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LAWWA 602: Law & Religion
Reading Materials

LAW & RELIGION

CHAPTER II: THE FREE EXERCISE CLAUSE: 1879-1990

Introduction

The Free Exercise Clause, unlike the Establishment Clause, is distinctly an individual rights provision that protects religious liberty. However, the scope of that protection has changed over time ranging from limited protection to significant protection. After a series of cases applied strict scrutiny analysis to laws that burdened religious liberty, in 1990 the Supreme Court decided *Employment Division v. Smith*, 494 U.S. 872 (1990). In an opinion by Justice Scalia, the Court adopted an approach that was a compromise between the two levels of protection, in some kinds of cases applying deferential review and in other kinds of cases applying strict scrutiny.

A. Early Cases: The Belief/Action Dichotomy

1. REYNOLDS v. UNITED STATES
98 U.S. 145 (1879)

CHIEF JUSTICE WAITE delivered the opinion of the Court.

[This case arose before Utah became a state. George Reynolds was charged with the crime of bigamy and tried and convicted in a territorial court.]

On the trial, the accused proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church "that it was the duty of male members of said church, circumstances permitting, to practice polygamy. He also proved "that he had received permission from the recognized authorities in said church to enter into polygamous marriage.

The question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is as to the guilt of one who knowingly violates a law, if he entertains a religious belief that the law is wrong.

Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment forbids such legislation. The question is whether the law under consideration comes within this prohibition. 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 which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

There never has been a time in any State of the Union when polygamy has not been an offence against society. In the face of this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is required to deal. Unless restricted by some form of constitution, it is within the legitimate scope of the power of every government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

In our opinion, the statute under consideration is within the power of Congress. The only question which remains is whether those who make polygamy a part of their religion are excepted from the statute. If they are, then those who do not make polygamy a part of their religious belief may be punished, while those who do, must go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the government to prevent her carrying her belief into practice?

So here, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

2. PRINCE v. MASSACHUSETTS
321 U.S. 158 (1944)

JUSTICE RUTLEDGE delivered the opinion of the Court.

The case brings for review another episode in the conflict between Jehovah's Witnesses and state authority. Sarah Prince appeals from convictions for violating Massachusetts' child labor laws, by acts said to be a rightful exercise of her religious convictions.

The only questions for our decision are whether §§ 80 and 81, as applied, contravene the Fourteenth Amendment by denying or abridging appellant's freedom of religion. Sections 80 and 81 form parts of Massachusetts' comprehensive child labor law. They provide methods for enforcing the prohibitions of § 69, which is as follows:

"No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place."

The story told by the evidence has become familiar. Mrs. Prince is the mother of two young sons. She also has legal custody of Betty Simmons, who lives with them. The children too are

Jehovah's Witnesses and both Mrs. Prince and Betty testified they were ordained ministers. The former was accustomed to go each week on the streets of Brockton to distribute "Watchtower" and "Consolation." She had permitted the children to engage in this activity previously, and had been warned against doing so by the school attendance officer. But, until December 18, 1941, she generally did not take them with her at night.

That evening, as Mrs. Prince was preparing to leave her home, the children asked to go. She at first refused. Childlike, they resorted to tears; and, motherlike, she yielded. Arriving downtown, Mrs. Prince permitted the children "to engage in the preaching work with her upon the sidewalks." That is, with specific reference to Betty, she and Mrs. Prince took positions about twenty feet apart near a street intersection. Betty held up in her hand, for passers-by to see, copies of "Watch Tower" and "Consolation." From her shoulder hung the usual canvas magazine bag, on which was printed: "Watchtower and Consolation 5 cents per copy." No one accepted a copy from Betty that evening and she received no money. Nor did her aunt. But on other occasions, Betty had received funds and given out copies.

As the case reaches us, the only question is whether, as construed and applied, the statute is valid. Appellant rests squarely on freedom of religion under the First Amendment. She buttresses this foundation, however, with a claim of parental right as secured by the due process clause. Cf. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). These guaranties, she thinks, guard alike herself and the child in what they have done. Thus, two claimed liberties are at stake. One is the parent's, to bring up the child in the way he should go, which for appellant means to teach him the tenets and the practices of their faith. The other freedom is the child's, "to preach the gospel . . . by public distribution" of "Watchtower" and "Consolation," in conformity with the scripture.

To make accommodation between these freedoms and an exercise of state authority always is delicate. It hardly could be more so than in such a clash as this case presents. On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests stand the interests of society to protect the welfare of children, and the state's authority to that end. It is the interest of the whole community that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed citizens. Between contrary pulls of such weight, the safest recourse is to the lines already marked out, not precisely but for guides, in narrowing the no man's land where this battle has gone on.

