

CHAPTER 4

RELIGION: EXERCISE AND ESTABLISHMENT

Const Day
Con / Stat review
State / Fed
national level

ON MY ARRIVAL in the United States,” wrote Alexis de Tocqueville in the 1830s, “the religious aspect of the country was the first thing that struck my attention; and the longer I stayed there, the more I perceived the great political consequences resulting from this new state of things. In France I had almost always seen the spirit of religion and the spirit of freedom marching in opposite directions. But in America I found they were intimately united and that they reigned in common over the same country.”¹ Writing in the 1990s, political commentator Garry Wills asserted, “We may not realize that we live in the most religious nation in the developed world. But nine out of ten Americans say that they have never doubted the existence of God, and internationally, Americans rank second (behind only Malta) when rating the importance of God in their lives. So why is it surprising when the decisions we make in the voting booth reflect our basic religious values?”²

Two of the most astute observers of American politics, writing a century and a half apart, reached similar conclusions: religion plays an important role in the lives of most Americans. In a nation where 68 percent of the population belongs to one of more than 350,000 churches, temples, mosques, and synagogues, it is not surprising to

find chaplains reading invocations before legislative sessions or cities putting up Christmas displays.³

Indeed, as Tocqueville observed, Americans have always been a religious people. All of us learned in elementary school that the first settlers came to America to escape religious persecution in Europe and to practice their religion freely in a new land. What we often forget, however, is that as the colonies developed during the seventeenth century, they too became intolerant toward “minority” religions: many passed anti-Catholic laws or imposed ecclesiastical views on their citizens. Prior to the adoption of the Constitution, only two states (Maryland and Rhode Island) provided full religious freedoms—the remaining eleven had some restrictive laws. Six states had established state religions. Puritanism was the official faith of the Massachusetts Bay Colony, and Virginia established itself under the Church of England.

More tolerant attitudes toward religious liberty developed with time. After independence was declared, some states adopted constitutions that contained guarantees of religious freedom. For example, North Carolina’s 1776 constitution proclaimed, “All men have a natural and unalienable right to worship Almighty God according to

1. Alexis de Tocqueville, *Democracy in America*, vol. 1 (New York: Vintage Books, 1954), 319.

2. Garry Wills, *Under God* (New York: Simon and Schuster, 1990), book jacket.

3. Religious membership and organizations statistics are taken from *Statistical Abstract of the United States* (Washington, D.C.: U.S. Bureau of the Census, 2001); and the *New York Times 2001 Almanac* (New York: Penguin Putnam, 2000). For excellent reviews of the role religion plays in American political culture, see Kenneth D. Wald, *Religion and Politics in the United States*, 3rd ed. (Washington, D.C.: CQ Press, 1997); and Wills, *Under God*.

the dictates of their own consciences.” But other constitutions continued to favor some religions over others. Delaware’s said “[t]here shall be no establishment of any religious sect in this State in preference to another,” but it required all state officers to “profess faith in God the Father, and in Jesus Christ His Only Son.”

It would be fair to say that when the framers gathered in Philadelphia, they—like modern-day Americans—held divergent views about the relationship between religion and the state. Even so, the subject of religion arose only occasionally during the course of the debates. After one particularly difficult session, Benjamin Franklin moved that the delegates pray “for the assistance of Heaven, and its blessings on our deliberations.” With virtual unanimity, the delegates attacked Franklin, arguing that a prayer session might offend some members and that the public would perceive it as an act of desperation.⁴ In the end, the founders mentioned religion only once in the Constitution. Article VI provides that all government officials must take an oath to “support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”

Opponents of the new Constitution objected to its lack of any guarantees of religious liberty. New York Anti-Federalists, for example, condemned the document for “not securing the rights of conscience in matters of religion, of granting the liberty of worshipping God agreeable to the mode thereby dictated.”⁵ Many states proposed amendments that centered on religious liberty. When James Madison drew up what would become the Bill of Rights, he included the following: “The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.” After several rounds of changes, the framers adopted two provisions to protect religious liberty: the establishment

clause and the free exercise clause. Together they became the first two guarantees contained in the First Amendment of the Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

How has the Court interpreted these two clauses? Are their meanings the same today as when the framers wrote them? In this chapter, we examine these and other questions. We begin with a basic question that has implications for both clauses: What is religion?

DEFINING RELIGION

Suppose some prisoners form a religion holding that God requires them to eat filet mignon and drink Cabernet Sauvignon every day. Members of this new religion ask prison officials to serve them these things, but the officials, believing that the religion is nothing more than a ploy to get expensive meat and wine, refuse the request. The prisoners file a lawsuit to force the prison to comply. They claim that the government is depriving them of their right to exercise their religion freely.

This dispute may strike you as easy to resolve; after all, it seems clear that the prisoners formed this religion only to obtain steak and wine. But how would you distinguish their “religion” from others that also seek to obtain benefits for their members at society’s expense? For example, if an Orthodox Jew is fired from her job because she refuses to work on Saturdays, may the state deny her unemployment benefits? Is she using her religion to take money from the state? You would probably answer no to both questions because you perceive a difference between the religion of the prisoners and the religion of the unemployed worker. But what is that difference? How do we distinguish a genuine religion from a sham?

These questions are critical to our discussion because if a religion is not genuine or bona fide, it is not entitled to protection under the religion clauses of the First Amendment. But the cases that come before the Supreme Court are rarely simple to resolve. In fact, the Court has had a good deal of difficulty in defining religion in terms of the First Amendment. Its first attempt came in 1879 in *Reynolds v. United States*. In the next section, which deals with the free exercise of religion, we discuss this case in

4. Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution*, 2nd ed. (St. Paul, Minn.: Thomson/West Publishing, 2005), 172–173.

5. Address of the Albany Antifederal Committee, April 26, 1788, excerpted in *ibid.*, 256.

some detail. Here, it is enough to say that it involved the Mormon Church, whose adherents at the time of this dispute lived mostly in the Utah Territory. Apparently, because the church was relatively new (it had formed in 1830) and its practices, particularly polygamy, were unfamiliar, if not distasteful, to the Court, the justices felt the need to consider whether it was a religion at all. Writing for the Court, Chief Justice Morrison R. Waite suggested:

The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted.

Using this approach, Waite did not declare that Mormonism was not a religion; but he did say that the government could outlaw one of its teachings—the practice of polygamy—because there was no support for it at the time of the founding of the nation.

In fact, at the time the Mormon religion was founded, its adherents were persecuted and even attacked by hostile mobs. Many Mormons moved to the West because other states would not tolerate their presence. For example, in 1838 Missouri called out the militia because, as the state governor wrote, "The Mormons must be treated as enemies, and must be exterminated."⁶ As *Reynolds* indicates, government efforts to undermine the religion did not stop after the Mormons settled in Utah. In addition to the antipolygamy law, Congress in 1887 passed an act that allowed the government to "disenfranchise Mormon voters, remove corporate status from the Mormon church, and confiscate all church property."⁷ About thirteen hundred Mormons were arrested.

A decade or so after the decision in *Reynolds*, the Court had an opportunity to reconsider it when a Mormon challenged a law that disqualified individuals from voting if they refused to take an oath "abjuring bigamy or polygamy." But in *Davis v. Beason* (1890), the Court only reinforced *Reynolds*, this time with a statement about beliefs in God and "morals":

The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence

for his being and character, and of obedience to his will. . . . With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with.

These are narrow approaches to religion; *Reynolds* suggests that government may regulate religious practices that are new or were unknown to the framers. When we consider that during the eighteenth century there were only a few dozen major religions or sects compared with more than 250 today—to say nothing of the hundreds of small "fringe" groups—we can see why this ruling was so underinclusive.⁸ *Davis v. Beason* binds religion to a belief in God, a belief that some religions do not hold or about which some "religious" individuals are skeptical. It also permits regulation of religious practices if those practices interfere with the "morals" of the people. In short, through the nineteenth century, courts defined religion, as legal scholar Laurence Tribe has written, in terms of "theistic notions respecting divinity, morality, and worship. In order to be considered legitimate, religions had to be viewed as 'civilized' by Western standards."⁹

Fortunately for adherents of nonmainstream religions, *Reynolds* and *Davis* were not the Court's last words on the subject. Since the 1940s two types of cases have provided the Court with opportunities to reconsider Chief Justice Waite's approach. The first centers on religions that appear to be shams and is well exemplified by *United States v. Ballard* (1944).

The *Ballard* case concerned the "I Am" movement, which was founded in California by Guy Ballard, who had a long-standing interest in the occult. He claimed that while hiking on Mount Shasta in 1930 he encountered a young man who identified himself as Comte de Saint Germain. Saint Germain supposedly asserted that he was several centuries old and was, along with Jesus, one of the Ascended Masters. According to Ballard's account, Saint Germain explained that the Ascended Masters had chosen Ballard and his wife, Edna, and their son,

6. Quoted in Laurence Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1988), 1271.

7. *Ibid.*

8. These figures were quoted in *ibid.*, 1179.

9. *Ibid.*

Donald, to be their divine messengers on earth. In response the Ballards started the "I Am" movement, a variation of which remains active today. As the spiritual leader of I Am, Ballard claimed supernatural healing powers and told his followers that he needed money to continue his work. In return he promised health, wealth, and happiness. Ballard used the postal service to collect these funds, making a good deal of money along the way.

Asserting that the I Am sect was not a religion, the federal government accused Ballard of using the mail to defraud people. When the case reached the Supreme Court, it addressed the question of what a jury could consider in determining whether to convict Ballard. The trial court judge had told the jury that it could not take into account the truth of Ballard's views (for example, whether Saint Germain had chosen Ballard as a messenger); rather, it could consider only the sincerity with which Ballard held his views. The Supreme Court agreed with this approach. Writing for the majority, Justice William O. Douglas asserted:

Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.

As for the Ballards, Douglas had this to say:

The religious views espoused by [Ballard] might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

Under the *Ballard* approach, the proper test of a constitutionally protected religious belief is not the truth of its doctrine but the sincerity with which it is held. For

our would-be gourmet prisoners, then, we would ask if they sincerely held their religious views, rather than if those views were factually accurate.

The second category of cases in which the Court has considered what religion is involves conscientious objector exemptions from the military. In the Universal Military Training and Service Act of 1940, Congress provided exemptions from military combat to individuals "who, by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form." The law defined religious training and belief as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising by any human relation but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."

Using Congress's definition, members of some organized religions, such as the Quakers, would qualify for exemptions. But what about those who are not members of a traditional, organized religion or those who do not necessarily frame their religious views with reference to a supreme being? Could they obtain religious exemptions from military service?

As the Vietnam War raged on in the 1960s, several cases presented the Court with an opportunity to answer these questions. In *United States v. Seeger* (1965) the justices considered whether individuals who were not members of an organized religion could obtain a military exemption on religious grounds. Daniel Seeger asserted that, although he opposed participation in the war on the basis of his religious belief, "he preferred to leave the question as to his belief in a Supreme Being open 'rather than answer yes or no.'" Did his declared "skepticism or disbelief in the existence of God" disqualify him from a religious exemption? Writing for the Court, Justice Tom C. Clark said it did not, for

Congress, in using the expression "Supreme Being" rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views.

Clark then provided a standard to govern future litigation, one that again stressed the sincerity of the beliefs held:

[T]he test of belief “in relation to a Supreme Being” is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to . . . the orthodox belief in God.

In response to the Court’s ruling in *Seeger*, Congress removed from the 1940 law the words “in relation to a Supreme Being.” But more litigation ensued. In *Welsh v. United States* (1970) the Court considered another section of the law, which excluded from exemption coverage individuals whose views were “essentially political, sociological, or philosophical.” In a judgment for the Court,¹⁰ Justice Hugo L. Black explained that even if a draftee’s objection to the war was not based strictly on traditional religious grounds, he could obtain a religious exemption if his moral and ethical beliefs were sincerely held—as sincerely held as traditionally defined religious beliefs. For if those views are that strong, they take on a religious character falling within the protection of the law.

In the conscientious objector cases, the Court moved away from the strictly theistic view of religion it had expressed in *Reynolds*. To be considered “religious,” that is, to come under the protection of the free exercise clause, one’s religion need not be based in a belief in God. Rather, the Court’s inquiries have focused on the sincerity (but not the truth) with which someone (or one’s religion) holds a particular view.

