

RELIGIOUSLY-BASED SOCIAL SECURITY
EXEMPTIONS: WHO IS ELIGIBLE, HOW DID THEY
DEVELOP, AND ARE THE EXEMPTIONS
CONSISTENT WITH THE RELIGION CLAUSES
AND THE RELIGIOUS FREEDOM RESTORATION
ACT (RFRA)?

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Since the inception of social security in 1935, Congress has provided a number of religiously-based exemptions to the social security system. This Article describes the exemptions and their historical development, and analyzes the exemptions in light of the Religion Clauses and the Religious Freedom Restoration Act of 1993 (RFRA). It concludes that the exemptions are constitutionally permissible under the Religion Clauses, but that the exemptions do not comport with the requirements of RFRA. It identifies inequities in the current regime and recommends modest changes that would both enhance the coherence and equity of the exemption system, and bring it into compliance with RFRA.

I. INTRODUCTION

When King Nebachadnezzar of Babylon impressed the best and brightest young men from Judah into his service during their exile, he ordered for them a strict regimen of training, including eating from the King's own table.¹ Daniel, not wanting to defile himself, asked for vegetables and water instead of the King's food and wine.² The King's

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1. *Daniel* 1:1-1:5.
2. *Id.* at 1:8-1:13.

court granted Daniel a ten-day trial period, during which his health and well-being would be evaluated.³ At the end of the ten-days, Daniel's health was superior to those on the King's diet, and he was granted an exemption from the dietary requirements.⁴

This biblical history provides an example of the delicate balancing of regulation existing for the benefit of the people, and certain people desiring exemptions from the regulations in order to abide by their religious faith.⁵

There are parallels to this biblical example in the current regime of religiously-based social security⁶ exemptions. Ministers, members of religious orders, Christian Science practitioners and members of certain religious faiths may receive an exemption from social security taxes based on a religious or conscientious objection.⁷ This article will first review the current law granting exemption for these groups. It will next review the historical development of these exemptions in light of the overall expansion of the social security program to show the ad hoc approach Congress took in granting these religiously-based exemptions. It will then analyze the constitutionality of the exemptions under the Establishment Clause and Free Exercise Clause, and its legality under RFRA. The article concludes that the exemptions are constitutional, but fail to meet the requirements of RFRA. It then recommends modest changes in the law to improve the equity and coherence of the exemptions.

II. CURRENT REQUIREMENTS FOR EXEMPTION

This section discusses the types of individuals who are eligible for an exemption from social security taxes; ministers, Christian Science practitioners and members of certain religious faiths.⁸ It also describes the criteria each individual must meet in order to qualify for an exemption.

A. *Ministers*

In order to qualify for an exemption from social security tax on

3. *Id.* at 1:14.

4. *Id.* at 1:15-1:21.

5. *See id.* at 1:1 – 1:21.

6. *See* Social Security Act of 1935, § 531, Pub. L. No. 74-271, 49 Stat. 620 (codified in scattered sections of 26 U.S.C. and 42 U.S.C. (1994)).

7. 26 U.S.C. § 1402(e)(1) (1994).

8. *See id.*

income received in the performance of his ministry, a minister must be a duly ordained, commissioned, or a licensed minister of a church.⁹ Within two tax years of first earning more than \$400 of self-employment income, any of which was in the performance of ministerial duties, the minister must file an application for exemption from the tax.¹⁰ The minister must file, with his application, a statement that he is either religiously or conscientiously opposed to public insurance that would pay benefits in the event of death, disability, old-age, retirement, or medical necessity.¹¹ He must further notify his licensing, ordaining, or commissioning body that he is either religiously or conscientiously opposed to such insurance and that he will request an exemption from the insurance.¹² The exemption only applies to tax on income received from ministerial services.¹³ He must still pay social security tax on other income he receives.¹⁴ The exemption will only be granted after the Commissioner of Social Security conducts an inquiry.¹⁵ The Commissioner must determine that the minister applying for the exemption is aware of the religious or conscientious objection requirements and that the minister is seeking the exemption for appropriate reasons.¹⁶

*B. Members of Religious Orders*¹⁷

The requirements for members of religious orders who have not taken a vow of poverty are the same as for ministers.¹⁸ They developed concurrently and identically.¹⁹

9. *Id.* See also *Wingo v. Comm'r*, 89 T.C. 922 (1987).

10. 26 U.S.C. § 1402(e)(3) (2001).

11. 26 U.S.C. § 1402(e)(1) (2001).

12. *Id.*

13. See *id.*; see also *Templeton v. Comm'r*, 719 F.2d 1408, 1411-12 (7th Cir. 1983) (denying exemption for minister of "Bible Believing Christian[s]" because income was not derived from performance of ministerial duties); *Seward v. United States*, 515 F. Supp. 505 (D. Md. 1981) (denying exemption for a dentist with an Honorary Doctor of Divinity degree).

14. See *Templeton*, 719 F.2d at 1411-12; *Seward*, 515 F. Supp. at 508.

15. 26 U.S.C. § 1402(e)(2) (2001).

16. *Id.*

17. There is nothing in the Congressional Record to indicate who is included in this class, other than to identify that the class includes approximately 160,000 members. See S. REP. NO. 83-1987 (1954), reprinted in 1954 U.S.C.C.A.N. 3710, 3718.

