THE MAKING OF THE SUPREME COURT'S FREE EXERCISE CLAUSE JURISPRUDENCE: LESSONS FROM THE BLACKMUN AND POWELL PAPERS IN *BOWEN V. ROY*

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In a prior article,[1] I discussed how the Court nearly revolutionized its Free Exercise Clause jurisprudence in the case *Jensen v. Quaring*.[2] After oral argument, the justices voted five to three (with Justice Lewis Powell not participating) to reject a free exercise challenge to a state law that required photos on drivers licenses. When Chief Justice Warren Burger circulated a draft opinion that would have radically altered the Court's approach to the Free Exercise Clause, Justice Blackmun switched his vote from the majority, leaving the Court split four to four.[3] Following convention, the Court then affirmed the lower court without opinion, and Chief Justice Burger's draft opinion remained in the Court's files.[4]

This Article picks up the behind-the-scenes story as the Court turned from *Jensen* to the case *Bowen v. Roy*.[5] *Bowen* involved a family seeking federal welfare benefits who objected to the government's requirement of a social security number. The government claimed that use of social security numbers number allowed it to more efficiently administer the program and prevent fraudulent claims. The parents countered that use of social security numbers violated their deeply held religious beliefs. The question was whether the Free Exercise Clause required the government to exempt religious objectors from the social security number requirement.

This Article examines the Court's decision making process in *Bowen* using unpublished correspondence and draft opinions from the papers of Justices Harry Blackmun and Lewis Powell. These materials show the justices' concern with a possible slippery slope if religious believers were exempt from generally applicable laws and regulations. That common concern

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1. Paul E. McGreal, *The Unpublished Free Exercise Opinion in* Jensen v. Quaring, 33 S. ILL. U. L.J. 1 (2008).
2. Jensen v. Quaring, 472 U.S. 478 (1985).
3. McGreal, *supra* note 1, at 8.
4. *Jensen*, 472 U.S. at 478.
5. Bowen v. Roy, 476 U.S. 693 (1986).

pulled the justices in different directions, fracturing the Court and leaving no majority position. The internal papers, however, show that a majority existed for one approach, but concerns over justiciability prevented a majority from formally adopting that position. Consequently, *Bowen* left the Court's Free Exercise Clause jurisprudence seemingly in disarray, and left the Court open to take a new direction in the future.

Part I of this Article sets the stage with a brief overview of the Court's modern Free Exercise Clause cases leading up to *Bowen*. Part II reviews how the Court substituted *Bowen* for *Jensen* in the hope of forming a majority approach to accommodating large, complex government benefit programs to religious objections. Part III then details the Court's consideration and decision of *Bowen*. Part IV concludes by drawing lessons that the Blackmun and Powell papers teach about *Jensen*, *Bowen*, and the Court's Free Exercise Clause jurisprudence.

I. THE COURT'S PRE-*BROWN* FREE EXERCISE CLAUSE CASES

Starting in the mid-1960's, the Court applied "strict scrutiny" to laws that substantially burden a person's free exercise of religion.[6] Strict scrutiny is the most demanding constitutional law standard of review; the government must show that the challenged law is necessary to achieve a compelling government interest.[7] Constitutional law conventional wisdom holds that few laws survive this test, prompting one academic to call the test "'strict' in theory and fatal in fact."[8]

Sherbert v. Verner[9] is an early free exercise strict scrutiny case, where the Court struck down a state unemployment compensation law that denied benefits to a Seventh-Day Adventist who was fired for refusing to work on Saturday, her Sabbath. The law denied benefits to any person who refused employment "without good cause."[10] The state agency and courts determined

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6. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1247 (3d ed. 2006).
7. *See* Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209, 221–22 (1998).
8. Gerald Gunther, *The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *see also* Employment Division v. Smith, 494 U.S. 872, 888 (1990) ("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."). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (empirical study of lower court decisions showed that many laws survive strict scrutiny, especially in free exercise cases).
9. Sherbert v. Verner, 374 U.S. 398 (1963).
10. *Id.* at 401.

that religious objection to Saturday work was not good cause, and the claimant was denied benefits. On appeal, the Court held that forcing a person to choose between unemployment benefits and her Sabbath day substantially burdened the free exercise of religion.[11] Applying strict scrutiny, the Court then held that denying benefits to a Seventh-Day Adventist was not necessary to achieve the state's interest in preventing fraudulent benefit claims.[12]

Given the diversity of religions in the United States and the pervasiveness of the modern regulatory state, a wide array of state and federal laws arguably burden the free exercise of someone's religion. Consequently, several justices worried that the strict scrutiny approach applied in *Sherbert* licensed lower courts to run roughshod over state and federal laws in the name of free exercise. Because the government could be put to strict scrutiny for any law that substantially burdened free exercise, the *Sherbert* approach effectively made each believer a law unto herself.[13] The question was whether the Court would put the brakes on this constitutional runaway train.

Almost twenty years later, in *Thomas v. Review Board*,[14] the Court hinted that it would start reining in *Sherbert*. There, a Jehovah's Witness challenged the state's determination that he had left work without good cause. The employer had assigned the claimant to work in a division that made components for military weapons. The claimant objected that such work was against his religious beliefs, and he quit when the employer denied his transfer

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11. *Id.* at 404.
12. *Id.* at 409.
13. In the later case *Employment Division v. Smith*, the Court's opinion put the point this way:

> 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," 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–ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.

   Smith, 494 U.S. at 888–89 (internal citations omitted).
14. Thomas v. Review Bd., 450 U.S. 707 (1981).

request. As in *Sherbert*, the Court concluded that denial of unemployment compensation substantially burdened the claimant's free exercise of religion,[15] and that the state law failed strict scrutiny.[16] In applying strict scrutiny, however, the Court sowed the seeds of a later limitation on the analysis when it accepted the state's asserted interest in preventing fraudulent or frivolous religious objections to employment. After all, if each employee could simply leave work by merely parroting a personal religious belief, "widespread unemployment" might result.[17] The Court, however, found that the state had not proven that accommodating religious objections would threaten the viability of its unemployment compensation system:

> There is no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create "widespread unemployment," or even to seriously affect unemployment–and no such claim was advanced by the Review Board.[18]

And while the Court later overturned the denial of benefits in two other cases,[19] *Thomas* left the door open for the government to pass strict scrutiny by arguing that religious exemptions would threaten the viability of a challenged government program.

The next year, the federal government walked through that door in *United States v. Lee*.[20] There, an Amish employer challenged a federal law requiring employers to pay into the national social security retirement system. The employer claimed that social security violated his religious belief that the Amish community should provide for the needs of its elderly members. The Court agreed that the social security tax burdened the Amish employer's free exercise of religion, and then applied strict scrutiny.[21] First, the Court stated the obvious–the federal government has a high interest in providing for the

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15. *Id.* at 717–18 ("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.").
16. *Id.* at 718.
17. *Id.* at 719.
18. *Id.*
19. *See* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987) (unemployment benefits denied to worker who refused to work on Sabbath); Frazee v. Ill. Dept. of Income Security, 489 U.S. 829 (1989).
20. United States v. Lee, 455 U.S. 252 (1982).
21. In cases like *Lee*, the Court did not always use the label or terminology of strict scrutiny. The cases, however, consistently applied a form of heightened scrutiny that was consistent with that test. *See* CHEMERINSKY, *supra* note 6, at 1248.

solvency and success of the social security retirement system.[22] Second, the Court explained that Congress had found that universal participation in social security was necessary for the continued existence of the program.[23] Indeed, while Congress had provided limited religious exemptions within the social security program, it concluded that a general religious exemption was not feasible.[24] The Court then incorporated a limiting principle into its strict scrutiny review: "Religious beliefs can be accommodated, but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.'"[25] If the government has a high interest in creating and maintaining a benefit program, then religious exercise need not be accommodated when doing so would threaten the program's viability.

