SECTION 3. THE FREE EXERCISE OF RELIGION

To some extent, claims based on the free exercise of religion overlap with free speech claims. For example, recall the free speech objections raised by members of Jehovah's Witnesses in cases such as Cantwell v. Connecticut, Lovell v. Griffin, Martin v. Struthers and Wooley v. Maynard. But the "free exercise" guarantee raises distinctive problems. *First*, "exercise" implies more than belief or expression; it often implies conduct or action. In many of the cases that follow, the free exercise claimant argues that a general law resting on state interests not related to religion either interferes with behavior dictated by religious belief or compels conduct forbidden by religious belief. Should government have more leeway to regulate conduct than belief? *Second*, the Establishment Clause has no parallel in the Speech Clause. In the religion context, however, it places limits on how far either legislatures or courts can go in exempting religious believers from general regulations, or otherwise accommodating free exercise values. The free exercise cases that follow look first at the question whether government may deliberately disadvantage religion or a particular religion, and second at whether religious practitioners are entitled to exemptions from generally applicable laws that conflict with dictates of their faith.

LAWS DISCRIMINATING AGAINST RELIGION

Free exercise clearly bars outlawing or compelling belief in a particular religious faith. As Chief Justice Burger stated in McDaniel v. Paty, which follows, "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." Perhaps because this principle is so basic, free exercise controversies over such attempts at thought control are rare. In Torcaso v. Watkins, 367 U.S. 488 (1961), the Court struck down a Maryland requirement that all holders of public office declare their belief in the existence of God. The decision stated: "Neither the State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion,' " nor could they "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." Torcaso rested principally on the Free Exercise Clause, but also noted by way of analogy the religious test clause of Article VI: "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

In **McDaniel v. Paty**, 435 U.S. 618 (1978), the Court invalidated, under the Free Exercise Clause, a Tennessee provision disqualifying clergy from being legislators or constitutional convention delegates. (Tennessee was the last state to retain the disqualification, once commonplace in state laws.) Chief Justice BURGER's plurality opinion, joined by Justices Powell, Rehnquist and Stevens, found the absolute bar on interference with religious *beliefs* inapplicable, because the state barrier referred to "*status* [as] 'minister' or 'priest' " and ministerial status was "defined in terms of conduct and activity rather [than] belief." The plurality nonetheless applied strict scrutiny to the disqualification's burden on religious practice, and found the State's rationale that it was preventing establishment of religion inadequate to support the ban: "[T]he American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-

establishment interests or less faithful to their oaths of civil office than their unordained counterparts." Separate concurrences by Justice BRENNAN, joined by Justice Marshall, and by Justice STEWART found that the disqualification did directly burden religious belief and thus was absolutely prohibited under Torcaso, without any further balancing. Justice Brennan wrote: "Clearly freedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief, even including doing so to earn a livelihood." Justice Stewart wrote: "The disability imposed on McDaniel, like the one imposed on Torcaso, implicates the 'freedom to believe' more than the less absolute 'freedom to act.' " (Note that both Torcaso and McDaniel rejected the government's argument that a public job or office is a mere "privilege" to which the state may attach conditions that would otherwise violate the First Amendment.)

Free exercise challenges arise more commonly when laws regulate religious practice or conduct. While previous eras have witnessed various forms of overt discrimination against disfavored religions, modern legislation rarely evinces outright hostility to particular religions or religious practices. Like overt racial bigotry, overt religious prejudice rarely appears on the face of contemporary laws. The Court has proved willing, however, to look behind the face of a statute to discern religiously discriminatory purpose, as illustrated in the Lukumi case, which follows. In Lukumi, the Court unanimously invalidated a city ordinance prohibiting the ritual slaughter of animals, finding that the law, while apparently neutral on its face, actually was targeted against practitioners of the Santería faith and thus violated the Free Exercise Clause:

Church of the Lukumi Babalu Aye v. City of Hialeah

508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993).

■ JUSTICE KENNEDY delivered the opinion of the Court, except as to Part II–A–2.

[This] case involves practices of the Santeria religion, which originated in the nineteenth century. When hundreds of thousands of members of the Yoruba people were brought as slaves from eastern Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, "the way of the saints." The Cuban Yoruba express their devotion to spirits, called orishas. [The] Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the orishas. The basis of the Santeria religion is the nurture of a personal relation with the orishas, and one of the principal forms of devotion is an animal sacrifice. [According] to Santeria teaching, the orishas are powerful but not immortal. They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals. Santeria adherents faced widespread persecution in Cuba, so

the religion and its rituals were practiced in secret. The open practice of Santeria and its rites remains infrequent.

[The Church's] announcement of plans to open a Santeria church in Hialeah[, Florida,] prompted the city council to hold an emergency public session on June 9, 1987. [The] city council adopted Resolution 87–66, which noted the "concern" expressed by residents of the city "that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and declared that "the City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety." [In] September 1987, the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice. Ordinance 87–52 defined "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption," and prohibited owning or possessing an animal "intending to use such animal for food purposes." It restricted application of this prohibition, however, to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed." The ordinance contained an exemption for slaughtering by "licensed establishments" of animals "specifically raised for food purposes." [Ordinance] 87–71 [defined] sacrifice as had Ordinance 87–52, and then provided that "it shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida." The final Ordinance, 87–72, defined "slaughter" as "the killing of animals for food" and prohibited slaughter outside of areas zoned for slaughterhouse use. The ordinance provided an exemption, however, for the slaughter or processing for sale of "small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." All ordinances and resolutions passed the city council by unanimous vote. Violations [were] punishable by fines not exceeding $500 or imprisonment not exceeding 60 days, or both.

[At] a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." [If] the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.

To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. [Petitioners] contend that three of the ordinances fail this test of facial neutrality because they use the words "sacrifice" and "ritual," words with strong religious connotations. We agree that these words are consistent with the claim of facial discrimination, but the argument is not conclusive. The words "sacrifice" and "ritual" have a religious origin, but current use admits also of secular meanings. [But] facial neutrality is not determinative. [The] Free Exercise Clause protects against governmental hostility which is masked, as well as overt.

[The] record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the

ordinances. [The June 9 resolution aimed at] "certain religions" [and] it cannot be maintained that city officials had in mind a religion other than Santeria. It is [also] a necessary conclusion that almost the only conduct subject to Ordinances 87–40, 87–52, and 87–71 is the religious exercise of Santeria church members. [Ordinance] 87–71 excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting Kosher slaughter. Operating in similar fashion is Ordinance 87–52, which prohibits the "possession, sacrifice, or slaughter" of an animal with the "intent to use such animal for food purposes" [but exempts] "any licensed [food] establishment" with regard to "any animals which are specifically raised for food purposes," if the activity is permitted by zoning and other laws. This exception, too, seems intended to cover Kosher slaughter. [Ordinance] 87–40 incorporates the Florida animal cruelty statute. Its prohibition is broad on its face, punishing "whoever . . . unnecessarily . . . kills any animal." The city claims that this ordinance is the epitome of a neutral prohibition. [But the city] deem[s] [k]illings for religious reasons [unnecessary but] deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. [The city's] application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.