The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against assertion of state power, have had recognition here, in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), and *Meyer* v. *Nebraska*. It is cardinal with us that the custody, care and nurture of the child reside first in the parents. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

But the family itself is not beyond regulation in the public interest, as against a claim of

religious liberty. *Reynolds* v. *United States*, 98 U.S. 145 (1879). And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. The catalogue need not be lengthened. It is sufficient to show that the state has a wide range of power for limiting parental authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

Concededly a statute or ordinance identical in terms with § 69, except that it is applicable to adults or all persons generally, would be invalid. But the mere fact a state could not wholly prohibit this form of adult activity does not mean it cannot do so for children. The state's authority over children's activities is broader than over like actions of adults. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. It may secure this against impeding dangers. 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. 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.

The case reduces itself therefore to the question whether the presence of the child's guardian puts a limit to the state's power. That fact may lessen the likelihood that some evils the legislation seeks to avert will occur. But it cannot forestall all of them. The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves. Massachusetts has determined that an absolute prohibition is necessary to accomplish its legitimate objectives. Its power to attain them is broad enough to reach these peripheral instances in which the parent's supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct. We think that with reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, and the boundary of its power has not been crossed in this case.

Our ruling does not extend beyond the facts. The religious training and indoctrination of children may be accomplished in many ways, some of which have received constitutional protection through decisions of this Court. These remain unaffected by the decision.

JUSTICE MURPHY, dissenting.

This attempt by Massachusetts to prohibit a child from exercising her constitutional right to

practice her religion on the public streets cannot, in my opinion, be sustained.

Religious training and activity, whether performed by adult or child, are protected by the Fourteenth Amendment against interference by state action, except insofar as they violate reasonable regulations adopted for the protection of the public health, morals and welfare. Our problem here is whether a state, under the guise of enforcing its child labor laws, can lawfully prohibit girls under the age of eighteen and boys under the age of twelve from practicing their religious faith insofar as it involves the distribution or sale of religious tracts on the public streets. A square conflict between the constitutional guarantee of religious freedom and the state's legitimate interest in protecting the welfare of children is presented.

As the opinion of the Court demonstrates, the power of the state to control the religious and other activities of children is greater than its power over similar activities of adults. But that fact is no more decisive of the issue posed by this case than is the obvious fact that the family itself is subject to reasonable regulation in the public interest. We are concerned solely with the reasonableness of this particular prohibition of religious activity by children.

In dealing with the validity of statutes which directly or indirectly infringe religious freedom and the right of parents to encourage their children in the practice of a religious belief, we are not aided by any strong presumption of the constitutionality of such legislation. On the contrary, the freedoms enumerated in the First Amendment are presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid. The burden was therefore on the state of Massachusetts to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of the type involved in this case.

The burden is not met by vague references to the reasonableness underlying child labor legislation in general. The reasonableness that justifies the prohibition of the ordinary distribution of literature in the public streets by children is not necessarily the reasonableness that justifies such a restriction when the distribution is part of their religious faith. There must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child. Freedom of religion cannot be erased by slender references to the state's power to restrict the more secular activities of children.

The state, in my opinion, has completely failed to sustain its burden of proving the existence of any grave or immediate danger to any interest which it may lawfully protect. There is no proof that Betty Simmons' mode of worship constituted a serious menace to the public. It was carried on in an orderly, lawful manner at a public street corner. The sidewalk, no less than the cathedral or the evangelist's tent, is a proper place, under the Constitution, for the orderly worship of God. Such use of the streets is as necessary to the Jehovah's Witnesses, the Salvation Army and others who practice religion without benefit of conventional shelters as is the use of the streets for purposes of passage.

It is claimed, however, that such activity was likely to affect adversely the health, morals and welfare of the child. The bare possibility that such harms might emanate from distribution of religious literature is not, standing alone, sufficient justification for restricting freedom of conscience and religion. The evils must be grave, immediate, substantial. Yet there is not the slightest indication in this record that children engaged in distributing literature pursuant to their

religious beliefs have been or are likely to be subject to any of the harmful "diverse influences of the street." Indeed, the likelihood is that children engaged in serious religious endeavor are immune from such influences. Moreover, Jehovah's Witness children invariably make their distributions in groups subject at all times to adult or parental control, as was done in this case. The dangers are thus exceedingly remote, to say the least.

No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. And the Jehovah's Witnesses are living proof of the fact that even in this nation the right to practice religion in unconventional ways is still far from secure. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the enforcement of little used ordinances and statutes. To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom. We should therefore hesitate before approving the application of a statute that might be used as another instrument of oppression. Religious freedom is too sacred a right to be restricted in any degree without convincing proof that a legitimate interest of the state is in grave danger.