18. See 26 U.S.C. § 1402(e) (2001).

19. See *infra* notes 44-104 and accompanying text.

*C. Christian Science Practitioners*²⁰

A Christian Science practitioner must file an application for exemption in the same manner as a minister or a member of a religious order.²¹ He must state that he is either religiously or conscientiously opposed to receiving public insurance,²² and he must file the application for exemption within the same time limits as ministers.²³ Christian Science practitioners are not required to notify their church of their application for exemption.²⁴ The Commissioner's verification procedures prior to granting the exemption are the same as for ministers or members of religious orders.²⁵

D. Members of Certain Religious Faiths

A self-employed individual may file an application for a social security tax exemption if he is a member of a recognized sect. The individual must also adhere to the established tenets of the sect, which cause him to conscientiously oppose the acceptance of benefits of public or private insurance that pay in the event of death, disability, old-age, retirement, or medical necessity.²⁶ The individual must also waive all future benefits under social security.²⁷ The Commissioner of Social Security must find that the sect has such tenets, the sect makes provision for its members during periods of dependency, and the sect has existed since December 31, 1950.²⁸ If an employer and employee are both members of religious orders satisfying the requirements described above, then both the employer's and employee's share of social security taxes may be exempted.²⁹

III. HISTORICAL DEVELOPMENT OF SOCIAL SECURITY AND EXEMPTIONS

This section traces the historical development of the social security exemptions in light of the ever-expanding coverage of social security.

20. This term is not defined in the Congressional Record.

21. See 26 U.S.C. § 1402(e)(1).

22. *Id.*

23. See 26 U.S.C. § 1402(e)(3).

24. See 26 U.S.C. § 1402(e)(1).

25. See 26 U.S.C. § 1402(e)(2).

26. 26 U.S.C. § 1402(g)(1) (2001).

27. 26 U.S.C. § 1402(g)(1)(B).

28. 26 U.S.C. § 1402(g)(1)(C)-(E).

29. See 26 U.S.C. § 3127(a) (2001).

A. *The Social Security Act of 1935 and its Exemptions: 1935-1956*

Congress approved the Social Security Act on August 14, 1935, during the height of the Great Depression.³⁰ The purpose of the statute was to provide a security net to a large portion of the workforce in America by requiring employers and employees to pay a tax on the income of the employees.³¹ In the original Act, Congress excluded several types of employees from the social security program:³² ministers working for a church,³³ agricultural workers, domestic service workers, workers providing casual labor not in the course of the employer's trade, those providing service on a vessel, government workers, and employees working for non-profit charitable, scientific, literary, educational, or abuse-prevention organizations.³⁴

1. Expansion of Social Security to the Self-Employed

In 1954, Congress expanded the social security program to include certain self-employed workers.³⁵ Congress initially considered allowing self-employed workers to participate on an individual, voluntary basis,³⁶ but eventually concluded that voluntary participation in the system would be unfair to those required to participate and would create instability in the funding of the program.³⁷ Moreover, since social security benefits may accrue disproportionately for those who enter the system later in their working years, there would be a disincentive to electing coverage earlier in a worker's life.³⁸

Congress ultimately determined which self-employed workers would be included in the social security system on a group by group basis.³⁹ Specifically, Congress ascertained whether certain self-employed occupational groups preferred inclusion or exclusion in the program.⁴⁰ As a result of this inquiry, Congress determined that fishermen, domestic workers, and more state government workers would be included in the social security system, while other groups, such as

30. See Social Security Act of 1935.

31. See § 1, 49 Stat. at 620.

32. See § 210(b)(7), 49 Stat. at 625.

33. See *id.*

34. See § 210(b), 49 Stat. at 625.

35. See S. REP. NO. 83-1987, reprinted in 1954 U.S.C.C.A.N. 3710, 3711.

36. See *id.*

37. See *id.*

38. See *id.*

39. See *id.*

40. See *id.*

farmers, doctors, dentists, lawyers, and architects, would be excluded in accordance with their preference.⁴¹

2. Religious Objections and Congressional Response

Many religious organizations argued that forcing churches to participate in the social security program as employers would violate the established principle of separation of church and state.⁴² They further argued that individual ministers should be allowed to exempt themselves from coverage on grounds of conscience.⁴³

In response, Congress established an exception for ministers, members of religious orders and Christian Science practitioners to the “all or nothing” participation scheme that applied to other self-employed groups.⁴⁴ Instead, Congress allowed ministers, members of religious orders and Christian Science practitioners to elect to participate in the social security system on an individual and voluntary basis⁴⁵ by treating the income they received in the performance of their ministries as self-employment income.⁴⁶ By treating the income that ministers, members of religious orders and Christian Science practitioners received from ministry as self-employment income, churches and religious orders would not have to pay employment taxes.

A minister, member of a religious order or a Christian Science practitioner had two years, after he became a minister, a member of a religious order, or a Christian Science practitioner, to make an irrevocable election to participate in the social security system.⁴⁷

B. Continued Expansion and Continued Exemptions: 1956-1971

In 1956, Congress, believing that coverage should be nearly universal,⁴⁸ again expanded coverage of the social security program.⁴⁹ The distinctions between types of self-employed professionals who were included and excluded was based, at least in part, on polling data and lobbying that indicated a desire on the part of certain groups to be

41. See S. REP. NO. 83-1987, reprinted in 1954 U.S.C.C.A.N. 3710, 3712-13.

42. *Id.* at 3718.

43. *Id.*

44. See *id.* at 3711

45. See *id.*

46. See Social Security Amendments of 1954, Pub. L. No. 83-761, § 210(d), 68 Stat. 1052, 1054 (1954).

47. See S. REP. NO. 83-1987, reprinted in 1954 U.S.C.C.A.N. 3710, 3718.

48. See S. REP. NO. 84-2133 (1956), reprinted in 1956 U.S.C.C.A.N. 3877, 3878.

49. See Social Security Amendments of 1956, Pub. L. No. 84-880, 70 Stat. 807(1956).

included in the social security program.⁵⁰ As social security coverage was expanded to include a group of workers, the group was included en masse based on Congress' belief that the group desired coverage.⁵¹ In the Social Security Amendments of 1956,⁵² Congress expanded coverage to include lawyers, dentists, chiropractors, veterinarians, naturopaths, and optometrists.⁵³ Congress also made coverage available, on a voluntary basis, to American ministers in foreign countries whose congregations were predominantly comprised of Americans.⁵⁴ Physicians and Christian Science practitioners remained excluded from compulsory coverage, although Christian Science practitioners could elect coverage in the same way a minister could.⁵⁵