The cases and narrative to come provide many opportunities to think about what elements define religion. As you read them, ask yourself whether the Court still evinces a bias toward established, major religions, or has it significantly changed its approach in response to the expanding diversity of religions in contemporary America? You may also want to consider the competing charge that the Court has gone too far, that it extends First Amendment coverage to religions that are undeserving.

FREE EXERCISE OF RELIGION

Imagine a religious sect whose members handle poisonous snakes in the belief that such activity demonstrates their faith in God. Should government prohibit such activity because it is dangerous? Or would a law

10. A judgment represents the view of a plurality, not a majority, of the Court’s members. Unlike a majority opinion (or “opinion of the Court”), a judgment lacks precedential value.

banning this behavior violate the First Amendment’s free exercise clause, which proclaims that there can be “no law . . . prohibiting the free exercise” of religion?

A literal approach to the free exercise clause would suggest that religious denominations can pursue any exercise of their religion they desire. Yet it seems clear that the majority of Americans did not think the free exercise of religion meant any such thing at the time the clause was framed. Although we do not know specifically what the framers intended by the words “free exercise” (congressional debates over religious guarantees tended to focus on the establishment clause rather than the free exercise clause), writings and documents of the day point to a universally accepted limit.¹¹ As Thomas Jefferson set it out in an 1802 letter to the Danbury Baptist Association: “[I believe] that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not opinion.”¹² In other words, the free exercise of religion is not limitless, as a literal reading of the amendment would suggest. Rather, at least under Jefferson’s interpretation, governments can regulate “actions.”

Belief-Action Distinction and Valid Secular Policy Test

Like Jefferson, the Court has never taken a literal approach to the free exercise clause. Rather, in its first major decision in this area, it seized on his words to proclaim that some religious activities lie beyond First Amendment protections. As we mentioned, that case was *Reynolds v. United States*, which involved the Mormon practice of polygamy. Mormons believed that males “had the duty . . . to practice polygamy” and that failure to do so would result in “damnation in the life to come.” Word of this practice found its way to the U.S. Congress, which was charged with governing the Utah Territory, where many Mormons lived. In 1874 Congress outlawed

11. For an interesting view, see Michael W. McConnell, “Free Exercise as the Framers Understood It,” in *The Bill of Rights*, ed. Eugene W. Hickok Jr. (Charlottesville: University of Virginia Press, 1991).

12. Letter to the Danbury Baptist Association, 1802, quoted in *Reynolds v. United States* (1879).

polygamy. After Mormon follower George Reynolds married his second wife, he was charged with violating the law. In his defense, Reynolds argued that he was following the dictates of his faith, a right reserved to him under the free exercise clause.

The U.S. Supreme Court disagreed. In a unanimous opinion, the justices rejected an absolutist interpretation of the clause and instead sought to draw a distinction between the behavior it did and did not protect. Chief Justice Waite's opinion for the Court asserted, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of the good order." This distinction between opinions (or beliefs) and actions (or practices) became, as we shall see, the centerpiece for several future religion cases.

Some have argued that the belief-action distinction was simply a way for the Court to uphold a government prohibition of an almost universally condemned practice advocated by a particularly unpopular church.¹³ This view receives support from the Court's failure to use the distinction in its next major free exercise clause case, *Pierce v. Society of Sisters* (1925). In 1922 Oregon had passed a compulsory public school education act, requiring children between the ages of eight and sixteen to attend public school. A diverse body of interests supported this measure for equally diverse reasons: progressives hailed it as a necessary step for the assimilation of immigrants, and the Ku Klux Klan backed it because it was viewed as anti-Catholic. Indeed, the ultimate effect of the Oregon law was to force closure of the state's privately run schools, many of which were Roman Catholic. The Society of Sisters, organized in 1880 to provide secular and religious instruction to children, faced dissolution because it derived more than \$30,000 of its annual income from its school.

Rather than shut its doors, the society chose to sue the state, arguing that the law impinged on its free exercise rights. The sisters received support from organizations representing the spectrum of religions in the United States. Jews, Lutherans, Episcopalians, and Seventh-Day

Adventists had a vested interest in the case's outcome because they also ran private schools. In addition, they wanted to show their unity of distaste for the Klan-backed law, believing it repressed "pluralism in education."¹⁴

In a unanimous opinion, the Court held for the Society of Sisters but virtually ignored the *Reynolds* belief-action distinction. Instead, the Court rested its ruling on the view that the sisters (as opposed to the Mormons) engaged in a "useful and meritorious" undertaking. Justice James McReynolds wrote:

The inevitable practical result of enforcing the act . . . would be the destruction of appellees' primary schools. . . . Appellees are engaged in a kind of undertaking not inherently harmful but long regarded as useful and meritorious. Certainly, there is nothing in the present record to indicate that they have failed to discharge their obligations to patrons, students, or the state.

The Court did not return to the belief-action dichotomy until 1940 when, for the first time, the justices specifically applied the free exercise clause to state action, this time, taken against the Jehovah's Witnesses (*see Box 4-1*). The Jehovah's Witnesses denomination actively promotes its religion and vigorously proselytizes to gain converts to the faith. Church members regularly distribute religious pamphlets and solicit money, activities regulated by laws in many states. In *Cantwell v. Connecticut*, among other cases, the Witnesses asked the Court to strike down such regulation as infringements upon their right to practice their religion freely.

Cantwell v. Connecticut

310 U.S. 296 (1940)

<http://laws.findlaw.com/US/310/296.html>

Vote: 9 (Black, Douglas, Frankfurter, Hughes, McReynolds, Murphy, Reed, Roberts, Stone)

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Opinion of the Court: Roberts

Newton Cantwell and his sons, Jesse and Russell, members of the Jehovah's Witnesses sect, were playing

13. John Brigham, *Civil Liberties and American Democracy* (Washington, D.C.: CQ Press, 1984), 77.

14. For more details on this case, see Clement E. Vose, *Constitutional Change* (Lexington, Mass.: Lexington Books, 1972).

BOX 4-1 THE JEHOVAH'S WITNESSES AND THE COURT

THE JEHOVAH'S WITNESSES began in the 1870s in Pittsburgh, Pennsylvania. Starting as a Bible study class directed by eighteen-year-old Charles Taze Russell, the sect became a powerful grassroots movement. By the late 1930s, under the leadership of Joseph Franklin Rutherford, the Witnesses were preaching all over the United States and in several foreign countries. The Witnesses claim 6.6 million active members today.

Members see themselves as evangelical ministers with the mission to preach about Jehovah's struggle with Satan. They denounce organized religion, particularly Catholicism, and reject the notion of the trinity and the deity of Christ. The Witnesses interpret the Bible as prohibiting them from honoring secular symbols, such as national flags, and from receiving blood transfusions and other medical treatments. They preach and distribute literature door-to-door and on street corners. Because of their active proselytizing and unpopular views, members of the church have been prosecuted for violating local ordinances. The Witnesses have a long history of turning to the courts for relief when their constitutional rights were threatened.

The Jehovah's Witnesses have secured many legal victories at the Supreme Court level, including the following:

Murdock v. Pennsylvania (1943). A local government may not impose a tax on the privilege of religious solicitation.

West Virginia State Board of Education v. Barnette (1943). A state may not require students to recite the Pledge of Allegiance.

Martin v. Struthers (1943). A city may not forbid knocking on doors without the resident's permission.

Niemotko v. Maryland (1951). A city may not deny a permit for a public meeting because it finds a group's beliefs objectionable.

Wooley v. Maynard (1977). A state may not require automobile owners to display license plates that include state mottoes that the person finds offensive to his or her religious creed.

Thomas v. Review Board (1981). A state may not deny unemployment compensation to an otherwise eligible individual who for religious reasons refuses to work in a weapons plant.

Watchtower Bible and Tract Society v. Stratton (2002). A city may not require a permit as a condition for engaging in door-to-door religious solicitation.

records and distributing pamphlets to citizens on the street in New Haven, Connecticut, in an area that was predominately Catholic. Two passersby took offense at the anti-Catholic messages in the material and complained. The next day, police arrested the Cantwells for violating a state law prohibiting individuals "from soliciting money for any cause" without a license. The law required those who wanted to solicit to obtain a "certificate of approval" from the state's secretary of the Public Welfare Council. The state charged this official with determining whether "the cause is a religious one" or one of a "bona fide object of charity." If the official found neither, he was authorized to withhold the necessary certificate.

Although this law was neutral—that is, it applied to all those engaging in solicitation—the Witnesses challenged it as a restriction on their free exercise rights. Hayden Covington, their attorney and a member of the American Civil Liberties Union (ACLU), argued that the law "deprived the Cantwells of their right of freedom to worship Almighty God." The Supreme Court's ruling in *Cantwell* is important not only because it helped define the limits of the government's regulatory power over religious activity, but also because it incorporated the free exercise clause, making it applicable to the states through the Fourteenth Amendment.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains



Russell Cantwell raising funds for the Jehovah's Witnesses in Brooklyn in 1991. He, his brother Jesse, and his father Newton Cantwell were convicted for soliciting without a license; the Supreme Court overturned the convictions in 1940.

subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a state may by general and nondiscriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured, solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited.

The appellants urge that to require them to obtain a certificate as a condition of soliciting support for their views amounts to a prior restraint on the exercise of their religion within the meaning of the Constitution. The State insists that the Act, as construed by the Supreme Court of Connecticut, imposes no previous restraint upon the dissemination of religious views or teaching but merely safeguards against the perpetration of frauds under the cloak of religion. Conceding that this is so, the question remains whether the method adopted by Connecticut to that end transgresses the liberty safeguarded by the Constitution.

The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise.

It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth. . . .

Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury. Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The state is likewise free to regulate the time and manner of solicitation generally, in the interest

of public safety, peace, comfort, or convenience. But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution. . . .

The judgment affirming the convictions . . . is reversed and the cause is remanded for further proceedings not inconsistent with this opinion. So ordered.

Reversed and remanded.

In this opinion, Justice Owen Roberts returned to the belief-action dichotomy, but he treated it in a slightly different manner. He claimed that although the free exercise clause covered belief and action, “The first is absolute but, in the nature of things, the second cannot be.” How then would the Court distinguish protected action from illegal action? Under the principles articulated in *Cantwell*, which some analysts refer to as the “valid secular policy” test, the Court looks at the particular legislation or policy adopted by the government. If the policy serves a legitimate nonreligious government goal, not directed at any particular religion, the Court will uphold it, even if the legislation has the effect of conflicting with religious practices. In *Cantwell* the Court said that the state could regulate the collection of funds, even if those funds were for a religious purpose, because it has a valid interest in protecting its citizens from fraudulent solicitation. If Connecticut’s law had not empowered government officials to use their own discretion in determining whether a cause is religious or not, the Court probably would have upheld it as a legitimate secular policy.¹⁵

Had the Court upheld the law, the Jehovah’s Witnesses would have found it more difficult to carry out the dictates of their religion. By the same token, all other would-be solicitors—charitable organizations and the like—would be similarly affected. In other words, the re-

ligious and the nonreligious would be subject to the regulations. Looking at *Cantwell* this way reveals an important underpinning of the logic of the valid secular policy test: neutrality. If the government has a valid secular reason for its policy, then, in the eyes of the justices, religions should not be exempt from its coverage simply because they are religions. Exempting them would give religions an elevated position in society. One could argue that there is a difference between making it more difficult for a religion to carry out its mandate and a charity to collect funds. But, by adopting the valid secular policy test, the Court suggested that the effect on the Jehovah’s Witnesses amounts to only an incidental intrusion on religion that comes about as the government pursues a legitimate interest.

Application of the Valid Secular Policy Test

How has this test worked? In particular, what constitutes a valid secular policy, a legitimate state interest? In *Cantwell*, Justice Roberts provided some clues as to what these concepts might encompass: the prevention of fraud, the reasonable regulation of the time and manner of solicitation, and the preservation of “public safety, peace, comfort or convenience.” Shortly after *Cantwell*, the Court added to Roberts’s list when it reviewed cases involving mandatory flag salutes and child labor laws.

