and the opportunity is a very great one. Let them resolutely adhere to first principles. Let them consider how narrow is the function which the constitutions have conferred on them -- the office merely of deciding litigated cases; how large, therefore, is the duty intrusted to others, and above all to the legislature. It is that body which is charged, primarily, with the duty of judging of the constitutionality of its work. The constitutions generally give them no authority to call upon a court for advice; they must decide for themselves, and the courts may never be able to say a word. Such a body, charged, in every State, with almost all the legislative power of the people, is entitled to the most entire and real respect; is entitled, as among all rationally permissible opinions as to what the constitution allows, to its own choice. Courts, as has often been said, are not to think of the legislators, but of the legislature -- the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, a coordinate department of the government,

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charged with the greatest functions, and invested, in contemplation of law, with whatsoever wisdom, virtue, and knowledge the exercise of such functions requires."

"To set aside the acts of such a body, representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act. Something is wrong when it can ever be other than that. And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people by undertaking a function not its own. On the

cannot rightly attempt to protect the people by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. The judiciary, today, in dealing with the acts of their coordinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it. For that course -- the true course of judicial duty always -- will powerfully help to bring the people and their representatives to a sense of their own responsibility. There will still remain to the judiciary an ample field for the determinations of this remarkable jurisdiction, of which our American law has so much reason to be proud; a jurisdiction which has had some of its chief illustrations and its greatest triumphs, as in Marshall's time, so in ours, while the courts were refusing to exercise it."

J. B. Thayer, John Marshall, (1901) 104-110.

Of course, patriotism cannot be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation, rather than with its wisdom, tends to preoccupation of the American mind with a false value. The tendency of focussing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech, much which should offend a free-spirited society is constitutional. Reliance

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for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and action of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

391 U.S. 367 (1968)

UNITED STATES
v.
O'BRIEN.

No. 232.

Supreme Court of United States.

Argued January 24, 1968.
Decided May 27, 1968.[*]

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

369 *369 *Solicitor General Griswold* argued the cause for the United States. With him on the brief were *Assistant Attorney General Vinson, Francis X. Beytagh, Jr., Beatrice Rosenberg,* and *Jerome M. Feit.*

Marvin M. Karpatkin argued the cause for respondent in No. 232 and petitioner in No. 233. With him on the brief were *Howard S. Whiteside, Melvin L. Wulf,* and *Rhoda H. Karpatkin.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. A sizable crowd, including several agents of the Federal Bureau of Investigation, witnessed the event.[1] Immediately after the burning, members of the crowd began attacking O'Brien and his companions. An FBI agent ushered O'Brien to safety inside the courthouse. After he was advised of his right to counsel and to silence, O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law. He produced the charred remains of the certificate, which, with his consent, were photographed.

For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of
370 Massachusetts.[2] He did not contest the fact *370 that he had burned the certificate. He stated in argument to the jury that he burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position."

The indictment upon which he was tried charged that he "willfully and knowingly did mutilate, destroy, and change by burning . . . [his] Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App., United States Code, Section 462 (b)." Section 462 (b) is part of the Universal Military Training and Service Act of 1948. Section 462 (b)(3), one of six numbered subdivisions of § 462 (b), was amended by Congress in 1965, 79 Stat. 586 (adding the words italicized below), so that at the time O'Brien burned his certificate an offense was committed by any person,

> "who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate. . . ." (Italics supplied.)

In the District Court, O'Brien argued that the 1965 Amendment prohibiting the knowing destruction or mutilation of certificates was unconstitutional because it was enacted to abridge free speech, and because it served no legitimate legislative purpose.[3] The District Court rejected these arguments, holding that the statute on its face did not abridge First Amendment rights, that the court was not competent to inquire into the motives of Congress in enacting the 1965
371 Amendment, and that the *371 Amendment was a reasonable exercise of the power of Congress to raise armies.

On appeal, the Court of Appeals for the First Circuit held the 1965 Amendment unconstitutional as a law abridging freedom of speech.[4] At the time the Amendment was enacted, a regulation of the Selective Service System required registrants to keep their registration certificates in their "personal possession at all times." 32 CFR § 1617.1 (1962).[5] Wilful violations of regulations promulgated pursuant to the Universal Military Training and Service Act were made criminal by statute. 50 U. S.

C. App. § 462 (b) (6). The Court of Appeals, therefore, was of the opinion that conduct punishable under the 1965 Amendment was already punishable under the nonpossession regulation, and consequently that the Amendment served no valid purpose; further, that in light of the prior regulation, the Amendment must have been "directed at public as distinguished from private destruction." On this basis, the court concluded that the 1965 Amendment ran afoul of the First Amendment by singling out persons engaged in protests for special treatment. The court ruled, however, that O'Brien's conviction should be affirmed under the statutory provision, 50 U. S. C. App. § 462 (b) (6), which in its view made violation of the nonpossession regulation a crime, because it regarded such violation to be a lesser included offense of the crime defined by the 1965 Amendment.[6]

372 *372 The Government petitioned for certiorari in No. 232, arguing that the Court of Appeals erred in holding the statute unconstitutional, and that its decision conflicted with decisions by the Courts of Appeals for the Second[7] and Eighth Circuits[8] upholding the 1965 Amendment against identical constitutional challenges. O'Brien cross-petitioned for certiorari in No. 233, arguing that the Court of Appeals erred in sustaining his conviction on the basis of a crime of which he was neither charged nor tried. We granted the Government's petition to resolve the conflict in the circuits, and we also granted O'Brien's cross-petition. We hold that the 1965 Amendment is constitutional both as enacted and as applied. We therefore vacate the judgment of the Court of Appeals and reinstate the judgment and sentence of the District Court without reaching the issue raised by O'Brien in No. 233.

I.

When a male reaches the age of 18, he is required by the Universal Military Training and Service Act to register with a local
373 draft board.[9] He is assigned a Selective Service number,[10] and within five days he is issued a *373 registration certificate (SSS Form No. 2).[11] Subsequently, and based on a questionnaire completed by the registrant,[12] he is assigned a classification denoting his eligibility for induction,[13] and "[a]s soon as practicable" thereafter he is issued a Notice of Classification (SSS Form No. 110).[14] This initial classification is not necessarily permanent,[15] and if in the interim before induction the registrant's status changes in some relevant way, he may be reclassified.[16] After such a reclassification, the local board "as soon as practicable" issues to the registrant a new Notice of Classification.[17]

Both the registration and classification certificates are small white cards, approximately 2 by 3 inches. The registration certificate specifies the name of the registrant, the date of registration, and the number and address of the local board with which he is registered. Also inscribed upon it are the date and place of the registrant's birth, his residence at registration, his physical description, his signature, and his Selective Service number. The Selective Service number itself indicates his State of registration, his local board, his year of birth, and his chronological position in the local board's classification record.[18]

The classification certificate shows the registrant's name, Selective Service number, signature, and eligibility classification. It
374 specifies whether he was so classified by his local board, an appeal board, or the President. It *374 contains the address of his local board and the date the certificate was mailed.