In 1957, Congress extended the two-year deadline for filing waiver certificates by ministers, members of religious orders and Christian Science practitioners for another two years.⁵⁶ Members of Congress concluded that many ministers wanted coverage but failed to file the required waiver certificates in time due to misinformation, misunderstanding, or a lack of knowledge of the law.⁵⁷

In 1960, Congress expanded coverage of the Social Security system to include a larger pool of employees.⁵⁸ Congress also extended the deadline for filing a waiver certificate to elect coverage under social security for ministers, members of religious orders and Christian Science practitioners by another two years to April 15, 1962.⁵⁹ A minister, member of a religious order, or a Christian Science practitioner could still receive coverage if he paid the self-employment taxes that would have been due in the previous years.⁶⁰ Of 200,000 eligible ministers, members of religious orders, or Christian Science practitioners, about 140,000 had filed waiver certificates to elect coverage under social security.⁶¹

50. See S. REP. NO. 84-2133, reprinted in 1956 U.S.C.C.A.N. 3877, 3883.

51. See *id.* at 3878.

52. See Social Security Amendments of 1956.

53. See S. REP. NO. 84-2133 (1956), reprinted in 1956 U.S.C.C.A.N. 3877, 3931.

54. See *id.* at 3932.

55. See *id.* at 3931.

56. See Act of Aug. 30, 1957, Pub. L. No. 85-239, 71 Stat. 521 (1957).

57. See S. REP. NO. 85-989 (1957), reprinted in 1957 U.S.C.C.A.N. 1768, 1770. Congress also decided to treat the rental value of parsonages as self-employment income for both contributions to social security and eligibility for benefits for those ministers electing coverage under the system. *Id.* at 1771.

58. See Social Security Amendments of 1960, Pub. L. No. 86-778, 74 Stat. 924 (1960).

59. See S. REP. NO. 86-1856 (1960), reprinted in 1960 U.S.C.C.A.N. 3608, 3631.

60. See *id.*

61. *Id.*

In 1961, Congress expanded coverage to survivors of certain deceased ministers and Christian Science practitioners.⁶² Congress allowed the estate of a minister, member of a religious order, or Christian Science practitioner to file a waiver certificate on the deceased party's behalf, so long as the party died between September 13, 1960 and April 15, 1962.⁶³ This would provide coverage for the decedent's dependents.⁶⁴

In 1964, Congress gave another extension to ministers who missed the previous two-year deadline.⁶⁵ Congress extended the time period during which ministers, members of religious orders and Christian Science practitioners could file a waiver certificate to April 15, 1965. As long as they filed a waiver certificate by that date, it would be effective beginning with the 1962 tax year.⁶⁶

In 1965, Congress expanded social security coverage to include self-employed physicians, medical and dental interns, and more state and local government employees, as well as certain new types of income such as cash tips.⁶⁷ The stated purpose of covering cash tips was to give greater protection under social security.⁶⁸ Physicians were the last significant professional, self-employed group to be excluded from coverage.⁶⁹ The Senate Report accompanying this 1965 legislation concluded: "The committee knows of no single reason why this single professional group should continue to be excluded. It runs counter to the general view that coverage should be as universal as possible."⁷⁰ Further, over half of the physicians had already received social security credits from other employment or military service outside of their self-employed private practice.⁷¹

1. An Exemption for Members of Certain Religious Faiths

Even in the midst of ever-expanding coverage for other types of workers, in 1965, Congress granted an exemption to certain religious

62. See Social Security Amendments of 1961, Pub. L. No. 87-64, 75 Stat. 131 (1961).

63. See S. REP. NO. 87-425 (1961), reprinted in 1961 U.S.C.C.A.N. 1855, 1901.

64. See *id.*

65. See Act of October 13, 1964, Pub. L. No. 88-650, 78 Stat. 1075 (1964).

66. See S. REP. NO. 88-1516 (1964), reprinted in 1964 U.S.C.C.A.N. 3951, 3954.

67. See Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965).

68. See S. REP. NO. 89-404 (1965), reprinted in 1965 U.S.C.C.A.N. 1943, 2052. This provision also, incidentally, provided a greater tax base for the government.

69. See S. REP. NO. 89-404, reprinted in 1965 U.S.C.C.A.N. 1943, 2051.

70. *Id.*

71. See *id.*

groups who were opposed to insurance.⁷² Congress granted an exemption from self-employment taxes for members of religious sects if: the member had a conscientious objection to insurance based on the teaching of the sect,⁷³ the sect was in continuous existence since December 31, 1950, and had a history of providing for its dependent members.⁷⁴

The premise that only self-employed individuals who met the criteria would be eligible for the exemption was based on the assumption that these types of people, such as Old Order Amish, limited their work to farming and other forms of self-employment.⁷⁵

The objections of the individual and the sect that the statute recognized were objections to private or public insurance for death, disability, retirement, or medical treatment.⁷⁶ The individual also had to waive his or her right to all future benefits in order to qualify for the exemption.⁷⁷ Any individual who was already entitled to benefits or who, through his participation in the social security system had secured for another person an entitlement to benefits, was not eligible for the exemption.⁷⁸ Congress concluded that an exemption on an individual basis would only be appropriate when the individual could not accept the insurance without violating the basic tenets of his religion.⁷⁹ Congress feared that any further voluntary coverage would undermine the soundness of the system.⁸⁰

Congress also allowed survivors of ministers, members of religious orders, or Christian Science practitioners to file a waiver certificate on their behalf if the minister, member of a religious order, or Christian Science practitioner had paid self-employment taxes properly, but had failed to file a proper waiver certificate. This would allow their dependents to receive benefits. Congress also allowed ministers, members of a religious order, or Christian Science practitioners who had filed a timely waiver to file a supplemental waiver certificate by April 16, 1967.⁸¹ This supplemental waiver provided retroactive coverage for those years after 1954 where the minister, member of a religious order,