At issue in the first flag salute case, *Minersville School District v. Gobitis* (1940), were the recitation of the Pledge of Allegiance and the hand gesture or salute that accompanied it. For most individuals, particularly school children, the pledge and salute are noncontroversial routines that illustrate their loyalty to the basic tenets of American society. Such is not the case for the Jehovah’s Witnesses, who exalt religious laws over all others. They claim that the salute and the pledge violate a teaching from Exodus:

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

Accordingly, Jehovah’s Witnesses do not want their children to recite the pledge or salute the flag. The problem, at the time of this case, was that schools made the

15. See, however, a more recent case, *Watchtower Bible and Tract Society v. Stratton* (2002), in which the Court, in response to another legal action by the Jehovah’s Witnesses, struck down a city’s permit requirement for door-to-door solicitation even when local officials were not given such discretion. The challenged ordinance applied to solicitation for any cause, not just for religious purposes. The Court said the ordinance violated First Amendment freedom of speech protections.



Walter Gobitas sued the Minersville, Pennsylvania, school district after his children, William and Lillian, were expelled for refusing to salute the flag because of their Jehovah's Witnesses faith.

pledge and salute to the flag mandatory for all public school children. Flag salute laws became particularly pervasive after World War I as a show of patriotism. Before the war only five states required flag salutes; by 1935 that figure had risen to eighteen, with many local school boards compelling the salute in absence of state legislation.¹⁶

Beginning in the mid-1930s, the Witnesses actively campaigned to do away with the salutes. The effort began in Nazi Germany, where Jehovah's Witnesses refused to salute Hitler with raised arms and were punished by imprisonment in concentration camps. Joseph Rutherford, the Witnesses' leader in the United States, spoke out against the American flag salute, which, at that time, was regularly done with a straight, extended arm, resembling the Nazi-Fascist salute. He asserted that Witnesses "do not 'Heil Hitler' nor any other creature."

16. We derive this account from Peter Irons, *The Courage of Their Convictions* (New York: Free Press, 1988), 17–24.

After Rutherford's speech, some members of the Jehovah's Witnesses asked their children not to salute the flag. Among these was Walter Gobitas, whose two children—twelve-year-old Lillian and her younger brother, William—attended a Pennsylvania public school with a mandatory flag salute policy.¹⁷ When the children refused to salute the flag, they were expelled. Represented by attorneys from the Witnesses, including Hayden Covington, Gobitas brought suit against the school board, arguing that the expulsion violated his children's free speech and free exercise of religion rights. In Chapter 5 we explore the free speech component of Gobitas's claim. For now, we note that the Supreme Court, by an 8 to 1 vote, rejected these arguments. Writing for the Court, Justice Felix Frankfurter asserted:

[T]he ultimate foundation of a free society is the binding tie of cohesive sentiment. . . . The flag is the symbol of our national unity, transcending all internal differences. . . . To stigmatize legislative judgment in providing for this universal gesture of

17. The family name, Gobitas, was misspelled as Gobitis in the Court records.

respect for the symbol of our national life . . . would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess . . . no controlling competence.

To put it in terms of the valid secular policy test, Frankfurter was claiming that the state had a legitimate secular reason for requiring flag salutes: to foster patriotism. That the law affected the religious practice of the Jehovah's Witnesses did not, in Frankfurter's view, detract from its constitutionality. Besides, Frankfurter believed that the Court should not interfere with local policies because that "would in effect make [the Court] the school board for the country."

The repercussions from the Court's decision in *Gobitis* were extraordinary. After the ruling many states either retained or passed laws that required flag salutes and pledges for all public school children and threatened to expel anyone who did not comply. What was startling was the violence against Jehovah's Witnesses. "Within two weeks of the Court's decision," two federal officials later wrote, "hundreds of attacks upon the Witnesses were reported to the Department of Justice."¹⁸ Viewing their refusal to salute the flag as unpatriotic—especially as the country fought in World War II—mobs throughout the United States stoned, kidnapped, beat, and even castrated Jehovah's Witnesses.

These episodes of violence prompted many newspapers and major organizations, such as the American Bar Association, to condemn the Court's ruling. Three years later, when the initial intensity of the war years had subsided and the criticisms of the flag salute case had made their mark, in *West Virginia State Board of Education v. Barnette* (1943), the justices overruled *Gobitis*. But, as shown in Chapter 5, the *Barnette* decision was primarily based on freedom of speech grounds rather than on religious exercise.

The justices' response to the issues raised in *Prince v. Massachusetts* (1944) provides a second example of the valid secular policy test, this time applied in the area of child welfare. *Prince* involved a Massachusetts law prohibiting minors (girls under eighteen and boys under

twelve) from selling "upon the streets or in other public places, any newspaper, magazines, periodicals, or other articles of merchandise." It further specified that any parent or guardian allowing minors to perform such activity would be engaging in criminal behavior. Sarah Prince, a Jehovah's Witness, allowed her nine-year-old niece, Betty Simmons, for whom Prince was the legal guardian, to help her distribute religious pamphlets. Prince knew she was violating the law—she had been warned by school authorities—but she continued and was arrested.

At the trial court level, some doubt arose as to whether the child actually had sold materials, but when the case reached the Supreme Court, it dealt exclusively with this question: Did the state law violate First Amendment principles? The Court divided 5 to 4 to hold that it did not. Writing for the majority, Justice Wiley Rutledge asserted:

The State's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests . . . upon the healthy, well-rounded growth of young people into full maturity as citizens. . . . It may secure this against impeding restraints and dangers, within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment . . . and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.

Clearly, legislatures can regulate religious practices of potential harm to children as well as those of questionable morality and safety. Such laws, in the eyes of the justices, present a reasonable use of state police power, which is the ability of states to regulate in the best interests of their citizens. In other words, child labor laws represent a valid secular policy and, when in opposition to a free exercise claim, the free exercise claim falls.

The Sherbert-Yoder Compelling Interest Test

Cantwell, *Gobitis*, and *Prince* have several traits in common: they were brought by a minority religion; they were decided during the 1940s, a period when the Court was neither particularly conservative nor liberal in ideological

18. Irons, *Courage of Their Convictions*, 22–23.

outlook; and they often involved free exercise arguments combined with other constitutional claims, such as freedom of expression. In addition, the Court's approach to the cases was relatively consistent. Religious beliefs were not questioned, but when a person's religious actions were at issue, the Court invoked the valid secular policy test to resolve the disputes. This approach occasionally led the justices to strike down state policies (*Cantwell*), as well as to uphold them (*Gobitis* and *Prince*).

In the 1960s, however, major changes began to occur in the direction of precedent governing free exercise claims and in the kinds of cases the Court decided. The first signs came in *Braunfeld v. Brown*, which was one of several cases the Court heard in 1961 involving "blue laws." These ordinances required businesses offering goods and services not considered essential to close on Sundays. Abraham Braunfeld, an Orthodox Jew, owned a retail clothing and home furnishing store in Philadelphia. Because under state law such stores were not among those permitted to remain open on Sunday, Braunfeld wanted the Court to issue a permanent injunction against the law. His religious principles dictated that he could not work on Saturday, the Jewish Sabbath, but he needed to be open six days a week for economic reasons. He challenged the law as a violation of, among other things, his right to exercise his religion.

In a judgment, Chief Justice Earl Warren upheld the constitutionality of blue laws and restated the belief-action dichotomy:

Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute. . . .

However, the freedom to act, even where the action is in accord with one's religious convictions, is not totally free from legislative restrictions. . . . [L]egislative power over mere opinion is forbidden but it may reach people's action when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion.

But, according to many observers, Warren's opinion veered significantly from established precedent. Consider the following passage:

Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance *unless the State may accomplish its purpose by means which do not impose such a burden* [emphasis added].

In some ways, this statement merely restates the logic of *Cantwell* and the valid secular policy test. But note the italicized phrase: it represents an important addition to the test because it suggests that the state must show that its legislation achieves an important secular end that it cannot achieve with less restrictive legislation, that is, legislation that would place less of a burden on religious freedom.

Sunday closing laws, Warren reasoned, met both of these standards. According to the chief justice, in passing blue laws, the state intended to set up a day of "rest, repose, recreation and tranquillity—a day which all members of the family and community have the opportunity to spend and enjoy together." In other words, the Sunday closing laws reflect a valid secular purpose. They also are the least restrictive way of accomplishing that purpose. Even though the laws indirectly burden members of some religions (for example, Orthodox Jews), Warren reasoned that the states had adopted a relatively unburdensome way of accomplishing their goal of creating a uniform "weekly respite from all labor."

Other members of the Court took issue with Warren's analysis, which, as a judgment, represented the views of only a plurality of the justices. Especially memorable were dissents by William Brennan and Potter Stewart. Brennan thought the Court had taken a misguided approach to the issue: "I would approach this case differently, from the point of view of the individuals whose liberty is—concededly—curtailed by these enactments. For the values of the First Amendment . . . look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals." In a

one-paragraph dissent, Stewart put the issue even more starkly:

Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness. I think the impact of this law upon the appellants grossly violates their constitutional right to free exercise of their religion.

The divided opinion over *Braunfeld* created something of a quandary for legal scholars: Was the Court—through its adoption of a least restrictive means approach—signaling a change in the way it would resolve free exercise disputes? Or was *Braunfeld* an aberration? Consider these questions as you read *Sherbert v. Verner*, decided just two years later.¹⁹

Sherbert v. Verner

374 U.S. 398 (1963)

<http://laws.findlaw.com/US/374/398.html>

Vote: 7 (Black, Brennan, Clark, Douglas, Goldberg, Stewart, Warren)

2 (Harlan, White)

Opinion of the Court: Brennan

Concurring opinions: Douglas, Stewart

Dissenting opinion: Harlan

Adell Sherbert was a spool tender in a Spartanburg, South Carolina, textile mill, a job she had held for thirty-five years. Sherbert worked Monday through Friday from 7 a.m. to 3 p.m. She had the option of working Saturdays but chose not to. Sherbert was a member of the Seventh-Day Adventist Church, which held that no work be performed between sundown on Friday and sundown on Saturday. In other words, Saturday was her church's Sabbath.

On June 5, 1959, Sherbert's employer informed her that starting the next day work on Saturdays would no longer be voluntary: to retain her job she would need to

report to the mill every Saturday. Sherbert continued to work Monday through Friday but, in accord with her religious beliefs, failed to show up on six successive Saturdays. Her employer fired her July 27.

Between June 5 and July 27, Sherbert had tried to find a job at three other textile mills, but they too operated on Saturdays. Sherbert filed for state unemployment benefits. Under South Carolina law, a claimant who is eligible for benefits must be "able to work . . . and available for work"; a claimant is ineligible for benefits if he or she has "failed, without good cause . . . to accept available suitable work when offered . . . by the employment office or the employer." The benefits examiner in charge of Sherbert's claim turned her down on the ground that she failed, without good cause, to accept "suitable work when offered" by her employer. In other words, her religious preference was an insufficient justification for her refusal of a job.

Sherbert and her lawyers filed suit in a state court, which ruled in favor of the employment office, as did the state supreme court. Sherbert's attorneys asked the U.S. Supreme Court to review the case, raising several claims emanating from the Court's previous rulings on the free exercise of religion. First, after reviewing the belief-action distinction of *Reynolds* and *Cantwell*, the lawyers tried to show that the state's denial actually impinged on the forbidden territory of beliefs. They illustrated the fine line that separates beliefs from actions. The South Carolina law, they said,

conditions [Sherbert's] eligibility for benefits . . . upon being willing to accept work on Saturday and disqualified her for her refusal to accept a job involving work on Saturday. In effect this requires her to repudiate her religious belief by professing a willingness to do something in conflict with the tenets of her church. This is not mere regulation of conduct. It invades the sphere of belief and intellect.

In essence, the attorneys were adopting a page out of Stewart's dissent in *Braunfeld*: the state was using economic coercion to force Sherbert to give up a religious belief.

Second, Sherbert's attorneys tried to use *Braunfeld*, a precedent seemingly adverse to their client's interests, by flipping *Braunfeld* so that it worked for her:

19. To hear oral arguments in this case, navigate to: <http://www.oyez.org/oyez/frontpage>.

The right to observe the Sabbath by abstaining from labor is of the essence. Take away that right or stifle it, and there is no freedom of religion so far as a Saturday Sabbatarian is concerned. Most Sunday-observing Christians probably feel as strongly with respect to their right similarly to refrain from labor in observance of Sunday as the Lord's Day.

The state had an easier task, or so it seemed. It could rely on *Braunfeld* to show that South Carolina, just like Pennsylvania, had not criminalized religious beliefs. Moreover, it offered—as did Pennsylvania in *Braunfeld*—a secular and, in its view, “legitimate governmental purposes for the law.” According to the state, it sought to encourage “stable employment” and to discourage fraudulent behavior in those seeking unemployment benefits. Finally, while the state admitted that its denial of benefits financially burdened Sherbert, it argued that the burden was no more direct or greater than the economic hardship Braunfeld had alleged.

