THE PEW FORUM ON RELIGION & PUBLIC LIFE

A DELICATE BALANCE: THE FREE EXERCISE CLAUSE AND THE SUPREME COURT

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When Americans speak of their most cherished liberties, freedom of worship often tops the list. But this freedom is not absolute. Indeed, throughout most of the nation's history, religious practices have often been subordinated to a variety of government laws and regulations. It was not until the 1960s that courts began to seek a more finely tuned balance between the government's public policy needs and peoples' interest in practicing their faith unencumbered by government regulations or requirements.

The foundation of religious liberty in America is the Free Exercise Clause of the First Amendment to the U.S. Constitution, which states that Congress "shall make no law … prohibiting the free exercise" of religion. This constitutional protection was born out of the Founding Fathers' desire to foster and safeguard freedom of religion. They hoped that, by protecting freedom of worship, they would shield what was already a religiously diverse country from the kinds of religious conflict that had raged in Europe through much of the 16th and 17th centuries.

Many of the first European settlers in America were refugees from these religious conflicts. Ironically, some of these refugees, such as the Puritans of Massachusetts, went on to found colonies that had official or state-sanctioned churches and to punish individuals who dissented from established forms of worship. By the mid-18th century, however, most Protestants in America had earned some measure of religious toleration and freedom. But Catholics, Jews, atheists and other religious minorities remained largely outside the scope of religious liberty protections.

It was the First Great Awakening of the 1730s and 1740s and the American Revolution later in the 18th century that ultimately created a new climate for religious freedom. Between 1776 and 1790, for example, many states included provisions guaranteeing freedom of worship in their new constitutions. And in

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1791, the First Amendment was ratified as part of the first 10 amendments to the Constitution, known as the Bill of Rights.

The First Amendment's guarantee that the federal government will respect the "free exercise" of religion seems relatively straightforward. However, in most religious liberty cases, courts have grappled with the same difficult question: Do individuals or groups professing sincerely held religious beliefs have a right because of those beliefs to be exempt from legal requirements generally imposed on all citizens? While the question has remained the same, the courts' answer has changed repeatedly. Indeed, more than a century of Supreme Court decisions in this area have forged a ragged path from one extreme to the other, with a number of permutations in between.

The issue was first addressed by the Supreme Court in the last decades of the 19th century in a number of cases concerning polygamy – religiously based plural marriages practiced at that time among some members of the Church of Jesus Christ of Latter-day Saints. Polygamy had been outlawed by the federal government in 1862. In the polygamy rulings, the court established the precedent that while the Free Exercise Clause protected religious "beliefs," it did not shield religiously motivated "actions" that came into conflict with the law. Then, beginning in the early 1960s, the court reversed course and issued a number of rulings that embraced the idea that the Free Exercise Clause *could* exempt religiously motivated actions from certain generally applicable legal requirements. Even important government concerns, such as the education of children, were curtailed in the interest of religious liberty. But by the 1990s, the court once again changed direction and largely re-established the doctrine forged in the 19th-century polygamy cases. This, in turn, prompted a reaction from the U.S. Congress and some state legislatures, which passed laws aimed at offering greater protection for religious liberty.

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These shifting interpretations of the right to free exercise illustrate the fact that the country – not to mention the courts – has yet to reach a consensus on exactly how to accommodate religious beliefs and practices. Whether the appointments of two new justices to the Supreme Court (Chief Justice John Roberts in 2005 and Justice Samuel Alito in 2006) will help forge this elusive consensus remains to be seen. But if history is any guide, judges, politicians and citizens will continue to spar over the exact meaning of "free exercise" for decades to come.

LIMITATIONS ON FREE EXERCISE RIGHTS

POLYGAMY AND OTHER EARLY CASES

The Supreme Court's first decisions concerning the Free Exercise Clause arose from the federal government's campaign in the late 19th century against polygamy among members of the Church of Jesus Christ of Latter-day Saints (LDS) – also known as Mormons – in the Utah, Idaho and Arizona territories. In *Reynolds v. United States* (1879), the court upheld the successful criminal prosecution of a prominent Mormon, George Reynolds, for practicing bigamy in Utah. Reynolds had argued that it was a religious obligation for him to take multiple wives and that the Free Exercise Clause should immunize him from prosecution. But the court concluded that while the Free Exercise Clause guarantees freedom of religious belief, it does not protect religiously motivated actions – such as polygamy – if those actions conflict with the law.

Writing for a unanimous court, Chief Justice Morrison Waite said, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may [interfere] with practices." Waite went on to state that to permit someone to use religious belief as an excuse to ignore legal requirements would "in effect … permit every citizen to become a law unto himself."