72. See Social Security Amendments of 1965.

73. See S. REP. NO. 89-404, *reprinted in* 1965 U.S.C.C.A.N. 1943, 2055.

74. See *id.*

75. See *id.* at 2056.

76. See *id.* at 2055.

77. See *id.*

78. See *id.*

79. See S. Rep. No. 89-404, *reprinted in* 1965 U.S.C.C.A.N. 1943, 2056.

80. See *id.*

81. See *id.* at 2058-59.

or Christian Science practitioner had reported earnings for social security.⁸²

2. The Dramatic Shift of 1967

In 1967, Congress radically changed the social security coverage rules for ministers, members of religious orders, and Christian Science practitioners.⁸³ Congress changed the coverage from voluntary, with an option to file a waiver certificate to participate in the program, to compulsory, with an option to file an exemption certificate based on conscientious or religious objection to the coverage.⁸⁴ Those claiming an exemption could assert either their own personal religious objection or that of their church, but the objection had to be religious in nature.⁸⁵ Ministers who were not currently participating in the program would have until April 15, 1970 to obtain an exemption. New ministers entering the ministry in 1969 or later would have until the due date of their second tax return to obtain an exemption.⁸⁶ The effect of the change was that coverage was still considered voluntary, since a minister could elect not to be included in the social security system.⁸⁷ A minister who had previously filed a waiver certificate was not eligible for an exemption.⁸⁸

C. Additional Expansion and Additional Exemption: 1972-1987

In 1972, Congress expanded coverage again,⁸⁹ allowing coverage for members of religious orders who had taken a vow of poverty, if the religious order made an irrevocable election for its entire active membership and lay employees.⁹⁰

In 1977, Congress again expanded coverage to include more State and local government employees on a compulsory basis⁹¹ and employees of non-profit organizations.⁹² Coverage of a non-profit organization's employees was previously available only if the employer

82. *See id.* at 2059.

83. *See* Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821 (1967).

84. *See* S. REP. NO. 90-744 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2834, 2887-88.

85. *See id.*

86. *See id.* at 2888.

87. *See id.*

88. *See id.* 3067

89. *See* Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (1972).

90. *See* H.R. REP. NO. 92-231 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4989, 5045-46.

91. *See* Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509 (1977).

92. *See* H.R. REP. NO. 95-702 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4155, 4166-67.

filed a certificate requesting coverage.⁹³ Congress also allowed a minister, member of a religious order who had not taken a vow of poverty, or a Christian Science practitioner who had filed a certificate for exemption to revoke his exemption as long as he filed it before he became eligible for benefits and it was within one taxable year of the date of effectiveness.⁹⁴

In 1983, Congress expanded coverage of social security to all new federal employees including the President, Vice-President, Members of Congress, certain appointees and Federal judges.⁹⁵ The Senate attempted, but failed, to exempt employee wages (along with self-employment income) of individuals who were already exempt from self-employment taxes based on their membership in a religious sect that conscientiously opposed insurance.⁹⁶ This would have applied to both the employee and employer portions of the social security tax.⁹⁷ The Senate also attempted to change the structure of social security taxation of ministers.⁹⁸ They proposed to allow churches and their ministers to elect to pay taxes as employees and employers rather than ministers paying the taxes as self-employed individuals.⁹⁹ This also failed.¹⁰⁰

In 1986, Congress allowed ministers, members of a religious order and Christian Science practitioners, who had previously filed an exemption to opt out of social security coverage, to make an irrevocable election to become covered.¹⁰¹ The Senate added further requirements.¹⁰² First, ministers and members of religious orders opting out of coverage must notify their church or order of their conscientious objection. Next, before the exemption would be approved, the Treasury Department would have to specifically verify either by telephone or in person that the minister or member of a religious order knew of the appropriate justifications for exemption and that he was seeking the exemption for appropriate reasons.¹⁰³ The enacted law did not require the telephonic or in person verification, but the Commissioner had to establish that the applicant was aware of the appropriate grounds for an

93. *Id.* at 4167.

94. *See id.* at 4198-99.

95. *See* Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1983).

96. *See* H.R. CONF. REP. NO. 98-47 (1983), *reprinted in* 1983 U.S.C.C.A.N. 404, 449.

97. *See id.*

98. *See id.* at 451.

99. *See id.*

100. *See id.*

101. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

102. *See infra* notes FN2 – 98.

103. *See id.*

exemption and that the exemption was irrevocable.¹⁰⁴

D. An Employer/Employee Exemption: 1988-Present

In 1988, Congress granted social security tax exemption to both employees and employers who were members of certain religious sects when both the employee and employer were members of a religious sect that met the criteria that Congress established for self-employed members of the sect.¹⁰⁵ Previously, the only members of the sect to receive an exemption were self-employed.¹⁰⁶

E. Summary of History

As the history shows, what started out as a program to help employees during retirement and periods of disability, became a nearly universal social insurance program. Although ministers, members of religious orders and Christian Science practitioners are currently required to file a request for exemption from social security, the income they receive from services they perform in their ministries has never been covered under social security without an exemption available to them.¹⁰⁷ Members of certain religious faiths, such as Old Order Amish, were granted an exemption for their self-employment taxes in 1965 and granted a limited exemption for their employee and employer taxes in 1988.¹⁰⁸ Members of religious groups who have taken a vow of poverty were granted an exemption in 1972 when coverage was made available to their groups.¹⁰⁹ This ad hoc expansion of the social security system has created an incoherent and inequitable exemption scheme that is analyzed in the following sections.