In an opinion concurring in the judgment in *Lee*, Justice John Paul Stevens took the position that Chief Justice Burger would later adopt in *Jensen* and *Bowen*:

> The Court's analysis supports a holding that there is virtually no room for a 'constitutionally required exemption' on religious grounds from a valid tax law that is entirely *neutral in its general application*. Because I agree with that holding, I concur in the judgment.[26]

In short, the Free Exercise Clause does not require religious exemptions from neutral and generally applicable regulatory schemes, just as Chief Justice Burger proposed in his *Jensen* draft opinion.[27] Justice Stevens, however, preferred his approach for a different reason. Whereas Chief Justice Burger was concerned with the practical effect of religious exemptions on administration of large, complex government programs, Justice Stevens was concerned about religious freedom vales:

> In my opinion, the principal reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government–whether it be the legislature or the courts–out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and

22. *Lee*, 455 U.S. at 258–59 ("the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high.").
23. *Id.* at 258.
24. *Id.*
25. *Id.* at 259.
26. *Id.* at 263 (Stevens, J., concurring in the judgment) (emphasis added).
27. *See* McGreal, *supra* note 1, at 5–7.

> disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.[28]

As discussed in Part IV, the Court eventually turned to Justice Stevens's neutral and generally applicable test in *Employment Division v. Smith*,[29] though for a slightly different reason.[30]

The year after *Lee*, the Court again applied the Free Exercise Clause to a denial of benefits, this time the denial of tax exempt status. In *Bob Jones University v. United States*,[31] the IRS denied tax exempt status to a private religious university because the school discriminated against students in inter-racial relationships. The university claimed that its sincerely held religious beliefs prohibited inter-racial dating and marriage, and that the non-discrimination condition unconstitutionally burdened their free exercise. Following *Lee*, the Court applied strict scrutiny, holding that the government had a compelling interest in eradicating race discrimination in education, and that the government had no less restrictive alternative to achieve that interest.[32]

After *Thomas*, *Lee*, and *Bob Jones University*, the Free Exercise Clause required courts to apply strict scrutiny on a case-by-case basis, deciding whether the government had proven that the legal burden on religious exercise was necessary to accomplish a compelling government purpose. For the welfare programs in *Sherbert*, *Thomas*, and *Lee*, this meant that the government had to prove that religious accommodations would threaten the success of the challenged benefit program. And later cases sought application to other contexts: in *Bob Jones University* to tax exempt status; in *Jensen v. Quaring* to photos on driver's licenses;[33] and in *Bowen v. Roy* to a federal law requiring social security numbers for aid eligibility.[34]

As discussed in my prior article, two aspects of Chief Justice Burger's draft opinion in *Jensen v. Quaring* would have altered the *Sherbert* approach in order to prevent the "law unto herself" threat posed by case-by-case use of strict scrutiny. Specifically, the draft opinion limited the test to laws that target behavior because of its religious motivation.[35] Further, only benefits laws that expressly provide for individualized exemptions create a danger of such targeting: By deciding that a religious adherent does not merit an

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28. *Lee*, 455 U.S. at 264 (Stevens, J., concurring in the judgment).
29. Employment Div. v. Smith, 494 U.S. 872 (1990).
30. *See* discussion *infra* Part IV.
31. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).
32. *Id.* at 603–04.
33. Jensen v. Quaring, 472 U.S. 478 (1985).
34. Bowen v. Roy, 476 U.S. 693 (1986).
35. McGreal, *supra* note 1, at 7.

exemption, the government expresses "hostility" towards religion. For example, in *Sherbert* the state made an individualized determination that the claimant's religious beliefs were not "good cause" for refusing work. Given that prior cases made none of these distinctions, Chief Justice Burger's draft opinion would have recast free exercise law. The split vote, however, denied him that chance. As discussed in the next section, *Bowen* gave Chief Justice Burger the constitutional equivalent of a do-over.

II. CODA–*JENSEN*'S IN; *BOWEN*'S OUT

Bowen v. Roy arrived at the Supreme Court while *Jensen v. Quaring* was already under review. (The table in Appendix A has a side-by-side timeline of milestones for the two cases.) The Court granted certiorari in *Jensen* on October 1, 1984, and the appellants in *Bowen* filed their jurisdictional statement only weeks later on November 13, 1984.[36] Then, *Jensen* was argued on January 7, 1985, with the justices set to discuss the case at their January 11 conference. A clerk's preliminary memorandum for *Bowen* shows that the Court was also to consider the appeal in *Bowen* at the same conference. On the bottom of the first page of that memorandum, Justice Lewis Powell's handwritten notation connected the two cases:

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36. *Bowen* came to the Court under the name *Heckler v. Roy* and by way of jurisdictional statement rather than application for writ of certiorari. The Department of Justice Web site describes the difference between the Court's appellate jurisdiction and certiorari as follows:

> Although most cases are subject to Supreme Court review only under the Court's discretionary certiorari jurisdiction, in some cases the law provides for an "appeal" to the Court, rather than for review by writ of certiorari. (One common example of appellate jurisdiction is cases under the Voting Rights Act.) In practice, the Court's appellate jurisdiction is also highly discretionary, but the form of papers filed and orders issued is somewhat different. Instead of a petition for a writ of certiorari, the party seeking review files a "jurisdictional statement" setting forth the grounds for appellate jurisdiction and arguing that the case presents a substantial question that warrants Supreme Court review. A party opposing review files a response that is styled a "motion to dismiss or affirm." If the Court decides to review the case, it issues an order that "notes probable jurisdiction" over the case. If the Court decides not to entertain full briefing and argument, it may issue a summary order affirming or reversing the judgment of the lower court, or it may "dismiss" the case "for lack of a substantial federal question." Summary affirmances and reversals have precedential value; dismissals are generally viewed as similar to denials of certiorari.

United States Department of Justice, Office of the Solicitor General, Briefs, Help/Glossary, http://www.justice.gov/osg/briefs/help.html (last visited May 10, 2010). *See also* Supreme Court Rule 18, *available at* http://supremecourtus.gov/ctrules/2010RulesoftheCourt.pdf (last visited May 10, 2010).

> HOLD for *Jensen v. Quaring*, No. 83-1944 (photo on driver's license case).
> –I disagree with the memo writer that the case is somehow significant and different enough to warrant.[37]

Justice Powell was absent from the Court when *Jensen* was argued, taking no part in that case, leaving eight justices. Justice Blackmun's notes on *Jensen* from the January 11 conference show that the justices voted five to three to uphold the state's driver's license photo law.[38] Justice Powell's notation quoted above indicates that the issue in *Bowen* was close enough to the issue in *Jensen* that *Bowen* should be held until the Court decided *Jensen*. Once *Jensen* was decided, the Court would likely reverse and remand *Bowen* for reconsideration in light of *Jensen*. Thus, after the Court's January 11 conference, *Jensen* was on track for decision by the Court, and *Bowen* was in limbo awaiting return to the lower court.

Almost five months after the January conference, Justice Blackmun switched his vote, and *Jensen* was suddenly derailed. *Bowen* was now being held for a case that might not generate an opinion for the Court. A letter dated June 4, 1985, from Justice Powell to Chief Justice Burger, and not circulated to any other justice, shows that Chief Justice Burger's first reaction to Justice Blackmun's change of heart was to seek re-argument of *Jensen*.[39] If the case were re-argued, Justice Powell could participate and possibly provide a fifth vote to decide the case. Justice Powell's letter rejects this approach as inconsistent with the Court's past practice, but suggests an alternative:

> I am puzzled that you had rather have *Jensen* reargued than to note in *Heckler v. Roy*, 84-1944-a case being held for *Jensen*. I will gladly vote to note probable jurisdiction in *Roy*. It presents substantially the same question involving a claimed religious belief of American Indians. I believe that the chances of your views prevailing would be at least as good–if not better–in *Roy* than on reargument of *Jensen*.[40]

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37. Preliminary Memorandum, at 1, *in* Papers of Justice Lewis A. Powell, Washington and Lee University School of Law, Lewis F. Powell, Jr. Archives, Box 268 (Jan. 11, 1985), [hereinafter "Powell Papers"] (on file with author).
38. McGreal, *supra* note 2, at 5.
39. Letter from Powell to Burger (June 4, 1985) *in* Powell Papers, Box 268. This letter is reproduced in Appendix B.
40. *Id.*

Justice Powell's view prevailed–his notes from the Court's June 13, 1985 conference show that seven justices voted to hear *Bowen*.[41] Four days later, on June 17, 1985, the Court announced both that *Jensen* was summarily affirmed by an equally divided Court,[42] and that the Court had noted probable jurisdiction in *Bowen*. *Jensen* was out, and *Bowen* was in.