Both the registration and classification certificates bear notices that the registrant must notify his local board in writing of every change in address, physical condition, and occupational, marital, family, dependency, and military status, and of any other fact which might change his classification. Both also contain a notice that the registrant's Selective Service number should appear on all communications to his local board.

Congress demonstrated its concern that certificates issued by the Selective Service System might be abused well before the 1965 Amendment here challenged. The 1948 Act, 62 Stat. 604, itself prohibited many different abuses involving "any registration certificate, . . . or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder . . . ." 62 Stat. 622. Under §§ 12 (b) (1)-(5) of the 1948 Act, it was unlawful (1) to transfer a certificate to aid a person in making false identification; (2) to possess a certificate not duly issued with the intent of using it for false identification; (3) to forge, alter, "or in any manner" change a certificate or any notation validly inscribed thereon; (4) to photograph or make an imitation of a certificate for the purpose of false identification; and (5) to possess a counterfeited or altered certificate. 62 Stat. 622. In addition, as previously mentioned, regulations of the Selective Service System required registrants to keep both their registration and classification certificates in their personal possession at all

375 times. 32 CFR § 1617.1 (1962) (Registration Certificates);[19] 32 CFR § 1623.5 *375 (1962) (Classification Certificates).[20] And § 12 (b) (6) of the Act, 62 Stat. 622, made knowing violation of any provision of the Act or rules and regulations promulgated pursuant thereto a felony.

By the 1965 Amendment, Congress added to § 12 (b) (3) of the 1948 Act the provision here at issue, subjecting to criminal liability not only one who "forges, alters, or in any manner changes" but also one who "knowingly destroys, [or] knowingly mutilates" a certificate. We note at the outset that the 1965 Amendment plainly does not abridge free speech on its face, and we do not understand O'Brien to argue otherwise. Amended § 12 (b) (3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. Compare *Stromberg* v. *California,* 283 U. S. 359 (1931).[21] A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.

376 *376 O'Brien nonetheless argues that the 1965 Amendment is unconstitutional in its application to him, and is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We consider these arguments separately.

II.

O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft."

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms:
377 compelling;[22] substantial;[23] subordinating;[24] *377 paramount;[25] cogent;[26] strong.[27] Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to § 12 (b) (3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. *Lichter* v. *United States,* 334 U. S. 742, 755-758 (1948); *Selective Draft Law Cases,* 245 U. S. 366 (1918); see also *Ex parte Quirin,* 317 U. S. 1, 25-26 (1942). The power of Congress to classify and conscript manpower for military service is "beyond question." *Lichter* v. *United States, supra,* at 756; *Selective Draft Law Cases, supra.* Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system.
378 And legislation *378 to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

O'Brien's argument to the contrary is necessarily premised upon his unrealistic characterization of Selective Service certificates. He essentially adopts the position that such certificates are so many pieces of paper designed to notify registrants of their registration or classification, to be retained or tossed in the wastebasket according to the convenience or taste of the registrant. Once the registrant has received notification, according to this view, there is no reason for him to

retain the certificates. O'Brien notes that most of the information on a registration certificate serves no notification purpose at all; the registrant hardly needs to be told his address and physical characteristics. We agree that the registration certificate contains much information of which the registrant needs no notification. This circumstance, however, does not lead to the conclusion that the certificate serves no purpose, but that, like the classification certificate, it serves purposes in addition to initial notification. Many of these purposes would be defeated by the certificates' destruction or mutilation. Among these are:

1. The registration certificate serves as proof that the individual described thereon has registered for the draft. The classification certificate shows the eligibility classification of a named but undescribed individual. Voluntarily displaying the two certificates is an easy and painless way for a young man to dispel a question as to whether he might be delinquent in his Selective Service obligations. Correspondingly, the availability of the certificates for such display relieves the Selective Service System of the administrative burden it would otherwise have in verifying the registration and classification of all
379 suspected delinquents. Further, since both certificates are in the nature of "receipts" attesting that the registrant *379 has done what the law requires, it is in the interest of the just and efficient administration of the system that they be continually available, in the event, for example, of a mix-up in the registrant's file. Additionally, in a time of national crisis, reasonable availability to each registrant of the two small cards assures a rapid and uncomplicated means for determining his fitness for immediate induction, no matter how distant in our mobile society he may be from his local board.

2. The information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefiting all concerned. To begin with, each certificate bears the address of the registrant's local board, an item unlikely to be committed to memory. Further, each card bears the registrant's Selective Service number, and a registrant who has his number readily available so that he can communicate it to his local board when he supplies or requests information can make simpler the board's task in locating his file. Finally, a registrant's inquiry, particularly through a local board other than his own, concerning his eligibility status is frequently answerable simply on the basis of his classification certificate; whereas, if the certificate were not reasonably available and the registrant were uncertain of his classification, the task of answering his questions would be considerably complicated.

3. Both certificates carry continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status. The smooth functioning of the system requires that local boards be continually aware of the status and whereabouts of registrants, and the destruction of certificates deprives the system of a potentially useful notice device.

4. The regulatory scheme involving Selective Service certificates includes clearly valid prohibitions against the alteration,
380 forgery, or similar deceptive misuse of certificates. *380 The destruction or mutilation of certificates obviously increases the difficulty of detecting and tracing abuses such as these. Further, a mutilated certificate might itself be used for deceptive purposes.

The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them. And we are unpersuaded that the pre-existence of the nonpossession regulations in any way negates this interest.

In the absence of a question as to multiple punishment, it has never been suggested that there is anything improper in Congress' providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest. Compare the majority and dissenting opinions in *Gore v. United States,* 357 U. S. 386 (1958).[28] Here, the pre-existing avenue of prosecution was not even statutory. Regulations may be modified or revoked from time to time by administrative discretion. Certainly, the Congress may change or supplement a regulation.