A decade later, in another case that involved polygamy, the Supreme Court reinforced the view that the federal government may suppress religious practices that conflict with the law. In *Davis v. Beason* (1890), the court upheld the conviction of an LDS church member who had falsely sworn a public oath that he did not advocate or believe in polygamy, as was required at the time from persons who sought to vote in the Utah, Idaho or Arizona territories. The right of free exercise, the court ruled in *Davis*, provided no defense to the charge of swearing a false oath, even though Davis himself had not engaged in a plural marriage.

In the polygamy rulings, the court established the precedent that while the Free Exercise Clause protected religious "beliefs," it did not shield religiously motivated "actions" that came into conflict with the law.

The same year as the *Davis* ruling, the Supreme Court upheld lower court orders that had placed the entire LDS church and all of its property under the control of the federal government on the grounds that the church and its leadership constituted an organization that unlawfully advo-

cated plural marriage. Only after the church firmly and formally renounced polygamy later that year did the federal government relinquish control and restore the church's property.

The Supreme Court's opinions in *Reynolds* and *Davis*, which rejected the idea that religiously motivated actions were exempt from general laws, remained controlling precedents for more than 70 years. Not until the 1960s, under Chief Justice Earl Warren and his successors, did the court begin to issue decisions that expanded the type of activity protected by the Free Exercise Clause. But even before Warren's tenure as chief justice, the Supreme Court issued a number of important decisions that began to reshape the government's role in safeguarding religious freedom.

GLIMMERS OF CHANGE

THE *CANTWELL* DECISION AND THE JEHOVAH'S WITNESSES CASES

The most important of these pre-Warren rulings was handed down in *Cantwell v. Connecticut* (1940). In this decision, the court held that the Free Exercise Clause applied to the states on the grounds that religious freedom is part of the 14th Amendment's Due Process Clause, which protects "life, liberty and property" against arbitrary interference by the states. Until *Cantwell*, the Free Exercise Clause had regulated only the actions of the federal government and did not in any way apply to state laws or actions regarding religion.

In the end, however, *Cantwell*'s potential impact on religious freedom was tempered by the fact that the case was ultimately more about freedom of speech than the free exercise of religion. Jesse Cantwell had been convicted of disturbing the peace after he played an anti-Catholic record on a street corner in New Haven, Conn. The court overturned his conviction, but the decision emphasized Cantwell's First Amendment right to free speech as well as religious liberty. Thus, *Cantwell* implicitly reaffirmed the core principle of *Reynolds* and *Davis* that the Free Exercise Clause affords no special exemption for religious actions that contravene the law.

In the end, however, Cantwell's potential impact on religious freedom was tempered by the fact that the case was ultimately more about freedom of speech than the free exercise of religion.

Around the same time that *Cantwell* was decided, the court issued two related rulings that further affirmed the interpretation of the Free Exercise Clause spelled out in *Reynolds* and *Davis*. In *Minersville School District v. Gobitis* (1940), the court ruled that the clause did not give religiously motivated public school children, who in this case were Jehovah's Witnesses, the right to opt out of a compulsory flag-salute ceremony. The *Gobitis* decision led to reports that Jehovah's Witnesses were being threatened and even physically assaulted for refusing to salute the flag.

Just three years later, the court took up a virtually identical case, once again involving the refusal of

THE FREE EXERCISE CLAUSE: SIGNIFICANT SUPREME COURT RULINGS

Reynolds v. United States (1879)
Upheld the successful criminal prosecution of a prominent Mormon for practicing bigamy in Utah.

Cantwell v. Connecticut (1940)
In overturning a conviction for disturbing the peace, held that the Free Exercise Clause applies to state as well as federal actions.

Minersville School District v. Gobitis (1940)
Ruled that the Free Exercise Clause did not give religiously motivated public school children the right to opt out of a compulsory flag-salute ceremony.

West Virginia Board of Education v. Barnette (1943)
Overruled *Gobitis* and recognized the right not to participate in a flag-salute ceremony based on the right of free speech and worship.

U.S. v. Ballard (1944)
In a case involving a faith healer who claimed to possess supernatural healing powers, ruled that government cannot question the truth or validity of someone's religious beliefs but is free to examine whether such beliefs are sincerely held.

Braunfeld v. Brown (1961)
Rejected an argument from Jewish businessmen who observed a Saturday Sabbath and opposed a law that required businesses to close on Sundays.

Sherbert v. Verner (1963)
Ruled that a South Carolina unemployment policy forcing an employee to choose between her faith's Saturday Sabbath and eligibility for unemployment benefits violated the Free Exercise Clause.

Wisconsin v. Yoder (1972)
Ruled that the Free Exercise Clause exempted the adolescent children of the Old Order Amish from compulsory school attendance laws.

Bob Jones University v. United States (1983)
Rejected a First Amendment challenge to the Internal Revenue Service's policy of denying tax-exempt status to nonprofit educational institutions that had racially discriminatory policies.

