Pepperdine Law Review

Volume 7 | Issue 3 Article 4

4-15-1980

Government Entanglement With Religion: What Degree Of Proof Is Required?

Lee Boothby

Government Entanglement With Religion: What Degree Of Proof Is Required?

LEE BOOTHBY*

Religious freedom is a fundamental right entitled to preferential treatment. The Supreme Court, in recognizing this, has imposed a stiff test on governmental action impinging on this right. the government must show a compelling state interest and that the means used in implementing its policies are the least intrusive possible. However the court has not yet discussed the degree of proof required of the state in establishing these factors. The author suggests that in light of the preferential position of religious freedom and its social impact, the standard of proof should be that of clear and convincing evidence. While the general standard for civil litigation is preponderance of the evidence, a more demanding standard is called for when restriction on liberty interests are involved. Selection of a standard of proof turns on the constitutional acceptability of an erroneous decision. The author analogizes such similar interests as denaturalization, civil commitments, deportation, discrimination, and free speech as lending support to his proposition since they are currently protected by the higher standard. He concludes that the same protection should be extended to freedom of religion.

I. INTRODUCTION

The right to practice one's own religion without interference

* Undergraduate work, Andrews University; J.D., Wayne State University, 1957; General Counsel for Americans United for Separation of Church and State Fund. Mr. Boothby has been involved in church-state conflict cases for ten years and is a recognized authority on the free exercise clause of the first amendment.

has long been recognized as a cherished and fundamental right. Indeed, the first sentence of our Bill of Rights prohibits Congress from making any law respecting an establishment of religion, or prohibiting its free exercise.[1]

It is basic that the free exercise of religion occupies a fundamental and preferred position.[2] As Professor Kauper stated: "Of all the constitutional guarantees, the protection of religious liberty has been the most exalted."[3] Chief Justice Burger, in referring to the preferential position of the first amendment, recently stated that "[t]he values enshrined in the First Amendment plainly rank high 'in the scales of our national values.' "[4]

In spite of the Court's repeated assertions revering the Free Exercise Clause of the first amendment, the individuals who laid claim to these rights rarely prevailed against the government prior to 1963.

In fact, the 1961 United States Supreme Court decision in *Braunfeld v. Brown* held that where a state regulation infringed on a "free exercise" right, the Court need only determine if the purpose and effect of the state regulation in question is to advance the state's secular goals.[5] In 1963, however, a major shift in policy was evidenced by the Supreme Court's decision in *Sherbert v. Verner*.[6] The Court in *Sherbert*, while not specifically overruling its earlier decisions, nonetheless significantly affected the application of those decisions by placing upon the state certain specific burdens of proof in cases involving the free exercise of religion.

II. THE *SHERBERT* TEST

In *Sherbert*, Adell Sherbert, a member of the Seventh-day Adventist Church, was fired from her job because her religious beliefs would not permit her to work on Saturday. Sherbert found it impossible to locate other employment which did not demand secular Saturday employment. She subsequently filed a claim for unemployment compensation benefits. The state denied her claim, determining that she was not entitled to benefits because she had not made herself available for suitable work when offered

1. U.S. CONST. amend. I.
2. Murdock v. Pennsylvania, 319 U.S. 105 (1943); Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969); Sharp v. Segler, 408 F.2d 966 (8th Cir. 1969); State v. Yoder, 49 Wis. 2d 430, 182 N.W.2d 539 (1971).
3. P. KAUPER, RELIGION AND THE CONSTITUTION 19 (1964).
4. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).
5. Braunfeld v. Brown, 366 U.S. 599 (1961).
6. 374 U.S. 398 (1963).

by the state employment office.[7]

Justice Brennan, deviating significantly from the Court's earlier ruling in *Braunfeld*, wrote that "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[8]

In *Sherbert*, the Court, in weighing the competing interests, established the proper three-part test to be used in free exercise cases:

1. Whether there was a burden imposed on the exercise of religion,[9]
2. Where such a burden was found, whether the infringement was justified by a compelling governmental interest,[10]
3. And, where a compelling governmental interest had been shown to exist, whether there was any less intrusive alternate means available to meet the state's objective.[11]

The Court made clear that every governmental interest would not overbalance a free exercise claim. The interest must be shown to involve a grave and paramount state concern.[12]

The most important change in the Court's thinking in this area was most certainly the placement of a burden *on the state* to establish: 1) that there was a compelling governmental interest involving a paramount state interest and 2) the absence of any less intrusive means whereby the state may carry out any such vital state objective.