Equally important, a comparison of the regulations with the 1965 Amendment indicates that they protect overlapping but not identical governmental interests, and that they reach somewhat different classes of wrongdoers.[29] The gravamen of the offense defined by the statute is the deliberate rendering of certificates unavailable for the various purposes which they may
381 serve. Whether registrants keep their certificates in their personal *381 possession at all times, as required by the regulations, is of no particular concern under the 1965 Amendment, as long as they do not mutilate or destroy the certificates so as to render them unavailable. Although as we note below we are not concerned here with the nonpossession regulations, it is not inappropriate to observe that the essential elements of nonpossession are not identical with those of mutilation or destruction. Finally, the 1965 Amendment, like § 12 (b) which it amended, is concerned with

abuses involving *any* issued Selective Service certificates, not only with the registrant's own certificates. The knowing destruction or mutilation of someone else's certificates would therefore violate the statute but not the nonpossession regulations.

We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

It is equally clear that the 1965 Amendment specifically protects this substantial governmental interest. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction. Compare *Sherbert* v. *Verner,* 374 U. S. 398, 407-408 (1963), and the cases cited therein. The 1965 Amendment prohibits such conduct and does nothing more. In other
382 words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative *382 aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg* v. *California,* 283 U. S. 359 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct. See also, *NLRB* v. *Fruit & Vegetable Packers Union,* 377 U. S. 58, 79 (1964) (concurring opinion).

In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended § 462 (b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction.

III.

O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the "purpose" of
383 Congress was "to suppress freedom of *383 speech." We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional.

It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated:

> "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray* v. *United States,* 195 U. S. 27, 56 (1904).

This fundamental principle of constitutional adjudication was reaffirmed and the many cases were collected by Mr. Justice Brandeis for the Court in *Arizona* v. *California,* 283 U. S. 423, 455 (1931).

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature,[30] because the
384 benefit to sound decision-making in *384 this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which

Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

O'Brien's position, and to some extent that of the court below, rest upon a misunderstanding of *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936), and *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960). These cases stand, not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional. Thus, in *Grosjean* the Court, having concluded that the right of publications to be free from certain kinds of taxes was a freedom of the press protected by the First Amendment, struck down a statute which on
385 its face did nothing other than impose *385 just such a tax. Similarly, in *Gomillion,* the Court sustained a complaint which, if true, established that the "inevitable effect," 364 U. S., at 341, of the redrawing of municipal boundaries was to deprive the petitioners of their right to vote for no reason other than that they were Negro. In these cases, the purpose of the legislation was irrelevant, because the inevitable effect—the "necessary scope and operation," *McCray* v. *United States,* 195 U. S. 27, 59 (1904)—abridged constitutional rights. The statute attacked in the instant case has no such inevitable unconstitutional effect, since the destruction of Selective Service certificates is in no respect inevitably or necessarily expressive. Accordingly, the statute itself is constitutional.

We think it not amiss, in passing, to comment upon O'Brien's legislative-purpose argument. There was little floor debate on this legislation in either House. Only Senator Thurmond commented on its substantive features in the Senate. 111 Cong. Rec. 19746, 20433. After his brief statement, and without any additional substantive comments, the bill, H. R. 10306, passed the Senate. 111 Cong. Rec. 20434. In the House debate only two Congressmen addressed themselves to the Amendment— Congressmen Rivers and Bray. 111 Cong. Rec. 19871, 19872. The bill was passed after their statements without any further debate by a vote of 393 to 1. It is principally on the basis of the statements by these three Congressmen that O'Brien makes his congressional-"purpose" argument. We note that if we were to examine legislative purpose in the instant case, we would be obliged to consider not only these statements but also the more authoritative reports of the Senate and House Armed Services Committees. The portions of those reports explaining the purpose of the Amendment
386 are reproduced in the Appendix in their entirety. While both reports make clear a concern with the "defiant" *386 destruction of so-called "draft cards" and with "open" encouragement to others to destroy their cards, both reports also indicate that this concern stemmed from an apprehension that unrestrained destruction of cards would disrupt the smooth functioning of the Selective Service System.

IV.

Since the 1965 Amendment to § 12 (b) (3) of the Universal Military Training and Service Act is constitutional as enacted and as applied, the Court of Appeals should have affirmed the judgment of conviction entered by the District Court. Accordingly, we vacate the judgment of the Court of Appeals, and reinstate the judgment and sentence of the District Court. This disposition makes unnecessary consideration of O'Brien's claim that the Court of Appeals erred in affirming his conviction on the basis of the nonpossession regulation.[31]

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

APPENDIX TO OPINION OF THE COURT.

PORTIONS OF THE REPORTS OF THE COMMITTEES ON ARMED SERVICES OF THE SENATE AND HOUSE EXPLAINING THE 1965 AMENDMENT.

The "Explanation of the Bill" in the Senate Report is as follows:

"Section 12 (b) (3) of the Universal Military Training and Service Act of 1951, as amended, provides, among other things,
387 that a person who forges, alters, or changes *387 a draft registration certificate is subject to a fine of not more than $10,000 or imprisonment of not more than 5 years, or both. There is no explicit prohibition in this section against the knowing destruction or mutilation of such cards.

"The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies.

"For a person to be subject to fine or imprisonment the destruction or mutilation of the draft card must be `knowingly' done. This qualification is intended to protect persons who lose or mutilate draft cards accidentally." S. Rep. No. 589, 89th Cong., 1st Sess. (1965).

And the House Report explained:

"Section 12 (b) (3) of the Universal Military Training and Service Act of 1951, as amended, provides that a person who forges, alters, or in any manner changes his draft registration card, or any notation duly and validly inscribed thereon, will be subject to a fine of $10,000 or imprisonment of not more than 5 years. H. R. 10306 would amend this provision to make it apply also to those persons who knowingly destroy or knowingly mutilate a draft registration card.

"The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.

388 "While the present provisions of the Criminal Code with respect to the destruction of Government property *388 may appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals, the committee feels that in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such wanton and irresponsible acts should be punished.

"To this end, H. R. 10306 makes specific that knowingly mutilating or knowingly destroying a draft card constitutes a violation of the Universal Military Training and Service Act and is punishable thereunder; and that a person who does so destroy or mutilate a draft card will be subject to a fine of not more than $10,000 or imprisonment of not more than 5 years." H. R. Rep. No. 747, 89th Cong., 1st Sess. (1965).

MR. JUSTICE HARLAN, concurring.

The crux of the Court's opinion, which I join, is of course its general statement, *ante,* at 377, that:

> "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

I wish to make explicit my understanding that this passage does not foreclose consideration of First Amendment claims in those rare instances when an "incidental" restriction upon expression, imposed by a regulation which furthers an "important or substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a
389 "speaker" *389 from reaching a significant audience with whom he could not otherwise lawfully communicate. This is not such a case, since O'Brien manifestly could have conveyed his message in many ways other than by burning his draft card.