[The] legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice. [Counsel] for the city conceded at oral argument that, under the ordinances, Santeria sacrifices would be illegal even if they occurred in licensed, inspected, and zoned slaughterhouses. [With] regard to the city's interest in ensuring the adequate care of animals, regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice.

[In Part II–A–2 of Justice Kennedy's opinion, which was joined only by Justices Stevens, Blackmun and O'Connor, he added: "In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. [Here], as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence. [Arlington Heights.] [The] minutes and taped excerpts of the June 9 session, both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice. The public crowd that attended the June 9 meetings interrupted statements by council members critical of Santeria with cheers and the brief comments of [the Church's leader] with taunts. When [a council member supporting the ordinances] stated that in prerevolution Cuba 'people were put in jail for practicing this religion,' the audience applauded. [One council member said that the] 'Bible says we are allowed to sacrifice an animal for consumption,' [and] continued, 'but for any other purposes, I don't believe that the Bible allows that.' [The] chaplain of the Hialeah Police Department told the city council that Santeria was a sin, 'foolishness,' 'an abomination to the Lord,' and the worship of 'demons.' [This] history discloses the object of the ordinances to target animal sacrifice by Santeria worshippers because of its religious motivation." Resuming his opinion for the Court, Justice Kennedy continued:]

In sum, [the] ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense.

[A] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. [It] follows from what we have already said that these ordinances cannot withstand this scrutiny. First, even were the governmental interests compelling, [all] four ordinances are overbroad or underinclusive. [The] absence of narrow tailoring suffices to establish the invalidity of the ordinances. [Moreover,] [w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. [Reversed.]

■ JUSTICE SCALIA, joined by CHIEF JUSTICE REHNQUIST, concurring in part and concurring in the judgment.

I do not join [Part II–A–2] because it departs from the opinion's general focus on the object of the laws at issue to consider the subjective motivation of the lawmakers, i.e., whether the Hialeah City Council actually intended to disfavor the religion of Santeria. [But] it is virtually impossible to determine the singular "motive" of a collective legislative body, and this Court has a long tradition of refraining from such inquiries. [The] First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted: "Congress shall make no law . . . prohibiting the free exercise [of religion]. . . ." This does not put us in the business of invalidating laws by reason of the evil motives of their authors. Had the Hialeah City Council set out resolutely to suppress the practices of Santeria, but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to "prohibit the free exercise" of religion. Nor, in my view, does it matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens. Had the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), they would nonetheless be invalid.

[Justice SOUTER filed an opinion concurring in part and in the judgment and Justice BLACKMUN, joined by Justice O'Connor, filed an opinion concurring in the judgment. Both these opinions found this an easy case for invalidation, reasoning that, in Justice Souter's words, Hialeah had enacted "a rare example of a law actually aimed at suppressing religious exercise," and that such a law is nearly always invalid. Justices Souter and Blackmun declined to join all of Justice Kennedy's opinion, however, because it referred in dicta to aspects of Employment Division v. Smith (1997; p. 1593 below) that they found objectionable.]

IDENTIFYING ANTIRELIGIOUS PURPOSE

1. ***Lukumi and religious gerrymanders.*** Justice Kennedy called the law in Lukumi a "religious gerrymander"—that is, "an impermissible attempt to target petitioners and their religious practices." Like drawing a district boundary so as to include or exclude members of a particular race or political party, the Hialeah law was drawn with definitions and exceptions that in practice singled out Santería for adverse treatment.

Hialeah's law was struck down under the Free Exercise Clause. But the Court has also struck down "religious gerrymanders" under the Establishment Clause. For example, in **Larson v. Valente**, 456 U.S. 228 (1982), the Court struck down a Minnesota law imposing registration and reporting requirements for charitable solicitations and exempting some, but not all, religious organizations from the law. The requirements applied only to religious organizations that solicit more than 50% of their funds from nonmembers. The Court found that this scheme violated the "clearest command of the Establishment Clause": "one religious denomination cannot be officially preferred over another." The law was challenged by the Unification Church, which consists of followers of Rev. Sun Myung Moon, on the ground that it preferred traditional over untraditional religions.

In invalidating the 50% rule, Justice BRENNAN's majority opinion applied strict scrutiny and found the law not closely tailored to any government interest in preventing fraudulent or abusive solicitation practices. He emphasized Minnesota's "*selective* legislative imposition of burdens and advantages upon particular denominations," noting that "the provision was drafted with the explicit intention of including particular religious denominations and excluding others." One state senator observed that other lawmakers seemed to have a religious animus toward groups that were included, stating, " 'I'm not sure why we're so hot to regulate the Moonies anyway.' " By contrast, an earlier version of the law was eliminated when "the legislators perceived that [it] would bring a Roman Catholic Archdiocese within the Act." Justice Brennan found that the 50% rule's "capacity—indeed, its express design—to burden or favor selected religious denominations led the Minnesota Legislature to discuss the characteristics of various sects with a view towards 'religious gerrymandering.' "

Note that Larson, like Lukumi, looked behind the facial neutrality of the law to discern a religiously discriminatory purpose. Why was Larson litigated under the Establishment rather than the Free Exercise Clause? Because its selective favoritism toward mainstream religions was more apparent than its selective burdens on unorthodox ones? Because the selective burdens did not fall upon practices central to the free exercise of the Unification faith? Was animal sacrifice more central to Santeria practitioners than solicitation was to Unification Church members? Is solicitation an aspect of the free exercise of religion at all? Should prosecutors, juries and judges be entrusted with deciding such questions?

Conversely, why was Lukumi litigated as a free exercise rather than an establishment case? Justice Kennedy noted several times Hialeah's careful exemption of the kosher slaughter practices used by Orthodox Jews. Did such exemptions for one religious tradition in particular create religious favoritism in violation of the Establishment Clause? Justice Kennedy expressly declined to reach that issue in Lukumi: "We need not discuss whether [the] differential treatment of two religions is itself an independent

constitutional violation. Cf. Larson v. Valente. It suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern." Does it seem implausible to imagine that Hialeah had "established" Orthodox Judaism, itself a minority faith? The Court has suggested that religious favoritism might violate the Establishment Clause whether it favors mainstream or minority faiths. See Kiryas Joel (1994; p. 1709 below).