Goldman v. Weinberger (1986)
Ruled that the Free Exercise Clause did not exempt a Jewish Air Force captain from the rule that forbade the wearing of any headgear indoors.

O'Lone v. Estate of Shabazz (1987)
Ruled that security considerations provided a reasonable basis for restricting prison inmate attendance at a Muslim religious service.

Employment Division v. Smith (1990)
Upheld the denial of unemployment compensation to two Native American drug rehabilitation counselors who had been dismissed because they had ingested the hallucinogen peyote as part of a religious ritual.

Church of the Lukumi Babalu Aye v. City of Hialeah (1993)
Ruled that the city of Hialeah's ordinances on the treatment of animals discriminated against the Santerian faith and its practice of animal sacrifice.

Locke v. Davey (2004)
Ruled that a Washington state higher education subsidy that excluded those who majored in devotional religious studies was constitutional.

City of Boerne v. Flores (1997)
Ruled that Congress lacks the power to substitute its judgment for that of the federal judiciary on the norms of religious liberty that states must obey.

Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal (2006)
Ruled that RFRA protects the right of a small religious sect to import and use a hallucinogenic substance in its religious rituals.

Cutter v. Wilkinson (2005)
Rejected the argument that the portion of a federal religious freedom statute that covers prisoners and other institutionalized persons violates the First Amendment's Establishment Clause.

Jehovah's Witnesses to salute the flag. This time, though, the result was quite different. In *West Virginia Board of Education v. Barnette* (1943), the court overruled *Gobitis* and recognized students' right not to participate in such a ceremony. But like the *Cantwell* decision, the ruling in *Barnette* still did not recognize a religion-based right to special treatment. Instead, the court again based the decision on the right of free speech, concluding that the school board had no power to compel any student, regardless of the reasons for the student's resistance, to participate in a ritual of patriotism.

Thus the *Barnette* case did not alter the court's general rule on the Free Exercise Clause that had been laid out in *Reynolds* and subsequent decisions. Indeed, shortly after *Barnette*, the court further affirmed the same principle in *Prince v. Massachusetts* (1944). In that case, it held that the Free Exercise Clause did not exempt a member of the Jehovah's Witnesses from child labor laws even though the child was selling religious materials as a matter of religious duty.

However, the same year as the *Prince* ruling, the court handed down another decision that affirmed the other, more religion-friendly side of the *Reynolds* doctrine – that the Free Exercise Clause protects religious belief. That case, *U.S. v. Ballard* (1944), centered on the conviction for mail fraud of Guy Ballard, a faith healer who claimed to possess supernatural healing powers. In *Ballard*, the high court ruled that the state cannot question the truth or validity of someone's religious beliefs – in this case, the state could not pass judgment on Ballard's belief that God grants certain people, including himself, special powers of healing. The court went on to say, however, that the government is free to examine whether someone holds such beliefs sincerely. As a result, the court upheld Ballard's conviction and ruled that the judge in his case had correctly charged the jury in his fraud trial with deciding whether Ballard's religious claims were made sincerely and in good faith.

WARREN COURT

EXPANSION OF FREE EXERCISE RIGHTS

During the 1950s and 1960s, the Supreme Court, under the leadership of Chief Justice Warren, issued a series of groundbreaking rulings that overturned long-standing precedents and policies in civil rights and other areas, including the free exercise of religion.

The court's opinion in *Braunfeld v. Brown* (1961) was an indication that the standards set out in *Reynolds* and subsequent cases might change. In *Braunfeld*, the court decided a legal challenge by several Orthodox Jewish store owners to a Pennsylvania law that required most retail stores to close on Sundays. The Jewish businessmen argued that the law disadvantaged people like themselves who closed on Saturdays to observe their Sabbath and that the Free Exercise Clause should be construed to exempt them from the requirement to close on Sundays.

In the court's majority opinion, Warren noted that the burden of the law on the businessmen was "indirect," because it did not force them to violate their own Sabbath. But even in a case of indirect burdens, Warren wrote, the government might not be justified in enforcing the law if it could accomplish its purpose "by means which do not impose such a burden." In this instance, however, Warren concluded that the government lacked an easily administered alternative to achieve its purpose – a uniform day of rest. Accordingly, the court rejected the businessmen's argument. Nevertheless, the ruling suggested a new receptiveness on the part of the court to the

use of the Free Exercise Clause to protect religiously motivated behavior.

Two years later, in *Sherbert v. Verner* (1963), the implications of *Braunfeld* became clear. Adele Sherbert was a Seventh-day Adventist and thus observed Saturday as the Sabbath. Her employer fired her for refusing to work on Saturdays, and she was unable to obtain other work because other jobs she sought also required Saturday work. Public officials in South Carolina rejected her application for unemployment compensation on the grounds that she had failed, without good cause, to accept "suitable work when offered." The government argued that this policy protected its interest in preventing people from making false claims of religious observance in order to qualify for unemployment benefits, and the state Supreme Court agreed.