IV. ANALYSIS OF THE EXEMPTIONS: THE RELIGION CLAUSES AND RFRA

Social Security exemptions may be attacked on the grounds that, granting exemptions violates the Establishment Clause while not granting them violates the Free Exercise Clause or RFRA.¹¹⁰ This

104. See Tax Reform Act of 1986.

105. See Act of November 10, 1988, Pub. L. No. 100-647, 102 Stat. 3781 (1988).

106. See *supra* notes 72-79 and accompanying text.

107. See *supra* Part III (Historical Development of Social Security and Exemptions).

108. See *supra* notes 75, 105 and accompanying text.

109. See *supra* notes 89-90 and accompanying text.

110. Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488, (codified at 42 U.S.C. § 2000bb to bb-4) (2001).

section considers each of these arguments.

The Supreme Court has considered religiously-based social security exemptions only once, in *United States v. Lee*.¹¹¹ In *Lee*,¹¹² an Amish employer did not pay either the employer's or the employee's share of social security taxes based on the employer's religious objection.¹¹³ The Court decided that requiring payment of the taxes did violate Lee's free exercise of religion, but that the government's interest in mandatory participation was "very high," or compelling.¹¹⁴ The Court then looked to whether accommodation would interfere with the fulfillment of the governmental interest.¹¹⁵ The Court viewed social security taxes the same as income taxes.¹¹⁶ The existing exemptions provided relief for self-employed Amish; therefore, the Court was not willing to expand the exemption to employers and employees who were Amish.¹¹⁷ Congress, largely in response to this decision, extended the exemption to both employers and employees when both are members of a religious sect that opposes insurance.¹¹⁸

A. Establishment Clause-The Lemon Test

In order for the exemptions to be constitutional they must not violate the Establishment Clause.¹¹⁹ *Agostini v. Felton*¹²⁰ provides a recent explanation of the Supreme Court's Establishment Clause jurisprudence. In *Agostini*,¹²¹ the Court applied the three-pronged *Lemon* Test:¹²² "first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."¹²³

The argument claimants make against the government is that by

111. *United States v. Lee*, 455 U.S. 252 (1982).

112. *Id.*

113. *Id.* at 254.

114. *Id.* at 258-59. It is interesting to note that the Court was not subject to social security taxes when it accepted the government's claim that mandatory participation in social security was "very high." See *supra* note 95 and accompanying text.

115. See *id.* at 259.

116. See *id.* at 260.

117. See *id.* at 260-61.

118. See 26 U.S.C. § 3127 (1994) and *supra* notes 105-06.

119. See U.S. CONST. amend. I.

120. *Agostini v. Felton*, 521 U.S. 203 (1997).

121. *Id.*

122. See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

123. See *Agostini*, 521 U.S. at 218 (citing *Lemon*, 403 U.S. at 612-13) (citations and internal quotation marks omitted).

allowing social security exemptions for some religious groups and not others, Congress shows preference for some religions over others, thereby violating the Establishment Clause.¹²⁴ Since people could have similar religious objections to social security and, yet, be treated disparately based on their membership in an unapproved sect, there is impermissible preference of one religion over another.¹²⁵

In *Droz v. Commissioner of Internal Revenue*,¹²⁶ the Ninth Circuit Court of Appeals applied the *Lemon Test*¹²⁷ in its analysis of the Establishment Clause claim in a social security exemption case. Martin Droz appealed the tax court's decision upholding the Internal Revenue Commissioner's ruling of a self-employment tax deficiency on the ground that denying him an exemption violated the Establishment Clause and Free Exercise Clause.¹²⁸ Mr. Droz had a religious objection to social security, but he did not belong to any religious sect. Although Mr. Droz had beliefs identical to members of religious sects who did receive the exemption, his lack of membership therein barred him from an exemption.¹²⁹ He argued that to deny him an exemption constituted differential treatment based on non-membership in a certain sect.¹³⁰ Mr. Droz urged the court to use the strict scrutiny standard in its Establishment Clause based on *Larsen v. Valente*.¹³¹ In *Larsen*,¹³² the Court used a strict scrutiny analysis when a Minnesota statute granted

124. See, e.g., *Droz v. Comm'r*, 48 F.3d 1120, 1124 (9th Cir. 1995); *Patterson v. Comm'r*, 740 F.2d 927 (11th Cir. 1984) (denying exemption for member of a "spiritual brotherhood" because the affiliation did not meet the requirements of §1402(g)); *Ward v. Comm'r*, 608 F.2d 599 (5th Cir. 1979), *cert denied*, 446 U.S. 918 (1980) (denying exemption for self-employed salesman who was conscientiously opposed to social security); *Jaggard v. Comm'r*, 582 F.2d 1189 (8th Cir. 1978), *cert denied*, 440 U.S. 913 (1979) (denying exemption for self-employed physician because he did not satisfy requirements of §1402(g)); *Varga v. United States*, 467 F. Supp 1113 (D. M 1979), *aff'd*, 618 F.2d 106 (4th Cir. 1980) (denying exemption for Seventh Day Adventist); *Randolph v. Comm'r*, 74 T.C. 284 (1980) (denying exemption for Seventh Day Adventist); *Henson v. Comm'r*, 66 T.C. 835 (1976) (denying exemption for member of Sai Baba because sect does not provide for members in dependency); *Palmer v. Comm'r*, 52 T.C. 310 (1969) (denying exemption for dentist who was a Seventh Day Adventist because his church did not provide for its members in dependency).

125. See *supra* note 113 and accompanying text.

126. *Droz*, 48 F.3d at 1120.

127. See *Lemon*, 403 U.S. at 612-13.

128. *Droz*, 48 F.3d at 1121. Mr. Droz also argued that the law violated the Equal Protection Clause and Due Process Clause, however, these arguments are outside the scope of this paper. See *id.*

129. See *id.*

130. See *id.* at 1122.

131. See *Larsen v. Valente*, 456 U.S. 228, 246, 252 (1982) (applying strict scrutiny to laws that discriminate among religions).