The "least intrusive alternative" aspect of the *Sherbert* test was not a new first amendment concept. It had been previously enunciated in *Shelton v. Tucker*,[13] where the Court struck down a state statute requiring teachers to file affidavits listing the organizations to which they belonged. In *Shelton*, the Court held that even though the governmental purpose may have been legitimate and substantial, that purpose could not be attained by a means that infringed upon fundamental personal liberties if a less intrusive method of shifting means was available. The Court stated that "[t]he breadth of legislative abridgement must be viewed in

7. *Id.* at 401.
8. *Id.* at 406 (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)).
9. 374 U.S. at 403.
10. *Id.* at 406.
11. *Id.* at 407. Although the *Sherbert* test was first applied within the context of a free exercise situation, it has also been applied to a variety of other first amendment issues; *see* Women Strike for Peace v. Hickel, 420 F.2d 597, 605 (D.C. Cir. 1969); Barnett v. Rodgers, 410 F.2d 995, 1000 (D.C. Cir. 1969); Heilberg v. Fixa, 236 F. Supp. 405, 408 (N.D. Cal. 1964).
12. *Id.* at 405.
13. 364 U.S. 479 (1960).

the light of less drastic means for achieving the same basic purpose."[14]

One of the most significant post-*Sherbert* decisions is *Wisconsin v. Yoder*.[15] In this case, the Supreme Court, citing *Sherbert*, held that there must be a state interest of sufficient magnitude to override an individual claim to protection under the Free Exercise Clause: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[16]

In *Yoder*, the Court upheld the right of Amish parents to remove teenage children from the public schools and held the provisions of the state's compulsory education laws, as applied to members of the Amish religion who had graduated from the eighth grade, to be unconstitutional.

Even though the *Yoder* Court found that the state had a substantial interest in education generally, it sustained the holding of the Wisconsin Supreme Court which ruled that "[a] compelling interest is not just a general interest in the subject matter but the need to apply the regulation without exception to attain the purposes and objectives of the legislation."[17]

The *Sherbert* test, as seen in *Yoder*, remains one of continuing vitality,[18] and its possible application in instances of governmental intrusion into church *institutional* affairs poses an interesting question.

III. Application of the *Sherbert* Test to Governmental Intrusion into Church Institutional Affairs

There is currently a substantial fear among many church leaders that state and federal governments are devising new and varied means to determine the particular purposes of individual churches and to define what is secular and what is religious. Moreover, the fear exists among these church leaders that government is attempting to thrust itself into purely ecclesiastical concerns.

A recent example of government activity which provokes such fears involved an attempt by the National Labor Relations Board to assert jurisdiction over Roman Catholic lay teachers.[19] Other

14. *Id.* at 488.
15. 406 U.S. 205 (1972).
16. *Id.* at 215.
17. State v. Yoder, 49 Wis. 2d 430, 438, 182 N.W.2d 539, 542 (1972).
18. L. Tribe, American Constitutional Law, 851-65 (1978).
19. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

examples include labor department directives requiring states to include church operated schools within its unemployment compensation program[20] and legislation applying restrictions and disclosure provisions to churches in their fund solicitation programs.[21]

In the recent case of *Surinach v. Pesquera de Busquets*,[22] the Department of Consumer Affairs of Puerto Rico, in accordance with its mandate to restrain inflationary trends, launched an investigation of the costs of private schools, including those operated by the Roman Catholic Church. The government subpoened detailed financial records from the Catholic schools. The Inter-Diocesan Secretariat for Catholic Education of Puerto Rico and school superintendants refused to comply and brought suit. The plaintiffs sought to have the Secretary permanently enjoined from "interfering, meddling, or entangling with or in the financial affairs of the Roman Catholic Church."[23]