In a landmark decision, the U.S. Supreme Court reversed the state high court's decision. Justice William Brennan's majority opinion described South Carolina's unemployment policy as a direct burden on Sherbert's religious freedom because it forced her to choose between the Saturday Sabbath required by her faith and eligibility for unemployment benefits. "Governmental imposition of such a choice," Brennan wrote, "puts the same kind of burden upon the free exercise of religion as would a fine imposed against [Sherbert] for her Saturday worship."

Having determined that the law imposed a burden on Sherbert's religious liberty, the court went on to establish an important doctrine for future cases. When the state refuses to accommodate religiously motivated conduct, Brennan wrote, it must show that it has a "compelling interest" for denying such claims. In other words, the government cannot interfere with someone's sincere religious practice unless it can show that the interference furthers a clear and important public interest.

SUPREME COURT CASE

SHERBERT V. VERNER (1963)

MAJORITY:		MINORITY:
BLACK	GOLDBERG	HARLAN
BRENNAN	STEWART	WHITE
CLARK	WARREN	
DOUGLAS		

Applying the compelling interest requirement to free exercise cases was a marked departure from the 1879 *Reynolds* polygamy decision. Indeed, before *Sherbert*, the requirement of compelling interest had appeared only in cases that involved freedom of speech and racial discrimination. In *Sherbert*, the court concluded that the government had offered no proof to support its alleged interest in preventing workers from making fraudulent claims of Saturday religious observance in order to qualify for unemployment benefits. The court therefore ordered the state to pay Sherbert unemployment benefits.

In his dissent, Justice John Marshall Harlan, joined by Justice Byron White, argued that the court's opinion carved out a special exemption for religious observance from the general requirement that employees must be available for work. In doing so, he wrote, the court compelled the state to subsidize Sherbert's religious practices. Although the state was free to choose such a course, Harlan asserted, the Constitution did not require it.

Many saw the *Sherbert* decision as a victory for the principle that all religions should be treated equally in the eyes of the law. In this case, South Carolina had a Sunday closing law (similar to the Pennsylvania law noted above) that favored workers who observed Sunday as the Sabbath and protected them against the hard choice imposed on Sherbert and those of other faiths (like the Jewish

businessmen in *Braunfeld*) whose Sabbath falls on another day. But others saw the ruling as a path to granting special privileges for religion. In particular, they worried that the compelling interest test would tip the balance in favor of religious exercise and would lead to more and broader claims for special religiously based exemptions from legal requirements generally imposed on all citizens.

BURGER COURT
EXPANSION AND CONTRACTION OF FREE EXERCISE RIGHTS

Early in the tenure of Chief Justice Warren Burger, who was appointed to lead the Supreme Court in 1969, the court issued a decision that dramatically reinforced the principles laid down in *Sherbert*. The case, *Wisconsin v. Yoder* (1972), involved a challenge by members of the Old Order Amish to a state law that required all children to attend school until the age of 16. The Amish, who eschew many aspects of modern life, objected to high school education for their children because they believed that the experience exposed their young to worldly influences, competitive values and material concerns inconsistent with life in a traditional Amish community. As a result, a number of Amish parents had removed their children from school at age 14. When Wisconsin charged these parents with violating the state's school attendance statute, the parents replied that the law, as applied to them, infringed upon their right to the free exercise of religion.

In a 6-1 decision, the court ruled that Wisconsin indeed had violated the Amish parents' free exercise rights. Writing for the majority, Burger stated that requiring Amish children to attend school until age 16 threatened the longstanding customs of the Amish community. Moreover, Burger stressed, these traditions were clearly grounded in religious belief. The court then subjected Wisconsin's school attendance law to the compelling interest test first set out in the *Sherbert* case and found that although the state had a strong interest in a well-educated populace, its interest in the extra period of formal education between ages 14 and 16 was relatively small, especially with regard to children who were part of a traditional farming community. At the same time, Burger asserted, the impact on the Amish of continued formal schooling at these ages was substantial. "During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife," he wrote.

As noted, many people had wondered whether the *Sherbert* decision would lead to frequent special exemptions for the free exercise of religion. With *Yoder*, the answer seemed to be "yes." Indeed, the court took pains in its ruling to emphasize that it was the deep religious beliefs of the Amish that justified this extraordinary constitutional protection.

SUPREME COURT CASE

WISCONSIN v. YODER (1972)

MAJORITY:	MINORITY:	DID NOT PARTICIPATE:
BLACKMUN	DOUGLAS (IN PART)	POWELL
BRENNAN		REHNQUIST
BURGER		
MARSHALL		
STEWART		
WHITE		

Note: While Justice William Douglas agreed with the majority's overall rational, he dissented in part because he believed that the case should be sent back to the lower courts for reconsideration. Justice Lewis Powell and Justice William Rehnquist did not participate in the decision because they were not yet on the court when the case was argued.