Before turning to the Court's consideration of *Bowen*, note what the justices' votes in *Jensen* suggest about where the Court was heading in *Bowen*. Four Justices were on record in support of Chief Justice Burger's new approach to the Free Exercise Clause (Chief Justice Burger, and Justices White, Rehnquist, and Stevens), and four justices were opposed (Justices Brennan, Marshall, Blackmun, and O'Connor).[43] Justice Powell's letter to Chief Justice Burger strongly suggests that Justice Powell would add a fifth vote in support of Chief Justice Burger's new approach. Counting noses in June 1985, then, Chief Justice Burger had reason to be cautiously optimistic about *Bowen*.

III. *BOWEN V. ROY* AT THE SUPREME COURT

Bowen came to the Court from a federal district court decision in *Roy v. Cohen*.[44] The case involved a Free Exercise Clause challenge to a federal law requiring a social security number for participation in the federal Aid to Families with Dependent Children (AFDC) and Food Stamp programs. The Supreme Court's published opinion in *Bowen* described the massive scope of these benefit programs:

> The programs at issue are of truly staggering magnitude. Each year roughly 3.8 million families receive $7.8 billion through federally funded AFDC programs and 20 million persons receive $11 billion in food stamps. The Social Security program itself is the largest domestic governmental program in the United States today, distributing approximately $51 billion monthly to 36 million recipients.[45]

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41. Heckler v. Roy, No. 84-780 (June 13, 1985) *in* Powell Papers, Box 268. Justice Powell's notes show that the remaining two justices–Justices Marshall and Brennan–voted to summarily affirm the lower court's decision.
42. Jensen v. Quaring, 472 U.S. 478 (1985) ("PER CURIAM. The judgment is affirmed by an equally divided court.").
43. McGreal, *supra* note 1, at 8.
44. Roy v. Cohen, 590 F. Supp. 600 (M.D. Penn. 1984).
45. Bowen v. Roy, 476 U.S. 693, 710 (1986).

The parents challenged two separate uses of the social security number: first, that the government makes internal use of the social security number in administering benefits; and second, that parents must provide a child's social security number to the government to apply for benefits. The parents in *Bowen* claimed that the government's internal use of such a number violated their religious beliefs, and that their religious beliefs prevented them from providing a social security number for their two-year-old daughter.[46] When the parents did not supply a social security number for their daughter, the family's AFDC and Food Stamp benefits were reduced. The parents filed suit.

Following the *Sherbert* approach, the district court applied strict scrutiny to the federal social security number requirements. First, the court concluded that the federal interests in efficient and accurate administration of benefits were sufficiently weighty.[47] Second, the Court determined that the social security number requirements were not necessary to achieve those goals. This second determination was based on three failures in the government's evidentiary showing: first, few claimants would lodge religious objections to the social security number requirements; second, granting the exemption would impose little additional cost on the federal agencies; and third, use of the social security number was not essential to the federal government's anti-fraud screening measures.[48] In short, the government could achieve its goals by means other than requiring a social security number of all claimants. The district court labeled this analysis the "reasonable least restrictive alternative test," meaning that the government must operate in a manner that imposes the least burden on religious exercise, as long as the least burdensome alternative is reasonable in terms of anticipated costs. Consequently, the social security number requirements were unconstitutional when applied contrary to a claimant's sincerely held religious beliefs. For purposes of the AFDC and

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46. The Supreme Court described the parents' religious beliefs as follows:

> At trial, Roy testified that he had recently developed a religious objection to obtaining a Social Security number for Little Bird of the Snow. Roy is a Native American descended from the Abenaki Tribe, and he asserts a religious belief that control over one's life is essential to spiritual purity and indispensable to "becoming a holy person." Based on recent conversations with an Abenaki chief, Roy believes that technology is "robbing the spirit of man." In order to prepare his daughter for greater spiritual power, therefore, Roy testified to his belief that he must keep her person and spirit unique and that the uniqueness of the Social Security number as an identifier, coupled with the other uses of the number over which she has no control, will serve to "rob the spirit" of his daughter and prevent her from attaining greater spiritual power.

Id. at 696.

47. *Cohen*, 590 F. Supp. at 610.

48. *Id.* at 612–13.

Food Stamp programs, then, such claimants were the dreaded "law unto themselves."

After the Court noted probable jurisdiction in June 1985, *Bowen* was set for argument on January 14, 1986. In December 1985, in preparation for oral argument, Justice Lewis Powell wrote a memo to his clerk, C. Cabell Chinnis, summarizing his thoughts on the case.[49] Justice Powell opened the memo leaving no doubt where he stood: "I think the decision of the DC [district court] is dead wrong."[50] He then noted his agreement that the federal government had a compelling interest in verifying the eligibility of benefit recipients, including prevention and detection of fraud and efficient operation of the benefit program.[51] Justice Powell found the second prong of strict scrutiny–whether use of social security numbers was necessary to achieve the government's interests–to be a closer question:

> Whether the 'means' employed–namely requirement of identification numbers–meets the "least restrictive" inquiry may be more difficult. The government argues rather persuasively that the use of identifying numbers is essential to verify eligibility, prevent and detect fraud, and promote efficient administration of the massive Social Security programs. No less restrictive and effective means has been identified.
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> The DC [district court] and appellees argue that the numbers really aren't necessary in cases like this one because very few religious sects will hold the same or similar views as those of the Roy family, namely, that computerized numbers violate their religious beliefs based on the 'legend of Katahdin.'[52]

This passage reflects that the *Sherbert* approach, especially after *Thomas* and *Lee*, required courts to conduct case-by-case balancing for each claimed religious exemption. In each new case, the question would be whether granting the requested exemption from the social security number requirement would bring down the benefits program.

The close of Justice Powell's memo suggested a change from the case-by-case approach:

> In sum, Cabell–as you indicated–it may be easier to affirm than to reverse the DC [district court] if one relies strictly on the formalistic type of analysis found in many of our prior cases. But where massive federal

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49. Memorandum from Powell to Cabell (Dec. 27, 1985) *in* Powell Papers, Box 268. The Memorandum is reproduced in Appendix C.
50. *Id.* at 1.
51. *Id.* at 1.
52. *Id.* at 1– 2.

> government programs are involved (the SG says that nearly 4 million families are receiving AFDC payments each month, involving some 11 million persons and billions of dollars), it simply makes no sense to start down the road of exempting from the quite simple requirement of an identification number, each person who claims to belong to some of the now numerous–and apparently increasing number of religious beliefs and sects.
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> But apart from my simmering sense of impatience with claims like this one I would like your independent judgment. I would particularly like for you to suggest how we can best frame a test that will attract votes of four other Justices. The key vote may well be John Stevens, and after argument I may talk to him.[53]

Here, Justice Powell expresses his desire to end *Sherbert*'s case-by-case balancing, at least for claims for religious exemptions from large, complex benefit programs. Earlier in his memorandum, Justice Powell briefly stated an alternate approach:

> [W]e could decide this type of case on the ground that requirements such as this, involving millions of people, may be sustained if they are facially neutral and uniformly applied with no intent to discriminate against particular religious beliefs or against religion in general. Lee notes that four Justices (the CJ, BRW, WHR and JPS) have adopted this position. I am not sure about JPS, and the CJ's opinion in *Jensen*–that did not command a Court–did not adopt this line of reason. It does have appeal to me.[54]

Justice Powell clearly signals his sympathy with Chief Justice Burger's approach in *Jensen*.