132. *Larsen v. Valente*, 456 U.S. 228 (1982).

certain religious denominations preferences over less established denominations.¹³³ The *Droz*¹³⁴ court concluded that since the statute does not facially discriminate among religions, the *Lemon Test*¹³⁵ was appropriate rather than a strict scrutiny analysis.¹³⁶ The court stated that §1402(g)(the exemption for ministers, Christian Science practitioners and members of religious orders) did not represent discrimination among sects, but rather an accommodation based on an individual's religious objection, provided that the "individual belongs to an organization with its own welfare system."¹³⁷ The court further explained that the provision is "narrowly drawn to maintain a fiscally sound social security system and to ensure that all persons are provided for, either by the social security system or by their church."¹³⁸ Finally, the court stated that the effect of the provision neither advances nor inhibits religion because in order to receive the exemption, a person must sign a waiver of social security benefits.¹³⁹

In deciding that the current exemption scheme did not violate the Establishment Clause, the *Droz*¹⁴⁰ court relied on *Lee*.¹⁴¹ The *Lee*¹⁴² Court did leave one question unanswered. The Court chose not to decide whether an exemption granted to employers and employees who were members of a sect would violate the Establishment Clause.¹⁴³ By granting the exemption to members of a sect that satisfies the self-supporting requirements, there is a question about whether the equality principle¹⁴⁴ of the Establishment Clause would be violated because members of one sect would be preferred over non-members with identical beliefs. This also raises the question about the disparate treatment between ministers and their congregants who share the same beliefs and, yet, do not have the same access to an exemption.

Both of these concerns can be addressed by the Court's analysis in

133. *See id.* at 247-48.

134. *Droz*, 48 F.3d at 1120.

135. *See Lemon*, 403 U.S. at 612-13.

136. *See Droz*, 48 F.3d at 1124.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Droz*, 48 F.3d at 1120.

141. *United States v. Lee*, 455 U.S. 252 (1982); *See Droz*, 48 F.3d at 1122-23.

142. *Lee*, 455 U.S. at 252.

143. *Id.* at 261, n.11.

144. *Cf. Lisa Schultz Bressman, Accommodatin and Equal Liberty*, 42 WM. & MARY L. REV. 1007 (2001) (discussing the equality principle inherent in the Establishment Clause extending to non-religious belief as well as religious belief).

Lee.¹⁴⁵ The Court describes the exemption as an accommodation confined to a readily identifiable category.¹⁴⁶ In *Lee*,¹⁴⁷ the category was self-employed individuals in a religious community with its own welfare system.¹⁴⁸ The exemption given was not based on membership in the sect, but membership in the sect that had its own welfare system.¹⁴⁹ A similar analysis is appropriate for ministers. Ministers do not receive a general exemption based only on their beliefs, but the exemption is limited to money earned in the performance of the ministry for their church or religious order.¹⁵⁰ This developed as an accommodation to both churches and ministers, not as a preference for ministers over their congregants with similar beliefs.¹⁵¹

The *Droz*¹⁵² court did not consider the possibility that a person with a religious objection would choose membership in a religious sect in order to receive an exemption. He may believe that he will receive a greater financial benefit through exemption from the self-employment taxes than the value of benefits he would receive as a social security beneficiary.¹⁵³ While it seems unlikely that an individual would choose a religion based on social security participation, it is likely that one could choose membership in one religion based on a social security exemption's financial benefit. This creates a perverse incentive to select certain religions even if it is unlikely one would act on it. This oversight does not flaw the court's reasoning and does not cause the exemption to violate the advancement prong of the *Lemon* Test.¹⁵⁴ The exemptions do not violate the Establishment Clause.

145. *Lee*, 455 U.S. at 252; *See infra* notes 135-38 and accompanying text.

146. *See Lee*, 455 U.S. at 260-61.

147. *Lee*, 455 U.S. at 252.

148. *Id.* at 261.

149. *Id.*

150. *See supra* notes 9-16 and accompanying text (describing the eligibility requirements for ministers).

151. *See supra* notes 42-46 and accompanying text (describing development of exemption for ministers).

152. *Droz*, 48 F.3d at 1120.

153. *But see Lee*, 455 U.S. at 262 (Stevens, J. concurring)(discussing the fiscal benefit to the government in allowing exemptions because the taxes collected would be less than the benefits paid by the government). From the perspective of the government, this may be correct. Because the government invests the taxes received into the Social Security Trust Fund, and the rate of return it will achieve could be smaller than the rate of return an individual could realize investing the same money privately, the future value of the present tax dollars could be higher for an individual than it is for the government. Therefore, an individual may choose to opt out of Social Security because he believes that he will achieve a higher future value for his tax dollars than he will receive from Social Security in the form of benefits.

154. *See Lemon*, 403 U.S. at 612.

B. Free Exercise Clause-Rational Basis Review

Another challenge the exemptions face is when someone does not qualify for one, but attempts to claim one using the Free Exercise Clause. In *Employment Division Department of Human Resources of Oregon v. Smith*,¹⁵⁵ the Court established that there is no compulsory constitutional exemption from generally applicable laws under the Free Exercise Clause.¹⁵⁶ According to the Court, as long as the law passes a “rational basis” analysis, there is no valid Free Exercise claim.¹⁵⁷

The common argument pursued under a Free Exercise claim for an exemption to social security is that being forced to participate in a social insurance program, contrary to one’s religious beliefs, is a denial of one’s Free Exercise rights.¹⁵⁸ Courts considering these claims¹⁵⁹ have relied on *Lee*.¹⁶⁰ These courts have accepted the assertion that participating in social security implicates the claimant’s Free Exercise rights. However, by citing *Lee*, these courts have concluded that the compelling governmental interests justify the compulsory nature of social security.¹⁶¹ These courts have correctly decided the Free Exercise question under the constitutional analysis of both *Smith*¹⁶² and *Lee*.¹⁶³

C. RFRA-Back to Strict Scrutiny

Even though the social security exemptions meet constitutional standards under the Establishment Clause and the Free Exercise Clause, do they comport with RFRA? In 1993, responding to the *Smith*¹⁶⁴ decision,¹⁶⁵ Congress passed the Religious Freedom Restoration Act (RFRA) of 1993. The law changed the standard of review of neutrally applicable laws from “rational basis,” as decided in *Smith*,¹⁶⁶ to

155. *Employment Div. Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

156. *See id.* at 879.