On the other hand, the judicial methodology employed in *Yoder* – weighing the gains to the state against the costs to the Amish – involved a balancing of interests. Thus the ruling was no guarantee that in all future free exercise cases the court would tip in favor of religiously motivated behaviors.

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Indeed, in the years immediately following *Yoder*, the court was generally reluctant to exempt religiously motivated actions from general legal requirements. From 1972 to 1990, the Supreme Court ruled in favor of free exercise claims in only three cases, and all three – like Sherbert – involved unemployment compensation. In the first decision, *Thomas v. Review Board* (1981), the court ordered the state of Indiana to pay unemployment benefits to a member of the Jehovah's Witnesses who, for religious reasons, had left his job in a factory that had switched to the manufacture of munitions. Later, in *Hobbie v. Unemployment Appeals Commission* (1987), the court protected the unemployment benefits of a Florida woman who had been fired from her job after she became a Seventh-day Adventist and informed her employer that she could no longer work on Saturdays because it was now her Sabbath. Likewise, in *Frazee v. Illinois Department of Employment Security* (1989), the court ordered Illinois to pay unemployment benefits to an employee who believed that Sunday was the "Lord's Day" (though he did not attend worship services on that day) and was fired from his job because he refused to work on Sundays.

In some of the cases in which the court rejected free exercise claims, it applied a less rigorous version of the compelling interest test than it had in earlier decisions. For example, in *Bob Jones University v. United States* (1983), the court rejected a First Amendment challenge to the Internal Revenue Service's policy of denying tax-exempt status to nonprofit educational institutions that had racially discriminatory policies. The university argued that even though it prohibited interracial dating among its students, it should retain its tax-exempt status because the school's dating policy was grounded in the institution's religious values. The court rejected the university's claim, and in doing so dispensed with the detailed balancing test it had used in *Sherbert* and *Yoder*. With minimal analysis, the court found that the government's interest in ending racial discrimination was a sufficiently compelling one and dismissed the notion that the university would be severely burdened by the loss of its tax exemption. The court did not attempt to rigorously assess whether allowing the university to keep the exemption would seriously impede the government's civil rights enforcement effort.

In several other post-*Yoder* decisions, the court refused to apply the compelling interest test because the justices concluded that the issues involved situations that should not be closely monitored by the judiciary. For example, in *Goldman v. Weinberger* (1986), the court held that the compelling interest

test should not be applied to the military. Accordingly, the court ruled against a Jewish Air Force captain who sought the right to wear a yarmulke – a religious head covering – despite the Air Force rule that forbade the wearing of any headgear indoors. By a 5-4 vote, the court held that the judicial branch should not interfere with military judgments about when religious exemptions from military policies should be allowed.

In *O'Lone v. Estate of Shabazz* (1987), the court similarly invoked a policy of deference to officials who administer prisons. Ahmad Uthman Shabazz and other Muslim inmates had challenged New Jersey state prison policies that made it impossible for them to attend Jum'ah, Friday afternoon Muslim prayer services. Chief Justice William Rehnquist, writing for a 5-4 majority, asserted that judges should defer to prison policies that are supported by "reasonable penological interests." In this case, the court ruled, considerations of rehabilitation and security provided a reasonable basis for restrictions on inmate attendance at this service.

In still other cases, the court has refused to apply the compelling interest test because it concluded that the challenged government action simply did not impose a substantial burden on the plaintiff's free exercise of religion. For example, in *Bowen v. Roy* (1986), a Native American family claimed that by assigning a Social Security number to their daughter, the federal government had robbed her of her spirit and, hence, offended their religious beliefs. The family argued that the Free Exercise Clause obligated the government to exempt them from the requirement, even though the girl needed a Social Security number in order to receive welfare benefits. The court, however, rejected the parents' claim and ruled that the government's assignment of a Social Security number to their daughter did not obstruct the parents' ability to "believe, express and exercise" their religion. In addition, the court asserted, the Free Exercise Clause should not be read to limit the way the government makes decisions about its internal affairs – in this case, how it distributes benefits.

THE *SMITH* DECISION

THE COURT RETURNS TO THE BELIEF-ACTION DISTINCTION

As a result of the Supreme Court's repeated refusal to uphold free exercise claims in virtually all contexts other than *Yoder* and a handful of unemployment compensation cases, many legal scholars began to wonder whether the distinction between religious belief and action established in the 19th-century polygamy cases (and thought to be overturned in *Sherbert*) was still operative. In 1990, the Supreme Court seemed to settle this uncertainty when it took a dramatic and unexpected step that largely re-established that distinction.