Presiding Judge Coffin, writing the court's opinion in *Surinach*, stated that the Commonwealth had "failed to shoulder its substantial burden of justifying" its encroachment into church affairs.[24] In *Surinach*, the court applied the *Sherbert* test to a case where the claimed conflict with first amendment rights involved the church as a corporate body, and not just the free exercise claim of an individual. Significantly, it applied this test not only to free exercise claims but also to claims of state entanglement. The court stated:

> Given our conclusion that the Secretary's demands for financial data of these schools both burden the free exercise of religion and pose a threat of entanglement between the affairs of the church and state, the Commonwealth must show that 'some compelling state interest' justifies that burden, and that there exists no less restrictive or entangling alternative. This demanding level of scrutiny also is required here because of the vehicle of regulation chosen by the Department-compelled disclosure which implicates First Amendment rights.[25]

The decision in *Surinach* should have substantial impact in instances where the state asserts authority to control the financial affairs of a church and demands carte blanche to obtain financial

20. U.S. Dept. of Labor, *Unemployment Insurance Program Letter No. 39-78.*

21. Valente v. Larsen, No. 4-78-453 (D. Minn. 1979); Heritage Village Church v. North Carolina, 40 N.C.App. 429, 253 S.E.2d 473 (1979), *aff'd*, 48 U.S.L.W. 2640 (1980).

22. Surinach v. Pesquera de Busquets, 604 F.2d 73 (1st Cir. 1979).

23. *Id.* at 75.

24. *Id.*

25. *Id.* at 79 (citations omitted).

records. The court warned that compelled disclosure has the potential for substantially infringing upon the exercise of first amendment rights. The court also stated that when there is compelled disclosure, such state action can not be justified by a mere showing of some legitimate governmental interest but that "the subordinating interest of the State must survive exacting scrutiny."[26]

Thus, the *Sherbert* test has been applied to the individual claims under the Free Exercise Clause and to church institutional claims of government encroachment into church affairs.

IV. Degree of Proof Required in Cases Arising Under Religion Clauses of the First Amendment

When the state infringes upon rights arising under the religious clauses of the first amendment, a question arises regarding the standard of proof constitutionally required for the state to prove the existence of a compelling state interest and that the actions of the state are the least intrusive alternative. While the Supreme Court has held that the due process required by the fifth and fourteenth amendments means that certain procedural protections must be granted to persons who may, in a non-criminal case, suffer a loss of either liberty or property interest which is within the ambit of the fifth or fourteenth amendment, the Court has never specified the particular standard of proof constitutionally required before the state can deprive an individual of such interests. It is submitted that the first and fourteenth amendments to the United States Constitution require *clear and convincing proof* from the government that a compelling state interest exists and that the governmental action is the least intrusive alternative available.

V. Due Process Analytical Framework

Several Supreme Court decisions[27] have provided an analytical framework for ascertaining the procedural protections necessary where the loss of a liberty or property interest is threatened. In its analysis of whether any due process protection is required, the Court has utilized a two-step process of reasoning. First, it must initially be determined whether a protectable interest exists and whether the individual will suffer a "grievous loss" to an interest

26. *Id.*

27. Wolff v. McDonnell, 418 U.S. 539 (1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). (*Morrissey* was explicit in its use of this framework).

"within the contemplation of the 'liberty or property' language of the fourteenth amendment."[28] If such an interest is involved, the Court proceeds to the second stage of the analysis and considers which procedural protections are required. This involves the determination "of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."[29] The procedure chosen should reflect a balance of these factors to insure that "fundamental fairness" is achieved.