2. ***Singling out religion for denial of public funding.*** Lukumi shows that even a law that makes no mention of religion can be found discriminatory against religion. Interestingly, the Court has held that even a law that singles out religion to deny government funding might not be discriminatory. This issue was addressed in Locke v. Davey (2004; below, p. 1696). There, the Court held, in an opinion by Chief Justice Rehnquist, that a Washington state educational scholarship that could not be used to pursue a degree in devotional theology did not unconstitutionally single out religion for disfavor under Lukumi. The Court explained that neither the Washington constitutional provision denying public money for religious instruction nor the program "suggest[ed] animus towards religion." Justice Scalia, in dissent, argued that legislative animus did not matter, a position in keeping with his general rejection of the use of legislative history to establish intent. But the Court distinguished Locke in its decision in Trinity Lutheran Church of Columbia v. Comer (below, p. 1699), when it held Missouri could not deny Trinity Lutheran Church a grant to resurface its school playground—grants the state offered to other secular schools—solely because the organization was a church. To do so, argued Chief Justice Roberts, was to deny Trinity Lutheran its free exercise right.

3. ***Religious or racial animosity?*** The Lukumi case demonstrates that it is not always possible to separate laws motivated by religious animosity from laws motivated by racial, or other, considerations. Such laws often stem from a variety of sources at once. The Church of Lukumi Babalu Aye is a Santería church composed predominately of Cuban-Americans of Afro-Caribbean descent. Much of the opposition to the animal-sacrifice elements of Santería stemmed from the white Cuban population of the Miami area. "Whenever the carcasses of dead animals appeared on beaches or in trash bins, residents blamed the [predominantly Afro-Caribbean] working class. [Cuban] [e]migrees who criticized santería tended to be the white elite, who were embarrassed and resentful of the negative attention." García, Havana USA 96 (1996).

4. ***Expressions of bias and differential results.*** In **Masterpiece Cakeshop v. Colorado Civil Rights Commission**, 584 U.S. ___, 138 S. Ct. 1719 (2018), a Colorado baker, Jack Phillips, told a same-sex couple that he would not create a cake for their wedding celebration because of his religious opposition to same-sex marriages. The couple filed a charge with the Colorado Civil Rights Commission pursuant to the Colorado Anti-Discrimination Act (CADA), which prohibits discrimination based on sexual orientation in a "place of business engaged in any sales to the public and any place offering services . . . to the public." The Colorado Civil Rights Division first found probable cause for a violation and referred the case to the Commission. The Commission then referred the case for a formal hearing before a state Administrative Law Judge, who ruled in the couple's favor.

The case received wide public attention as the first major post-Obergefell clash between religious liberty and marriage equality. Justice

KENNEDY's opinion for a 7–2 Court avoided the major issues of whether the baker was entitled to a religious exemption from Colorado's anti-discrimination law and whether requiring the baker to make a cake would violate his free speech rights. Instead, the Court found a Lukumi violation:

"[Our] society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. [Nevertheless,] while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

"[The] neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection. That hostility surfaced at the Commission's formal, public hearings. [During the Commission's first public meeting,] [one] commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state." A few moments later, the commissioner restated the same position: "[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise." Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.

"[At the Commission's second public meeting,] another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated: ['Freedom] of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is

one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.' To describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects discrimination on the basis of religion as well as sexual orientation.

"The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission's decision did not mention those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. See Lukumi (Scalia, J., concurring in part and concurring in judgment). In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.

"Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission. [On] at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included 'wording and images [the baker] deemed derogatory.' The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection. The Commi
Phillips in part on the theory that any messa
would carry would be attributed to the
Division did not address this point in
the cakes depicting anti-gay marr sy
found no violation of CADA in oth
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that a proper basis for distinguishing the cases was available—in fact, was obvious. The Colorado Anti-Discrimination Act (CADA) makes it unlawful for a place of public accommodation to deny 'the full and equal enjoyment' of goods and services to individuals based on certain characteristics, including sexual orientation and creed. The three bakers in the cases [brought by William Jack] did not violate that law. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA's demand that customers receive 'the full and equal enjoyment' of public accommodations irrespective of their sexual orientation. The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief. I read the Court's opinion as fully consistent with that view."

Justice GORSUCH concurred, joined by Justice Alito, to disagree with Justice Kagan: "In both cases, the effect on the customer was the same: bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service intending only to honor a personal conviction. To be sure, the bakers knew their conduct promised the effect of leaving a customer in a protected class unserved. But there's no indication the bakers actually intended to refuse service because of a customer's protected characteristic. We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). So, for example, the bakers in the first case would have refused to sell a cake denigrating same-sex marriage to an atheist customer, just as the baker in the second case would have refused to sell a cake celebrating same-sex marriage to a heterosexual customer. And the bakers in the first case were generally happy to sell to persons of faith, just as the baker in the second case was generally a[illegible]y to sell to gay persons. In both cases, it was the kind of cake, not the [illegible]mer, that mattered to the bakers.

NSBURG dissented, joined by Justice Sotomayor: "The [illegible]es the Court features do not evidence hostility to religion of [illegible]e previously held to signal a free-exercise violation, nor do [illegible]s by one or two members of one of the four decisionmaking [illegible]nsidering this case justify reversing the judgment below. [The] [illegible]fusal to make Jack cakes of a kind they would not make for any [illegible]arcely resembles Phillips' refusal to serve Craig and Mullins: [illegible] sell to Craig and Mullins, for no reason other than their [illegible]ke of the kind he regularly sold to others. When a [illegible]r a wedding cake, the product they are seeking is [illegible]vedding—not a cake celebrating heterosexual [illegible]dings—and that is the service Craig and Mullins [illegible]he other hand, suffered no service refusal on the [illegible]any other protected characteristic. He was treated as [illegible]ould have been treated—no better, no worse.

"[Statements] made at the Commission's public hearings on Phillips' case provide no firmer support for the Court's holding today. [The] proceedings involved several layers of independent decisionmaking, of which the Commission was but one. [What] prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips' case is thus far removed from the only precedent upon which the Court relies, Lukumi, where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council."

Does the Masterpiece Cakeshop decision break new ground in identifying antireligious animus? How searching was the Court's inquiry into animus in Masterpiece compared to Lukumi? Has the Court broadened the category of considerations that could count as animus? How much of a role did the allegedly disparate treatment between Phillips and the other bakers' cases play in the Court's decision? Recall that Justice Scalia refused to look to the legislative history of the ordinance in Lukumi, meaning the majority of the Court looked only to the ordinance itself. Can that be reconciled with Justice Kennedy's consideration of adjudicators' motives and statements in Masterpiece? Is his distinction between the adjudicatory versus legislative natures of the proceedings in Masterpiece and Lukumi convincing? Furthermore, were the commissioners' statements genuinely antireligious? For an argument that the Court misread them, see Kendrick & Schwartzman, "The Etiquette of Animus," 132 Harv. L. Rev. 133 (2018).