[Justice Jackson also wrote a dissenting opinion joined by Justices Roberts and Frankfurter.]

B. Free Exercise Challenges to Denial of Government Benefits

SHERBERT v. VERNER
374 U.S. 398 (1963)

JUSTICE BRENNAN delivered the opinion of the Court.

Appellant, a member of the Seventh-day Adventist Church, was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith.[1] When she was unable to obtain other employment because she would not take Saturday work, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. That law provides that, to be eligible for benefits, a claimant must be "able to work and available for work"; and, further, that a claimant is ineligible for benefits "if he has failed, without good cause to accept available suitable work when offered him by the employment office or the employer." The appellee Employment Security Commission found that appellant's restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept "suitable work when offered by the employment office or the employer." The Commission's finding was sustained by the Court of Common Pleas. That court's judgment was affirmed by the South

[1] Appellant became a member of the Seventh-day Adventist Church in 1957, at a time when her employer, a textile-mill operator, permitted her to work a five-day week. It was not until 1959 that the work week was changed to six days, including Saturday. No question has been raised concerning the sincerity of appellant's religious beliefs. Nor is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed.

Carolina Supreme Court which rejected appellant's contention that the disqualifying provisions of the abridged her right to the free exercise of her religion. We reverse the judgment of the South Carolina Supreme Court and remand for further proceedings.

If 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 of her rights of free exercise, or because any incidental burden on the free exercise of religion may be justified by a "compelling state interest."

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. It is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning 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 only indirect." Here not only is it apparent that appellant's ineligibility for benefits derives solely from the practice of her religion, but 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.

Significantly South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty. When in times of "national emergency" the textile plants are authorized by the State Commissioner of Labor to operate on Sunday, "no employee shall be required to work on Sunday who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious objections he or she shall not be discriminated against in any manner." The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects.

We must next consider whether some compelling state interest justifies the substantial infringement of appellant's First Amendment right. 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 no such objection appears to have been made before the South Carolina Supreme Court. Nor, if the contention had been made, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit. Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs, it is 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 be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.

In holding as we do, plainly we are not fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians

in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences. Nor does the recognition of the appellant's right to unemployment benefits serve to abridge any other person's religious liberties. Nor do we, by our decision, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment. This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society. Finally, nothing we say today constrains the States to adopt any particular scheme of unemployment compensation. Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest. This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947).

JUSTICE STEWART, concurring in the result.

This case presents a double-barreled dilemma, which in all candor I think the Court's opinion has not succeeded in papering over. The dilemma ought to be resolved.

I am convinced that no liberty is more essential to the continued vitality of the free society than is the religious liberty protected by the Free Exercise Clause. And I regret that on occasion the Court has shown what has seemed to me a distressing insensitivity to the appropriate demands of this guarantee. By contrast I think that the Court's approach to the Establishment Clause has on occasion been not only insensitive, but positively wooden. There are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's insensitive construction of the Establishment Clause. The controversy now before us is clearly such a case.

The appellant refuses to accept available jobs which would require her to work on Saturdays based on the tenets of her religious faith. The Court says that South Carolina cannot declare her to be not "available for work" within the meaning of its statute because to do so would violate her right to the free exercise of her religion. Yet what this Court has said about the Establishment Clause must inevitably lead to a diametrically opposite result. If the appellant's refusal to work on Saturdays were based on indolence, or on a desire to watch the Saturday television programs, no one would say that South Carolina could not hold that she was not "available for work." That being so, the Establishment Clause as construed by this Court not only *permits* but affirmatively *requires* South Carolina equally to deny the appellant's claim for unemployment compensation when her refusal to work on Saturdays is based upon her religious creed.

To require South Carolina to so administer its laws as to pay public money to the appellant under the circumstances of this case is thus clearly to require the State to violate the Establishment Clause as construed by this Court. This poses no problem for me, because I think the Court's mechanistic concept of the Establishment Clause is historically unsound and constitutionally wrong. I think that the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and

accommodation to individual belief or disbelief.

South Carolina would deny unemployment benefits to a mother unavailable for work on Saturdays because she was unable to get a babysitter. Thus, we do not have before us a situation where a State provides unemployment compensation generally, and singles out for disqualification only persons who are unavailable for work on religious grounds. This is not a scheme which operates to discriminate against religion as such. But the Court nevertheless holds that the State must prefer a religious over a secular ground for being unavailable for work.