In preparation for oral argument, Mr. Chinnis wrote a Bench Memorandum to Justice Powell dated January 2, 1986. Justice Powell's handwritten notes show that the Bench Memorandum was "Reviewed 1/4/86," and that it was an "[e]xcellent memo with which I agree."[55] The Bench Memorandum focuses on the second part of the strict scrutiny test–whether requiring social security numbers is necessary to protect the benefit program. This question, in turn, depended on whether the federal government had a less restrictive alternative to requiring submission and making internal use of social security numbers. That is, did the federal government have an alternative way to prevent fraud that restricted the claimant's religious exercise less? Mr.

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53. *Id.*
54. *Id.* at 2–3.
55. Bench Memorandum (Jan. 2, 1986) at 1, *in* Powell Papers, Box 268.

Channis explained how the parties had framed the least restrictive alternative inquiry quite differently:

> Both sides agree that the proper legal test–at least as the case currently stands–is that the government must have a compelling need and must employ the least restrictive means of meeting the need. The real debate centers over whether that analysis should focus on an individual petition for an exception or on the administration of the program to the entire population of beneficiaries. It is of course easier to prove that there is a "less restrictive means" available in administering only one person's benefits than in overseeing a program having 383 million accounts.[56]

In short, the question was whether the *Sherbert* balancing test required "that the least restrictive means should be assessed with respect to the program as a whole, not by a case-by-case basis."[57] The Bench Memorandum concluded that while the "programmatic test" had clear "logical support," support in precedent was less clear.[58]

Next, the Bench Memorandum explained the alternative approach proposed by Chief Justice Burger's draft opinion in *Jensen*:[59] Rational basis review for generally applicable and neutral government benefit programs. Mr. Channis concluded that the approach would nicely address the "law unto herself" problem raised by *Sherbert*:

> As the dissent in the *Jensen* draft and Lee Bentley have pointed out, this approach [of Justice Stevens and Chief Justice Burger] is an arguably [sic] break with the Court's past free exercise cases. I am, however, sympathetic with these views, especially in light of the proliferation of religious sects and the increasingly great number of perceived 'intrusions' into their beliefs (who would have thought SSNs were a great evil?).[60]

Regardless of the approach, Mr. Channis recommended that Justice Powell vote to reject the religious exemptions claimed in *Bowen*.

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56. *Id.* at 4–5.
57. *Id.* at 5.
58. *Id.* at 6.
59. *Id.* at 7. Mr. Channis also noted that Justice Stevens had taken a similar approach in his opinion concurring in the judgment in *Lee*. *Id.* The Bench Memorandum explains that Mr. Channis had obtained a copy of Chief Justice Burger's draft opinion from the Clerk of the Supreme Court. Interestingly, Justice Powell's margin notes say the following about this: "He should not have given it to you."
60. *Id.* at 7–8.

Justice Powell's handwritten notes from January 4, 1986, summarize his views going into oral argument:

> 3. A reasonable standard applicable to this type of legislation would uphold a "facially neutral provision uniformly applied."[61]

This is Chief Justice Burger's approach just discussed. And Justice Powell's oral argument notes reflect this line of reasoning during the Solicitor General's argument: "Something wrong for a person to claim benefits w/o being willing to comply with a neutral requirement."[62]

Three days after oral argument, the Court held a conference to vote on *Bowen*. Justices Blackmun and Powell's notes from that conference show not only the justices' votes on disposition of the case, but also a summary of their reasons.[63] Both justices record the conference vote as 5 to 4 to reverse the lower court, with Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and Stevens listed as voting to reverse, and Justices Brennan, Marshall, White, and O'Connor voting to affirm.[64] Justice Blackmun's conference notes summarize Justice Powell's comments at the conference:

> Our cases → affirm easily
> But standard here should be when statute is
> Facially neutral and uniformly applied
> We all [?] by numbers
> Reverse tentative
> United States interest substantial. Is it compelling?[65]

For the first time before his colleagues, Justice Powell had expressed support for Chief Justice Burger's approach. Note, however, that Justice White is listed as voting to affirm–that is, to grant an exemption. This is an apparent change from his vote in *Jensen* to deny an exemption to the drivers' license photo requirement.

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61. Handwritten notes of Powell (Jan, 4, 1986) *in* Powell Papers, Box 268.
62. Handwritten notes of Powell (Jan. 14, 1986) *in* Powell Papers, Box 268 (the notes are not dated, but they are clearly from the oral argument, which was held on January 14, 1986).
63. Notes of Powell from Conference in Bowen v. Roy (Jan. 17, 1986) *in* Powell Papers, Box 268. Justice Powell's conference notes are reproduced in Appendix D. Notes of Blackmun from Conference in Bowen v. Roy (Jan. 17, 1986) *in* Papers of Harry A. Blackmun, Library of Congress, Madison Building, Box 437 [hereinafter Blackmun Papers"]. Justice Blackmun's conference notes are reproduced in Appendix E.
64. Despite the vote, the top of Justice Powell's conference notes list a vote tally of six to three to reverse.
65. Notes of Blackmun from Conference in Bowen v. Roy, *supra* note 63.

The conference notes show that the justices who voted to grant an exemption followed similar lines of reasoning. For example, Justice Powell's conference notes list the following for Justice Brennan:

> Affirm
> Religious belief was genuine.
> Question is whether government interest is
> compelling. There are less restrictive
> means.
> Relies on District Court's opinion and findings.[66]

Justice Blackmun's conference notes have a similar summary of Justice Brennan's views:

> Affirm
> Sincere belief
> Does Statute interest justify the burden?
> Important, yes
> But Government could satisfy another way
> Exemption would not compromise United States interests
> Sherbert v. Verner

Justice Brennan, then, simply applied the *Sherbert* case-by-case balancing approach.

The justices who voted to reverse also took similar lines of reasoning. Justices Blackmun and Powell note that Chief Justice Burger relied on his reasoning from *Jensen*. Justice Blackmun wrote:

> Reverse
> Statute neutral
> Government's need greater than usual of *Quaring*
> Our standards set in *Quaring*
> [But equals divided Court!][67]

Justice Blackmun characterizes Chief Justice Burger as referencing *Jensen* as authority despite the disposition without opinion. Justice Powell's notes for Chief Justice Burger are similar: "Reverse–Statute is neutral–Would require

66. Notes of Powell from Conference in Bowen v. Roy, *supra* note 63, at 1.
67. Notes of Blackmun from Conference in Bowen v. Roy, *supra* note 63, at 1.

government to accommodate many similar requests."[68] Justice Powell notes Justice Blackmun making a similar point: "Reverse (tentative) – These religious objections will proliferate."[69] And Justice Powell's notes show Justice Stevens making a similar point:

> Reverse
> Different case under prior cases. See *Adams*.
> But allowing an exception like this is constitutionally required opens door to serious abuse.
> What about numbers on auto licenses.
> Can distinguish *Lee*.

Two themes emerge from the conference comments of the Justices who voted to reverse. First, the case would be close under the case-by-case balancing analysis from *Sherbert*. Second, deciding in favor of an exemption would perpetuate the "law unto herself" concern that had lingered since *Sherbert*. In short, to prevent chaos, the Court had to turn back from the road taken in *Sherbert*. The question was whether the five justices in the majority could articulate a common approach.