157. *See id.* at 885.

158. *See, e.g., Lee*, 455 U.S. at 252 (denying claim by Amish carpenter that payment of employee Social Security tax (FICA) violates Free Exercise Clause); *Droz*, 48 F.3d at 1120 (denying claim by person who was not a member of a religious organizations); *Seward v. United States*, 515 F.Supp. 505 (D. Md. 1981) (denying a dentist with an Honorary Doctor of Divinity degree claiming an exemption); *See also supra* note 124.

159. *See id.*

160. *Lee*, 455 U.S. at 252; *see id.*

161. *See e.g., Droz*, 48 F.3d at 1123.

162. *Employment Div. Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

163. *Lee*, 455 U.S. at 252.

164. *Smith*, 494 U.S. at 872.

165. *See City of Boerne v. Flores*, 521 U.S. 507, 515, (1997).

166. *Smith*, 494 U.S. at 872.

“compelling interest,” as decided in *Sherbert v. Verner*¹⁶⁷ and *Wisconsin v. Yoder*.¹⁶⁸ If a law substantially burdened a person’s religious expression, the state would be required to show a compelling governmental interest and the least restrictive means for achieving that interest.¹⁶⁹

In 1997, in *City of Boerne v. Flores*,¹⁷⁰ the Court ruled that Congress had overstepped its authority under §5 of the 14th Amendment¹⁷¹ when it passed RFRA and applied it to the states.¹⁷² There is continuing debate over the validity of RFRA as applied to the Federal government.¹⁷³ Some federal courts have held that RFRA still remains valid as to the federal government,¹⁷⁴ and some have ruled that *Boerne*¹⁷⁵ overturned the entire statute.¹⁷⁶ Based on the principle articulated in *Ashwander v. TVA*¹⁷⁷ that judicial questions are to be decided on the narrowest grounds possible,¹⁷⁸ and because the Court in *Boerne*¹⁷⁹ did not declare RFRA unconstitutional as to the federal government,¹⁸⁰ this article concludes that RFRA is still valid as to the federal government.

Since RFRA remains applicable to the federal government, there is a statutory right to claim a religiously-based exemption from a neutral government regulation in the absence of a compelling governmental interest which is implemented by the least restrictive means available.¹⁸¹

The only case to consider social security religiously-based

167. *Sherbert v. Verner*, 374 U.S. 398 (1963), *overruled in part by Smith*, 494 U.S. at 872 (rejecting previous balancing test).

168. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

169. *See* Religious Freedom Restoration Act of 1993 (RFRA).

170. *Boerne*, 521 U.S. at 507.

171. U.S. CONST. amend. XIV, § 5.

172. *See Boerne*, 521 U.S. at 511.

173. *See* Edward J.W. Blatnik, Note, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of City of Boerne v. Flores*, 98 COLUM. L. REV. 1410 (1998) (analyzing the constitutionality of RFRA after *Boerne* and concluding that although it is not ruled unconstitutional as applied to the federal government, RFRA is unconstitutional because it violates the doctrine of separation of powers). *But see* JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES, 125 (2000) (arguing that RFRA is still valid as to the federal government).

174. *See, e.g., Hodge v. Fitzgerald*, 220 B.R. 386 (D. Idaho 1998).

175. *Boerne*, 521 U.S. at 507.

176. *See, e.g., United States v. Sandia*, 6 F. Supp. 2d 1278, (D. N.M. 1997), *aff'd*, 188 F.3d 1215 (10th Cir. 1999).

177. *Ashwander v. TVA*, 297 U.S. 288 (1936).

178. *See id.* at 347.

179. *Boerne*, 521 U.S. at 507.

180. *See generally id.*

181. *See generally Hodge*, 220 B.R. at 386.

exemptions under RFRA, *Droz v. Commissioner of Internal Revenue*,¹⁸² missed a key element of analysis. The *Droz*¹⁸³ court refers to RFRA as the governing law, then uses the analysis in *Lee*¹⁸⁴ to declare compulsory participation in social security to be a compelling governmental interest.¹⁸⁵ However, in its reliance on *Lee*,¹⁸⁶ the court conducts no analysis of the law under the least restrictive means prong.¹⁸⁷ The *Droz*¹⁸⁸ Court imputes to *Lee*¹⁸⁹ the determination that the exemption granted in the tax code was narrowly tailored and no further exemptions were required.¹⁹⁰ However, when the *Lee*¹⁹¹ Court made the determination that no further exemptions were required, its comparison was limited to the difference between exemptions for self-employed individuals and employees/employers.¹⁹² For the *Droz*¹⁹³ Court to apply that limited analysis to a comparison between two self-employed individuals with identical beliefs misses the point of the least restrictive means test.

In order for the law, which substantially burdens one's Free Exercise, to pass constitutional muster, it must be the least restrictive means of accomplishing a compelling governmental interest.¹⁹⁴ If the compelling governmental interest is the maintenance of the social security system with provision for individuals to opt out,¹⁹⁵ then the existing exemptions provide evidence that either the current law is not the least restrictive means of achieving those ends or those ends are not a compelling governmental interest.

If the compelling governmental interest is the maintenance of the social security system,¹⁹⁶ then the least restrictive means of achieving the interest would be for the system to be compulsory to all.¹⁹⁷ However, if the government provides exemptions for some that object to

182. *Droz*, 48 F.3d at 1120.