Yet in cases decided under the Establishment Clause the Court has decreed otherwise. It has decreed that government must blind itself to the differing religious beliefs and traditions of the people. With all respect, I think it is the Court's duty to face up to the dilemma posed by the conflict between the Free Exercise Clause and the Establishment Clause as interpreted by the Court. For so long as the fallacious fundamentalist rhetoric of some of our Establishment Clause opinions remains on our books, so long will the possibility of consistent decision in this most difficult and delicate area of constitutional law be impeded and impaired. And so long, I fear, will the guarantee of true religious freedom in our pluralistic society be uncertain and insecure.

JUSTICE HARLAN, whom JUSTICE WHITE joins, dissenting.

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. Thus the purpose of the legislature was to tide people 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 he is able to work and is available for work."

The South Carolina Supreme Court has uniformly applied this law in conformity with its clearly expressed purpose. In the present case all that the state court has done is to apply these accepted principles. The appellant was "unavailable for work," and thus ineligible for benefits, when personal considerations prevented her from accepting employment on a full-time basis in the industry and locality in which she had worked. The fact that these personal considerations sprang from her religious convictions was wholly without relevance to the state court's application of the law. Thus in no proper sense can it be said that the State discriminated against the appellant on the basis of her religious beliefs. She was denied benefits just as any other claimant would be denied benefits who was not "available for work" for personal reasons.

With this background, this Court's decision comes into clearer focus. 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.

The implications of the present decision are far more troublesome than its apparently narrow dimensions would indicate at first glance. The State must *single out* for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior is not religiously motivated.

My view 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. However, I cannot subscribe to the conclusion that the State is constitutionally *compelled* to carve out an exception to its general rule of eligibility. Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between.

Professor's Note: In several subsequent cases, the Supreme Court invalidated similar restrictions on unemployment compensation. In doing so, the Court made clear it would broadly define religion for this purpose. In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), the Court reviewed a decision by the Indiana Supreme Court to deny benefits to a member of the Jehovah's Witnesses who left his job when he was required to work on the production of military weapons because to do so violated his religious beliefs. The U.S. Supreme Court found he left his employment for religious reasons even though not all members of his religion shared his belief and he appeared to be "struggling" with his beliefs. In doing so, the Court stated:

> Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion. The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task. However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. . . ..
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> . . . Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.
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> The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness such work was "scripturally" acceptable. Intrafaith differences are not uncommon among followers of a particular creed, and the judicial process is ill equipped to resolve such differences in relation to the Religion Clauses. One can imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.
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> The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion. On this record, it is clear that Thomas terminated his employment for religious reasons.

In *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987), the Court further expanded on its inclusive definition of religion by refusing to distinguish an employee who changed her religious beliefs after starting her employment from one whose views did not change:

> The Appeals Commission asks us to single out the religious convert for less favorable treatment than that given an individual whose adherence to his or her faith precedes employment. We decline to do so. The First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired. The timing of Hobbie's conversion is immaterial to our determination that her free exercise rights have been burdened; the salient inquiry is the burden involved. In *Sherbert, Thomas*, and the present case, the employee was forced to choose between fidelity to religious belief and continued employment; the forfeiture of unemployment benefits for choosing the former brings coercion to bear on the employee's choice.

Finally, in *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989), the Court refused to require that an employee objecting to working on Sunday be a member of a particular Christian sect:

> Frazee asserted that he was a Christian, but did not claim to be a member of a particular sect. It is also true that there are Christian denominations that do not profess to be compelled to refuse Sunday work, but this does not diminish Frazee's protection. *Thomas* settled that much. Undoubtedly, membership in an organized religious denomination, especially one with a tenet forbidding work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection.

C. Free Exercise Claims to Special Treatment

1. WISCONSIN v. YODER

406 U.S. 205 (1972)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We review a decision of the Wisconsin Supreme Court holding that respondents' convictions of violating the State's compulsory school-attendance law were invalid under the Free Exercise Clause. We affirm the judgment of the Supreme Court of Wisconsin.

Respondents Jonas Yoder and Wallace Miller are members of the Old Order Amish religion, and respondent Adin Yutzy is a member of the Conservative Amish Mennonite Church. Wisconsin's compulsory school-attendance law required them to cause their children to attend public or private school until reaching age 16 but the respondents declined to send their children, ages 14 and 15, to public school after they completed the eighth grade.

Respondents were convicted of violating the compulsory-attendance law and were fined the sum of $ 5 each. The trial testimony showed that respondents believed, in accordance with the tenets of Old Order Amish communities generally, that their children's attendance at high school was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would endanger their own salvation and that of their children. The State stipulated that respondents' religious beliefs were sincere.