That task fell to Chief Justice Burger, who assigned himself the opinion for the Court. He circulated a first draft opinion on March 10, 1986, that upheld both of the social security number requirements – that the parents provide the number, and that the federal government make internal use of the number to administer benefits. [70] Over the next few weeks, the justices' votes on the draft opinion trickled in:

> March 12–Justice White would await the dissent[71]
> March 14–Justice Marshall would await the dissent,[72] Justice O'Connor would author a dissent, and Justice Rehnquist joined Chief Justice Burger's draft opinion[73]

At this point, there were two votes to reverse, and three votes to affirm. And three justices who voted at conference to reverse had not expressed their

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68. Notes of Powell from Conference in Bowen v. Roy, *supra* note 63, at 1.
69. *Id.* at 2.
70. First Draft, Opinion of the Court in Bowen v. Roy (Mar. 10, 1986) *in* Blackmun Papers, Box 437 [hereinafter referred to as "First Draft Opinion"]. The first draft opinion is reproduced in Appendix F.
71. Letter from White to Burger (Mar. 12, 1986) *in* Blackmun Papers, Box 437.
72. Letter from Marshall to Burger (Mar. 14, 1986) *in* Blackmun Papers, Box 437.
73. Letter from Rehnquist to Burger (Mar. 14, 1986) *in* Blackmun Papers, Box 437.

views–Justices Blackmun, Powell, and Stevens. Internal correspondence in the Blackmun and Powell papers show the deliberations that took place before Justices Powell and Blackmun voted on Chief Justice Burger's draft.

Justice Powell traded private correspondence with Chief Justice Burger before voting on the draft opinion. In a letter dated March 17, 1986, Justice Powell complained that Chief Justice Burger's first draft opinion "identifies several grounds for reversing the District Court."[74] Justice Powell preferred that the Court rely simply on "a 'facially neutral, generally applicable' test," and "not state alternate tests."[75] Justice Powell specifically took issue with the draft's purported distinction between laws that directly prohibit religious exercise and those that merely condition benefits on behavior inconsistent with religious exercise:

> The "benefits vs. prohibition" test mentioned on pages 6–8 is unnecessary, and also raises questions for me. It may well be that a "denial of governmental benefits" sometimes could constitute an "infringement of religious liberty." Moreover, although it may be true that denial of benefits is less intrusive than affirmative compulsion or prohibition, I do not think that necessarily answers the question in this case.[76]

Justice Powell then closed his letter by returning to his concern with administration of large benefit programs: "I agree generally . . . with your emphasis on pages ten to twelve of the Social Security numbers' importance in the computer-assisted administration of a large and complex program."[77]

Justice Powell's letter leaves room for interpretation of his precise position. On the one hand, he writes that he agrees with use of the neutral and generally applicable test, and that there is no need for alternate tests. This suggests that he is comfortable with using neutrality and general applicability as the general Free Exercise Clause test, much as the Court later adopted in *Employment Division v. Smith*.[78] On the other hand, the letter's closing sentence refers to the context of "computer-assisted administration of a large and complex program," much as Justice Powell's internal memos on the case had done. It is not clear whether Justice Powell would limit the neutral-generally applicable test to cases seeking religious exemptions from large, complex government programs.

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74. Letter from Powell to Burger (Mar. 17, 1986) *in* Powell Papers, Box 268. This letter is reproduced in Appendix G.
75. *Id.*
76. *Id.*
77. *Id.*
78. Employment Div. v. Smith, 494 U.S. 872 (1990).

In a letter dated ten days later, Chief Justice Burger replied to Justice Powell's concerns.[79] His reply makes clear that Chief Justice Burger would apply a different constitutional test to free exercise cases involving large, complex benefits programs than he would to laws that simply stated a direct prohibition on conduct. The letter's second paragraph explained this significant limitation on his proposed approach:

> The reason for discussing the fact that this is a *benefits* case, not a *criminal* sanctions case, is to focus the opinion narrowly on the precise question presented. I am concerned that removing that limitation might unduly expand the holding, to the ultimate detriment of Free Exercise claimants. In other words, the facially neutral nature of the provisions at issue here *combined with* the fact that this is a benefits case produce the result. I do not intend to suggest that one without the other would 'necessarily answer the case,' and I think the opinion is clear on this point. I have, however, added discussion concerning the *Bob Jones University* case, which I hope will satisfy your concern that the opinion creates some kind of new 'benefits v. prohibition' test. I have also added modifying language to the statements that might appear to discuss benefits alone.[80]

Given the date of his letter, Chief Justice Burger is referring to changes made in his third draft opinion, which was circulated to the full court on March 29, 1986.[81] First, compare the passages referred to on page eight. Chief Justice Burger's first draft contained the following sentence:

> These two very different forms of government action are not governed by the same constitutional standard.[82]

The third draft added a prefatory clause to the sentence:

> *Although the denial of government benefits over religious objection can raise serious Free Exercise problems,* these two very different forms of government action are not governed by the same constitutional standard.[83]

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79. Letter from Burger to Powell (Mar. 27, 1986) *in* Powell Papers, Box 268. This letter is reproduced in Appendix H.
80. *Id.* (internal citations omitted).
81. Third Draft, Opinion of the Court in Bowen v. Roy (Mar. 29, 1986) *in* Blackmun Papers, Box 437 [hereinafter "Third Draft Opinion"].
82. First Draft Opinion, *supra* note 70, at 8.
83. Third Draft Opinion, *supra* note 81, at 8 (emphasis added).

This addition was targeted at Justice Powell's concern that the first draft suggested that benefit denials receive no Free Exercise Clause scrutiny.

Also on page eight, Chief Justice Burger added a footnote addressing the *Bob Jones University v. United States*[84] case that distinguished a criminal prohibition from the denial of government benefits:

> In *Bob Jones University* . . . the Court upheld the denial of tax benefits to a school that prohibited interracial dating observing that the school remained wholly free to 'observ[e] its religious tenets.' If denying government benefits is the same as imposing criminal sanctions, then the Free Exercise Clause could not prevent the government from ordering Bob Jones University, under pain of criminal penalty, to violate its religious beliefs and permit interracial dating on its campus. But that difficult question is still an open one since 'the Constitution may compel toleration of private discrimination in some circumstances.'[85]

According to this passage, direct prohibitions and denials of benefits each have their own Free Exercise Clause test. Just because a denial of benefits law (*e.g.*, a tax exemption made contingent upon non-discrimination) passes constitutional scrutiny under its applicable test does *not* mean that a direct prohibition on the same subject (*e.g.*, a criminal prohibition on discrimination in higher education) would survive constitutional review under its test. Of course, one problem is that this passage ignores that *Bob Jones University* actually applied strict scrutiny to denial of a tax exemption, and not the neutral-generally applicable approach urged in his draft. So, Chief Justice Burger must be suggesting that past cases be re-characterized to fit his proposed approach.

The revised passages on page six further highlight that Chief Justice Burger envisioned different constitutional approaches for denials of benefits and direct prohibitions. Specifically, he added the italicized words to the following passage:

> We are not unmindful of the importance of many government benefits today or of the value of sincerely-held religious beliefs. However, *while we do not believe that no government compulsion is involved,* we cannot ignore the reality that denial of such benefits is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications.

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84. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

85. Third Draft Opinion, *supra* note 81, at 8 (internal citations omitted).

> This distinction is clearly revealed in the Court's opinions. Decisions rejecting religiously-based challenges have often recited the fact that a mere denial of a government benefit *by a uniformly applicable statute* does not constitute infringement of religious liberty.[86]

A neutral and generally-applicable law governing a benefit program receives a different constitutional approach. Later in his draft, Chief Justice Burger makes clear what that approach is:

> In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the government is entitled to wide latitude. In the absence of evidence suggesting an intent to discriminate against particular religious beliefs or against religion in general, the government should not be put to the strict test applied by the District Court; that standard required the government to justify enforcement of the use of social security number requirement as the least restrictive means of accomplishing a compelling state interest. Absent proof of an intent to discriminate, the government meets its burden when it demonstrates that a challenged requirement for government benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.[87]

This passage clarifies the limited nature of Chief Justice Burger's approach. First, the Court must ask whether the challenged law is part of a large, complex benefit scheme. If so, the Court should apply rational basis review to a neutral and generally applicable law, and apply strict scrutiny to laws that are not neutral or generally applicable. Second, if the challenged law places a direct sanction or prohibition on religious conduct, then the Court must engage in more searching scrutiny. The passage discussing *Bob Jones University* purports to leave open precisely what test applies to such laws. Chief Justice Burger's correspondence with Justice Powell, along with passages of the draft opinion for the Court, strongly suggest that he views such direct legal burdens with greater suspicion, even if the laws are neutral and generally applicable.