While the Court left open the questions of whether someone can claim a religious exemption to antidiscrimination laws and whether there is a free speech issue in requiring someone to engage in an arguably artistic project, does the language in Justice Kennedy's opinion provide support for a particular outcome on those questions? How might Justices Kagan and Gorsuch's concurrences be used to argue those issues?

Consider also how Masterpiece Cakeshop fits with another important case from same Term, Trump v. Hawaii, 585 U.S. ___, 138 S. Ct. 2392 (2018), which declined to apply Lukumi analysis to President Donald Trump's allegedly anti-Muslim statements associated with his executive order banning travel from a several majority-Muslim countries. Is there tension between the two decisions? While the majority in Trump v. Hawaii did not directly address the potential establishment violation, Justice Breyer's dissent argued that if the decision to implement the ban were "significantly affected by religious animus," it would violate the First Amendment. Justice Sotomayor, also in dissent, found explicitly that "the primary purpose of the Proclamation is to disfavor Islam and its adherents."

RELIGIOUS EXEMPTIONS

Free exercise claims are more commonly raised against facially neutral laws that are not targeted at a religious practice, but which have a disproportionately adverse impact on religious practitioners. Such laws might either require conduct that is incompatible with religious practice or forbid conduct that is religiously required. The free exercise claimant typically seeks an exemption from, not invalidation of the law. Are religious exemptions ever constitutionally compelled?

The Court's first major decision on free exercise exemptions was **Reynolds v. United States**, 98 U.S. 145 (1878), which upheld application of a federal law making bigamy a crime in the territories to a Mormon claiming that polygamy was his religious duty. As Chief Justice WAITE read the First Amendment, "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 good order." He reviewed the traditional condemnation of multiple marriages in modern western society, and cited work by Francis Lieber (better known as the author of the Civil War-era "Lieber Code" on the laws of war) suggesting that "polygamy leads to the patriarchal principle, which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy." Chief Justice Waite concluded: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil 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 civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, 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 professed 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."

Cantwell v. Connecticut, 310 U.S. 296 (1940) (p. 990, above), which incorporated the Free Exercise Clause against the states, suggested that religious conduct was not wholly outside the protection of the Free Exercise Clause, even if it was subject to greater regulation than belief. Justice ROBERTS wrote: "[Free exercise] embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. [In] every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."

That same year, in **Minersville School Dist. v. Gobitis**, 310 U.S. 586 (1940) (p. 1390, above), the Court refused to grant a free exercise exemption to Lillian and William Gobitis, Jehovah's Witnesses who had been expelled from a Pennsylvania public school for refusing to salute the flag. In his opinion for the Court, Justice FRANKFURTER wrote: "In the judicial enforcement of religious freedom we are concerned with a historic concept. The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. The necessity for this adjustment has again and again been recognized. In a number of situations the exertion of political

authority has been sustained, while basic considerations of religious freedom have been left inviolate. Reynolds. In [previous] cases the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable."

Just three years later, the Court effectively reversed Gobitis, which had been widely criticized, in **West Virginia State Bd. of Educ. v. Barnette**, 319 U.S. 624 (1943) (p. 1392, above), but did so on free-speech grounds, leaving the free exercise holding unchanged. And in **Braunfeld v. Brown**, 366 U.S. 599 (1961), the Court rejected a free exercise challenge to a Pennsylvania Sunday closing law. The challengers were Orthodox Jews whose religion required that they close their stores on Saturdays. They alleged that the Sunday closing laws would place them at such a severe competitive disadvantage as to force them out of business. Chief Justice WARREN's plurality opinion, joined by Justices Black, Clark and Whittaker, rejected the free exercise challenge. Citing Reynolds and Cantwell, Chief Justice Warren emphasized that, unlike the freedom to hold religious beliefs and opinions, the "freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions." He added that the law here did not "make criminal the holding of any religious belief or opinion, nor force anyone to embrace any religious belief. [It simply made] the practice of their religious beliefs more expensive. To strike down [legislation] which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the [legislature]. We are a cosmopolitan nation made up of people of almost every conceivable religious preference. [Consequently,] it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. [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.

"As we pointed out in [McGowan v. Maryland (1961); p. 1665 below, rejecting an Establishment Clause challenge to Sunday closing laws], we cannot find a State without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquility. [To] permit the exemption [sought by the challengers] might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity. [E]nforcement problems would be more difficult [and Saturday observers] might well [receive] an economic advantage over their competitors who must remain closed on that day. [Competitors might] assert that they have religious convictions which compel them [illegible] had formerly been their least [illegible]ducted inquiry into the which a State might [illegible]ionally protected ice Harlan, also

Justice BRENNAN's dissent argued that the law violated the Free Exercise Clause because it "put an individual to a choice between his business and his religion." He argued that the state's interest was "the mere convenience of having everyone rest on the same day. It is to defend this interest that the Court holds that a State need not follow the alternative route of granting an exemption for those who in good faith observe a day of rest other than Sunday. [The Court] conjures up several difficulties with such a system which seem to me more fanciful than real. [The] Court [has] exalted administrative convenience to a constitutional level high enough to justify making one religion economically disadvantageous." Justices Stewart and Douglas also dissented.

Compare with the decision in Braunfeld the Court's decision in the following case, which held that a state must pay unemployment benefits to a Saturday sabbatarian:

Sherbert v. Verner

374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).

[Appellant Sherbert, a Seventh-day Adventist, was discharged by her employer "because she would not work on Saturday, the Sabbath Day of her faith." She was unable to obtain other employment because she would not take Saturday work. Her claim for South Carolina state unemployment compensation was denied because the state compensation law barred benefits to workers who failed, without good cause, to accept "suitable work when offered." The highest state court sustained the denial of benefits and the Supreme Court reversed.]

■ JUSTICE BRENNAN delivered the opinion of the [Court].

[If the state decision is to stand] it must be either because [appellant's] disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise; or because any incidental 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. [Here] not only is it apparent that appellant's declared ineligibility for benefits solely derives 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.

[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 [state courts, and] there is no proof whatever to warrant such fears of malingering or deceit. [Even if] there were such risks, 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]. [That statute was] 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. [Here] no such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive [benefits].

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, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. [Nor] do we, by our decision today, 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. [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]. [Reversed and remanded.]

■ JUSTICE STEWART, concurring in the result.

[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. [Yet] in cases decided under the Establishment Clause the Court [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 [religion clauses].