Old Order Amish communities are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept is central to their faith. A related feature of Old Order Amish communities is their devotion to a life in harmony with nature and the soil. Amish beliefs require members of the community to make their living by farming or closely related activities. Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents. Their conduct is regulated by the *Ordnung*, or rules, of the church community. Adult baptism, which occurs in late adolescence, is the time at which young people undertake heavy obligations, not unlike the Bar Mitzvah of the Jews, to abide by the rules of the church community.

Amish objection to formal education beyond the eighth grade is grounded in these central religious concepts. They object to 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, competitiveness, worldly success, and social life. 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, but also because it takes them away from their community during the crucial and formative adolescent period. 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. Once a child has learned basic reading, writing, and mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and "doing" rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance interposes a serious barrier to the integration of the Amish child into the Amish religious community.

The Amish do not object to elementary education through the first eight grades 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.

On the basis of such considerations, [an expert] testified that compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also, in his opinion, ultimately result in the destruction of the Old Order Amish church community as it exists in the United States. Testimony also showed that the Amish succeed in preparing their high school age children to be productive members of the Amish community. The evidence also showed that the Amish have an excellent record as law-abiding and generally self-sufficient members of society.

I.

A State's interest in universal education is not totally free from a balancing process when it impinges on fundamental rights, such as those protected by the Free Exercise Clause, and the traditional interest of parents with respect to the religious upbringing of their children.

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. Only those interests of the highest order can overbalance legitimate claims to the 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.

II.

We come then to the claims of the respondents concerning the alleged encroachment on their rights and the rights of their children to the free exercise of religious beliefs. In evaluating those claims we must determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however 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. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their rejection of contemporary secular values, their claims would not rest on a religious basis.

Giving no weight to such secular considerations, however, 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. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, "be not conformed to this world." This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community. Their rejection of

telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society.

As the society around the Amish has become more populous, urban, industrialized, and complex, government regulation of human affairs has correspondingly become more detailed and pervasive. The Amish mode of life has thus come into conflict increasingly with requirements of contemporary society. So long as compulsory education laws were confined to eight grades of elementary education imparted in a nearby rural schoolhouse, with a large proportion of students of the Amish faith, the Old Order Amish had little basis to fear that school attendance would expose their children to worldly influence. But modern compulsory secondary education in rural areas is now largely carried on in a consolidated school, often remote from the student's home and alien to his daily home life. As the record shows, the values and programs of the modern secondary school are in sharp conflict with the mode of life mandated by the Amish religion. The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences, 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.

The impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs. As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region.

In sum, the unchallenged testimony of experts, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger the free exercise of respondents' religious beliefs.

III.

We turn, then, to the State's 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, 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 participants in society. 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.

Respondents' experts testified at trial that the value of all education must be assessed in terms of its capacity to prepare the child for life. 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, 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. This argument does not square with the facts disclosed in the record. 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.

It is neither fair nor correct to suggest that the Amish are opposed to education beyond the eighth grade level. They are opposed to conventional formal education of the type provided by a high school because it comes at the child's crucial adolescent period of religious development. Dr. Erickson, for example, testified that their system of learning-by-doing was an "ideal system" of education in terms of preparing Amish children for life as adults in the Amish community.

The State, however, supports its interest in providing an additional one or two years of compulsory high school education to Amish children because of the possibility that some children will choose to leave the Amish community. The State argues that if Amish children leave their church they should not be in the position of making their way in the world without the education available in the one or two additional years the State requires. However, that argument is highly speculative. There is no evidence of the loss of Amish adherents by attrition, nor is there any showing that upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance, would become burdens on society. Indeed, this argument appears to rest on the State's mistaken assumption that the Amish do not provide any education beyond the eighth grade. To the contrary, the Amish provide what has been characterized by expert educators as an "ideal" vocational education for their children.

There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication would fail to find ready markets. We are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they leave the Amish faith, nor is there any basis to warrant a finding that an additional one or two years of education would serve to eliminate any such problem that might exist.

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 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.

Compulsory education beyond the eighth grade is a relatively recent development. Less than 60 years ago, the educational requirements of almost all States were satisfied by completion of the elementary grades. The independence and successful social functioning of the Amish

community for more than 200 years in this country are strong evidence that there is at best a speculative gain from an additional one or two years of compulsory formal education. Against this background it would require a more particularized showing from the State to justify the severe interference with religious freedom such additional compulsory attendance would entail.

IV.