183. *Id.*

184. *Lee*, 455 U.S. at 252.

185. *See Droz*, 48 F.3d at 1123.

186. *Lee*, 455 U.S. at 252.

187. *See* Religious Freedom Restoration Act of 1993 (RFRA).

188. *Droz*, 48 F.3d at 1120.

189. *Lee*, 455 U.S. at 252.

190. *See Droz*, 48 F.3d at 1123-24.

191. *Lee*, 455 U.S. at 252.

192. *See id.* at 256.

193. *Droz*, 48 F.3d at 1120.

194. *See* Religious Freedom Restoration Act of 1993 (RFRA).

195. *See Droz*, 48 F.3d at 1123.

196. *See id.*

197. *See Lee*, 455 U.S. at 259-60.

participation, then the government concedes that providing an exemption does not frustrate the compelling governmental interest.¹⁹⁸ In this case, the government already provides an exemption for a member of a religious sect who objects to insurance;¹⁹⁹ therefore, how could the government claim that the least restrictive means is achieved by denying an exemption to a non-member with the same objection?²⁰⁰

If the compelling governmental interest is providing an opportunity for individuals,²⁰¹ who are members of a religious sect with history of providing for its dependent members²⁰² to opt out, then the least restrictive means would be for compulsory coverage for all who are not members of such sects.²⁰³ However, if the government provides an exemption to some that are not members of such sects, the government concedes that providing an exemption does not frustrate the compelling governmental interest.²⁰⁴ In this case, the government provides an exemption for ministers, members of religious orders, and Christian Science practitioners, none of who are required to be members of a sect that provides for its members during dependency.²⁰⁵ Therefore, how could it be within the least restrictive means to deny an exemption to a member of their church with the same beliefs?

Limiting exemptions to the current statutory scheme violates RFRA by, 1) not granting an exemption to those who have means to provide for their dependency and whose religious exercise is substantially burdened, when 2) the compelling governmental interest is funding social security and ensuring the provision of people during periods of dependency, when 3) the government grants the current exemptions.

V. RECOMMENDATIONS

There are several inconsistencies and inequities in the current regime of religiously-based social security exemptions. (1) Ministers, members of religious orders and Christian Science practitioners need not profess any objection to private insurance, as opposed to members of

198. *See supra* notes 9-25 and accompanying text (explaining current exemption regime).

199. *See supra* notes 26-29 and accompanying text (explaining current exemption regime for members of certain religious faiths).

200. *Cf. Droz*, 48 F.3d at 1120.

201. *See id.* at 1123.

202. *See supra* notes 26-29 and accompanying text (explaining current exemption regime for members of certain religious faiths).

203. *See Lee*, 455 U.S. at 259-60.

204. *Cf. supra* notes 9-25 and accompanying text (explaining current exemption regime for ministers, members of religious orders, and Christian Science practitioners).

205. *See supra* notes 9-25 and accompanying text.

certain religious faiths, to qualify for the exemption;²⁰⁶ (2) the only income exempted from social security for ministers, members of religious orders and Christian Science practitioners is the income they derive in the performance of their ministry;²⁰⁷ (3) ministers and members of religious orders must notify their church of their objection, but there is no such requirement for Christian Science practitioners;²⁰⁸ (4) members of religious sects that oppose insurance and who work for employers of the sect can be exempted, as can employers for their share of the social security tax, but members of religious sects that oppose insurance who work for employers who are not members of the sect cannot be exempted from social security;²⁰⁹ (5) individuals with identical beliefs and membership in sects with identical beliefs can be distinguished based on the length of the existence of the sects;²¹⁰ and (6) members of religious sects are required to waive all future benefits under social security, while ministers, members of religious orders and Christian Science practitioners are not.²¹¹

Based on the compelling governmental interests articulated in *Lee*²¹² and *Droz*,²¹³ I recommend the religiously-based social security exemptions be modified in order to more equitably and coherently reflect those interests. The first compelling governmental interest is a sound financial base to social security.²¹⁴ The second compelling governmental interest is non-governmental provision for those who opt out of coverage.²¹⁵ In order to meet those interests, I recommend the exemption be allowed for any person who, based on his religious beliefs, cannot participate in public insurance, and has a means available to him to provide for his support in dependency. I would also require a waiver of all future benefits. The means available could be membership in a religious sect that provides for its members in case of dependency, private means, or private insurance. There is no principled reason that the individual could not participate in a private insurance program and still object to a public social insurance program. The exemption would not be limited to ministers or members of certain sects, nor would it only

206. See *supra* notes 9-29 and accompanying text.

207. See *supra* notes 9-25 and accompanying text.

208. See 26 U.S.C. § 1402(e)(1).

209. See *supra* notes 26-29 and accompanying text.

210. See *supra* note 28 and accompanying text.

211. See *supra* note 27 and accompanying text.

212. *Lee*, 455 U.S. at 252.

213. *Droz*, 48 F.3d at 1120.

214. See *id.* at 1124.

215. See *id.* at 1123.

apply to self-employment income of those with an objection; but rather it would include their share of employment taxes. It would not, however, exempt any employer's share of social security taxes, because paying those taxes does not accrue any insurance benefit to the employer.

VI. CONCLUSION

Religiously-based social security exemptions developed over the years into a hodge-podge of rules and eligibility requirements.²¹⁶ A thoughtful analysis of the history behind the development of the exemptions provides the insight and information necessary to formulate the exemptions into a more equitable and coherent system. Congress can, in compliance with RFRA, fashion a set of exemptions that provides for the Free Exercise of workers with a religious objection to participation in social security, ensure that those with an objection have provision during dependency, and maintain the financial stability of social security.

216. *See supra* notes 30-109 and accompanying text (discussing historical development of religiously-based exemptions).