[I] cannot agree that today's decision can stand consistently with [Braunfeld]. 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 *criminal* statute [and a drastic impact on the challenger's business]. The impact upon the appellant's religious freedom in the present case is considerably less onerous [than in Braunfeld]. 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]. I think [Braunfeld] was wrongly decided and should be overruled, and accordingly I concur in the result [here].

■ JUSTICE HARLAN, whom JUSTICE WHITE joins, dissenting.

[In] no proper sense can it be said that the State discriminated against the appellant on the basis of her religious beliefs or that she was denied benefits *because* she was a Seventh-day Adventist. 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. Such a holding has particular significance in two respects.

First, despite the Court's protestations to the contrary, the decision necessarily overrules [Braunfeld]. 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 the holding is that 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. It has been suggested that such singling out of religious conduct for special treatment may violate the constitutional limitations on state action. See Kurland, "Of Church and State and the Supreme Court," 29 U. Chi. L. Rev. 1 (1961). 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. The constitutional obligation of "neutrality" is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. [There is] enough flexibility in the Constitution to permit a legislative judgment accommodating an unemployment compensation law to the exercise of religious beliefs such as appellant's. [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. [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].

LIMITING THE SCOPE OF MANDATORY RELIGIOUS EXEMPTIONS?

In the wake of Sherbert, religious objectors to general regulations repeatedly came to the Court, invoking Sherbert's strict scrutiny in claiming constitutionally mandated exemptions. Although the Court typically adhered to the Sherbert analysis in form, it quite frequently rejected the religious objectors' claims in fact. The major cases in which the free exercise claims succeeded arose in the unemployment compensation context following

Sherbert, and in the education setting following Wisconsin v. Yoder. In other cases, the Court, despite lip service to Sherbert's strict scrutiny standard, in fact exercised a quite deferential variety of review and accordingly refused to carve out exemptions from general regulations.

1. ***Unemployment compensation cases after Sherbert.*** **Thomas v. Review Board**, 450 U.S. 707 (1981), a case factually very close to Sherbert, relied on it to strike down Indiana's denial of unemployment compensation to a Jehovah's Witness who quit his job in a munitions factory because of his religious objections to war. A state court upheld the denial of compensation, because the law denied compensation to all employees who voluntarily left employment for personal reasons without good cause. Chief Justice Burger's majority opinion, however, found the coercive impact here "indistinguishable from Sherbert" and rejected an argument that the grant of benefits to the employee would violate the Establishment Clause. Justice Rehnquist was the sole dissenter, insisting that the majority had read free exercise "too broadly" and had failed "to squarely acknowledge that such a reading conflicts with many of our Establishment Clause cases." He urged that Sherbert be overruled. **Hobbie v. Unemployment Appeals Comm'n**, 480 U.S. 136 (1987), likewise followed Sherbert in upholding the unemployment compensation claim of an employee whose religious beliefs had changed during the course of her employment.

2. ***Compulsory education laws.*** In **Wisconsin v. Yoder**, 406 U.S. 205 (1972), Yoder, a member of the Old Order Amish, was convicted and fined $5 for refusing to send his 15-year-old daughter to school after she had completed the eighth grade, in violation of Wisconsin's requirement of school attendance until age sixteen. The Amish object to high school education because of their "fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence." They believe that high school exposes their children to worldly influence and emphasizes "intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students." The Amish society, by contrast, emphasizes "informal learning-through-doing" and "wisdom, rather than technical knowledge; community welfare, rather than competition; and separation [from] contemporary worldly society." Attendance at school through the eighth grade is acceptable to the Amish because it "prepares children to read the Bible [and] to be good farmers and citizens," and because such education does not "significantly expose their children to worldly values." The Wisconsin Supreme Court overturned Yoder's conviction because it violated the Free Exercise Clause. The Court affirmed, with six Justices joining the majority opinion and only one Justice dissenting in part.

Chief Justice BURGER's majority opinion insisted that "a State's interest in universal education" must be strictly scrutinized "when it impinges on fundamental rights and interests" such as the right of free exercise. The State could not prevail unless it showed that its requirement served "a state interest of sufficient magnitude to override the [free exercise claim]." And "only those interests of the highest order and those not otherwise served can overbalance legitimate claims of free exercise. [E.g., Sherbert.]" Applying this analysis, Chief Justice Burger began by asking whether the Amish claim was "rooted in religious belief" (the sincerity of the Amish was conceded), and found it was "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized

group, and intimately related to daily living." Compulsory school-attendance laws required the Amish "to perform acts undeniably at odds with fundamental tenets of their religious beliefs" and carried with them "a very real threat of undermining the Amish community and religious practice."

Chief Justice Burger proceeded to reject the State's attempted reliance on the "belief"-"action" distinction: "in this context belief and action cannot be neatly confined in logic-tight compartments." Nor could the case be disposed of because the law was facially nondiscriminatory, for such a regulation might nevertheless "offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. [E.g., Sherbert.]" Accordingly exercising the heightened scrutiny demanded by this case as well as Sherbert, the Court examined the interests asserted by the State. Chief Justice Burger noted the State's claim that "some degree of education is necessary to prepare citizens to participate [effectively] in our open political system [and] to be self-reliant and self-sufficient participants in society," but replied that an additional one or two years of formal high school would do "little to serve those interests."

Turning to the State's argument that the Amish position fostered "ignorance," Chief Justice Burger replied 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." The State also argued that children "may choose to leave the Amish community, and that if this occurs they will be ill-equipped for life." Chief Justice Burger found this argument "highly speculative": "There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance and dedication to work would fail to find ready markets in today's society." Accordingly, the State's interest here "emerges as somewhat less substantial than requiring such attendance for children generally." The Court added that it was "not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' [process] for rearing children for modern life." In view of the long history of the Amish as a "successful and self-sufficient segment of American society" and their showing of "the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances," a showing that "probably few other religious groups or sects 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 admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. [Sherbert.]" The Court dismissed in a footnote the claim that a mandatory exemption for the Amish would violate the Establishment Clause: "Accommodating the religious beliefs of the Amish can hardly be characterized as sponsorship or active involvement."

Justice DOUGLAS dissented in part, emphasizing the potential conflict of interest between Amish parents and their children. He insisted that the free exercise rights of Amish children had to be reached here. Some Amish children might want to attend high school in order to be able to choose whether to adhere or break with the Amish tradition. (The majority opinion, as well as the concurring notations by Justices Stewart and White, insisted that this issue was not presented by the record.) Justice Douglas also

objected to the majority's emphasis on the "law and order record" of the Amish, finding it "quite irrelevant."