So the question for the Court to settle was the following: May a state deny unemployment benefits to persons whose religious beliefs preclude working on Saturdays?

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such, *Cantwell v. Connecticut*. . . . On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for “even when the action is in accord with one’s religious convictions, [it] is not totally free from legislative restrictions.” *Braunfeld v. Brown*. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. See, e.g., *Reynolds v. United States*; *Prince v. Massachusetts*. . . .

Plainly enough, appellant’s conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant’s constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any inci-

dental burden on the free exercise of appellant’s religion may be justified by a “compelling state interest in the regulation of a subject within the State’s constitutional power to regulate. . . .”

We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant’s religion. We think it is clear that it does. In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State’s general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For “if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.” *Braunfeld v. Brown*. Here not only is it apparent that appellant’s declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Nor may the South Carolina court’s construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant’s “right” but merely a “privilege.” It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. . . .

We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant’s First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, “[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.” . . . No such abuse or danger has been advanced in the

present case. The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. But that possibility is not apposite here because no such objection appears to have been made before the South Carolina Supreme Court, and we are unwilling to assess the importance of an asserted state interest without the views of the state court. Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance. Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs, *United States v. Ballard*, . . . it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights. . . .

In these respects, then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in *Braunfeld v. Brown*. The Court recognized that the Sunday closing law which that decision sustained undoubtedly served "to make the practice of [the Orthodox Jewish merchants'] . . . religious beliefs more expensive." But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers. That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable. In the present case no such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive benefits. . . .

unworkable

The judgment of the South Carolina Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

The case we have for decision seems to me to be of small dimensions, though profoundly important. The question is whether the South Carolina law which denies unemployment compensation to a Seventh-day Adventist who, because of her religion, has declined to work on her Sabbath, is a law "prohibiting the free exercise" of religion as those words are used in the First Amendment. It seems obvious to me that this law does run afoul of that clause. . . .

Some have thought that a majority of a community can, through state action, compel a minority to observe their particular religious scruples so long as the majority's rule can be said to perform some valid secular function. That was the essence of the Court's decision in the Sunday Blue Law Cases . . . a ruling from which I then dissented and still dissent.

That ruling of the Court travels part of the distance that South Carolina asks us to go now. She asks us to hold that when it comes to a day of rest a Sabbatarian must conform with the scruples of the majority in order to obtain unemployment benefits.

The result turns not on the degree of injury, which may indeed be nonexistent by ordinary standards. The harm is the interference with the individual's scruples or conscience—an important area of privacy which the First Amendment fences off from government. The interference here is as plain as it is in Soviet Russia, where a churchgoer is given a second-class citizenship, resulting in harm though perhaps not in measurable damages. . . .

. . . If appellant is otherwise qualified for unemployment benefits, payments will be made to her not as a Seventh-day Adventist, but as an unemployed worker.

MR. JUSTICE STEWART, concurring in the result.

My . . . difference with the Court's opinion is that I cannot agree that today's decision can stand consistently with *Braunfeld v. Brown*. The Court says that there was a "less direct burden upon religious practices" in that case than in this. With all respect, I think the Court is mistaken, simply

as a matter of fact. The *Braunfeld* case involved a state criminal statute. The undisputed effect of that statute, as pointed out by MR. JUSTICE BRENNAN in his dissenting opinion in that case, was that

“Plaintiff, Abraham Braunfeld, will be unable to continue in his business if he may not stay open on Sunday and he will thereby lose his capital investment.’ In other words, the issue in this case—and we do not understand either appellees or the Court to contend otherwise—is whether a State may put an individual to a choice between his business and his religion.”

The impact upon the appellant’s religious freedom in the present case is considerably less onerous. We deal here not with a criminal statute, but with the particularized administration of South Carolina’s Unemployment Compensation Act. Even upon the unlikely assumption that the appellant could not find suitable non-Saturday employment, the appellant at the worst would be denied a maximum of 22 weeks of compensation payments. I agree with the Court that the possibility of that denial is enough to infringe upon the appellant’s constitutional right to the free exercise of her religion. But it is clear to me that in order to reach this conclusion the Court must explicitly reject the reasoning of *Braunfeld v. Brown*. I think the *Braunfeld* case was wrongly decided and should be overruled, and accordingly I concur in the result reached by the Court in the case before us.

MR. JUSTICE HARLAN, whom MR. JUSTICE WHITE joins, dissenting.

Today’s decision is disturbing both in its rejection of existing precedent and in its implications for the future. The significance of the decision can best be understood after an examination of the state law applied in this case.

South Carolina’s Unemployment Compensation Law was enacted in 1936 in response to the grave social and economic problems that arose during the depression of that period. . . . [T]he purpose of the legislature was to tide people over, and to avoid social and economic chaos, during periods when *work was unavailable*. But at the same time there was clearly no intent to provide relief for those who for purely personal reasons were or became *unavailable for work*. In accordance with this design, the legislature provided that “an unemployed insured worker shall be eligible to receive benefits with respect to any week *only* if the Commission finds that . . . [h]e is able to work and is available for work. . . .” [Emphasis added.]

The South Carolina Supreme Court has uniformly applied this law in conformity with its clearly expressed purpose. It has consistently held that one is not “available for work” if his unemployment has resulted not from the inability of industry to provide a job but rather from personal circumstances, no matter how compelling. . . .

. . . What the Court is holding is that if the State chooses to condition unemployment compensation on the applicant’s availability for work, it is constitutionally compelled to *carve out an exception*—and to provide benefits—for those whose unavailability is due to their religious convictions. Such a holding has particular significance in two respects.

First, despite the Court’s protestations to the contrary, the decision necessarily overrules *Braunfeld v. Brown*, which held that it did not offend the “Free Exercise” Clause of the Constitution for a State to forbid a Sabbatarian to do business on Sunday. The secular purpose of the statute before us today is even clearer than that involved in *Braunfeld*. And just as in *Braunfeld*—where exceptions to the Sunday closing laws for Sabbatarians would have been inconsistent with the purpose to achieve a uniform day of rest and would have required case-by-case inquiry into religious beliefs—so here, an exception to the rules of eligibility based on religious convictions would necessitate judicial examination of those convictions and would be at odds with the limited purpose of the statute to smooth out the economy during periods of industrial instability. Finally, the indirect financial burden of the present law is far less than that involved in *Braunfeld*. Forcing a store owner to close his business on Sunday may well have the effect of depriving him of a satisfactory livelihood if his religious convictions require him to close on Saturday as well. Here we are dealing only with temporary benefits, amounting to a fraction of regular weekly wages and running for not more than 22 weeks. Clearly, any differences between this case and *Braunfeld* cut against the present appellant.

Second, the implications of the present decision are far more troublesome than its apparently narrow dimensions would indicate at first glance. The meaning of today’s holding, as already noted, is that the State must furnish unemployment benefits to one who is unavailable for work if the unavailability stems from the exercise of religious convictions. The State, in other words, must *single out* for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose iden-

tical behavior (in this case, inability to work on Saturdays) is not religiously motivated.

It has been suggested that such singling out of religious conduct for special treatment may violate the constitutional limitations on state action. My own view, however, is that at least under the circumstances of this case it would be a permissible accommodation of religion for the State, if it chose to do so, to create an exception to its eligibility requirements for persons like the appellant. . . .

. . . [H]owever, I cannot subscribe to the conclusion that the State is constitutionally compelled to carve out an exception to its general rule of eligibility in the present case. Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between, and this view is amply supported by the course of constitutional litigation in this area. . . . Such compulsion in the present case is particularly inappropriate in light of the indirect, remote, and insubstantial effect of the decision below on the exercise of appellant's religion and in light of the direct financial assistance to religion that today's decision requires.

For these reasons I respectfully dissent from the opinion and judgment of the Court.

Does Brennan's majority opinion represent a significant break from past free exercise claims? Some analysts suggest that it does. Although Brennan affirmed the belief-action dichotomy, he agreed with Sherbert's attorney that the lines were blurred. Accordingly, he made it far more difficult for states to regulate "action." No longer would a secular legislative purpose suffice; rather, under *Sherbert*, when the government enacts a law that burdens free exercise of religion, it must show that it is protecting a compelling government interest and in the least restrictive manner possible. *Sherbert* also represented a step away from previous free exercise cases in which the Court insisted on neutrality, for here the Court was striking down a law that was neutral in application on the ground that it burdened the free exercise of religion with a less-than-compelling interest. Other analysts argue that *Sherbert* represented a logical step from *Braunfeld*. It was in *Braunfeld* that Warren first articulated the least restrictive manner standard on which Brennan relied to strike the South Carolina law. Either way, the stan-

dard articulated in *Sherbert* was more favorable to religious exercise claims, and less sympathetic to government efforts to regulate religious practices.

How would the Court use this new standard? Many analysts believed that the compelling interest-least restrictive means approach would almost always result in a victory for the free exercise claimant. Governments would have to demonstrate that policies burdening religion are of sufficient magnitude to override the free exercise interest and that the policy is cast in the least restrictive possible manner. As indicated by *Sherbert*, this is a very difficult task.

Although the Warren Court ushered in the change in free exercise standards in *Braunfeld* and *Sherbert*, it was up to the justices of the Court led by Chief Justice Warren Burger to apply those standards because the Warren Court heard very few free exercise cases after *Sherbert*.

The opportunity for the Burger Court to put its stamp on this area of the law arose early in the new chief justice's tenure. The case was *Wisconsin v. Yoder* (1972).²⁰ As you read the excerpt from *Yoder*, consider how the Burger Court dealt with the standard it inherited from its predecessor. Do you detect any differences in approach? Or does Burger's opinion parallel Warren's in *Braunfeld* and Brennan's in *Sherbert*?

Wisconsin v. Yoder

406 U.S. 205 (1972)

<http://laws.findlaw.com/US/406/205.html>

Vote: 6 (Blackmun, Brennan, Burger, Marshall, Stewart, White)

1 (Douglas)

Opinion of the Court: Burger

Concurring opinions: Stewart, White

Dissenting in part: Douglas

Not participating: Powell, Rehnquist

Like many states, Wisconsin had a compulsory education law, mandating that children attend public or

20. To hear oral arguments in this case, navigate to: <http://www.oyez.org/oyez/frontpage>.

private schools until the age of sixteen. This law violated the norms of the Amish, who were among the first religious groups to arrive in the United States. The Amish eschew technology, including automobiles and electricity, and they do not permit their children to attend school after the eighth grade, believing that they will be adversely exposed "to worldly influences in terms of attitudes, goals, and values contrary to their beliefs." Instead, they prefer to educate their older children at home.

For several decades prior to the 1970s, the Amish had many skirmishes with education officials over this issue. In response to this history of hostility, a group of professors, lawyers, and clergy formed the National Committee for Amish Religious Freedom (NCARF) in 1967 to provide legal defense services for the Amish. NCARF's leaders included the general counsel of the American Jewish Committee, the dean of Boston University Law School, and the executive director of the Commission on Religious Liberty of the National Council of Churches.

Among the suits for which NCARF provided legal assistance was a controversy emanating from New Glarus, Wisconsin, where the school district administrator brought a complaint against Amish families for not sending their older children to school. When the parents were fined \$5 by the county court, they claimed that the compulsory attendance law violated their First and Fourteenth Amendment rights.

At the heart of this case, attorney William Ball argued, were two fundamental issues. First, he claimed that the Amish did not want their children to be uneducated or ignorant. In fact, the teenagers pursued rigorous home study after their public school education. Second, because education was continuing at home, the state could demonstrate no compelling reason to require the children to attend public school. Amicus curiae briefs, representing the full spectrum of religious beliefs in the United States, supported Ball's view. In contrast, the attorney general of Wisconsin compared this case to *Prince v. Massachusetts*, in which the Court upheld child labor regulations. He claimed that the two laws were similar because both were enacted out of a legitimate "concern for the welfare" of children.

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

On petition of the State of Wisconsin, we granted the writ of certiorari in this case to review a decision of the Wisconsin Supreme Court holding that respondents' convictions for violating the State's compulsory school-attendance law were invalid under the Free Exercise Clause of the First Amendment to the United States Constitution made applicable to the States by the Fourteenth Amendment. For the reasons hereafter stated we affirm the judgment of the Supreme Court of Wisconsin. . . .