MR. JUSTICE DOUGLAS, dissenting.

The Court states that the constitutional power of Congress to raise and support armies is "broad and sweeping" and that Congress' power "to classify and conscript manpower for military service is `beyond question.' " This is undoubtedly true in times when, by declaration of Congress, the Nation is in a state of war. The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war.[1] That question has not been briefed nor was it presented in oral argument; but it is, I submit, a question upon which the litigants and the country are entitled to a ruling. I have discussed in *Holmes* v. *United States, post,* p. 936, the nature of the legal issue and it will be seen from my
390 dissenting opinion in that case that this Court has never ruled on *390 the question. It is time that we made a ruling. This case should be put down for reargument and heard with *Holmes* v. *United States* and with *Hart* v. *United States, post,* p. 956, in which the Court today denies certiorari.[2]

The rule that this Court will not consider issues not raised by the parties is not inflexible and yields in "exceptional cases" (*Duignan* v. *United States,* 274 U. S. 195, 200) to the need correctly to decide the case before the court. *E. g., Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Terminiello* v. *Chicago,* 337 U. S. 1.

In such a case it is not unusual to ask for reargument (*Sherman* v. *United States,* 356 U. S. 369, 379, n. 2, Frankfurter, J., concurring) even on a constitutional question not raised by the parties. In *Abel* v. *United States,* 362 U. S. 217, the petitioner had conceded that an administrative deportation arrest warrant would be valid for its limited purpose even though not supported by a sworn affidavit stating probable cause; but the Court ordered reargument on the question whether the warrant had been validly issued in petitioner's case. 362 U. S., at 219, n., par. 1; 359 U. S. 940. In *Lustig* v. *United States,* 338 U. S. 74, the petitioner argued that an exclusionary rule should apply to the fruit of an unreasonable search by state officials solely because they acted in concert with federal officers (see *Weeks* v. *United States,* 232 U. S. 383; *Byars* v. *United States,* 273 U. S. 28). The Court ordered reargument on the question raised in a then pending case, *Wolf* v. *Colorado,* 338 U. S. 25: applicability of the Fourth Amendment to the States. U. S. Sup. Ct. Journal, October Term, 1947, p. 298. In *Donaldson* v. *Read Magazine,* 333 U. S. 178, the only issue presented, *391 according to both parties, was whether the record contained sufficient evidence of fraud to uphold an order of the Postmaster General. Reargument was ordered on the constitutional issue of abridgment of First Amendment freedoms. 333 U. S., at 181-182; Journal, October Term, 1947, p. 70. Finally, in *Musser* v. *Utah,* 333 U. S. 95, 96, reargument was ordered on the question of unconstitutional vagueness of a criminal statute, an issue not raised by the parties but suggested at oral argument by Justice Jackson. Journal, October Term, 1947, p. 87.

391

These precedents demonstrate the appropriateness of restoring the instant case to the calendar for reargument on the question of the constitutionality of a peacetime draft and having it heard with *Holmes* v. *United States* and *Hart* v. *United States.*

[*] Together with No. 233, *O'Brien* v. *United States,* also on certiorari to the same court.

[1] At the time of the burning, the agents knew only that O'Brien and his three companions had burned small white cards. They later discovered that the card O'Brien burned was his registration certificate, and the undisputed assumption is that the same is true of his companions.

[2] He was sentenced under the Youth Corrections Act, 18 U. S. C. § 5010 (b), to the custody of the Attorney General for a maximum period of six years for supervision and treatment.

[3] The issue of the constitutionality of the 1965 Amendment was raised by counsel representing O'Brien in a pretrial motion to dismiss the indictment. At trial and upon sentencing, O'Brien chose to represent himself. He was represented by counsel on his appeal to the Court of Appeals.

[4] *O'Brien* v. *United States,* 376 F. 2d 538 (C. A. 1st Cir. 1967).

[5] The portion of 32 CFR relevant to the instant case was revised as of January 1, 1967. Citations in this opinion are to the 1962 edition which was in effect when O'Brien committed the crime, and when Congress enacted the 1965 Amendment.

[6] The Court of Appeals nevertheless remanded the case to the District Court to vacate the sentence and resentence O'Brien. In the court's view, the district judge might have considered the violation of the 1965 Amendment as an aggravating circumstance in imposing sentence. The Court of Appeals subsequently denied O'Brien's petition for a rehearing, in which he argued that he had not been charged, tried, or convicted for nonpossession, and that nonpossession was not a lesser included offense of mutilation or destruction. *O'Brien* v. *United States,* 376 F. 2d 538, 542 (C. A. 1st Cir. 1967).

[7] *United States* v. *Miller,* 367 F. 2d 72 (C. A. 2d Cir. 1966), cert. denied, 386 U. S. 911 (1967).

[8] *Smith* v. *United States,* 368 F. 2d 529 (C. A. 8th Cir. 1966).

[9] See 62 Stat. 605, as amended, 65 Stat. 76, 50 U. S. C. App. § 453: 32 CFR § 1613.1 (1962).

[10] 32 CFR § 1621.2 (1962).

[11] 32 CFR § 1613.43a (1962).

[12] 32 CFR §§ 1621.9, 1623.1 (1962).

[13] 32 CFR §§ 1623.1, 1623.2 (1962).

[14] 32 CFR § 1623.4 (1962).

[15] 32 CFR § 1625.1 (1962).

[16] 32 CFR §§ 1625.1, 1625.2, 1625.3, 1625.4, and 1625.11 (1962).

[17] 32 CFR § 1625.12 (1962).

[18] 32 CFR § 1621.2 (1962).

[19] 32 CFR § 1617.1 (1962), provides, in relevant part:

"Every person required to present himself for and submit to registration must, after he is registered, have in his personal possession at all times his Registration Certificate (SSS Form No. 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form No. 2) in his personal possession shall be prima facie evidence of his failure to register."

[20] 32 CFR § 1623.5 (1962), provides, in relevant part:

"Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form No. 2), a valid Notice of Classification (SSS Form No. 110) issued to him showing his current classification."

[21] See text, *infra,* at 382.

[22] *NAACP* v. *Button,* 371 U. S. 415, 438 (1963); see also *Sherbert* v. *Verner,* 374 U. S. 398, 403 (1963).

[23] *NAACP* v. *Button,* 371 U. S. 415, 444 (1963); *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449, 464 (1958).

[24] *Bates* v. *Little Rock,* 361 U. S. 516, 524 (1960).

[25] *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945); see also *Sherbert* v. *Verner,* 374 U. S. 398, 406 (1963).