This case involves the fundamental interest of parents to guide the religious future and education of their children. This primary role of the parents in the upbringing of their children is now established. Perhaps the most significant statements of the Court in this area are found in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), in which the Court observed:

"We think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

The Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And when the interests of parenthood are combined with a free exercise claim more than a "reasonable relation to some purpose within the competency of the State" is required. To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. But in this case, the record strongly indicates that accommodating the religious objections of the Amish will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the responsibilities of citizenship.[2]

The Amish have demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the more difficult burden of demonstrating the adequacy of their mode of continuing informal vocational education in terms of those interests that the State advances in support of compulsory high school education. In light of this convincing showing, one that probably few other religious groups could make, and weighing the minimal difference between what the State would require and what the Amish already accept, it was incumbent on the State to show with more particularity how its strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. There is no basis for assuming that reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance, provided that state regulations are not inconsistent with this opinion.[3]

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[2] An exemption for the Amish [does not] constitute an establishment of religion. Such an accommodation "reflects nothing more than the governmental obligation of neutrality in the face of religious differences."

[3] Several States have adopted plans to accommodate Amish religious beliefs through the establishment of an "Amish vocational school." These are not schools in the traditional sense.

JUSTICE POWELL and JUSTICE REHNQUIST took no part in the decision of this case.

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

This would be a very different case 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 and since the deviation from the compulsory-education law is relatively slight, I conclude that respondents' claim must prevail.

JUSTICE DOUGLAS, dissenting in part.

The Court's analysis assumes that the only interests at stake are those of the Amish parents and the State. The difficulty with this approach is that the parents are seeking to vindicate not only their own free exercise claims, but also those of their children. On this vital matter of education, I think the children should be heard. It is the student's judgment that is essential if we are to give full meaning to the Bill of Rights and the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.

The Court rightly rejects the notion that actions, even though religiously grounded, are always outside the protection of the Free Exercise Clause. In so ruling, the Court departs from *Reynolds*. What we do today opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time *Reynolds* will be overruled.

2. UNITED STATES v. LEE
455 U.S. 252 (1982)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

Appellee, a member of the Old Order Amish, is a farmer and carpenter. From 1970 to 1977, appellee employed several other Amish on his farm and in his carpentry shop. He failed to file the social security tax returns required of employers, withhold social security tax from his employees, or pay the employer's share of social security taxes. The IRS assessed appellee $ 27,000 for unpaid employment taxes; he paid $ 91 and then sued for a refund, claiming that imposition of the taxes violated his free exercise rights and those of his Amish employees.

The preliminary inquiry in determining the existence of a constitutionally required exemption is whether the payment of social security taxes and the receipt of benefits interferes with the free exercise rights of the Amish. We accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith. Because the payment of the taxes or

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Respondents attempted to reach a compromise patterned after the Pennsylvania plan, but those efforts were not productive. There is no basis to assume that Wisconsin will be unable to reach a satisfactory accommodation in light of what we now hold.

receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights.

The conclusion that there is a conflict between the Amish faith and the obligations imposed by the social security system is only the beginning and not the end of the inquiry. Not all burdens on religion are unconstitutional. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.

The social security system is by far the largest domestic governmental program in the United States today. The design of the system requires support by mandatory contributions from covered employers and employees. This mandatory participation is indispensable to the fiscal vitality of the system. Thus, the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high.

The remaining inquiry is whether accommodating the Amish will unduly interfere with the governmental interest. Unlike the situation in *Wisconsin* v. *Yoder*, it would be difficult to accommodate the social security system with myriad exceptions flowing from a variety of religious beliefs. The obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes. If a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the system because tax payments were spent in a manner that violates their religious belief. Because the broad public interest in a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

Congress has accommodated, to the extent compatible with a comprehensive national program, those who believe it a violation of their faith to participate in the social security system. In § 1402(g) Congress granted an exemption, on religious grounds, to self-employed Amish and others. Confining the exemption to the self-employed provided for a narrow category which was readily identifiable. Self-employed persons in a religious community having its own "welfare" system are distinguishable from wage earners employed by others.

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all burdens incident to exercising religious beliefs. When followers of a sect enter into commercial activity, the limits they accept on their own conduct as a matter of faith are not to be superimposed on statutory schemes binding on others in that activity. The tax imposed on employers to support the social security system must be applicable to all, except as Congress provides otherwise.

D. A Significant Change in Free Exercise Analysis

The Supreme Court’s interpretation of the Establishment Clause changed dramatically in 1990 with the Court’s decision in *Employment Division v. Smith*. In that case, the Court announced that only some Free Exercise Clause cases would be analyzed using the strict scrutiny standard that had been applied increasingly in recent years when free exercise rights were

infringed. The *Smith* two-track analysis, with many cases analyzed using a deferential reasonableness standard and only two specific categories still analyzed using a much more rigorous strict scrutiny standard, drew a strong negative reaction both on and off the Court. As a result of *Smith*, more recent Establishment Clause cases have focused on invalidating laws that are not found to be "neutral laws of general applicability," and fall within a category that escapes deferential review.

EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON v. SMITH

494 U.S. 872 (1990)

JUSTICE SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Free Exercise Clause permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

I.

Oregon law prohibits the knowing or intentional possession of a "controlled substance" unless the substance has been prescribed by a medical practitioner. The law defines "controlled substance" as a drug classified in Schedules I through V of the Federal Controlled Substances Act, as modified by the State Board of Pharmacy. Persons who violate this provision are "guilty of a Class B felony." Schedule I contains the drug peyote.

Respondents Alfred Smith and Galen Black were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. When respondents applied to petitioner Employment Division for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related "misconduct." The Oregon Court of Appeals reversed that determination. On appeal to the Oregon Supreme Court, petitioner argued that the denial of benefits was permissible because respondents' consumption of peyote was a crime under Oregon law. The Oregon Supreme Court concluded that respondents were entitled to benefits. We granted certiorari.

Before this Court in 1987, petitioner continued to maintain that the illegality of respondents' peyote consumption was relevant to their constitutional claim. We agreed, concluding that "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct." *(Smith I)*. We noted, however, that the Oregon Supreme Court had not decided whether respondents' sacramental use of peyote was in fact proscribed by Oregon's controlled substance law. Being "uncertain about the legality of the religious use of peyote in Oregon," we determined that it would not be "appropriate for us to decide whether the practice is protected by the Federal Constitution." Accordingly, we remanded for further proceedings.

On remand, the Oregon Supreme Court held that respondents' religiously inspired use of peyote fell within the prohibition of the Oregon statute, which "makes no exception for the sacramental use" of the drug. It then considered whether that prohibition was valid under the Free Exercise Clause, and concluded that it was not. The court therefore reaffirmed its previous ruling that the State could not deny unemployment benefits to respondents for having engaged in that practice. We again granted certiorari.

II.

Respondents' claim for relief rests on our decisions in *Sherbert*, *Thomas*, and *Hobbie*, in which we held that a State could not condition unemployment insurance on an individual's willingness to forgo conduct required by his religion. As we observed in *Smith I*, however, the conduct in those cases was not prohibited by law. We held that distinction to be critical. Now that the Oregon Supreme Court has confirmed that Oregon does prohibit the religious use of peyote, we consider whether that prohibition is permissible under the Free Exercise Clause.

A.

The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. 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, 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.

Respondents, 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 constitutional as applied to those who use the drug for other reasons.

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. As described in *Reynolds* v. *United States*[:] "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."

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)." *Prince v. Massachusetts*. Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion was *United States* v. *Lee*. There, we observed that "The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a

manner that violates their religious belief."

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*, or the right of parents to direct the education of their children, see *Wisconsin* v. *Yoder*. Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion. And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.

The present case does not present such a hybrid situation. 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.

B.

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*. 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. 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, see *United States* v. *Lee*, 455 U.S. 252 (1982). In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all.

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. A distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment: "The statutory conditions [in *Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions." Our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.

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, we have sometimes used the *Sherbert* test to analyze free exercise challenges to such laws, see *United States* v. *Lee*,

we have never applied the test to invalidate one. We conclude 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. 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" -- 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 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 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 in the free exercise field, than it would be for them to determine the "importance" of ideas in the free speech field.

If the "compelling interest" test is to be applied at all, then, it must be applied to all actions thought to be religiously commanded. Moreover, 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. Precisely because "we are a nation made up of people of almost every religious preference," 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 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, child labor, animal cruelty, environmental protection, 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. 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. 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 laws against the centrality of 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.

JUSTICE O'CONNOR, with whom JUSTICES BRENNAN, MARSHALL, and BLACKMUN join as to Parts I and II, concurring.

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. . . .

II.

As the Court recognizes, the "free *exercise*" of religion often requires the performance of (or abstention from) certain acts. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion, even if the law is generally applicable. 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 jurisprudence, 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, in cases such as *Cantwell v. Connecticut and Wisconsin v. 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 adopts:

> It is true that activities of individuals, even when religiously based, are often subject to regulation by the States. But to agree that religiously grounded conduct must often be subject to the broad police power is not to deny that there are areas of conduct protected by the Free Exercise Clause and thus beyond the power of the State to control, *even under regulations of general applicability*. A regulation neutral on its face may, in its application, offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion.