Amish objection to formal education beyond the eighth grade is firmly grounded in . . . central religious concepts. They object to the high school, and higher education generally, because the values they teach are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life. 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. . . .

The Amish do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the "three R's" in order to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs. They view

such a basic education as acceptable because it does not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period. While Amish accept compulsory elementary education generally, wherever possible they have established their own elementary schools in many respects like the small local schools of the past. In the Amish belief higher learning tends to develop values they reject as influences that alienate man from God. . . .

There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education. . . . [But] a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they . . . "prepare them for additional obligations."

It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. . . .

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims of free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests. *E.g.*, *Sherbert v. Verner* (1963). . . .

We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries. In evaluating those claims we must be careful to determine whether the Amish religion and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may

not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations: to have the protection of the Religion Clauses, the claims must be rooted in religious belief. . . .

Giving no weight to . . . secular considerations . . . we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. . . .

. . . The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child. . . .

In sum . . . the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs.

Neither the findings of the trial court nor the Amish claims as to the nature of their faith are challenged in this Court by the State of Wisconsin. Its position is that the State's interest in universal compulsory formal secondary education to age 16 is so great that it is paramount to the undisputed claims of respondents that their mode of preparing their youth for Amish life, after the traditional elementary education, is an essential part of their religious belief and practice. Nor does the State undertake to meet the claim that the Amish mode of life and education is inseparable from and a part of the basic tenets of their religion—indeed, as much a part of their religious belief and practices as baptism, the confessional, or a sabbath may be for others.

Wisconsin concedes that under the Religion Clauses religious beliefs are absolutely free from the State's control, but it argues that "actions," even though religiously grounded, are outside the protection of the First Amendment. But our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. . . . This case, therefore, does not become easier because respondents were convicted for their "actions" in refusing to send their children to the public high school; in

this context belief and action cannot be neatly confined in logic-tight compartments. . . .

Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens free exercise of religion. *Sherbert v. Verner*. . . .

We turn, then, to the State's broader contention that its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way. Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption. . . .

The State advances two primary arguments in support of its system of compulsory education. It notes . . . that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient. We accept these propositions.

However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. . . . It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith. . . .

The State attacks respondents' position as one fostering "ignorance" from which the child must be protected by the State. No one can question the State's duty to protect children from ignorance but this argument does not square

with the facts disclosed in the record. Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional "mainstream." Its members are productive and very law-abiding members of society. . . .

Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief. When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education. Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the "sturdy yeoman" who would form the basis of what he considered as the ideal of a democratic society. Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage. . . .

Finally, the State, on authority of *Prince v. Massachusetts*, argues that a decision exempting Amish children from the State's requirement fails to recognize the substantive right of the Amish child to a secondary education, and fails to give due regard to the power of the State as *parens patriae* to extend the benefit of secondary education to children regardless of the wishes of their parents. Taken at its broadest sweep, the Court's language in *Prince* might be read to give support to the State's position. However, the Court was not confronted in *Prince* with a situation comparable to that of the Amish as revealed in this record; this is shown by the Court's severe characterization of the evils that it thought the legislature could legitimately associate with child labor, even when performed in the company of an adult. . . .

This case, of course, is not one in which any harm to the physical or mental health of the child or to the public

safety, peace, order, or welfare has been demonstrated or may be properly inferred. The record is to the contrary, and any reliance on that theory would find no support in the evidence. . . .

For the reasons stated we hold, with the Supreme Court of Wisconsin, that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16. Our disposition of this case, however, in no way alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the "necessity" of discrete aspects of a State's program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements. . . .

Affirmed.

MR. JUSTICE WHITE with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, concurring.

Cases such as this one inevitably call for a delicate balancing of important but conflicting interests. I join the opinion and judgment of the Court because I cannot say that the State's interest in requiring two more years of compulsory education in the ninth and tenth grades outweighs the importance of the concededly sincere Amish religious practice to the survival of that sect.

This would be a very different case for me if respondents' claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State. Since the Amish children are permitted to acquire the basic tools of literacy to survive in modern society by attending grades one through eight, and since the deviation from the State's compulsory education law is relatively slight, I conclude that respondents' claim must prevail. . . .

. . . *Pierce v. Society of Sisters* (1925) lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society. . . . A State has a legitimate interest not only in seeking to develop the latent talents of its children, but also in seeking to prepare them for the lifestyle that they

may later choose, or at least to provide them with an option other than the life they have led in the past. In the circumstances of this case, although the question is close, I am unable to say that the State has demonstrated that Amish children who leave school in the eighth grade will be intellectually stultified or unable to acquire new academic skills later. The statutory minimum school attendance age set by the State is, after all, only 16.

. . . I join the Court because the sincerity of the Amish religious policy here is uncontested, because the potentially adverse impact of the state requirement is great, and because the State's valid interest in education has already been largely satisfied by the eight years the children have already spent in school.

MR. JUSTICE DOUGLAS dissenting in part.

I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children. . . .

. . . [N]o analysis of religious-liberty claims can take place in a vacuum. If the parents in this case are allowed religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potential conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views. . . . As the child has no other effective forum, it is in this litigation that his rights should be considered. And, if an Amish child desires to attend high school, and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections.

What are we to make of Chief Justice Burger's first major statement on the free exercise of religion? He cited *Sherbert* with approval and invoked its approach to find that the state's interest was not sufficiently compelling

to outweigh the free exercise claim. That Burger found for the religious claimants lends support to those analysts who argue that the *Sherbert* standard would almost always lead to such a conclusion. But some scholars allege that Burger grounded his opinion on respect for the history and the practices of the Amish rather than the logic of *Sherbert*. If Burger had followed such a course, he would not be the first nor probably the last to do so. Remember Chief Justice Waite's opinion in *Reynolds*? Did it not rest as much on the Court's perception of the Mormons as a strange and bizarre sect as it did on legal factors?

Whatever Burger's motivation, it looked as if the Court would continue to apply the compelling interest standard to free exercise claims. Less than a decade after *Yoder*, the justices decided *Thomas v. Review Board of Indiana Employment Security Division* (1981), the facts of which bore a marked resemblance to *Sherbert*. Eddie Thomas was a Jehovah's Witness who worked in a steel mill. When the owners closed the mill down, they transferred Thomas to another plant. Because his new job required him to make tanks for use by the military, Thomas quit on religious grounds and filed for unemployment benefits, which the state denied. Writing for the Court, Burger acknowledged the parallels between *Sherbert* and this dispute: "Here, as in *Sherbert*, the employee was put to a choice between fidelity to his religious beliefs or cessation of work; the coercive impact on Thomas is indistinguishable from *Sherbert*." Accordingly, he said, "Unless we are prepared to overrule *Sherbert*, Thomas can not be denied the benefits due him."

Two years after *Thomas*, in *Bob Jones University v. United States* (1983), the Supreme Court examined yet another free exercise question: May the government punish a sectarian institution for its religiously divined racist policy? Bob Jones University was not affiliated with any denomination but described itself as "dedicated to the teaching and propagation of . . . fundamentalist Christian beliefs." These beliefs included, among others, a strong prohibition against interracial dating and marriage. To enforce this particular tenet, the school excluded blacks until 1971, when it began to accept applica-

tions from married blacks only. Litigation forced the school to begin admitting unmarried blacks in 1976, but only if they adhered to a strict set of rules; for example, interracial dating or marriage would lead to expulsion. The school continued to deny admission to individuals in interracial marriages. The Internal Revenue Service (IRS) revoked Bob Jones's tax-exempt status on the ground that the school's policies were racist. The university challenged the decision, saying that the IRS action punished the practice of religious beliefs. When the case reached the Court, one of the issues for the justices to decide was whether the government's interest in prohibiting race discrimination was sufficiently compelling to abridge free exercise guarantees.

Writing for the Court, Burger applied the compelling interest-least restrictive means standard of *Sherbert* to rule against Bob Jones:

The governmental interest at stake here is compelling. . . . [T]he government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed . . . for the first 165 years of this Nation's constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, and no "less restrictive means" are available to achieve the governmental interest.

Burger also noted that this policy—unlike the one at issue in *Yoder*—would not prevent Bob Jones from practicing its religion. Seen in this way, the IRS policy was more akin to Sunday closing laws. In *Braunfeld*, Warren acknowledged that blue laws would place an economic burden on some Orthodox Jews, but not stop them from practicing their religion. In this case Burger wrote: "Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent these schools from observing their religious tenets."

Bob Jones is also interesting because it demonstrates the Court's use of the compelling interest standard to uphold a government policy that allegedly infringes on the free exercise of religion. The eradication of racism, in the eyes of the justices, is a compelling government objective.

Demise of Sherbert/Yoder and Adoption of the Smith Test

Despite the Burger Court's application of the compelling interest standard in *Bob Jones*, signs began to appear in the early to mid-1980s that some of the justices wanted to rethink that standard or at least make it easier for the state to respond to free exercise challenges. *United States v. Lee*—decided in 1982, a year before *Bob Jones*—was the first of these signs.

Edwin Lee, a member of the Amish faith, owned a farm and a carpentry shop. In violation of federal law, he refused to withhold Social Security taxes or pay the employers' share of those taxes, arguing that the payment of taxes and the receipt of Social Security benefits violated his religious tenets. To support his argument, Lee's attorneys pointed out that Congress had provided a Social Security tax exemption to self-employed Amish. Although Lee did not fall under that specific exemption—he employed others—the very existence of the exemption demonstrated Congress's sensitivity toward the Amish.

In a short opinion for the Court, Burger disagreed. To be sure, he conceded, "compulsory participation" in the Social Security system interferes with the free exercise rights of the Amish. But the government was able to justify that burden on religion by showing that compulsory participation is "essential to accomplish an overriding governmental interest" in the maintenance of the Social Security system. As Burger put it: "To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."

Why do some scholars cite *Lee* as a first foray into the compelling interest standard of *Sherbert*? What they see is a discrepancy between *Lee* and *Yoder*. Why was Burger willing to exempt the Amish from mandatory education laws but unwilling to exempt them from compulsory participation in the Social Security system? In *Lee* Burger tried to address this question when he wrote: "It would be difficult to accommodate the comprehensive Social Security system with myriad exceptions flowing from a wide variety of religious beliefs." But this point caused

observers to suggest that the Burger Court was willing to override an important government interest if only a few groups would be affected or if the impact of the religious exemption would be fairly negligible, as was the case in *Yoder*.

Goldman v. Weinberger (1986), one of the last major free exercise cases of the Burger Court era, did little to quell these and other suspicions about the direction of Court doctrine. S. Simcha Goldman, an Orthodox Jew, was an ordained rabbi and a captain in the U.S. Air Force. He was stationed at March Air Force Base in Riverside, California, as a clinical psychologist in the base hospital. From the time Goldman began his service at the base, he wore a yarmulke (skull cap) while in and out of uniform. Goldman did so because his religion requires its male adherents to keep their heads covered at all times.

After a superior told him that the yarmulke violated Air Force Dress Code Regulation (AFR) 35-10, a 190-page regulation that describes in minute detail all of the various items of apparel that constitute the air force uniform, Goldman brought suit against the secretary of defense, arguing that the regulation violated his First Amendment free exercise rights. A U.S. district court agreed, but a panel of judges on the U.S. Court of Appeals for the District of Columbia reversed.

With the court of appeals' rejection, Goldman brought the case to the Supreme Court. There, his attorneys argued that Goldman's conduct was of a nonintrusive nature that "interferes with no one else, does not harm the public health, and imposes no burden on accommodation." They were attempting to show that Goldman's behavior was markedly different from activities the Court had struck down in *Reynolds* and *Prince*. They also maintained that the air force lacked any overriding government interest that would justify this intrusion into Goldman's religious practice.

The government's response was that "there can be no serious doubt that uniform dress and appearance standards serve the military interest in maintaining discipline, morale, and esprit de corps" and that enforcement of the dress code "is a necessary means to the undeniably critical ends of molding soldiers into an effective fighting

force.” The government also urged the justices to consider what might happen if they allowed Goldman to wear his yarmulke: other religions could request exemptions to wear turbans, dreadlocks, kum kums (red dots on foreheads), and so forth.

Writing for the majority, Justice William Rehnquist agreed with the government and ruled against Goldman. He wrote:

Petitioner argues that AFR 35-10, as applied to him, prohibits religiously motivated conduct and should therefore be analyzed under the standard enunciated in *Sherbert v. Verner* (1963). . . . But we have repeatedly held that “the military is, by necessity, a specialized society separate from civilian society.” . . . “[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life” . . . in order to prepare for and perform its vital role. . . .