In determining whether procedural due process is required, the Court in *Board of Regents v. Roth*[30] stated that "we must look not to the 'weight' but to the *nature* of the interest at stake. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property."[31] The first amendment's guarantees concerning religion are clearly within the protection provided by the fourteenth amendment, since the Due Process Clause has been held to protect the rights to the free exercise of religion[32] and the non-establishment of religion.[33] Indeed, the Court in *Roth*, quoting a lengthy list of freedoms enumerated in *Meyer v. Nebraska*,[34] specifically included an individual's freedom "to worship God according to the dictates of his own conscience" as within the liberty protected by the fourteenth amendment.[35]

Because deprivation of one's first amendment rights triggers an individual's entitlement to due process, it becomes necessary to determine which specific procedures are required by the right. The decision regarding the necessary standard of proof should reflect the nature of the liberty interest which is subject to deprivation, as well as the interest of the state and others who may be involved.

The Supreme Court recently discussed the function of a standard of proof in *Addington v. Texas*:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the fact

28. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (citing Fuentes v. Shevin, 407 U.S. 67 (1972)).
29. 408 U.S. at 481.
30. 408 U.S. 471 (1972).
31. 408 U.S. at 471 (citations omitted). In *Roth* the Supreme Court made clear that it is improper to rely upon balancing to decide whether the right is applicable.
32. Cantwell v. Connecticut, 310 U.S. 296 (1940).
33. Everson v. Board of Education, 330 U.S. 1 (1947).
34. 262 U.S. 390, 399 (1921).
35. Board of Regents v. Roth, 408 U.S. at 572.

> finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.[36]

In addressing the question of the applicable standard of proof in a particular proceeding, Justice Douglas, in his dissenting opinion in *Murel v. Baltimore City Criminal Court*,[37] noted that the allocation and degree of burden of proof is determined by the nature of the rights implicated in the lawsuit. He quoted *Speiser v. Randall*, in which first amendment rights were at issue:

> There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant [sic] his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading in the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt.[38]

VI. The "Clear and Convincing Proof" Standard

In general, the required standard of proof in civil litigation is a mere preponderance of the evidence. Since civil cases typically involve disputes between private parties, the preponderance standard is appropriate because "society has a minimal concern with the outcome of such private suits, . . ."[39]

Yet for certain issues courts have required a higher degree of proof than a preponderance of the evidence—clear and convincing proof. This is a standard used in unusual civil cases where, for exceptional reasons—such as the difficulty of proof of an issue or a reason to be distrustful of a particular party—a higher standard than normally imposed is required.[40]

VII. "Clear and Convincing Proof" and Individual Liberties

In addition to the above situations, this more demanding stan-

---

36. 441 U.S. 418, 423 (1979) (citations omitted).

37. 407 U.S. 355 (1972).

38. *Id.* at 362. (Douglas, J., dissenting), quoting from Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

39. Addington v. Texas, 441 U.S. at 423.

40. "Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases." Cross v. Ledford, 161 Ohio St. 469, 477, 120 N.E.2d 118, 123 (1954), footnoted in Hobson v. Eaton, 339 F.2d 781, 784 (6th Cir. 1968).

dard has also been imposed in situations where the various interests of society are pitted against restrictions on the liberty of the individual. The Supreme Court has used this standard of proof "to protect particularly important individual interests in various civil cases."[41]

A. Denaturalization, Expatriation, and Deportation

The Supreme Court has held that in denaturalization, expatriation, and deportation hearings in the area of citizenship and immigration, the government must prove its allegations by *clear, unequivocal*, and *convincing evidence*.[42] In the first of these decisions, involving denaturalization, the Court explained its reasoning, stating that "rights once conferred should not be lightly revoked. And more especially is this true when the rights are precious and when they are conferred by solemn adjudication, as is the situation where citizenship is granted."[43]

In a later decision involving the deportation of aliens, the Court rejected the contention that because such proceedings are civil, "a person may be banished from this country upon no higher degree of proof than applies to a negligence case."[44] In light of the "drastic deprivations" that may follow a deportation, the Court held the higher standard of clear, unequivocal, and convincing proof to be necessary.[45]