[26] *Bates* v. *Little Rock,* 361 U. S. 516, 524 (1960).

[27] *Sherbert* v. *Verner,* 374 U. S. 398, 408 (1963).

[28] Cf. *Milanovich* v. *United States,* 365 U. S. 551 (1961); *Heflin* v. *United States,* 358 U. S. 415 (1959); *Prince* v. *United States,* 352 U. S. 322 (1957).

[29] Cf. *Milanovich* v. *United States,* 365 U. S. 551 (1961); *Heflin* v. *United States,* 358 U. S. 415 (1959); *Prince* v. *United States,* 352 U. S. 322 (1957).

[30] The Court may make the same assumption in a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose. The principal class of cases is readily apparent—those in which statutes have been challenged as bills of attainder. This Court's decisions have defined a bill of attainder as a legislative Act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial. In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether the three definitional elements— specificity in identification, punishment, and lack of a judicial trial— are contained in the statute. The inquiry into whether the challenged statute contains the necessary element of punishment has on occasion led the Court to examine the legislative motive in enacting the statute. See, *e. g., United States* v. *Lovett,* 328 U. S. 303 (1946). Two other decisions not involving a bill of attainder analysis contain an inquiry into legislative purpose or motive of the type that O'Brien suggests we engage in in this case. *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 169-184 (1963); *Trop* v. *Dulles,* 356 U. S. 86, 95-97 (1958). The inquiry into legislative purpose or motive in *Kennedy* and *Trop,* however, was for the same limited purpose as in the bill of attainder decisions—*i. e.,* to determine whether the statutes under review were punitive in nature. We face no such inquiry in this case. The 1965 Amendment to § 462 (b) was clearly penal in nature, designed to impose criminal punishment for designated acts.

[31] The other issues briefed by O'Brien were not raised in the petition for certiorari in No. 232 or in the cross-petition in No. 233. Accordingly, those issues are not before the Court.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

[1] Neither of the decisions cited by the majority for the proposition that Congress' power to conscript men into the armed services is " `beyond question' " concerns peacetime conscription. As I have shown in my dissenting opinion in *Holmes v. United States, post,* p. 936, the *Selective Draft Law Cases,* 245 U. S. 366, decided in 1918, upheld the constitutionality of a conscription act passed by Congress more than a month after war had been declared on the German Empire and which was then being enforced in time of war. *Lichter* v. *United States,* 334 U. S. 742, concerned the constitutionality of the Renegotiation Act, another wartime measure, enacted by Congress over the period of 1942-1945 (*id.,* at 745, n. 1) and applied in that case to excessive war profits made in 1942-1943 (*id.,* at 753). War had been declared, of course, in 1941 (55 Stat. 795). The Court referred to Congress' power to raise armies in discussing the "background" (334 U. S., at 753) of the Renegotiation Act, which it upheld as a valid exercise of the War Power.

[2] Today the Court also denies stays in *Shiffman* v. *Selective Service Board No. 5,* and *Zigmond* v. *Selective Service Board No. 16, post,* p. 930, where punitive delinquency regulations are invoked against registrants, decisions that present a related question.

BOY SCOUTS OF AMERICA V. DALE (99-699) 530 U.S. 640 (2000)
160 N. J. 562, 734 A. 2d 1196, reversed and remanded.

Syllabus	Opinion [Rehnquist]	Dissent [Stevens]	Dissent [Souter]
HTML version (/supct/html/99-699.ZS.html) PDF version (/supct/pdf/99-699P.ZS)	HTML version (/supct/html/99-699.ZO.html) PDF version (/supct/pdf/99-699P.ZO)	HTML version (/supct/html/99-699.ZD.html) PDF version (/supct/pdf/99-699P.ZD)	HTML version (/supct/html/99-699.ZD1.html) PDF version (/supct/pdf/99-699P.ZD1)

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 99—699

BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL, et al., PETITIONERS *v.* JAMES DALE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

[June 28, 2000]

Chief Justice Rehnquist delivered the opinion of the Court.

Petitioners are the Boy Scouts of America and the Monmouth Council, a division of the Boy Scouts of America (collectively, Boy Scouts). The Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people. The Boy Scouts asserts that homosexual conduct is inconsistent with the values it seeks to instill. Respondent is James Dale, a former Eagle Scout whose adult membership in the Boy Scouts was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist. The New Jersey Supreme Court held that New Jersey's public accommodations law requires that the Boy Scouts admit Dale. This case presents the question whether applying New Jersey's public accommodations law in this way violates the Boy Scouts' First Amendment (/supct-cgi/get-const?amendmenti) right of expressive association. We hold that it does.

I

James Dale entered scouting in 1978 at the age of eight by joining Monmouth Council's Cub Scout Pack 142. Dale became a Boy Scout in 1981 and remained a Scout until he turned 18. By all accounts, Dale was an exemplary Scout. In 1988, he achieved the rank of Eagle Scout, one of Scouting's highest honors.

Dale applied for adult membership in the Boy Scouts in 1989. The Boy Scouts approved his application for the position of assistant scoutmaster of Troop 73. Around the same time, Dale left home to attend Rutgers University. After arriving at Rutgers, Dale first acknowledged to himself and others that he is gay. He quickly became involved with, and eventually became the copresident of, the Rutgers University Lesbian/Gay Alliance. In 1990, Dale attended a seminar addressing the psychological and health needs of lesbian and gay teenagers. A newspaper covering the event interviewed Dale about his advocacy of homosexual teenagers' need for gay role models. In early July 1990, the newspaper published the interview and Dale's photograph over a caption identifying him as the copresident of the Lesbian/Gay Alliance.

Later that month, Dale received a letter from Monmouth Council Executive James Kay revoking his adult membership. Dale wrote to Kay requesting the reason for Monmouth Council's decision. Kay responded by letter that the Boy Scouts "specifically forbid membership to homosexuals." App. 137.

In 1992, Dale filed a complaint against the Boy Scouts in the New Jersey Superior Court. The complaint alleged that the Boy Scouts had violated New Jersey's public accommodations statute and its common law by revoking Dale's membership based solely on his sexual orientation. New Jersey's public accommodations statute prohibits, among other things, discrimination on the basis of sexual orientation in places of public accommodation. N. J. Stat. Ann. §§10:5—4 and 10:5—5 (West Supp. 2000); see Appendix, *infra*, at 18—19.