Justice Powell was apparently satisfied with Chief Justice Burger's changes as he joined the third draft opinion on April 3, 1986.[88] In the meantime, Justice O'Connor had circulated a draft dissent, Justices Brennan and Marshall had joined her dissent, and Justice White circulated a draft

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86. First Draft Opinion, *supra* note 70, at 8 (emphasis added).
87. *Id.* at 8–9.
88. Letter from Powell to Burger (Apr. 3, 1986) *in* Blackmun Papers, Box 437.

dissent of his own.[89] At this point, the Court had the three votes for Chief Justice Burger's third draft opinion, four votes in dissent, and Justices Blackmun and Stevens yet to vote. Internal correspondence show that Justices Blackmun and Stevens were troubled by Chief Justice Burger's failure to distinguish between the two social security number requirements–internal use by the government versus parents' providing the number. Both justices believed that the Free Exercise Clause did not bar the federal government from making internal use of the social security number. Regarding the second requirement, however, Justice Blackmun believed that the parents ought not be required to provide the number, while Justice Stevens believed that the challenge to the second requirement was not justiciable.[90]

Justice Blackmun's thinking can be glimpsed from memoranda prepared by his judicial clerk, David A. Sklansky. Shortly after circulation of Chief Justice Burger's first draft opinion, Professor Sklansky wrote a memorandum reviewing the draft:

> The Chief Justice's opinion in this case is similar to the opinion he circulated last Term in *Jensen v. Quaring*, No. 83-1944. In effect, he renders the Free Exercise Clause inapplicable to government benefit programs, reviving the old right/privilege distinction. I think you were right not to join the Chief's opinion in *Jensen*, and I do not think you should join his opinion in this case under any circumstances.[91]

The remainder of the memorandum recommends that Justice Blackmun vote to uphold the government's internal use of the social security number, but that he await Justice O'Connor's dissent regarding the requirement that the parents provide the number.

Professor Sklansky followed with a second memorandum on March 29, 1986, which he wrote after circulation of both Chief Justice Burger's third draft opinion and Justice O'Connor's draft dissent. This memorandum urged Justice Blackmun to make his views known to the other justices: "I think you should circulate something reasonably soon in this case, but I am not sure what. This memo presents three options."[92] The three options were: (1) join Justice O'Connor's dissent striking down both requirements; (2) offer to join

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89. Letter from Brennan to O'Connor (Mar. 28, 1986) *in* Blackmun Papers, Box 437; Letter from Marshall to O'Connor (Mar. 31, 1986) *in* Blackmun Papers, Box 437; First Draft, Dissenting opinion of Justice White in Bowen v. Roy (Apr. 8, 1986) *in* Blackmun Papers, Box 437.

90. Justice Stevens did not believe that the record clearly showed that the federal government would require the parents to actually provide the social security number.

91. Memorandum from Sklansky to Blackmun (Mar. 11, 1986) at 1, *in* Blackmun Papers, Box 437.

92. Memorandum from Sklansky to Blackmun (Mar. 29, 1986) at 1, *in* Blackmun Papers, Box 437.

Justice O'Connor's dissent if she changed her draft to reject the claim against the government making internal use of the number; or (3) write a separate opinion upholding the government's internal use, and remanding the case "for further factfinding to determine whether the remainder of the claim is alive."[93] The third approach rested on the view that the record was unclear on whether the government would actually require objecting parents to provide a social security number to obtain benefits.

Professor Sklansky circulated a third memorandum to Justice Blackmun on April 9, 1986. At this point, Justice Stevens had not yet circulated his vote, and Professor Sklansky added the following: "Justice Stevens' [sic] clerk informs me that Justice Stevens has not yet figured out exactly what position he will take in this case. The clerk thinks your views might influence Justice Stevens if they were circulated." The memorandum concluded with an unusual suggestion:

> Perhaps the best solution is to circulate along with your opinion a letter noting that you cannot join either of the judgments yet proposed, and suggesting that a judgment along the following lines be announced in a *per curiam* (or perhaps in THE CHIEF JUSTICE's opinion?): "The judgment of the District Court is vacated and the case is remanded. THE CHIEF JUSTICE, JUSTICE BLACKMUN, JUSTICE POWELL, JUSTICE REHNQUIST, and JUSTICE STEVENS agree that the Government's use, dissemination, and continued possession of the social security number it already possesses for appellees' daughter should not be enjoined, and that the remainder of the relief ordered by the District Court should also be vacated. If, however, appellees' religious convictions still prevent them from supplying the Government with a social security number for their daughter, JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN and JUSTICE O'CONNOR agree that, on the facts as determined by the District Court, the Government should be enjoined from denying assistance to appellees' daughter for that reason.[94]

In a Memorandum to the Conference dated April 11, 1986, Justice Blackmun circulated a proposed *per curiam* opinion taken almost verbatim from Professor Sklansky's third memorandum. Justice Blackmun noted that while Justice Stevens had yet to vote, "it is evident that we are all over the place in

93. *Id.* at 5–6.
94. Memorandum from Sklansky to Blackmun (Apr. 9, 1986) at 1–2, *in* Blackmun Papers, Box 437.

this case."[95] Later that day, Justice Stevens broke his silence and replied with a Memorandum to the Conference of his own[96] that confirmed his conference vote, rejected the *per curiam* approach, and urged the justices to simply issue their various opinions.[97] Justice Stevens indicated, however, that he "may end up joining the Chiefs' opinion, but since my views are not exactly the same as his, I may write separately in any event."[98]

Along with his Memorandum to the Conference, Justice Blackmun circulated a draft opinion concurring in the judgment in part that distinguished the two social security number requirements.[99] First, Justice Blackmun stated that the Free Exercise Clause did not bar the federal government from making internal use of the number. Second, he concluded that the record did not clearly indicate whether there was a continuing claim regarding the parents' need to provide their child's social security number in the future:

> The record is ambiguous on this score. In rejecting the Government's argument that the existence of the number rendered the case moot, the District Court found that Roy 'feels compelled by his religious belief to avoid any use of that number and, to that end, has refused to provide the number to the Defendants in order to receive welfare benefits for Little Bird of the Snow.' It is unclear whether the 'use' to which the District Court referred included use by Roy and Miller, or just more extensive use of the number by the Government. And even if the Court meant to refer only to use by the Government, it is not clear that appellees do not have an independent religious objection to the requirement that *they* provide a social security number for their daughter.[100]

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95. Memorandum from Blackmun to Conference (Apr. 11, 1986) *in* Blackmun Papers, Box 437. Justice Powell's handwritten note on Justice Blackmun's Memorandum reads, "I have no objection to this. LFP."
96. Memorandum from Stevens to Conference (Apr. 11, 1986) *in* Blackmun Papers, Box 437.
97. *Id.*
98. *Id.* It appears that Justice Stevens misunderstood Justice Blackmun to propose that the Court issue *only* the *per curiam* opinion. A later memo from Professor Sklansky clarifies that Justice Blackmun intended that the *per curiam* opinion be followed by the Justices' separate opinions. Indeed, Justice Blackmun circulated a draft opinion concurring in the judgment in part along with his Memorandum.
99. Third Draft, Opinion of Justice Blackmun Concurring in the Judgment in Part in Bowen v. Roy (May 2, 1986) *in* Blackmun Papers, Box 437. The third draft of the opinion concurring in the judgment in part is reproduced in Appendix I.
100. *Id.* at 3–4.