B. Civil Commitment

In a recent opinion, the Supreme Court has held that a clear and convincing standard of proof is required by the fourteenth amendment in a civil proceeding brought under state law to involuntarily commit an individual to a state mental hospital for an indefinite period.[46] Such a standard was required because the individual's liberty interest in the outcome of a civil commitment proceeding is of greater weight and gravity than the state's interest in providing care to its citizens with emotional disorders and

41. Addington v. Texas, 441 U.S. at 453.
42. Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966) (expatriation); Schneidermann v. United States, 320 U.S. 118 (1943) (denaturalization).
43. Schneidermann v. United States, 320 U.S. at 125.
44. Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 285 (1966).
45. *Id.*
46. Addington v. Texas, 441 U.S. at 423.

in protecting the community from potentially dangerous mentally ill persons. The Court noted that the "individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."[47] It recognized that in cases involving individual rights, the standard of proof reflects the value society places on individual liberty, regardless of whether a case is criminal or civil.[48]

C. Equal Protection and Racial Discrimination

The principle is well-established that where a history of racial discrimination is shown to exist, the burden of showing nondiscrimination in particular situations shifts to the party having the power to produce the facts.[49] In two critical areas, public education and private employment, courts have held that this burden of showing nondiscrimination can only be met by the presentation of "clear and convincing evidence."

For example, when a plaintiff alleges that conduct of a school system is racially-motivated, a prima facie case of violation of substantive constitutional rights under the equal protection clause is shown if the system has a history of racial discrimination. The burden then shifts to the school authorities, who must rebut the prima facie case by showing by clear and convincing evidence that permissible, racially neutral criteria governed their conduct.[50]

Likewise, numerous cases which have dealt with the issue of racial discrimination in private employment have established that a prima facie showing of past discrimination shifts the burden to the employer to prove that a particular person or class of persons would have been denied the contested job, promotion, transfer, etc., absent racial discrimination. "And those courts which have given the most careful consideration to the burden of proof ques-

47. *Id.* at 427.

48. The United States Court of Appeals for the District of Columbia has required the "beyond a reasonable doubt" standard in such cases. *See In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973).

49. *See* Rolfe v. County Board of Education of Lincoln County, Tennessee, 391 F.2d 77 (6th Cir. 1968); Chambers v. Hendersonville Bd. of Educ., 364 F.2d 189 (4th Cir. 1966).

50. *See generally* Keyes v. Denver School Dist., 413 U.S. 189 (1973); Reynolds v. Abbeville County School Dist., 554 F.2d 638 (4th Cir. 1977); Barnes v. Jones County School Dist., 544 F.2d 804 (5th Cir. 1977); Jones v. Pitt County Bd. of Educ., 528 F.2d 414 (4th Cir. 1975); Alexander v. Warren School Dist., 464 F.2d 471 (8th Cir. 1972); Wall v. Stanley County Bd. of Educ., 378 F.2d 275 (4th Cir. 1967); Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189 (4th Cir. 1966); Baker v. Columbus Municipal Separate School Dist., 329 F. Supp. 706 (N.D. Miss. 1971); Williams v. Kimbrough, 295 F. Supp. (W.D. La. 1969).

tion have held that the employee must prevail unless the employer proves its case by clear and convincing evidence."[51]

D. First Amendment Rights

The clear and convincing standard is not foreign to cases concerned with first amendment liberties. In *Rosenbloom v. Metromedia*,[52] a plurality of the Supreme Court held that proof of libel required clear and convincing evidence due to the important first amendment issues involved. It found that an erroneous verdict for the plaintiff in a libel case was most serious because the possibility of such an error "would create a strong impetus toward self-censorship which the First Amendment cannot tolerate."[53] The Court concluded that the safeguarding of important first amendment rights necessitated a more rigorous standard of proof:

> We thus hold that a libel action by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon *clear and convincing proof* that the defamatory falsehood was published with knowledge that it was false with reckless disregard of whether it was false or not.[54]