3. ***The New Glarus Amish in Yoder v. Wisconsin.*** The Old Order Amish families in Wisconsin v. Yoder were among the least likely groups of people to participate in a precedent-setting legal case. "The Amish feel that 'going to the law' violates their faith's tradition of nonresistance." The great attention brought to the New Glarus community by the Yoder case sparked division between Amish in favor of the litigation and those against it. It also pitted more progressive members of the community against traditionalists. The Amish plaintiffs had "repeatedly argued that [they] would flee the community if the courts ruled against them and thus burdened their religious practice. As it happened, almost all the Amish did leave New Glarus—but after the U.S. Supreme Court ruled *in favor* of their faith. [Far] from preserving their community, the litigation sparked discord that contributed to its disintegration." Peters, The Yoder Case: Religious Freedom, Education, and Parental Rights 2, 6 (2003).

4. ***Denials of free exercise exemption claims between Sherbert and Smith.*** Even though Sherbert and Yoder held that the Free Exercise Clause mandated exemptions from government regulations in certain circumstances, a much larger number of cases during this period rejected such claims. The heightened scrutiny announced by such decisions as Sherbert and Yoder proved quite deferential in fact.

a. **United States v. Lee**, 455 U.S. 252 (1982): Lee, a member of the Old Order Amish, employed several Amish to work on his farm and in his carpentry shop. He objected, on religious grounds, to paying the Social Security tax for his employees, arguing that "the Amish believe it sinful not to provide for their own elderly." Chief Justice BURGER's majority opinion found Yoder distinguishable and rejected Lee's claim. Chief Justice Burger conceded that "there is a conflict between the Amish faith and the obligations imposed by the social security system" and accepted that heightened scrutiny was appropriate. In nevertheless upholding application of the tax law to Lee, he noted that "the State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest"; here, mandatory participation in the Social Security system was indispensable to the fiscal vitality of the system. Chief Justice Burger distinguished Yoder on the ground that here "it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs." He also noted that there was "no principled way" to distinguish between general taxes and Social Security taxes, so that, if Lee's claim were granted, a religious opponent to war "would have a similarly valid claim to be exempt from paying [a] percentage of the income tax." "The tax system could not function if denominations were allowed to challenge [it] because tax payments were spent in a manner that violates their religious beliefs."

In a separate opinion concurring only in the judgment, Justice STEVENS criticized the majority for imposing upon the Government "a heavy burden of justifying the application of neutral general laws [to] individual conscientious objectors. In my opinion, it is the objector who must shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability." The Amish ought to prevail under strict scrutiny, which he opposed, because an exemption to them would be costless to the government: "[T]he

nonpayment of these taxes by the Amish would be more than offset by the elimination of their right to collect benefits. [Since] the Amish have demonstrated their capacity to care for their own, the social cost of eliminating this relatively small group of dedicated believers would be minimal." Nor was there a great risk of myriad similar claims: "[T]he Amish claim applies only to a small religious community within an established welfare system of its own." Nevertheless, he agreed with the majority's result because of the difficulties involved in processing claims to religious exemption from taxes.

b. **Bob Jones University v. United States**, 461 U.S. 574 (1983): This decision rejected a free exercise challenge to IRS denials of tax-exempt status to two educational institutions that practiced racial discrimination in accordance with the religious beliefs upon which they were founded. The IRS claimed that the schools were disqualified as "charities" because their racial policies were "contrary to settled public policy." After finding that the IRS policy was authorized by Congress, Chief Justice BURGER's opinion for the Court rejected the free exercise claim despite formal application of strict scrutiny. Under the Lee standard that "[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest," the Court found the governmental interest in eradicating racial discrimination in education sufficiently "compelling."

c. **Goldman v. Weinberger**, 475 U.S. 503 (1986): In rejecting a free exercise challenge in this case, involving military service, the Court abandoned any reliance on heightened scrutiny and instead adopted an openly deferential approach. Goldman was an Orthodox Jew, a clinical psychologist in the Air Force, who was disciplined for wearing a yarmulke in violation of uniform dress regulations barring the wearing of headgear indoors. He sought an exemption from the Air Force regulation under the strict scrutiny standard of Sherbert. Justice REHNQUIST's majority opinion answered: "Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar [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." Accordingly, "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." In this case, the military judgment was that "the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. [The] First Amendment does not require the military to accommodate such practices as the wearing of [the yarmulke] in the face of its view that they would detract from the uniformity sought by the dress regulations."

In a concurring opinion, Justice STEVENS, joined by Justices White and Powell, admitted that Goldman presented "an especially attractive case for an exception" but worried about the application of such an exemption to members of other religious groups who wished to wear, e.g., turbans and dreadlocks. He accordingly insisted on testing the validity of the regulation "as it applied to all service personnel who have sincere religious beliefs." The interest in uniformity was important because it was an interest "in uniform

treatment for the members of all religious faiths"; yet the "very strength of [Captain Goldman's] claim creates the danger that a similar claim on behalf of a Sikh or a Rastafarian might readily be dismissed as 'so extreme, so unusual, or so faddish an image that public confidence in his ability to perform his duties will be destroyed.' If exceptions from dress code regulations are to be granted, [inevitably] the decisionmaker's evaluation of the character and the sincerity of the requester's faith—as well as the probable reaction of the majority to the favored treatment of a member of that faith—will play a critical part in the decision. [Yet the] Air Force has no business drawing distinctions between such persons when it is enforcing commands of universal application."

Justice BRENNAN's dissent, joined by Justice Marshall, attacked the majority's "subrational-basis standard—absolute, uncritical 'deference to the professional judgment of military authorities.' " He rejected as "totally implausible" the claim that the "group identity of the Air Force would be threatened" by the wearing of yarmulkes. In response to the Government's fear of "a classic parade of horribles, the specter of a brightly-colored, 'rag-tag band of soldiers,' " he stated: "Although turbans, saffron robes, and dreadlocks are not before us [and] must each be evaluated against the reasons a service branch offers for prohibiting personnel from wearing them while in uniform, a reviewing court could legitimately give deference to dress and grooming rules that have a *reasoned* basis in, for example, functional utility, health and safety considerations, and the goal of a polished, professional appearance. It is the lack of any reasoned basis for prohibiting yarmulkes that is so striking here."

Justice BLACKMUN's dissent stated that the Air Force was justified in considering "the cumulative costs of accommodating constitutionally indistinguishable requests for religious exemptions" and also shared Justice Stevens's concern about discriminating in favor of mainstream religions. He nevertheless joined the dissenters because the "Air Force simply has not shown any reason to fear that a significant number of enlisted [people] would request religious exemptions that could not be denied on neutral grounds such as safety, let alone that granting these requests would noticeably impair the overall image of the service." Justice O'CONNOR's dissent, joined by Justice Marshall, found "two consistent themes" in the precedents: "First, when the government attempts to deny a free exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated 'compelling,' 'of the highest order,' or 'overriding.' [Sherbert, Yoder, and Lee.] 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,' or that the interest will not 'otherwise be served.' These two requirements are entirely sensible [and there is no reason why they] should not apply in the military, as well as the civilian, context." Applying these standards here, she stated that she "would require the Government to accommodate the sincere religious belief of Captain Goldman."