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. . . . The essence of military service “is the subordination of the desires and interests of the individual to the needs of the service.” . . .

These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment. . . . But “within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community.” . . . In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. . . . Not only are courts “ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have,” . . . but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation’s military policy. “[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.”

The Court’s decision in *Goldman* fueled debate in political and academic circles. Taking up an invitation is-

sued by Justice Brennan in a dissenting opinion—“The Court and the military have refused these servicemen their constitutional rights; we must hope that Congress will correct this wrong”—Congress passed legislation in 1987 allowing members of the armed forces “to wear an item of religious apparel while in uniform” so long as the item is “neat and conservative” and does not “interfere with the performance” of military duties.

Academic and legal debate centered on the rationale the Court invoked to resolve *Goldman*. Was *Goldman* a substantial break from the *Sherbert* standard? Clearly, the four dissenters saw it that way. Justice Sandra Day O’Connor’s opinion is particularly interesting. After noting that Court cases in this area adopted slightly different versions of a similar standard, she set out the “two consistent themes” running through precedent from *Sherbert* to *Lee*. First, the government “must show that an unusually important interest is at stake, whether or not that interest is denominated ‘compelling.’” Second, “the government must show that granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the ‘least restrictive’ or ‘essential.’” O’Connor saw no reason to jettison this two-pronged standard—as she thought the majority had done in *Goldman*—simply because the military was involved.

In contrast, some scholars (along with a few members of the Court) did not think *Goldman* represented a significant shift in Court opinion. They argued that *Goldman* was an exceptional case: it involved the interests of the armed forces, interests to which the justices traditionally defer. Accordingly, they asserted that the Court would return to the compelling interest-least restrictive means standard, mentioned in the dissents, in future cases.

Just months after the *Goldman* decision was handed down, significant changes occurred on the Court. Warren Burger stepped down as chief justice, and President Ronald Reagan promoted Justice Rehnquist to replace Burger and appointed Antonin Scalia to take Rehnquist’s former seat. These changes prompted increased speculation that some alteration in the Court’s free exercise jurisprudence might be forthcoming.

In the first year or so of the Rehnquist Court, it appeared that those scholars who argued that *Goldman* was

an anomalous ruling were correct. In *Hobbie v. Unemployment Appeals Commission of Florida* (1987) the Court returned to the compelling interest standard. The facts of *Hobbie* were similar to those of *Sherbert* and *Thomas*: a Seventh-Day Adventist was fired from her job for refusing to work certain hours, and the state denied her claim for unemployment benefits. The state claimed Paula Hobbie had failed to meet the standard that she became "unemployed through no fault of her own." The only significant difference between *Hobbie* and *Sherbert/Thomas* was that Hobbie had converted to the Seventh-Day Adventist Church after working at the company for two and a half years.

That difference was, however, trivial to the majority:

We see no meaningful distinction among the situations of *Sherbert*, *Thomas*, and *Hobbie*. We again affirm, as we stated in *Thomas*: "Where the state conditions receipt of an important benefit upon the conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by a religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."

Writing for a majority of eight, Justice Brennan used the logic of *Sherbert* and similar cases to find for Hobbie: "Both *Sherbert* and *Thomas* held that such infringements [on the free exercise of religion] must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest."

Hobbie seemed to indicate the willingness of most of the justices to return to the *Sherbert* standard. Whether they feared congressional retaliation (the justices knew that Congress was considering legislation to overturn *Goldman*) or because they never had really abandoned *Sherbert* is open to speculation. What is clear, however, is that Chief Justice Rehnquist was unhappy with the *Sherbert* standard. He had written the Court's opinion in *Goldman*, in which he abstained from applying *Sherbert*, and he dissented in *Thomas*. Rehnquist stated:

Where . . . the State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not in my view require the State to conform that statute to the dictates of religious conscience of any group. As Justice Harlan recognized in his dissent in *Sher-*

bert: "Those situations in which the Constitution may require special treatment on account of religion are . . . few and far between."

Applying this logic to *Hobbie*, Rehnquist voted in favor of Florida: the state had not discriminated against Hobbie because she was a Seventh-Day Adventist.

Rehnquist may not have prevailed in *Hobbie*, but in a series of subsequent decisions his position appeared to be gaining support inside the Court. In *O'Lone v. Shabazz* (1987) a Rehnquist-led five-justice majority held that for security and other relevant reasons prison officials could restrict certain prisoners from attending Muslim religious services. In 1988 another five-justice majority in *Lyng v. Northwest Indian Cemetery Protective Association* upheld a U.S. Forest Service plan to construct roadways through federal lands that were used by Native American tribes for religious rituals. The tribes argued that the roads "could have devastating effects on traditional Indian religious practices" and therefore constituted a major intrusion into the free exercise of their religion, but the Court rejected their First Amendment claims. *Lyng* was followed by *Hernandez v. Commissioner* (1989), disallowing certain payments to the Church of Scientology as tax deductible contributions, and *Swaggart Ministries v. California Board of Equalization* (1990), upholding a state tax on the sale of religious articles.

These decisions indicated a growing tendency for the Court to support government programs when challenged by free exercise claims. It became clear that the *Sherbert/Yoder* compelling interest standard was losing support and that a significant change was likely. That change occurred in 1990, when the justices handed down their ruling in *Employment Division v. Smith*.²¹ In *Smith* the Court seemed to turn its back on nearly three decades of free exercise cases from *Braunfeld* and *Sherbert/Yoder* through *Hobbie*. How did the majority justify its position? Do you find its logic compelling? Keep these questions in mind as you read the facts and excerpts that follow.

21. To hear oral arguments in this case, navigate to: <http://www.oyez.org/oyez/frontpage>.

Employment Division, Department of Human Resources of Oregon v. Smith

494 U.S. 872 (1990)

<http://laws.findlaw.com/US/494/872.html>

Vote: 6 (Kennedy, O'Connor, Rehnquist, Scalia, Stevens, White)
3 (Blackmun, Brennan, Marshall)

Opinion of the Court: Scalia

Concurring opinion: O'Connor

Dissenting opinion: Blackmun

This case centers on the use of peyote, which is a controlled substance under Oregon law. In other words, it is illegal to possess the drug unless it is prescribed by a doctor. Peyote is a hallucinogen produced by certain cactus plants found in the southwestern United States and northern Mexico. Unlike other hallucinogenic drugs, such as LSD, peyote has never been widely used or deemed especially problematic. One reason is that peyote is taken by eating the buds of certain cactus plants, which are unpleasant to the taste and can induce nausea and vomiting. One group, however, uses peyote on a regular basis, and they are members of a bona fide religion—the Native American Church. To them peyote is a sacramental substance, necessary for religious rituals.

Various governments acknowledge the spiritual nature of the church's use of peyote. Although states, including Oregon, have laws criminalizing the general use of peyote, twenty-three states (those with large Native American populations) and the federal government exempt the religious use of peyote from such laws. The federal government even provides licenses to grow peyote for sacramental purposes.

The dispute at issue in *Smith* arose when two members of the Native American Church, Alfred Smith and Galen Black, were fired from their jobs as counselors at a private drug and alcohol abuse clinic for ingesting peyote at a religious ceremony. Smith and Black applied for unemployment benefits, but the state turned them down. The state found them ineligible because they had been fired for "misconduct," and, under state law, workers discharged for that reason cannot obtain benefits.

Smith and Black brought suit in state court, arguing that under the U.S. Supreme Court's precedents of *Sherbert* and *Thomas* (they later added *Hobbie*, which the Court had yet decided), the state could not deny them benefits. The issue for them was not that the state had criminalized peyote—they had not been charged with committing a criminal offense. Rather, they pointed to the Supreme Court's previous rulings, which indicated that states may not deny unemployment benefits because of an individual's unwillingness to give up an activity mandated by religion. The state argued that it could deny the benefits, regardless of Smith and Black's free exercise claim, because the use of peyote was prohibited by a general criminal statute, which was not aimed at inhibiting religion. Oregon also noted that—like all other government entities—it has a compelling interest in regulating drug use and that the state's law represented the least intrusive means of achieving that end.

The Oregon Supreme Court thought otherwise, relying on *Sherbert* and *Thomas* to find in favor of Smith and Black. The state appealed to the U.S. Supreme Court, which heard arguments in the case in 1987. But, because the state supreme court had not determined whether peyote use at religious ceremonies violated the state's criminal laws, the justices remanded the case back to Oregon for a decision.

That court ruled that the state law's prohibition against the use of peyote did not exempt the sacramental use of peyote, but it also said that the prohibition violated the free exercise clause. The state brought its case back to the U.S. Supreme Court, where both sides assumed that the Court would use the *Sherbert* standard to resolve the dispute.

JUSTICE SCALIA delivered the opinion of the Court.

The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such." . . .

But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine,

proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. . . .

. . . We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. . . . We first had occasion to assert that principle in *Reynolds v. United States* (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. . . .

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *United States v. Lee* (1982). . . . In *Prince v. Massachusetts* (1944) we held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in "excluding [these children] from doing there what no other children may do." In *Braunfeld v. Brown* (1961) (plurality opinion) we upheld Sunday-closing laws against the claim that they burdened

the religious practices of persons whose religions compelled them to refrain from work on other days. . . .

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut*, . . . *Pierce v. Society of Sisters*, . . . *Wisconsin v. Yoder*. . . .

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

Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner* (1963). Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. . . . Applying that test we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. See *Sherbert v. Verner*; *Thomas v. Review Bd. of Indiana Employment Security Div.* (1981); *Hobbie v. Unemployment Appeals Comm'n of Florida* (1987). We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied. . . . In recent years we have abstained from applying the *Sherbert* test (outside

the unemployment compensation field) at all. . . . In *Goldman v. Weinberger* (1986) we rejected application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes. . . .

Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. . . .

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

The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race . . . or before the government may regulate the content of speech . . . is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.

Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. . . . It is no more appropriate for judges to determine

the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." . . . Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. . . .

If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld v. Brown*, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service . . . to the payment of taxes . . . to health and safety regulation such as manslaughter and child neglect laws . . . compulsory vaccination laws . . . drug laws . . . and traffic laws . . . to social welfare legislation such as minimum wage laws . . . child labor laws . . . animal cruelty laws . . . environmental protection laws . . . and laws providing for equality of opportunity for the races. . . . The First Amendment's protection of religious liberty does not require this.

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the

press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. . . . But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

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

It is so ordered.

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

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

[Part I, a short clarification of the issue before the Court, is omitted.]

II

The Court today extracts from our long history of free exercise precedents the single categorical rule that "if pro-

hibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." Indeed, the Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.

The Free Exercise Clause of the First Amendment commands that "Congress shall make no law . . . prohibiting the free exercise [of religion]." In *Cantwell v. Connecticut* (1940) we held that this prohibition applies to the States by incorporation into the Fourteenth Amendment and that it categorically forbids government regulation of religious beliefs. As the Court recognizes, however, the "free exercise" of religion often, if not invariably, requires the performance of (or abstention from) certain acts. . . . Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause.

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

The Court responds that generally applicable laws are "one large step" removed from laws aimed at specific religious practices. The First Amendment, however, does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few

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

States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice. . . .

To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. See, e.g., *Cantwell*; *Reynolds v. United States* (1879). Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. . . .

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

The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them "hybrid" decisions, but there is no denying that both cases expressly relied on the Free Exercise Clause . . . and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence. Moreover, in each of the other cases cited by the Court to support its categorical rule, we rejected the particular constitutional claims before us only after carefully weighing the competing interests. See *Prince v. Massachusetts* . . . *Braunfeld v. Brown*. . . . That we rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.

Respondents, of course, do not contend that their conduct is automatically immune from all governmental regulation simply because it is motivated by their sincere religious beliefs. The Court's rejection of that argument might therefore be regarded as merely harmless dictum. Rather, respondents invoke our traditional compelling interest test to argue that the Free Exercise Clause requires the State to grant them a limited exemption from its general criminal prohibition against the possession of peyote. The Court today, however, denies them even the opportunity to make that argument, concluding that "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling interest] test inapplicable to" challenges to general criminal prohibitions.

In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. . . . A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it "results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution." . . . I would have thought it beyond argument that such laws implicate free exercise concerns.