If the lower court found the second issue justiciable, Justice Blackmun would then cast his lot with Justice O'Connor's dissent:

> [F]or the reasons expressed by JUSTICE O'CONNOR . . . , I think the question requires nothing more than a straightforward application of *Sherbert*, *Thomas*, and *Wisconsin v. Yoder* . . . . If it proves necessary to reach the issue on remand, I agree with JUSTICE O'CONNOR that, on the facts as determined by the District Court, the Government may not deny assistance to Little Bird of the Snow solely because her parents' religious convictions prevent them from supplying the Government with a social security number for their daughter.[101]

Justice Blackmun then took an unusual tack on the second social security number requirement. On the judgment, he cast his vote to vacate the lower court judgment and remand for consideration of justiciability. On the merits, while not necessary to his preferred judgment, he opined that requiring objecting parents to provide their child's social security number violated the Free Exercise Clause. In short, he issued a springing constitutional opinion to guide the lower court's consideration. In looking at the case on remand, the lower court would see the vote line up set forth in Table One.

Table 1

Government's Internal Use of the Social Security Number is Constitutional	**Requirement that Parents Provide their Child's Social Security Number Is Constitutional**
Chief Justice Burger	Brennan
Blackmun	White
Rehnquist	Marshall
Powell	Blackmun
Stevens	O'Connor

So, while five votes existed for the proposition that the second social security number requirement was unconstitutional, the Court had only four votes for a judgment on that ground, as Justice Blackmun rested his vote on justiciability grounds.

Chief Justice Burger now had to revise his draft opinion to reflect the justices' emerging positions. Most fundamentally, he had to distinguish

101. *Id.* at 5 (internal citations omitted).

treatment of the two social security number requirements. His fifth draft opinion did so,[102] adopting the approach that appears in the Court's final published opinion for the case. Interestingly, though he no longer had five votes on the second issue, Chief Justice Burger still styled the fifth draft as "the opinion of the Court." In his Memorandum to the Conference, Chief Justice Burger said he had "reworked the opinion, borrowing some thoughts from the separate opinions of others."[103] Part II of the draft upholds the government's internal use of the social security number, and Part III upholds the requirement that parents provide that number to be eligible for benefits.[104] Justice Stevens immediately voted to join Part II of Chief Justice Burger's fifth draft, but noted that he "remain[ed] unpersuaded that the remaining issue–what the government can require when it already has the social security number it seeks–is ripe for review."[105] And Justice Blackmun's fourth draft of his opinion concurring in part joined only Parts I and II of Chief Justice Burger's opinion.[106] As to Part III, Justice Blackmun reiterated his view that the record did not clearly indicate whether the second social security number requirement was justiciable, but if the issue was found justiciable on remand, he would strike down the requirement under the Free Exercise Clause. Justices Powell and Rehnquist joined Chief Justice Burger's fifth draft.[107] And Justice O'Connor circulated a revised draft dissent that would uphold the government's internal use of the social security number while striking down the requirement that the parents provide the number.

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102. Fifth Draft, Opinion of Court in Bowen v. Roy (May 9, 1986) *in* Blackmun Papers, Box 437.
103. Memorandum from Burger to Conference (May 8, 1986) *in* Blackmun Papers, Box 437.
104. In a memorandum reviewing the fifth draft, Professor Sklansky observed that "[t]he Chief Justice has an interesting way of 'borrowing some thoughts from the separate opinions of others' Almost every sentence of Part II is taken virtually verbatim either from your opinion or from Justice Stevens' [sic] opinion." Memorandum from Sklansky to Blackmun (May 11, 1986) *in* Blackmun Papers, Box 437.
105. Letter from Stevens to Burger (May 9, 1986) *in* Blackmun Papers, Box 437.
106. Fourth Draft, Opinion of Justice Blackmun Concurring in Part in Bowen v. Roy (May 24, 1986) *in* Blackmun Papers, Box 437.
107. Letter from Stevens to Burger (May 9, 1986) *in* Blackmun Papers, Box 437.

After all of the votes on the fifth draft were in, the Court's voting line up on the two issues was as follows:

Constitutionality of Government's Internal Use of Social Security Number

Vacate Lower Court on Merits: 8 votes (Burger, Brennan, Marshall, Blackmun, Powell, Rehnquist, Stevens, and O'Connor)
Affirm Lower Court on Merits: 1 vote (White)

Constitutionality of the Requirement that Parents Provide their Child's Social Security Number

Vacate Lower Court on Merits: 3 votes (Burger, Powell, and Rehnquist)
Vacate Lower Court on Justiciability: 2 votes (Blackmun and Stevens)
Affirm Lower Court on Merits: 4 votes (Brennan, White, Marshall, and O'Connor)

Note also that Justice Blackmun expressed his view, albeit in an advisory manner, that requiring the parents to provide the social security number was unconstitutional. This vote line up carried through to the Court's published opinions in *Bowen*, which were released on June 11, 1986, almost a year after the Court took the case and disposed of *Jensen*.

IV. LESSONS FROM THE BLACKMUN AND POWELL PAPERS

As discussed above, before *Bowen* arrived at the Court, several justices were increasingly concerned that application of strict scrutiny to large, complex benefit programs would be cost prohibitive, threatening the programs' feasibility. To meet this threat, the Court initially applied strict scrutiny in a manner that recognized the government's bind. In cases like *Lee*, the Court concluded that if the government had an interest in creating a large, complex benefit program, it surely had a compelling interest in ensuring the program's continued operation. And if the benefit programs were large enough, and administering religious exemptions were costly enough, denying such exemptions would be necessary to preserve the program. Voila! The government had survived strict scrutiny. *Lee* left the courts to apply this calculus on a case-by-case basis.

In *Bowen*, Chief Justice Burger tried to substitute a general rule for the case-by-case determinations required by *Lee*. Instead of applying strict

scrutiny to each neutral and generally applicable benefit program, he would simply apply rational basis review. Given the large burden of such exemptions on the government, and the slim burden such benefit laws place on religious exercise, Chief Justice Burger favored a categorical approach. That approach, however, would not apply to direct prohibitions of religiously motivated conduct, such as generally applicable criminal laws, because such laws posed a greater burden on free exercise. This view attracted the support of Justices Powell and Rehnquist,[108] with five of the remaining justices in favor of continuing *Sherbert*'s case-by-case balancing approach.

Based on both published opinions and internal court documents, it is possible to count noses for the different free exercise approaches revealed by *Bowen*. First, eight justices specifically supported the idea that the Free Exercise Clause does not require the government to mold its internal operations to the requirements of specific religious beliefs. While Justice White did not write on this issue, his dissent from the Court's entire judgment implies that he did not endorse the proposition.

Second, regarding regulation of private behavior, one could say the following about the Justices' positions on the proper Free Exercise Clause test:

> Chief Justice Burger–He would apply rational basis review to generally applicable and neutral laws governing large, complex benefit programs. While he would apply more exacting judicial scrutiny to direct prohibitions of religious behavior, Chief Justice Burger did not specify what specific test ought to apply.
>
> Justice Brennan–He would apply the *Lee* case-by-case balancing approach.
>
> Justice White–Justice White's views here are difficult to determine. On the one hand, his published opinion in *Bowen* states that the case is controlled by *Sherbert* and *Thomas*, and both of those cases applied the case-by-case balancing approach. On the other hand, in *Jensen*, Justice White cast his conference vote with Chief Justice Burger's neutral and generally applicable approach, and he voted to join Chief Justice Burger's draft opinion articulating that approach.[109] Because we have no internal documents from Justice White explaining his views, we cannot reconcile this apparent contradiction.
>
> Justice Marshall–He would apply the *Lee* case-by-case balancing approach.

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108. Justice Stevens had embraced a similar approach in his opinion concurring in the judgment in *United States v. Lee*, 455 U.S. 252 (1982).