After Goldman, Congress enacted a law permitting members of the military to "wear an item of religious apparel while wearing the uniform," unless "the wearing of the item would interfere with the performance [of] military duties [or] the item of apparel is not neat and conservative." 10 U.S.C. § 774.

d. **Bowen v. Roy**, 476 U.S. 693 (1986): The Court by a vote of 8–1 rejected a free exercise challenge to a requirement in the federal AFDC and Food Stamp programs that applicants for welfare benefits be identified by Social Security numbers. The challengers claimed that assignment of a number for their two-year-old daughter, Little Bird of the Snow, would violate their religious beliefs because it would "rob the spirit" of the child. Chief Justice BURGER's majority opinion rejected the claim regarding the *government*'s use of the number by distinguishing free exercise claims with respect to personal conduct from such claims with respect to the government's conduct: "Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development. [Free exercise] does not afford an individual a right to dictate the conduct of the Government's internal procedures."

The Court did not rule definitively on the requirement that the *applicant* furnish a Social Security number as a condition of receiving aid, but five Justices indicated that they thought that free exercise warranted an exception here. Chief Justice BURGER, writing on this issue only for himself and Justices Powell and Rehnquist, would have rejected both aspects of the free exercise claim, asserting that scrutiny should be more deferential in the case of a condition on benefits than in the case of "governmental action [that] criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons." Justice WHITE's brief dissent apparently would have granted both aspects of the free exercise claim, finding that the case was controlled by Sherbert and Thomas. Justice O'CONNOR, joined by Justices Brennan and Marshall, disputed Chief Justice Burger's distinction between "conditions" and "compulsion," arguing that the fact that the "underlying dispute involves an award of benefits rather than an exaction of penalties does not grant the Government license to apply a different version of the Constitution." Applying heightened scrutiny, she would have exempted Roy from providing the number. Justices BLACKMUN and STEVENS filed separate partial concurrences, agreeing that free exercise did not bar the government's own use of the Social Security number, but claiming that the record was insufficient to allow consideration of the claims with respect to Roy's furnishing the number. However, Justice Blackmun appended to his concurrence a comment that, if forced to reach the latter issue, he would agree with Justice O'Connor's position. Given Justice Blackmun's comment, and the view of the four dissenters, there was apparently a majority on the Court to uphold a free exercise claim regarding the furnishing of the number.

e. **Lyng v. Northwest Indian Cemetery Protective Ass'n**, 485 U.S. 439 (1988): This was an unsuccessful free exercise challenge to the U.S. Forest Service's plan to build a road through and permit timber harvesting in an area of national forest traditionally used by several Indian tribes as sacred areas for religious rituals. In a 5–3 decision, the Court rejected the free exercise claim. Justice O'CONNOR's majority opinion acknowledged that the challengers' beliefs were "sincere" and that "the Government's proposed actions [would] have severe adverse effects on the practice of their religion," but insisted that the burden was not sufficiently great to trigger any form of heightened scrutiny. Accordingly, the Government did not have to meet a "compelling interest" standard of justification for the project. Relying heavily on Bowen v. Roy (p. 1591 above), she stated: "The building of a road or the harvesting of timber on publicly owned land cannot

meaningfully be distinguished from the use of a Social Security number in Roy. In both cases, the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs. In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize the religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." She acknowledged that "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment. [But] this does not and cannot imply that incidental effects of governmental programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for otherwise lawful actions. The crucial word in the constitutional text is 'prohibit.' "

Justice O'Connor went on to rely heavily on the possibility that many similar claims might impair the operation of government: "[Government] simply could not operate if it were required to satisfy every citizen's religious needs and desires. [The] First Amendment must apply to all citizens alike, and it can give to none of them a veto of public programs that do not prohibit the free exercise of religion. The Constitution does not, and courts cannot, offer to reconcile the various competing demands on Government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task [is] for the legislatures and other institutions." Thus, though the Government could not forbid the Indian challengers from visiting the area, these rights "do not divest the Government of its right to use what is, after all, *its* land."

Justice BRENNAN, joined by Justices Marshall and Blackmun, dissented. He objected to the majority's limitation of free exercise claims to cases of direct or indirect "coercion": "The constitutional guarantee [draws] no such fine distinctions between types of restraints on religious exercise, but rather is directed against any form of governmental action that frustrates or inhibits religious practice. [I] cannot accept the Court's premise that the form of the Government's restraint on religious practice, rather than its effect, controls our constitutional analysis. [Ultimately,] the Court's coercion test turns on a distinction between governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief. [Such] a distinction is without constitutional significance. The crucial word in the constitutional text, as the Court itself acknowledges, is 'prohibit,' a comprehensive term that in no way suggests that the intended protection is aimed only at governmental actions that coerce affirmative conduct." He accordingly insisted that the Sherbert "compelling interest" standard was appropriate here.

5. ***The Court's methodology in applying Sherbert.*** In the preceding cases, the Court used three techniques to distinguish Sherbert and Yoder. In some cases, it found an overriding government interest in uniformity, for example in the administration of the tax laws. In others, it found that free exercise interests were attenuated and government interests paramount in specialized environments such as the military. And in others, it applied a narrow definition of what constitutes a burden on religious

practice, rejecting free exercise claims seeking to alter "internal" government operations such as the use of Social Security numbers and the development of federal property.

Can these findings be reconciled with Sherbert and Yoder? In particular, can the narrow definition of burdens on free exercise set forth in Roy and Lyng be reconciled with Sherbert? Didn't Sherbert itself compel a change in "internal government operations," and in the use of government "property"? Can government actions even with respect to "internal" operations have negative external effects on religious practitioners? See Williams & Williams, "Volitionalism and Religious Liberty," 76 Cornell L. Rev. 769 (1991) (arguing that the Court undervalues the beliefs of "nonvolitionalist" religions, i.e., those that believe that negative religious consequences can attach even to events over which the religious adherent exercised no personal control). Should the fact that the government had a monopoly over use of a unique worship site have mattered in Lyng? Could the Native American worshippers in Lyng themselves have asserted a countervailing property right? See Lupu, "Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion," 102 Harv. L. Rev. 933 (1988) (arguing that government actions that are comparable to harms actionable at common law should count as burdens on religion, and that in Lyng, the government interfered, in effect, with a prescriptive easement of access to the worship site). In reading the 1990 Smith case, which follows, consider whether the pattern of decisions after Sherbert and Yoder had already abandoned in all but name strict scrutiny of most neutral government regulations challenged as violations of free exercise:

Employment Division, Dept. of Human Resources v. Smith

494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990).