The case, *Employment Division v. Smith*, involved a challenge brought by two Native Americans, Alfred Smith and Galen Black, who had been dismissed from their jobs as drug rehabilitation counselors because they had ingested the hallucinogen peyote as part of a religious ritual in the Native American

SUPREME COURT CASE

EMPLOYMENT DIVISION v. SMITH (1990)

MAJORITY:		MINORITY:
KENNEDY	SCALIA	BLACKMUN
O'CONNOR	STEVENS	BRENNAN
REHNQUIST	WHITE	MARSHALL

Church. The state of Oregon denied their application for unemployment benefits because they had been fired for work-related misconduct. Smith and Black took their case to the courts, where they argued they should not be denied government benefits because the cause of their dismissal – the use of peyote for religious purposes – was protected by the Free Exercise Clause.

In an opinion that stunned many in the legal world, the court, by a vote of 6-3, rejected the Native Americans' claim. Justice Antonin Scalia's opinion, joined by four other justices, concluded that in most circumstances, generally applicable laws that impose a burden on religious practice – such as Oregon's criminal prohibition on the use of peyote – are not subject to the compelling interest test. Scalia's opinion explicitly hearkened back to the reasoning in *Reynolds*, the first polygamy case. The Free Exercise Clause protects religious beliefs, he wrote, but it does not insulate religiously motivated actions from laws, unless the laws single out religion for disfavored treatment.

Such nondiscriminatory, general laws should be evaluated, the court ruled, under the "rational basis" standard. Under this standard, which is much more deferential to the government than the compelling interest test, a law is constitutional as long as there is a rational or legitimate reason for it; it does not need to further an important or compelling government interest. Because Oregon had a rational basis for outlawing peyote – it is a hallucinogenic drug – the court concluded that the Free Exercise Clause did not exempt those who used the drug for religious reasons.

Scalia distinguished the court's ruling in *Smith* from prior decisions – such as *Yoder* and *Cantwell* – by arguing that in those cases, the right to free exercise had been bolstered by a second, companion right under the Constitution. In *Yoder*, for instance, free exercise had been linked to the right of parents to direct and control the upbringing of their children, he wrote. In *Cantwell*, he pointed out, free exercise had been connected to the right of free expression. These combinations produce "hybrid" rights, Scalia asserted. Had this combination of rights not been present, he argued, the court would have rejected those religious freedom claims, just as it was now doing in *Smith*.

[The court ruled] that in most circumstances, generally applicable laws that impose a burden on religious practice – such as Oregon's criminal prohibition on the use of peyote – are not subject to the compelling interest test.

The *Smith* opinion narrowed the impact of *Sherbert* and its progeny and limited the use of the compelling interest test to circumstances in which state law already allows for certain people to be exempt from the law's requirements for specific reasons. In *Sherbert*, for instance, exemptions were available to those seeking unemployment benefits in South Carolina if they could demonstrate a justifiable reason for refusing work. In cases involving unemployment compensation or other contexts where these types of exemptions are available, such as zoning, the government must have a compelling reason when it rejects religious hardship as such a cause. But where the government does not routinely grant exemptions to a law, such as in the case of most criminal prohibitions, the Free

Exercise Clause does not trigger any entitlement to a religious exemption.

In the *Smith* decision, Scalia also asserted that those seeking exemptions from legal requirements based on religious grounds should look for redress in the political arena by petitioning the legislative or executive branches of government. He stated that the courts are not the best venue for those seeking exemptions because each judge or court can have a different view of laws and rights, and thus produce inconsistent decisions.

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The court in *Smith* recognized that its new approach would sometimes make things difficult for religious minorities, whose need for exemption from general rules might well be ignored in the political process. Scalia concluded, however, that this "unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of … laws against … religious beliefs."

The *Smith* opinion produced several forceful responses from other justices. In her concurrence, Justice Sandra Day O'Connor argued against the central thrust of the majority opinion and in favor of retaining the compelling interest test in free exercise cases as a means of protecting religious minorities. O'Connor concurred with the decision only because she agreed with the ultimate ruling in the case; she believed that Smith and Black should lose precisely because the state of Oregon had a compelling interest in outlawing all uses of peyote.

In his dissent, Justice Harry Blackmun (joined by Justices William Brennan and Thurgood Marshall) agreed with O'Connor that the compelling interest test should be retained as a way for courts to mitigate "the severe impact of a state's restrictions on the adherents of a minority religion." Unlike O'Connor, however, Blackmun argued that Smith and Black's interest in using peyote in religious sacraments outweighed Oregon's interest in applying its anti-peyote laws to them.

The *Smith* decision produced a significant political protest from religious organizations and civil liberties groups such as the American Civil Liberties Union. These critics saw the ruling as a serious retreat from judicial protection of free exercise rights. They argued that the decision would threaten the religious liberty of many people, and especially those of minority faiths, who engaged in religiously motivated acts that might conflict with general laws.