The New Jersey Superior Court's Chancery Division granted summary judgment in favor of the Boy Scouts. The court held that New Jersey's public accommodations law was inapplicable because the Boy Scouts was not a place of public accommodation, and that, alternatively, the Boy Scouts is a distinctly private group exempted from coverage under New Jersey's law. The court rejected Dale's common-law claim holding that New Jersey's policy is embodied in the public accommodations law. The court also concluded that the Boy Scouts' position in respect of active homosexuality was clear and held that the First Amendment (/supct-cgi/get-const?amendmenti) freedom of expressive association prevented the government from forcing the Boy Scouts to accept Dale as an adult leader.

The New Jersey Superior Court's Appellate Division affirmed the dismissal of Dale's common-law claim, but otherwise reversed and remanded for further proceedings. 308 N. J. Super. 516, 70 A. 2d 270 (1998). It held that New Jersey's public accommodations law applied to the Boy Scouts and that the Boy Scouts violated it. The Appellate Division rejected the Boy Scouts' federal constitutional claims.

The New Jersey Supreme Court affirmed the judgment of the Appellate Division. It held that the Boy Scouts was a place of public accommodation subject to the public accommodations law, that the organization was not exempt from the law under any of its express exceptions, and that the Boy Scouts violated the law by revoking Dale's membership based on his avowed homosexuality. After considering the state-law issues, the court addressed the Boy Scouts' claims that application of the public accommodations law in this case violated its federal constitutional rights " 'to enter into and maintain … intimate or private relationships … [and] to associate for the purpose of engaging in protected speech.' " 160 N. J. 562, 605, 734 A. 2d 1196, 1219 (1999) (quoting *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte,* 481 U.S. 537 (/supct-cgi/get-us-cite?481+537), 544 (1987)). With respect to the right to intimate association, the court concluded that the Boy Scouts' "large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association.' " 160 N. J., at 608—609, 734 A. 2d, at 1221 (quoting *Duarte, supra,* at 546). With respect to the right of expressive association, the court "agree[d] that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members." *Ibid.*, 734 A. 2d, at 1223. But the court concluded that it was "not persuaded … that a shared goal of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral." 160 N. J., at 613, 734 A. 2d, at 1223—1224 (internal quotation marks omitted). Accordingly, the court held "that Dale's membership does not violate the Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [the Boy Scouts'] existing members' ability to carry out their various purposes.' " *Id.*, at 615, 734 A. 2d, at 1225 (quoting *Duarte, supra,* at 548). The court also determined that New Jersey has a compelling interest in eliminating "the destructive consequences of discrimination from our society," and that its public accommodations law abridges no more speech than is necessary to accomplish its purpose. 160 N. J., at 619—620, 734 A. 2d, at 1227—1228. Finally, the court addressed

the Boy Scouts' reliance on *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (/supct-cgi/get-us-cite?515+557) (1995), in support of its claimed First Amendment (/supct-cgi/get-const?amendmenti) right to exclude Dale. The court determined that *Hurley* did not require deciding the case in favor of the Boy Scouts because "the reinstatement of Dale does not compel Boy Scouts to express any message." 160 N. J., at 624, 734 A. 2d, at 1229.

We granted the Boy Scouts' petition for certiorari to determine whether the application of New Jersey's public accommodations law violated the First Amendment (/supct-cgi/get-const?amendmenti). 528 U.S. 1109 (/supct-cgi/get-us-cite?528+1109) (2000).

II

In *Roberts* v. *United States Jaycees,* 468 U.S. 609 (/supct-cgi/get-us-cite?468+609), 622 (1984), we observed that "implicit in the right to engage in activities protected by the First Amendment (/supct-cgi/get-const?amendmenti)" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. See *ibid.* (stating that protection of the right to expressive association is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority"). Government actions that may unconstitutionally burden this freedom may take many forms, one of which is "intrusion into the internal structure or affairs of an association" like a "regulation that forces the group to accept members it does not desire." *Id.,* at 623. Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, "[f]reedom of association … plainly presupposes a freedom not to associate." *Ibid.*

The 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. *New York State Club Assn., Inc.* v. *City of New York,* 487 U.S. 1 (/supct-cgi/get-us-cite?487+1), 13 (1988). But the freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts, supra,* at 623.

To determine whether a group is protected by the First Amendment (/supct-cgi/get-const?amendmenti)'s expressive associational right, we must determine whether the group engages in "expressive association." The First Amendment (/supct-cgi/get-const?amendmenti)'s protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.

Because this is a First Amendment (/supct-cgi/get-const?amendmenti) case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obligated to independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression. See *Hurley, supra,* at 567—568. The record reveals the following. The Boy Scouts is a private, nonprofit organization. According to its mission statement:

"It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.

"The values we strive to instill are based on those found in the Scout Oath and Law:

"Scout Oath

"On my honor I will do my best

To do my duty to God and my country

and to obey the Scout Law;

To help other people at all times;

To keep myself physically strong,

mentally awake, and morally straight.

"Scout Law

"A Scout is:

"Trustworthy Obedient

Loyal Cheerful

Helpful Thrifty

Friendly Brave

Courteous Clean

Kind Reverent." App. 184.

Thus, the general mission of the Boy Scouts is clear: "[T]o instill values in young people." *Ibid.* The Boy Scouts seeks to instill these values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values—both expressly and by example. It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity. See *Roberts, supra,* at 636 (O'Connor, J., concurring) ("Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement").

Given that the Boy Scouts engages in expressive activity, we must determine whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints. This inquiry necessarily requires us first to explore, to a limited extent, the nature of the Boy Scouts' view of homosexuality.

The values the Boy Scouts seeks to instill are "based on" those listed in the Scout Oath and Law. App. 184. The Boy Scouts explains that the Scout Oath and Law provide "a positive moral code for living; they are a list of 'do's' rather than 'don'ts.' " Brief for Petitioners 3. The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms "morally straight" and "clean."

Obviously, the Scout Oath and Law do not expressly mention sexuality or sexual orientation. See *supra*, at 6—7. And the terms "morally straight" and "clean" are by no means self-defining. Different people would attribute to those terms very different meanings. For example, some people may believe that engaging in homosexual conduct is not at odds with being "morally straight" and "clean." And others may believe that engaging in homosexual conduct is contrary to being "morally straight" and "clean." The Boy Scouts says it falls within the latter category.

The New Jersey Supreme Court analyzed the Boy Scouts' beliefs and found that the "exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts' commitment to a diverse and 'representative' membership … [and] contradicts Boy Scouts' overarching objective to reach 'all eligible youth.' " 160 N. J., at 618, 734 A. 2d, at 1226. The court concluded that the exclusion of members like Dale "appears antithetical to the organization's goals and philosophy." *Ibid*. But our cases reject this sort of inquiry; it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent. See *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107 (/supct-cgi/get-us-cite?450+107), 124 (1981) ("[A]s is true of all expressions of First Amendment (/supct-cgi/get-const?amendmenti) freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational"); see also *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (/supct-cgi/get-us-cite?450+707), 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment (/supct-cgi/get-const?amendmenti) protection").