109. McGreal, *supra* note 1, at 6–8.

> Justice Blackmun–He would apply the *Lee* case-by-case balancing approach.
> Justice Rehnquist–He would apply Chief Justice Burger's approach to large, complex benefit programs. Because we have no internal writings from Justice Rehnquist, we do not know whether he would limit the neutral and generally applicable approach to large complex benefit programs, or apply that approach to all Free Exercise Clause challenges.
> Justice Powell–He would apply Chief Justice Burger's neutral and generally applicable approach to large, complex benefit programs.
> Justice Stevens–Neither his published opinion in *Bowen* nor his internal writings in that case reveal which approach he would apply. His opinion concurring in the judgment in *Lee*, along with his conference vote in *Jensen*, however, show that he had sympathy with Chief Justice Burger's neutral and generally applicable approach.
> Justice O'Connor–She would apply the *Lee* case-by-case balancing approach.

This accounting shows four votes for the case-by-case balancing approach, four votes for Chief Justice Burger's approach, with Justice White's views undetermined. In addition, we do not know whether Justices Rehnquist and Stevens would have extended the neutral and generally applicable approach beyond large, complex benefit programs.

The above observations highlight perhaps a missed opportunity in *Bowen*. Note that because Justice Blackmun voted to vacate and remand due to justiciability concerns, the Court never reached a holding on the requirement that parents provide a social security number. If, however, he had voted on the merits of that issue, the Court would have had a majority of five votes to strike down that prohibition. Justice O'Connor's opinion on that issue would have been joined by Justices Brennan, Marshall, and Blackmun, giving Justice O'Connor the plurality opinion on that issue. And if Justice White had either concurred in part of Justice O'Connor's opinion, or concurred in the judgment, she would have had a majority for continued application of the *Lee* approach, or at least for a judgment striking down the requirement. However, because Justice Blackmun withheld his vote on the merits, *Bowen* did not produce a majority judgment or rationale on the merits of that Free Exercise Clause challenge, and the Court's precedent was left in a confused state.

Four years later, the Court eliminated the confusion when it re-vamped its Free Exercise Clause jurisprudence in *Employment Division v. Smith*.[110] In

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110. Employment Div. v. Smith, 494 U.S. 872 (1990).

Bowen, Chief Justice Burger and Justice Powell were the only two justices to specifically distinguish large, complex benefit programs from direct prohibitions for purposes of Free Exercise Clause analysis. By the time of *Smith*, however, they had been replaced by Justices Antonin Scalia and Anthony Kennedy. Consequently, the only two proponents of a separate approach for large, complex benefits programs had left the Court. The voting line up in *Smith* revealed the two replacements favored applying the neutral and generally applicable test to virtually all Free Exercise Clause claims,[111] that Justice Stevens also supported this approach, and that Justice White had once again switched to this approach. The Court finally had a majority for a new approach to the Free Exercise Clause.

Of course, one could ask whether Chief Justice Burger's approach was any different from the one adopted in *Smith*. To answer this question, consider how the Court's opinion in *Smith* framed the claimant's argument: "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."[112] The challenged law is precisely the type of direct prohibition that Chief Justice Burger referenced in *Bowen* and that he suggested should get a different approach from challenges to large, complex benefits programs. Justice Powell had also showed sympathy with this approach, noting that such large, complex benefits programs could not operate if forced to grant multiple religious exemptions. A criminal prohibition, however, would be different from an administrative perspective. Crimes are prosecuted on a case-by-case basis, and so the criminal justice system is already set up to consider individual defenses and excuses–such as self-defense, necessity, or insanity–raised by each criminal defendant. The administrative rationale offered by Chief Justice Burger and Justice Powell in *Bowen* does not neatly apply to the criminal prohibition in *Smith*.

Nonetheless, five justices coalesced around a "rule of law" rationale not mentioned in either the *Bowen* opinions or the justices' internal papers: applying strict scrutiny to any generally applicable and neutral law that burdened religious exercise would brook anarchy by making each person of faith a law unto herself.[113] That is, because strict scrutiny imposes a high

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111. *Smith* explained that hybrid free exercise claims, such as when a litigant raises both the Free Exercise Clause and another constitutional right, would still receive strict scrutiny. *Id.* at 881–82. For example, a parent's religiously-based objection to compulsory schooling raised both free exercise rights as well as a fit parent's fundamental right to the care, custody, and control of their minor child. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

112. *Smith*, 494 U.S. at 878.

113. *Id.* at 879.

burden of justification on the government, it would deputize religious observers to ignore laws that conflict with their religious beliefs. To allow such claims would court chaos:

> [I]f '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,' 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–ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.[114]

And this threat could not be blunted by limiting strict scrutiny to either substantial burdens on religious exercise, or burdens on core religious practices.

> 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. It is no 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.' 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.'

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114. *Id.* at 888–89.

> 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.[115]

As the internal citation hints, this passage echoes Justice Stevens's concern in his opinion concurring in the judgment in *Lee*.[116] *Smith*, then, officially shifted the focus of Free Exercise Clause analysis from the threat to efficient administration to concerns with preservation of the rule of law and religious freedom. To maintain order and prevent government decisions on sensitive religious matters, persons of faith must endure incidental burdens on religious exercise, no matter how severe, as long as those burdens are the incidental effect of a neutral and generally applicable law.

Given what we know about *Bowen* and *Jensen*, one can ask whether *Smith* would have come out differently if a majority in either of the prior cases had endorsed *Lee* or Chief Justice Burger's more limited approach. There are at least three possible answers. First, given Chief Justice Burger's willingness to re-characterize past cases to fit his new rule, the *Smith* majority could have simply done the same to *Bowen* when establishing its new approach. Indeed, the Court has certainly been willing to re-rationalize the holdings of past cases in terms of a new rule, test, or approach adopted in a later case.[117] In that case, neither *Jensen* nor *Bowen* would have stood in the way of *Smith*'s new approach. If, however, at least one justice in the *Smith* majority would have felt the precedential pull of a *Jensen* or *Bowen* majority, the Court could have gone off in two other directions. If *Jensen* had adopted Chief Justice Burger's approach to large, complex benefits programs, that precedent might have received deference under *stare decisis*. Or if five justices in *Bowen* had endorsed *Lee*, that approach might have served as precedent in *Smith*. In either case, Free Exercise Clause jurisprudence would be more protective of religious behavior than under *Smith*'s blanket neutral and generally applicable approach.[118]

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115. *Id*. at 886–87 (internal citations omitted).

116. *See id.* and accompanying text.

117. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 198–99 (1976) (re-conceiving past Equal Protection Clause gender cases in terms of the intermediate scrutiny test announced in that case); United States v. Lopez, 514 U.S. 549, 555–64 (1995) (re-conceiving past Commerce Clause cases in terms of the categorical approach announced in that case).

118. Spinning this scenario out further, without *Smith* Congress would not have enacted the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (2007), which was Congress's attempt to overturn the Court's decision in *Smith*. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court struck down the Act as outside of Congress's enumerated powers in an opinion that reinterpreted the scope of Congress's power under section five of the Fourteenth Amendment.

In the end, current Free Exercise Clause jurisprudence may owe its existence to two historical occurrences that prevented prior majorities. In *Jensen*, Justice Powell did not participate in the case and thus could not provide a crucial fifth vote in support of Chief Justice Burger's approach. In *Bowen*, Justice Blackmun's idiosyncratic view on justiciability deprived Justice O'Connor of a fifth vote to endorse the *Lee* case-by-case approach. These happenstances, which had nothing to do with the merits of either case, left the precedential slate much cleaner for *Smith*, and so may have aided adoption of that case's third approach.

Appendix A

Timeline of *Jensen v. Quaring* and *Bowen v. Roy*

Date	Jensen v. Quaring	Bowen v. Roy
October 1, 1984	Cert. Granted	
January 7, 1985	Oral Argument	
January 7, 1985		Conference for note–held for Jensen v. Quaring
May 24, 1985	Burger's First Draft Opinion	
May 31, 1985	Blackmun's vote switch	
June 4, 1985	Powell letter to Burger	
June 17, 1985	Opinion announced	Court notes probably jurisdiction[119]
January 14, 1986		Oral argument
January 17, 1986		Conference
June 11, 1986		Opinion announced

119. Heckler v. Roy, 472 U.S. 1016 (1985).