This holding in *Rosenbloom* was consistent with the earlier Supreme Court case of *New York Times Co. v. Sullivan*.[55] In the *New York Times* case, the Court, concerned with the defamation of a public figure, found that the proof presented to show actual malice lacked "the convincing clarity which the constitutional standard demands."[56]

In his concurring opinion in a decision which found an Alabama law on obscenity to be facially unconstitutional in both civil and criminal aspects, Justice Brennan argues that the hazards to first amendment freedoms inherent in the regulation of obscenity necessitate that the state comply with the most demanding standard of proof beyond a reasonable doubt in a civil proceeding. "Inher-

51. Day v. Matthews, 530 F. 2d 1083, 1085 (D.C. Cir. 1976). *See also* Seven-Up Bottling Co. v. Seven-Up Co., 561 F.2d 1275 (8th Cir. 1977); Stewart v. General Motors Corp., 542 F.2d 445 (7th Cir. 1976); United States v. United States Steel Corp., 520 F.2d 1043 (5th Cir. 1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Johnson v. Goodyear Tire and Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033 (1974); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972).

52. 403 U.S. 29 (1971).

53. *Id.* at 40.

54. *Id.* at 52 (emphasis added).

55. 376 U.S. 254 (1964).

56. *Id.* at 285.

ent in all factfinding procedures is the potential for erroneous judgments and, when First Amendment values are implicated, the selection of the standard of proof of necessity implicates the relative *constitutional* acceptability of erroneous judgments."[57] Justice Brennan found that inherent in the increased likelihood of error resulting from a preponderance of the evidence standard are the dangers of "the likelihood of self-censorship and the erroneous proscription of constitutionally protected material."[58] Such dangers are just as likely in civil as in criminal regulation, and the "beyond a reasonable doubt" standard is thus necessary to reduce the hazards to first amendment freedoms to a tolerable level.[59]

It can be readily seen that clear and convincing proof is the standard required to sustain claims which have serious consequences or harsh or far-reaching effects.[60] In institutional free exercise of religion cases, when the Court is dealing with the weighing of evidence submitted by the government to sustain its burdens of proof under the *Sherbert* test, no quantum of proof is appropriate other than the clear and convincing standard. This is because the Court is dealing with a claim which holds a preferred position and has far-reaching social consequences. It is the only standard that fits the requirements of close scrutiny mandated by the religion clauses of the first amendment.

VIII. CONCLUSION

In a case involving either government infringement of free exercise rights or state intrusion into church institutional concerns, a heavy burden of proof falls upon the government to establish the existence of a compelling state interest and the absence of any less violative method of attaining the government's objectives.

It is clear that the government cannot meet the burden imposed upon it by *Sherbert* by simply asserting the existence of some generally recognized interest which the state has over the subject matter. As Professor Tribe has stated:

> In applying the least intrusive alternative-compelling interest requirement, it is crucial to avoid the error of equating the state's interest in denying an exemption with the state's usually much greater interest in maintaining the underlying rule or program for unexceptional cases. Only the first interest—that in denying an exemption—is constitutionally relevant when an exemption is sought.[61]

The courts have not yet discussed the degree of proof which is

57. McKinney v. Alabama, 424 U.S. 669, 684 (1976) (Brennan, J., concurring).
58. *Id.* at 687.
59. *Id.*
60. United States v. Bridges, 133 F. Supp. 638, 641 (N.D. Cal. 1955).
61. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 855 (1978).

required in applying the *Sherbert* test. It is submitted, however, that only the clear and convincing standard is suitable for permitting the infringement or intrusion by the state into religious matters protected by the religion clauses of the first amendment.

This degree of proof should be unequivocally required of the government whenever it seeks to thrust the power of the state into this sensitive and delicate area of constitutional concern. Government should not be permitted to enter this sacred domain without the same type of showing required when other precious rights are at stake.

The application of the *Sherbert* test, coupled with a high standard of proof, is the best protection against a government that, from time to time, may lose sight of the fact that its most compelling governmental concern should be to insure the protection of those rights guaranteed by the Bill of Rights.