The Boy Scouts asserts that it "teach[es] that homosexual conduct is not morally straight," Brief for Petitioners 39, and that it does "not want to promote homosexual conduct as a legitimate form of behavior," Reply Brief for Petitioners 5. We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality. But because the record before us contains written evidence of the Boy Scouts' viewpoint, we look to it as instructive, if only on the question of the sincerity of the professed beliefs.

A 1978 position statement to the Boy Scouts' Executive Committee, signed by Downing B. Jenks, the President of the Boy Scouts, and Harvey L. Price, the Chief Scout Executive, expresses the Boy Scouts' "official position" with regard to "homosexuality and Scouting":

"Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?

"A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership." App. 453—454.

Thus, at least as of 1978–the year James Dale entered Scouting–the official position of the Boy Scouts was that avowed homosexuals were not to be Scout leaders.

A position statement promulgated by the Boy Scouts in 1991 (after Dale's membership was revoked but before this litigation was filed) also supports its current view:

"We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts." *Id.*, at 457.

This position statement was redrafted numerous times but its core message remained consistent. For example, a 1993 position statement, the most recent in the record, reads, in part:

"The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization. We do not believe that homosexuals provide a role model consistent with these expectations. Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA." *Id.*, at 461.

The Boy Scouts publicly expressed its views with respect to homosexual conduct by its assertions in prior litigation. For example, throughout a California case with similar facts filed in the early 1980's, the Boy Scouts consistently asserted the same position with respect to homosexuality that it asserts today. See *Curran* v. *Mount Diablo Council of Boy Scouts of America*, No. C—365529 (Cal. Super. Ct., July 25, 1991); 48 Cal. App. 4th 670, 29 Cal. Rptr. 2d 580 (1994); 17 Cal. 4th 670, 952 P.2d 218 (1998). We cannot doubt that the Boy Scouts sincerely holds this view.

We must then determine whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not "promote homosexual conduct as a legitimate form of behavior." Reply Brief for Petitioners 5. As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression. See, *e.g.*, *La Follette*, *supra*, at 123—124 (considering whether a Wisconsin law burdened the National Party's associational rights and stating that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party").

That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have "become leaders in their community and are open and honest about their sexual orientation." App. 11. Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist. Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.

Hurley is illustrative on this point. There we considered whether the application of Massachusetts' public accommodations law to require the organizers of a private St. Patrick's Day parade to include among the marchers an Irish&nbhyph;American gay, lesbian, and bisexual group, GLIB, violated the parade organizers' First Amendment (/supct-cgi/get-const?amendmenti) rights. We noted that the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner. We observed:

"[A] contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals … . The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." 515 U.S., at 574—575.

Here, we have found that the Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members; it will not "promote homosexual conduct as a legitimate form of behavior." Reply Brief for Petitioners 5. As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout's choice not to propound a point of view contrary to its beliefs.

The New Jersey Supreme Court determined that the Boy Scouts' ability to disseminate its message was not significantly affected by the forced inclusion of Dale as an assistant scoutmaster because of the following findings:

"Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality." 160 N. J., at 612, 734 A. 2d, at 1223.

We disagree with the New Jersey Supreme Court's conclusion drawn from these findings.

First, associations do not have to associate for the "purpose" of disseminating a certain message in order to be entitled to the protections of the First Amendment (/supct-cgi/get-const?amendmenti). An association must merely engage in expressive activity that could be impaired in order to be entitled to protection. For example, the purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless.

Second, even if the Boy Scouts discourages Scout leaders from disseminating views on sexual issues–a fact that the Boy Scouts disputes with contrary evidence–the First Amendment (/supct-cgi/get-const?amendmenti) protects the Boy Scouts' method of expression. If the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach only by example, this fact does not negate the sincerity of its belief discussed above.

Third, the First Amendment (/supct-cgi/get-const?amendmenti) simply does not require that every member of a group agree on every issue in order for the group's policy to be "expressive association." The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment (/supct-cgi/get-const?amendmenti) purposes. In this same vein, Dale makes much of the claim that the Boy Scouts does not revoke the membership of heterosexual Scout leaders that openly disagree with the Boy Scouts' policy on sexual orientation. But if this is true, it is irrelevant.[1] The presence of an avowed homosexual and gay rights activist in an as-
sistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment (/supct-cgi/get-const?amendmenti) right to choose to send one message but not the other. The fact that the organization does not trumpet its views
from the housetops, or that it tolerates dissent within
its ranks, does not mean that its views receive no First Amendment (/supct-cgi/get-const?amendmenti) protection.

Having determined that the Boy Scouts is an expressive association and that the forced inclusion of Dale would significantly affect its expression, we inquire whether the application of New Jersey's public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association. We conclude that it does.

State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation–like inns and trains. See, *e.g., Hurley, supra,* at 571—572 (explaining the history of Massachusetts' public accommodations law); *Romer* v. *Evans,* 517 U.S. 620 (/supct-cgi/get-us-cite?517+620), 627—629 (1996) (describing the evolution of public accommodations laws). Over time, the public accommodations laws have expanded to cover more places.[2] New Jersey's statutory definition of " '[a] place of public accommodation' " is extremely broad. The term is said to "include, but not be limited to," a list of over 50 types of places. N. J. Stat. Ann. §10:5—5(*l*) (West Supp. 2000); see Appendix, *infra*, at 18—19. Many

on the list are what one would expect to be places where the public is invited. For example, the statute includes as places of public accommodation taverns, restaurants, retail shops, and public libraries. But the statute also includes places that often may not carry with them open invitations to the public, like summer camps and roof gardens. In this case, the New Jersey Supreme Court went a step further and applied its public accommodations law to a private entity without even attempting to tie the term "place" to a physical location.[3] As the definition of "public accommodation" has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment (/supct-cgi/get-const?amendmenti) rights of organizations has increased.

We recognized in cases such as *Roberts* and *Duarte* that States have a compelling interest in eliminating discrimination against women in public accommodations. But in each of these cases we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express. In *Roberts*, we said "[i]ndeed, the Jaycees has failed to demonstrate … any serious burden on the male members' freedom of expressive association." 468 U.S., at 626. In *Duarte*, we said:

"[I]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment (/supct-cgi/get-const?amendmenti). In this case, however, the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes." 481 U.S., at 548 (internal quotation marks and citations omitted).