THE *CITY OF HIALEAH* AND *LOCKE* DECISIONS

REAFFIRMING THE *SMITH* DECISION

Despite the political outcry over the *Smith* opinion, the court reaffirmed the decision's basic principle

SUPREME COURT CASE

CHURCH OF THE LUKUMI BABALU AYE v. CITY OF HIALEAH (1993)

MAJORITY:	
BLACKMUN	SCALIA
KENNEDY	SOUTER
O'CONNOR	STEVENS
REHNQUIST	THOMAS
	WHITE

three years later. The case, *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993), involved a series of ordinances passed by the Florida city in response to the ritual practice of animal sacrifice by practitioners of Santeria, an Afro-Cuban religion that mixes Roman Catholic and indigenous African traditions. The city's ordinances outlawed the sacrifice or killing of animals in rituals or ceremonies, with specific exemptions for Kosher slaughter or other state-approved activities.

The Supreme Court's majority opinion was written by Justice Anthony Kennedy, who had voted with the majority in *Smith*. In his opinion, Kennedy explicitly reaffirmed the principle in *Smith* that the Free Exercise Clause does not exempt religiously motivated acts from general laws. Nevertheless, the court ruled against the city, finding that the Hialeah ordinances were discriminatory because they had been carefully crafted to prohibit only the mistreatment of animals for religious purposes. Indeed, the court concluded that the ordinances specifically discriminated against the practitioners of Santeria. For instance, the city had not outlawed killing animals for secular reasons or forbidden practices of animal slaughter performed to satisfy Jewish dietary laws.

Because the ordinances were not general laws, but instead specifically discriminated against the practitioners of Santeria, Kennedy wrote, the compelling interest standard should apply in this case. The court found that the city had no such interest that could justify banning the Santerian practices without similarly banning comparable religious or secular practices.

In separate concurring opinions, three of the justices (David Souter, Harry Blackmun and Sandra Day O'Connor) agreed with the rest of the majority that the Hialeah ordinances violated the Free Exercise Clause. But the three also urged the court to reconsider the rule in *Smith*, which, they asserted, was an incorrect interpretation of the Free Exercise Clause. In particular, they argued, the *Smith* ruling was insensitive to religious minorities, inconsistent with precedent and insufficiently protective of religious freedom.

More than a decade after *City of Hialeah*, the court was confronted with an example of a law that singled out religion generally rather than a particular faith. In *Locke v. Davey* (2004), a student challenged a Washington state higher education subsidy that specifically excluded those who were pursing a degree in theology. In a 7-2 decision, the court ruled that the program was constitutional. Writing for the majority, Chief Justice Rehnquist argued that the government was free to include all major fields of study except theology or other devotional religious studies, on the grounds that such studies frequently lead to a career in the clergy. Because the Free Exercise Clause significantly

SUPREME COURT CASE

LOCKE v. DAVEY (2004)

MAJORITY:		MINORITY:
BREYER	O'CONNOR	SCALIA
GINSBURG	REHNQUIST	THOMAS
KENNEDY	SOUTER	
	STEVENS	

limits government regulation of the clergy, Rehnquist reasoned, the clause similarly permitted the government to refrain from subsidizing this field of study.

The *Locke* decision reflects the traditional judicial reluctance to interfere in governmental spending decisions. The dissenting justices (Antonin Scalia and Clarence Thomas), however, criticized the majority opinion in *Locke* for departing from the traditional requirement that the state be strictly neutral between religion and nonreligious philosophies.

STATE COURT AND LEGISLATIVE RESPONSES TO THE *SMITH* DECISION

In the years following *Smith*, the fear that the decision would significantly curtail religious liberty prompted state courts and legislatures, as well as the U.S. Congress, to act. Prior to this ruling, many state courts had followed the Supreme Court's more expansive view of religious liberty in interpreting their own constitutions' religion clauses. After *Smith*, however, several state courts explicitly rejected the high court's new doctrine and continued to employ some variation of the compelling interest test in deciding religious liberty claims.

For instance, in *State v. Hershberger* (1990), the Minnesota Supreme Court upheld the right of the Old Order Amish to use silver reflecting tape instead of the state-mandated orange triangle on their slow-moving, horse-drawn buggies. The state court ruled that the Minnesota Constitution's protection of religious liberty required the state to establish that it had a compelling interest in regulating religiously motivated actions. Furthermore, the state was required to demonstrate that accommodating religious practices would undermine those interests. The court concluded that the state was unable to meet that requirement in this case. Similarly, in *First Covenant Church v. City of Seattle* (1992), the Washington state Supreme Court, adopting the compelling interest test for religious liberty claims under the Washington state Constitution, ruled in favor of a church that had been prevented from making alterations to its building by the state's historic preservation laws.