Indeed, we have never distinguished between cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct. The *Sherbert* compelling interest test applies in both kinds of cases. . . . I would reaffirm that principle today: a neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, more burdensome than a neutral civil statute placing legitimate conditions on the award of a state benefit.

Legislatures, of course, have always been "left free to reach actions which were in violation of social duties or subversive of good order." . . . Yet because of the close relationship between conduct and religious belief, "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." . . . Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of

religion, we have consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector “is essential to accomplish an overriding governmental interest,” or represents “the least restrictive means of achieving some compelling state interest.” . . . To me, the sounder approach—the approach more consistent with our role as judges to decide each case on its individual merits—is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling. Even if, as an empirical matter, a government’s criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim. . . . Given the range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment never requires the State to grant a limited exemption for religiously motivated conduct. . . .

The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result in a “constitutional anomaly,” the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a “constitutional nor[m],” not an “anomaly.” . . . The Court’s parade of horrors not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests.

Finally, the Court today suggests that the disfavoring of minority religions is an “unavoidable consequence” under our system of government and that accommodation of such religions must be left to the political process. In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility.

The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah’s Witnesses and the Amish. . . .

III

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

There is no dispute that Oregon’s criminal prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion. Peyote is a sacrament of the Native American Church and is regarded as vital to respondents’ ability to practice their religion. . . .

There is also no dispute that Oregon has a significant interest in enforcing laws that control the possession and use of controlled substances by its citizens. . . .

Thus, the critical question in this case is whether exempting respondents from the State’s general criminal prohibition “will unduly interfere with fulfillment of the governmental interest.” . . . Although the question is close, I would conclude that uniform application of Oregon’s criminal prohibition is “essential to accomplish” . . . its overriding interest in preventing the physical harm caused by the use of a . . . controlled substance. Oregon’s criminal prohibition represents that State’s judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous. Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them. . . . Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon’s stated interest in preventing any possession of peyote. . . .

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

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

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

Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a "constitutional anomaly." . . .

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

In weighing respondents' clear interest in the free exercise of their religion against Oregon's asserted interest in enforcing its drug laws, it is important to articulate in precise terms the state interest involved. It is not the State's broad interest in fighting the critical "war on drugs" that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote. . . .

The State's interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, cannot be merely abstract or symbolic. The State cannot plausibly assert that unbending application of a criminal prohibition is essential to fulfill any compelling interest, if it does not, in fact, attempt to enforce that prohibition. In this case, the State actually has not evinced any concrete interest in enforcing its drug laws against religious users of peyote. Oregon has never sought to prosecute respondents, and does not claim that it has made significant enforcement efforts against other religious users of peyote. The State's

asserted interest thus amounts only to the symbolic preservation of an unenforced prohibition. But a government interest in "symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs," cannot suffice to abrogate the constitutional rights of individuals. . . .

Similarly, this Court's prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded evidentiary support for a refusal to allow a religious exception. . . . In this case, the State's justification for refusing to recognize an exception to its criminal laws for religious peyote use is entirely speculative. . . .

I dissent.

Smith represents a change in the standards governing free exercise disputes. For the first time since it was articulated, the Court explicitly rejected the *Sherbert* test. To be sure, the justices had failed to apply it in cases such as *Goldman* and *Lyng*, but here the Court was eradicating the *Sherbert/Yoder* line of cases and returning to the kind of analysis it used in *Reynolds v. United States*. As Scalia wrote:

To make an individual's obligation to obey . . . a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself," *Reynolds v. United States*—contradicts both constitutional tradition and common sense.

In place of the *Sherbert* test, the Court now held that the free exercise clause does not relieve an individual from the obligation to comply with a valid and neutral law of general applicability on the ground that the law commands behavior inconsistent with a person's religious teachings. The articulation of this new standard meant, as one scholar put it, that the Court had "brought free exercise jurisprudence full circle by reaffirming the . . . doctrine of *Reynolds*," and rejecting the compelling interest approach of *Sherbert*.²²

22. Frederick Mark Gedicks, "Religion," in *The Oxford Companion to the Supreme Court*, ed. Kermit L. Hall (New York: Oxford University Press, 1992), 725.

As you might expect, *Smith* generated enormous controversy. O'Connor's and Blackmun's opinions made clear their displeasure with the majority's break from precedent, asserting that the Court should stick with the compelling interest-least restrictive means approach of *Sherbert* and *Yoder*. Members of Congress also voiced their disapproval. Soon after the justices handed down *Smith*, interest groups began to lobby Congress to overturn the decision. As Sen. Edward M. Kennedy, D-Mass., put it, these interests feared that, under the new standard, "dry communities could ban the use of wine in communion services, government meat inspectors could require changes in the preparation of kosher food and school boards could force children to attend sex education classes [contrary to their religious beliefs]." ²³ Led by politicians as varied in ideological approach as Kennedy and Sen. Orrin Hatch, R-Utah, Congress began debating legislative options to counteract the Supreme Court's newly articulated position on religious liberty.

Before Congress could arrive at a legislative response to *Smith*, the Supreme Court heard another free exercise case. In *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993) the justices considered whether ordinances prohibiting animal slaughter for religious purposes violate the free exercise clause. The particular targets of this law were adherents of the Santeria religion, a faith that has a mixture of African, Caribbean, and Roman Catholic roots. Central to this religion is animal sacrifice. Practitioners sacrifice chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles at various events, including the initiation of new priests, weddings, births, and deaths, and as cures for the ailing. The animals, which are killed by cutting the carotid arteries in the neck, are cooked and eaten after some of the rituals. Santerians may sacrifice as many as thirty animals during a given ritual.

Members of the Hialeah, Florida, community—who apparently were less than enthusiastic about the practice of animal sacrifice—enacted six ordinances limiting animal sacrifice, which was defined as "to unnecessarily kill,

torment, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption."

The Supreme Court, 9–0, struck down the Hialeah ordinances. Although the justices were no more in agreement over the appropriate standard to use than they were in *Smith*, they unanimously concluded that the city had violated the free exercise clause. Even though the ordinances were generally worded, no one doubted that the laws were passed to prohibit the practices of a particular religious group, the Santerians. As such, the statutes would fall under either the *Sherbert/Yoder* or *Smith* tests. As Justice Blackmun put it in a concurring opinion, "Because the respondent [Hialeah] here does single out religion in this way, the present case is an easy one to decide."

That the Court unanimously had supported a religious practice over state regulation did not stop Congress from continuing to find ways to blunt the impact of the *Smith* decision. In ruling for the Santerians, the majority opinion liberally cited *Smith* as the governing standard in religious liberty cases. Almost no one viewed *Lukumi Babalu* as a retreat from the *Smith* test.

The *Smith* decision gave governments more latitude to restrict religious exercise than they had under the *Sherbert/Yoder* approach to the First Amendment, but governments may use their discretion in exercising that power. Congress and the state legislatures can always give greater protection to rights than the Constitution requires. Even Justice Scalia, who wrote the majority opinion in *Smith*, acknowledged that Oregon was free to accommodate the religious use of peyote if it wanted to do so.

Pursuing just such a course, Congress passed the Religious Freedom Restoration Act (RFRA) in November 1993. RFRA received the support of a coalition of more than sixty religious and civil liberties groups. Congressional approval for the proposed law was overwhelming. The Senate, for example, passed the statute on a vote of 97 to 0.

RFRA expanded protection of religious exercise by restricting the use of government authority to regulate it.

23. Quoted by Adam Clymer in "Congress Moves to Ease Curb on Religious Acts," *New York Times*, May 10, 1993, A9.

The law's most important provision, which applied to both state and federal governments, reads as follows:

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [unless the government can show that the burden] (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

The language should sound familiar: the statute codified the compelling interest-least restrictive means test used in *Sherbert* and *Yoder*. It explicitly rejected the general applicability approach ushered in by *Smith*. Congress was extending more protection to religious exercise rights than the Court was offering through its interpretation of the First Amendment.

Although most religious groups praised RFRA, state and local officials were troubled by it. Did the act mean that a city would violate federal civil rights laws if it enforced an antinoise ordinance against a religious group that used sound trucks to spread its message, or arrested for disorderly conduct a group of religious zealots who paraded down streets blocking traffic, or failed to make religious accommodations for jail inmates? What did the statute mean when it prohibited a government from imposing a substantial burden on a person's religious exercise? What standards would be used to determine a compelling government interest and the least restrictive means?

It did not take long for the statute to be challenged. The case arose from a dispute between a local Catholic church and the city of Boerne, Texas.²⁴ The city had denied the church permission to tear down its existing building, which had historic landmark status, and erect a new structure. The Catholic archdiocese claimed that under RFRA the city was without power to block construction. Did Congress act constitutionally when it passed a statute substituting its own preferred free exercise test for the one handed down by the Court in *Smith*?

24. To hear oral arguments and the announcement of the decision in this case, navigate to: <http://www.oyez.org/oyez/frontpage>.

City of Boerne v. Flores

521 U.S. 507 (1997)

<http://laws.findlaw.com/US/521/507.html>

Vote: 6 (Ginsburg, Kennedy, Rehnquist, Scalia, Stevens, Thomas)

3 (Breyer, O'Connor, Souter)

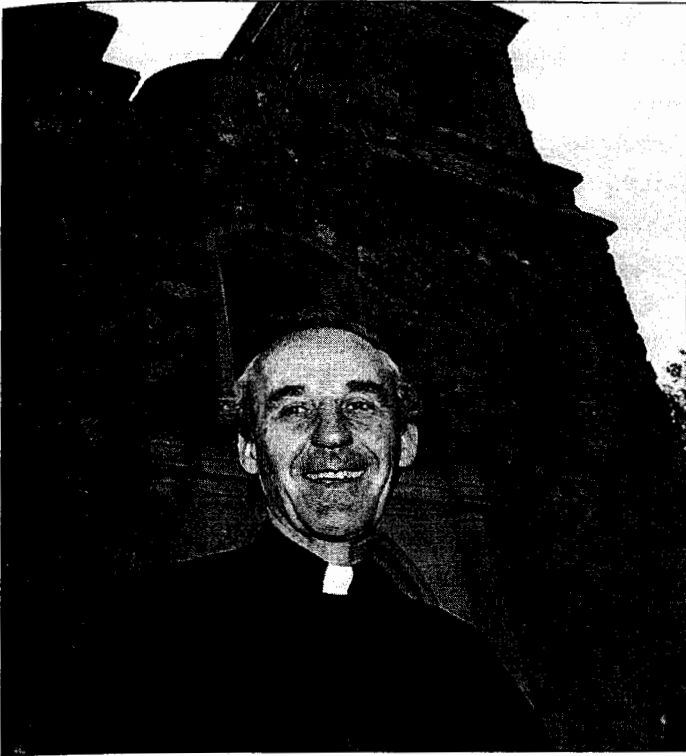
Opinion of the Court: Kennedy

Concurring opinions: Scalia, Stevens

Dissenting opinions: Breyer, O'Connor, Souter

In 1991 St. Peter the Apostle Church received permission from the archbishop of San Antonio to demolish its current structure, which it had outgrown, and to build a new seven-hundred-seat church, more than tripling its capacity. When the local parish applied for the necessary building permits, however, city officials rejected the project on the ground that the existing church was covered by the city's historic preservation program. Archbishop P. F. Flores, on behalf of the church, sued in federal court, claiming that constructing a new church was a form of religious exercise that was protected against government interference by the Religious Freedom Restoration Act. The city countered by arguing that the statute was unconstitutional, that Congress lacked the authority to restrict the power of the states to regulate religious exercise. The district court agreed with the city, striking down the law. But the court of appeals reversed, concluding that the law was a proper exercise of federal legislative power.

On appeal to the Supreme Court, the city argued that the statute impermissibly interfered with the powers of local governments and violated the separation of powers doctrine that leaves to the judiciary, not the legislature, the authority to decide what the proper standards should be in balancing individual rights with government authority. The church responded that Congress acted within its power under the Fourteenth Amendment to protect religious liberty against government encroachment in much the same manner as it had when it passed the various civil rights statutes.



Father Tony Cummins in front of St. Peter the Apostle Catholic Church in Boerne, Texas. In 1997 the church lost its battle to replace the structure, which the city had declared a historic landmark.

JUSTICE KENNEDY delivered the opinion of the Court.