The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them "hybrid" decisions, but both cases expressly relied on the Free Exercise Clause, and we have 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 constitutional claims before us only after carefully weighing the competing interests. See *Prince*, *Lee*. That we rejected the free exercise claims hardly calls into question the applicability of First Amendment doctrine in the first place.

Respondents invoke our 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, however, denies them even the opportunity to make that argument. A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible. I would have thought it beyond argument that such laws implicate free exercise concerns.

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 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.

The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result in a "constitutional anomaly," the First Amendment makes freedom of religion, like freedom of speech, a "constitutional nor[m]," not an "anomaly." A law that makes criminal such an activity therefore triggers constitutional concern -- and heightened judicial scrutiny -- even if it does not target the particular religious conduct at issue.

Finally, the Court 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 those whose religious practices may be viewed with hostility. The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society.

III.

The Court's holding not only misreads settled precedent; it appears to be unnecessary. 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. Under Oregon law, members of the Native American Church must choose between carrying out the ritual embodying their religious beliefs and avoidance of criminal prosecution. There is also no dispute that Oregon has a significant interest in enforcing laws that control the possession and use of controlled substances.

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 Schedule I controlled substance. 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, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon's stated interest in preventing any possession of peyote.

For these reasons, I believe that granting a selective exemption in this case would seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens. Under such circumstances, the Free Exercise Clause does not require the State to accommodate respondents' religiously motivated conduct.

Respondents contend that any incompatibility is belied by the fact that the Federal Government and several States provide exemptions for the religious use of peyote. But other governments may surely choose to grant an exemption without Oregon being *required* to do so by the First Amendment. Respondents also note that the sacramental use of peyote is central to the tenets of the Native American Church, but I agree with the Court that our determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of the particular religious practice at issue.

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 JUSTICES BRENNAN and MARSHALL join, dissenting.

This Court 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 is able to arrive at this view only by mischaracterizing this Court's precedents. The Court discards leading cases such as *Wisconsin* v. *Yoder* as "hybrid." The Court views traditional free exercise analysis as somehow inapplicable to criminal prohibitions and to state laws of general applicability. In short, it effectuates a wholesale overturning of settled law.

This distorted view of our precedents leads the majority 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 the interest of respondents Smith and Black in the free exercise of their religion against Oregon's asserted interest in enforcing its drug laws, it is important to articulate the state interest involved. It is not the State's broad interest in fighting the "war on drugs," but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote. In this case, 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" cannot abrogate the constitutional rights of individuals.

Similarly, this Court's prior decisions have not allowed a government to rely on speculation

about potential harms, but have demanded evidentiary support for a refusal to allow a religious exception. In this case, the State's justification is entirely speculative. The State proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote has ever harmed anyone.

The fact that peyote is classified as a Schedule I controlled substance does not show that any and all uses of peyote are inherently harmful and dangerous. The Federal Government, which created the classifications of unlawful drugs from which Oregon's drug laws are derived, apparently does not find peyote so dangerous as to preclude an exemption for religious use.[4]

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs. The Native American Church's internal restrictions on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns.

The State also seeks to support its refusal to make an exception for religious use of peyote by invoking its interest in abolishing drug trafficking. There is, however, practically no illegal traffic in peyote. Peyote simply is not a popular drug; its distribution for use in religious rituals has nothing to do with the vast traffic in illegal narcotics that plagues this country.

Finally, the State argues that granting an exception for religious peyote use would erode its uniform enforcement of its drug laws. The State fears that, if it grants an exemption for religious peyote use, a flood of other claims to religious exemptions will follow. The State's apprehension is purely speculative. Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and have not found themselves overwhelmed by claims to other religious exemptions.[5] Though the State must treat all religions equally, and not favor one over another, this obligation is fulfilled by the uniform application of the "compelling interest" *test* to all free exercise claims, not by reaching uniform *results* as to all claims.

I conclude that Oregon's interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents' right to the free exercise of their religion. Since the State could not constitutionally enforce its criminal prohibition against respondents, the interests underlying the drug laws cannot justify its denial of unemployment benefits. Absent such justification, the State's regulatory interest in denying benefits for religiously motivated "misconduct" is indistinguishable from the state interests this Court has rejected in *Frazee, Hobbie, Thomas*, and *Sherbert*. The State of Oregon cannot, consistently with the Free Exercise Clause, deny respondents unemployment benefits. I dissent.

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[4] See 21 CFR § 1307.31 (1989) ("The listing of peyote as a controlled substance does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Church so using peyote are exempt from registration.").

[5] Over the years, various sects have raised free exercise claims regarding drug use. In no reported case, except those involving claims of religious peyote use, has the claimant prevailed.