We thereupon concluded in each of these cases that the organizations' First Amendment (/supct-cgi/get-const?amendmenti) rights were not violated by the application of the States' public accommodations laws.

In *Hurley,* we said that public accommodations laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendment (/supct-cgi/get-const?amendmentxiv)s." 515 U.S., at 572. But we went on to note that in that case "the Massachusetts [public accommodations] law has been applied in a peculiar way" because "any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wish to join in with some expressive demonstration of their own." *Id.*, at 572—573. And in the associational freedom cases such as *Roberts*, *Duarte*, and *New York State Club Assn.*, after finding a compelling state interest, the Court went on to examine whether or not the application of the state law would impose any "serious burden" on the organization's rights of expressive association. So in these cases, the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other.

Dale contends that we should apply the intermediate standard of review enunciated in *United States* v. *O'Brien,* 391 U.S. 367 (/supct-cgi/get-us-cite?391+367) (1968), to evaluate the competing interests. There the Court enunciated a four-part test for review of a governmental regulation that has only an incidental effect on protected speech–in that case the symbolic burning of a draft card. A law prohibiting the destruction of draft cards only incidentally affects the free speech rights of those who happen to use a violation of that law as a symbol of protest. But New Jersey's public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment (/supct-cgi/get-const?amendmenti) protection. Thus, *O'Brien* is inapplicable.

In *Hurley,* we applied traditional First Amendment (/supct-cgi/get-const?amendmenti) analysis to hold that the application of the Massachusetts public accommodations law to a parade violated the First Amendment (/supct-cgi/get-const?amendmenti) rights of the parade organizers. Although we did not explicitly deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here. We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment (/supct-cgi/get-const?amendmenti) prohibits the State from imposing such a requirement through the application of its public accommodations law.[4]

Justice Stevens' dissent makes much of its observation that the public perception of homosexuality in this country has changed. See *post*, at 37—39. Indeed, it appears that homosexuality has gained greater societal acceptance. See *ibid.* But this is scarcely an argument for denying First Amendment (/supct-cgi/get-const?amendmenti) protection to those who refuse to accept these views. The First Amendment (/supct-cgi/get-const?amendmenti) protects expression, be it of the popular variety or not. See, *e.g.*, *Texas* v. *Johnson*, 491 U.S. 397 (/supct-cgi/get-us-cite?491+397) (1989) (holding that Johnson's conviction for burning the American flag violates the First Amendment (/supct-cgi/get-const?amendmenti)); *Brandenburg* v. *Ohio*, 395 U.S. 444 (/supct-cgi/get-us-cite?395+444) (1969) (holding that a Ku Klux Klan leaders' conviction for advocating unlawfulness as a means of political reform violates the First Amendment (/supct-cgi/get-const?amendmenti)). And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment (/supct-cgi/get-const?amendmenti) rights of those who wish to voice a different view.

Justice Stevens' extolling of Justice Brandeis' comments in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262 (/supct-cgi/get-us-cite?285+262), 311 (1932) (dissenting opinion); see *post*, at 2, 40, confuses two entirely different principles. In *New State Ice*, the Court struck down an Oklahoma regulation prohibiting the manufacture, sale, and distribution of ice without a license. Justice Brandeis, a champion of state experimentation in the economic realm, dissented. But Justice Brandeis was never a champion of state experimentation in the suppression of free speech. To the contrary,

his First Amendment (/supct-cgi/get-const?amendmenti) commentary provides compelling support for the Court's opinion in this case. In speaking of the Founders of this Nation, Justice Brandeis emphasized that they "believed 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." *Whitney* v. *California*, 274 U.S. 357 (/supct-cgi/get-us-cite?274+357), 375 (concurring opinion). He continued:

"Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law–the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." *Id.*, at 375—376.

We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley,* 515 U.S., at 579.

The judgment of the New Jersey Supreme Court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

N. J. Stat. Ann. §10:5—4 (West Supp. 2000). Obtaining employment, accommodations and privileges without discrimination; civil right

"All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right."

N. J. Stat. Ann. §10:5—5 (West Supp. 2000). Definitions

"As used in this act, unless a different meaning clearly appears from the context:

. . . . .

"*l.* 'A place of public accommodation' shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or

services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post secondary school from using in good faith criteria other than race, creed, color, national origin, ancestry or affectional or sexual orientation in the admission of students."

Notes

1. The record evidence sheds doubt on Dale's assertion. For example, the National Director of the Boy Scouts certified that "*any* persons who advocate to Scouting youth that homosexual conduct is" consistent with Scouting values will not be registered as adult leaders. App. 746 (emphasis added). And the Monmouth Council Scout Executive testified that the advocacy of the morality of homosexuality to youth members by any adult member is grounds for revocation of the adult's membership. *Id.*, at 761.

2. Public accommodations laws have also broadened in scope to cover more groups; they have expanded beyond those groups that have been given heightened equal protection scrutiny under our cases. See *Romer*, 517 U.S., at 629. Some municipal ordinances have even expanded to cover criteria such as prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology. See 1 Boston, Mass., Ordinance No. §12—9(7) (1999) (ex-offender, prior psychiatric treatment, and military status); D. C. Code Ann. §1—2519 (1999) (personal appearance, source of income, place of residence); Seattle, Wash., Municipal Code §14.08.090 (1999) (political ideology).

3. Four State Supreme Courts and one United States Court of Appeals have ruled that the Boy Scouts is not a place of public accommodation. *Welsh* v. *Boy Scouts of America,* 993 F.2d 1267 (CA7); cert. denied, 510 U.S. 1012 (/supct-cgi/get-us-cite?510+1012) (1993); *Curran* v. *Mount Diablo Council of the Boy Scouts of America,* 17

Cal. 4th 670, 952 P.2d 218 (1998); *Seabourn* v. *Coronado Area Council, Boy Scouts of America,* 257 Kan. 178, 891 P.2d 385 (1995); *Quinnipiac Council, Boy Scouts of America, Inc.* v. *Comm'n on Human Rights & Opportunities,* 204 Conn. 287, 528 A. 2d 352 (1987); *Schwenk* v. *Boy Scouts of America,* 275 Ore. 327, 551 P.2d 465 (1976). No federal appellate court or state supreme court–except the New Jersey Supreme Court in this case–has reached a contrary result.

4. We anticipated this result in *Hurley* when we illustrated the reasons for our holding in that case by likening the parade to a private membership organization. 515 U.S., at 580. We stated: "Assuming the parade to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision, GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.,* at 580—581.