Legislatures, beginning with the U.S. Congress, also acted to counter what they perceived would be the negative impact of *Smith*. In 1993, a coalition of religious and civil liberties groups persuaded Congress to enact the Religious Freedom Restoration Act (RFRA), which attempted to codify the compelling interest standard that the Supreme Court had applied in *Sherbert* and *Yoder* but had curtailed in *Smith*. Specifically, the statute prohibited the government from burdening religiously motivated activity unless there is a compelling interest to do so, and unless that interest is being furthered in the least restrictive manner.

In 1997, the constitutionality of RFRA came before the Supreme Court in *City of Boerne v. Flores*. The case involved a dispute between a Texas town and a local Catholic archbishop who wanted to enlarge a church building, which was a violation of local historic preservation rules. In a sweeping decision, the Supreme Court ruled that RFRA was unconstitutional as applied to the states. The foundation of the decision rested upon federalism. The court concluded that Congress lacked the power to impose upon state and local governments the same compelling interest test that the court itself had repudiated in *Smith* and *City of Hialeah*. Among other things, the court pointed

out that Congress had offered no evidence that state or local governments were systematically imperiling religious liberty. Such findings might have shown that the restoration of the pre-*Smith* compelling interest test was in fact necessary to maintain religious freedom against state and local government intrusion.

In 2006, the Supreme Court had an opportunity to apply RFRA in a case involving the federal government. In *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, the court unanimously ruled that the statute protects the right of a small religious sect to import and use a hallucinogenic substance in its religious rituals. The court also concluded that the government failed to show that the substance – hoasca tea – is dangerous to human health or is the subject of illicit commercial trafficking. Hence, the court ruled that the government, as required by RFRA, did not demonstrate a compelling interest in denying the religious group access to the tea.
A dozen states have followed Congress' lead and enacted state RFRAs, which require the state to justify burdens they place on religiously motivated actions. However, as of 2007, these state-level RFRAs have not had a significant impact on state court decisions concerning religious freedom. For example, in *Freeman v. Department of Motor Vehicles* (2006), a Florida appellate court ruled that the state RFRA did not protect the right of a Muslim woman to refuse to be photographed without her head covering if she wanted to obtain a driver's license. The Florida Supreme Court declined to hear an appeal of the lower court's decision.

Meanwhile, in 2000, three years after *City of Boerne*, Congress passed a significantly scaled-back version of RFRA, the Religious Land Use and Institutionalized Persons Act (RLUIPA). As its name suggests, RLUIPA is focused on two kinds of state and local actions. First, the law regulates government decisions concerning the uses of land by religious organizations. Most such decisions involve matters of zoning or issues of historic preservation. As of mid-2007, many cases involving this portion of RLUIPA were working their way through the lower courts. In addition, the act aims to protect the religious freedom of prison inmates and other persons incarcerated in state or local institutions, such as jails or mental hospitals.

So far, RLUIPA has weathered constitutional challenges better than its predecessor. For instance, in *Cutter v. Wilkinson* (2005), the Supreme Court unanimously rejected the argument that the portion of the statute that covers prisoners and other institutionalized persons violates the First Amendment's Establishment Clause, which forbids the government from specially favoring religion or promoting religious belief. The court ruled that Congress is free to insist that states receiving federal financial assistance for their penal institutions

The winding trail of decisions from Reynolds *to* Yoder *to* Smith *to the legislative responses to* Smith *demonstrates that American courts and legislatures continue to struggle with the vexing question of whether and under what conditions religiously motivated actions should be exempt from generally applicable laws.*

respect the religious liberties of prisoners within the standards required by RLUIPA. Prison officials and courts must now apply RLUIPA, as interpreted in *Cutter*, on a case-by-case basis to the particular religious freedom claims of prisoners and other institutionalized persons. (An upcoming backgrounder will discuss in much greater detail RLUIPA and other legislative accommodations of religious liberty.)

In light of the reasoning in *Cutter*, there is reason to believe that the court would similarly uphold RLUIPA's land use provisions against a constitutional challenge based on the Establishment Clause. But this result is by no means assured, since these provisions raise a unique blend of concerns about religious freedom and federal interference in local decisions concerning the effect of land use on the surrounding community.

LOOKING AHEAD

Ever since the Supreme Court first addressed a free exercise claim in the late 19th century, there has been no clear resolution to the question of how to interpret the Free Exercise Clause. The winding trail of decisions from *Reynolds* to *Yoder* to *Smith* to the legislative responses to *Smith* demonstrates that American courts and legislatures continue to struggle with the vexing question of whether and under what conditions religiously motivated actions should be exempt from generally applicable laws.

The persistence of such a question is inevitable in a religiously pluralistic society with a wide variety of religious practices. As religious pluralism in the U.S. increases, these questions are bound to occur with increasing frequency. The answers, however, may prove elusive, requiring the courts to continue to grapple with the precise meaning of the Free Exercise Clause.

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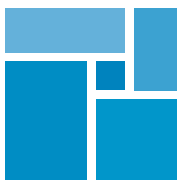

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