A decision by local zoning authorities to deny a church a building permit was challenged under the Religious Freedom Restoration Act of 1993 (RFRA). The case calls into question the authority of Congress to enact RFRA. We conclude the statute exceeds Congress' power. . . .

Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990). . . . In evaluating the claim, we declined to apply the balancing test set forth in *Sherbert v. Verner* (1963), under which we would have asked whether Oregon's prohibition substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling government interest. . . .

The application of the *Sherbert* test, the *Smith* decision explained, would have produced an anomaly in the law, a constitutional right to ignore neutral laws of general applicability. The anomaly would have been accentuated, the Court

reasoned, by the difficulty of determining whether a particular practice was central to an individual's religion. We explained, moreover, that it "is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." . . .

Four Members of the Court disagreed. They argued the law placed a substantial burden on the Native American Church members so that it could be upheld only if the law served a compelling state interest and was narrowly tailored to achieve that end. Justice O'Connor concluded Oregon had satisfied the test, while Justice Blackmun, joined by Justice Brennan and Justice Marshall, could see no compelling interest justifying the law's application to the members.

These points of constitutional interpretation were debated by Members of Congress in hearings and floor debates. Many criticized the Court's reasoning, and this disagreement resulted in the passage of RFRA. Congress announced:

"(1) [T]he framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

"(2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

"(3) governments should not substantially burden religious exercise without compelling justification;

"(4) in *Employment Division v. Smith* (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

"(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."

The Act's stated purposes are:

"(1) to restore the compelling interest test as set forth in *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder* (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

"(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government."

RFRA prohibits "[g]overnment" from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance

of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." The Act's mandate applies to any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States," as well as to any "State, or . . . subdivision of a State." . . .

Under our Constitution, the Federal Government is one of enumerated powers. *McCulloch v. Maryland* (1819). The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison* (1803).

Congress relied on its Fourteenth Amendment enforcement power in enacting the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the States. The Fourteenth Amendment provides, in relevant part:

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The parties disagree over whether RFRA is a proper exercise of Congress' §5 power "to enforce" by "appropriate legislation" the constitutional guarantee that no State shall deprive any person of "life, liberty, or property, without due process of law" nor deny any person "equal protection of the laws." . . .

Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres of autonomy previously reserved to the States." *Fitzpatrick v. Bitzer* (1976). . . .

It is also true, however, that "[a]s broad as the congressional enforcement power is, it is not unlimited." *Oregon v. Mitchell* [1970]. . . .

Congress' power under §5 . . . extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial," *South Carolina v. Katzenbach* [1966]. The design of the Amendment and the text of §5 are inconsistent with the suggestion that

Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]." . . .

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. . . .

The design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary. The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions. . . . As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing. The power to interpret the Constitution in a case or controversy remains in the Judiciary.

The remedial and preventive nature of Congress' enforcement power, and the limitation inherent in the power, were confirmed in our earliest cases on the Fourteenth Amendment. In the *Civil Rights Cases* (1883), the Court invalidated sections of the Civil Rights Act of 1875 which prescribed criminal penalties for denying to any person "the full enjoyment of" public accommodations and conveyances, on the grounds that it exceeded Congress' power by seeking to regulate private conduct. The Enforcement Clause, the Court said, did not authorize Congress to pass "general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing. . . ."

Any suggestion that Congress has a substantive, nonremedial power under the Fourteenth Amendment is not supported by our case law. . . .

If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." *Marbury v. Madison*. Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

We now turn to consider whether RFRA can be considered enforcement legislation under §5 of the Fourteenth Amendment.

Respondent contends that RFRA is a proper exercise of Congress' remedial or preventive power. The Act, it is said, is a reasonable means of protecting the free exercise of religion as defined by *Smith*. . . . If Congress can prohibit laws with discriminatory effects in order to prevent racial discrimination in violation of the Equal Protection Clause, then it can do the same, respondent argues, to promote religious liberty.

While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

A comparison between RFRA and the Voting Rights Act is instructive. In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. . . .

Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to pre-

vent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional. Remedial legislation under §5 "should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against." *Civil Rights Cases*.

RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion. . . .

The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. . . . This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

. . . It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs. In addition, the Act imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA

purported to codify—which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations. . . .

Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

It is for Congress in the first instance to “determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,” and its conclusions are entitled to much deference. Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance. The judgment of the Court of Appeals sustaining the Act's constitutionality is reversed.

It is so ordered.

JUSTICE STEVENS, concurring.

In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a “law respecting an establishment of religion” that violates the First Amendment to the Constitution.

If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to

an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment. *Wallace v. Jaffree* (1985).

JUSTICE SCALIA, with whom JUSTICE STEVENS joins, concurring in part.

Who can possibly be against the abstract proposition that government should not, even in its general, non-discriminatory laws, place unreasonable burdens upon religious practice? Unfortunately, however, that abstract proposition must ultimately be reduced to concrete cases. The issue presented by *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases. For example, shall it be the determination of this Court, or rather of the people, whether (as the dissent apparently believes) church construction will be exempt from zoning laws? The historical evidence put forward by the dissent does nothing to undermine the conclusion we reached in *Smith*: It shall be the people.

JUSTICE O'CONNOR, with whom JUSTICE BREYER joins . . . dissenting.*

I dissent from the Court's disposition of this case. I agree with the Court that the issue before us is whether the Religious Freedom Restoration Act (RFRA) is a proper exercise of Congress' power to enforce §5 of the Fourteenth Amendment. But as a yardstick for measuring the constitutionality of RFRA, the Court uses its holding in *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990), the decision that prompted Congress to enact RFRA as a means of more rigorously enforcing the Free Exercise Clause. I remain of the view that *Smith* was wrongly decided, and I would use this case to reexamine the Court's holding there. Therefore, I would direct the parties to brief the question whether *Smith* represents the correct understanding of the Free Exercise Clause and set the case for reargument. If the Court were to correct the misinterpretation of the Free Exercise

* *Author's note:* JUSTICE BREYER joins this dissent with the reservation that he does not agree with all of the points made in the second paragraph of the material excerpted here.

Clause set forth in *Smith*, it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that *Smith* improperly restricted religious liberty. We would then be in a position to review RFRA in light of a proper interpretation of the Free Exercise Clause.

I agree with much of the reasoning . . . of the Court's opinion. Indeed, if I agreed with the Court's standard in *Smith*, I would join the opinion. As the Court's careful and thorough historical analysis shows, Congress lacks the "power to decree the *substance* of the Fourteenth Amendment's restrictions on the States." (Emphasis added.) Rather, its power under §5 of the Fourteenth Amendment extends only to enforcing the Amendment's provisions. In short, Congress lacks the ability independently to define or expand the scope of constitutional rights by statute. Accordingly, whether Congress has exceeded its §5 powers turns on whether there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." This recognition does not, of course, in any way diminish Congress' obligation to draw its own conclusions regarding the Constitution's meaning. Congress, no less than this Court, is called upon to consider the requirements of the Constitution and to act in accordance with its dictates. But when it enacts legislation in furtherance of its delegated powers, Congress must make its judgments consistent with this Court's exposition of the Constitution and with the limits placed on its legislative authority by provisions such as the Fourteenth Amendment. . . .

Stare decisis concerns should not prevent us from revisiting our holding in *Smith*. "[S]*tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.'" *Adarand Constructors, Inc. v. Peña* (1995). This principle is particularly true in constitutional cases, where—as this case so plainly illustrates—"correction through legislative action is practically impossible." *Seminole Tribe of Fla. v. Florida* (1996). . . .

Accordingly, I believe that we should reexamine our holding in *Smith*, and do so in this very case. In its place, I would return to a rule that requires government to justify any substantial burden on religiously motivated conduct by

a compelling state interest and to impose that burden only by means narrowly tailored to achieve that interest. . . .

The historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause. The record instead reveals that its drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with our pre-*Smith* jurisprudence. . . .

The Religion Clauses of the Constitution represent a profound commitment to religious liberty. Our Nation's Founders conceived of a Republic receptive to voluntary religious expression, not of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law. . . . [T]he Free Exercise Clause is properly understood as an affirmative guarantee of the right to participate in religious activities without impermissible governmental interference, even where a believer's conduct is in tension with a law of general application. Certainly, it is in no way anomalous to accord heightened protection to a right identified in the text of the First Amendment. For example, it has long been the Court's position that freedom of speech—a right enumerated only a few words after the right to free exercise—has special constitutional status. Given the centrality of freedom of speech and religion to the American concept of personal liberty, it is together reasonable to conclude that both should be treated with the highest degree of respect.

Although it may provide a bright line, the rule the Court declared in *Smith* does not faithfully serve the purpose of the Constitution. Accordingly, I believe that it is essential for the Court to reconsider its holding in *Smith*—and to do so in this very case. I would therefore direct the parties to brief this issue and set the case for reargument.

I respectfully dissent from the Court's disposition of this case.

JUSTICE SOUTER, dissenting.

To decide whether the Fourteenth Amendment gives Congress sufficient power to enact the Religious Freedom Restoration Act, the Court measures the legislation against the free exercise standard of *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990). For the reasons stated in my opinion in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*

(1993) (opinion concurring in part and concurring in judgment), I have serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence. These doubts are intensified today by the historical arguments going to the original understanding of the Free Exercise Clause presented in Justice O'Connor's opinion, which raises very substantial issues about the soundness of the *Smith* rule. But without briefing and argument on the merits of that rule (which this Court has never had in any case, including *Smith* itself), I am not now prepared to join Justice O'Connor in rejecting it or the majority in assuming it to be correct.

In *City of Boerne* the Court's majority remained loyal to the *Smith* interpretation of government's power to regulate religious exercise. But the decision was relatively narrow. The Court held that government could by statute provide increased accommodation for religious practices, but Congress lacked the power under the Fourteenth Amendment to require the states to do so. The decision left open the possibility that Congress might use another constitutional provision to accomplish its goals.

It did not take Congress long to do so. Three years after the Court issued *City of Boerne*, President Bill Clinton signed into law the Religious Land Use and Institutionalized Persons Act (RLUIPA), a scaled-back version of RFRA applying primarily to zoning issues and the religious rights of prisoners. Congress based this law on the power of the federal government to regulate interstate commerce and to spend for the general welfare. Specifically, the provisions of the law affected any zoning activity or prison facility that received federal financial assistance or affected interstate or foreign commerce. Under the law, the religious exercise rights could not be restricted without a compelling reason to do so using the least restrictive means possible.

Shortly after RLUIPA was enacted, a group of inmates sued the Ohio Department of Rehabilitation and Correction for violating their rights under the statute. The prisoners, members of the Satanist, Wicca, and Asatru sects along with adherents of the Church of Jesus Christ Christian, claimed that Ohio authorities discriminated against them. They were not allowed access to religious literature, opportunities for group worship, freedom to en-

gage in religious dress, and access to ceremonial items that members of mainstream religions were given. In *Cutter v. Wilkinson* (2005) the Court unanimously upheld the law. The justices ruled that Congress was within its authority to require accommodation of the religious liberty of persons institutionalized in prisons systems receiving federal assistance.

The decision in *City of Boerne* was also narrow in another respect. The ruling struck down RFRA only as it applied to Congress placing demands on the states. The decision did not speak to the constitutionality of RFRA's applicability to the federal government, an issue raised in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* (2006). The case involved a Christian Spiritist sect based in Brazil. Only about 130 of its members reside in the United States. Central to the group's practices is the use of hoasca, a sacramental tea made from two plants unique to the Amazon region. The tea's ingredients contain hallucinogens that are outlawed under the federal Controlled Substances Act. When a shipment of the tea was intercepted by U.S. customs agents, the group filed suit claiming that the confiscation of their sacramental substance violated their rights under RFRA.

The Court unanimously upheld RFRA and its applicability in this case. The federal government has the power to restrict the degree to which its own officials and agencies can limit religious exercise. Under RFRA, the Controlled Substances Act could not be enforced against drugs used for sacramental purposes without a compelling reason to do so.

In spite of the Court's willingness to allow government to provide additional protections for religious liberty, the justices have not changed their view of the free exercise clause. The *Smith* test prevails. Under this approach, the government, if it wishes to do so, is free to make and enforce valid and neutral laws of general applicability even if they restrict religious exercise.

RELIGIOUS ESTABLISHMENT

In an 1802 letter to the Danbury Baptist Association, Thomas Jefferson proclaimed that the First Amendment built "a wall of separation between Church and State." But what sort of wall did Jefferson conceive? Was it to be