■ JUSTICE SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Free Exercise Clause [permits] 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," [including] the drug peyote, a hallucinogen derived from [a plant]. 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 Supreme Court, after a first round of litigation that went up to the Supreme Court, found on remand that respondents' peyote use fell within the prohibition of Oregon's criminal laws, that those laws made no exception for sacramental use of the drug, but that that the ban on sacramental peyote use was invalid under the Free Exercise Clause. Thus, the state court ruled, Oregon could not deny unemployment

benefits for engaging in conduct that was constitutionally protected. The Court 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 the availability of unemployment insurance on an individual's willingness to forgo conduct required by his religion. As we observed in Smith I, however, the conduct at issue in those cases was not prohibited by law. [Now that it is clear] that Oregon does prohibit the religious use of peyote, we proceed to 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 (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. It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom [of] the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

Our decisions reveal that the latter reading is the correct one. 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], 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 (Stevens, J., concurring in judgment). [See also Prince; Braunfeld; Gillette.]

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; Murdock]; or the right of parents, acknowledged in Pierce v. Society of Sisters, 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 [see Wooley v. Maynard; Barnette.]

[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.

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. Under the Sherbert test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. [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 [United States v. Lee; Gillette v. United States]. In recent years we have abstained from applying the Sherbert test (outside the unemployment compensation field) at all. [Roy; Lyng; Goldman.]

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. As a plurality of the Court noted in Roy, a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment. [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, 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." [Lyng.] 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—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.[1]

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. Cf. [Lyng (Brennan, J., dissenting).] 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." United States v. Lee (Stevens, J., concurring). [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. [E.g., Thomas; Ballard.]

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] value and protect [religious]

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[1] [Just] as we subject to the most exacting scrutiny laws that make classifications based on race or on the content of speech, so too we strictly scrutinize governmental classifications based on religion. But we have held that race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause, see Washington v. Davis; and we have held that generally applicable laws unconcerned with regulating speech that have the *effect* of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment, see Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (antitrust laws). Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents. [Footnote by Justice Scalia.]

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 [e.g., Gillette] to the payment of taxes [United States v. Lee] 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 [Bob Jones University]. 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. [Reversed.]

■ JUSTICE O'CONNOR, concurring in the judgment [joined by JUSTICES BRENNAN, MARSHALL, and BLACKMUN as to Parts I and II of the opinion, but not as to the judgment].

Although I agree with the result the Court reaches, [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. A. The Court today [interprets] the [Free Exercise] 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. [The] First Amendment [does] not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such.

[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. 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. [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. [Prince; Braunfeld; Gillette; Lee.] 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.

B. [In] my view, [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. [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. [E.g., Lee; Gillette; Yoder.]

[Legislatures], of course, have always been "left free to reach actions which were in violation of social duties or subversive of good order." [Reynolds.] [But 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" [Lee] or represents "the least restrictive means of achieving some compelling state interest" [Thomas]. 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.

[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. [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. Our free speech cases similarly recognize that neutral regulations that affect free speech values are subject to a balancing, rather than categorical, approach. See e.g., [O'Brien, p. 1176 above]. [The] Court's parade of horribles 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. [The] compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a "luxury" is to denigrate "[t]he very purpose of a Bill of Rights."

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. [In Part III, Justice O'Connor, writing only for herself, found that Oregon had "a compelling interest in prohibiting the possession of peyote by its citizens." The critical question thus was "whether exempting respondents from the State's general criminal prohibition 'will unduly interfere with fulfillment of the governmental interest.' [Lee.]" She concluded: "Although the question is [close,] uniform application of Oregon's criminal prohibition is 'essential to accomplish' its overriding interest in 'preventing the physical harm' " caused by drug use. She rejected the argument that any incompatibility between the general law and an exemption was "belied by the fact that the Federal Government and several States provide exemptions for the religious use of peyote," finding that such other exemptions did not mean that Oregon was "*required*" to grant an exemption by the First Amendment. She added moreover, that the constitutionality of applying Oregon's general criminal prohibition "cannot, and should not turn on the centrality of the particular religious practice at issue."]

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

[I] agree with Justice O'Connor's analysis of the applicable free exercise doctrine, and I join parts I and II of her opinion. As she points out, "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.' " I do disagree, however, with her specific answer to that question.

I. 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. [E.g., Thomas; Yoder.] Failure to reduce the competing interests to the same plane of generality tends to distort the weighing process in the State's favor.

[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 suffice to abrogate the constitutional rights of individuals. [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] carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful [drugs]. [Moreover,] just as in Yoder, the values and interests of those seeking a religious exemption in this case are congruent, to a great degree, with those the State seeks to promote through its drug laws. Not only does the Church's doctrine forbid nonreligious use of peyote; it also generally advocates self-reliance, familial responsibility, and abstinence from alcohol.

III. [Finally], although I agree with Justice O'Connor that courts should refrain from delving into questions of whether, as a matter of religious doctrine, a particular practice is "central" to the religion, I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion. Respondents believe, and their sincerity has *never* been at issue, that the peyote plant embodies their deity, and eating it is an act of worship and communion. Without peyote, they could not enact the essential ritual of their religion. [This] potentially devastating impact must be viewed in light of the federal policy—reached in reaction to many years of religious persecution and intolerance—of protecting the religious freedom of Native Americans. See American Indian Religious Freedom Act, 42 U.S.C. § 1996 ("it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites"). [The] American Indian Religious Freedom Act, in itself, may not create rights enforceable against government action restricting religious freedom, but this Court must scrupulously apply its free exercise analysis to the religious claims of Native Americans, however unorthodox they may be. Otherwise, both the First Amendment and the stated policy of Congress will offer to Native Americans merely an unfulfilled and hollow promise.

SMITH AND RELIGIOUS EXEMPTIONS

1. ***Smith's story.*** Smith was a Native American who had become a serious alcoholic after a lifetime of harsh treatment by federal authorities. "As a young child he was the unwilling recipient of the U.S. government's policy to deprive American Indians of their native heritage and assimilate them into U.S. society. [As] a young man he lived on the city streets and was unwillingly drafted into the army [only] to come home several years later to a life of alcohol abuse." One day in 1957, after waking up in an alley on some cardboard boxes after a drinking binge, Smith gave up drinking. Smith embraced his Native American heritage and became an alcohol treatment counselor at a Native American alcohol program. The practice of Native American rituals, including the ritual consumption of peyote at issue in the case, was an important part of his recovery from alcoholism. As Smith described his peyote consumption, "I took the medicine—the communion, the sacrament, and I survived. I didn't have to go back to have a relapse." The position from which Smith was fired for peyote use was a counseling position in an alcohol treatment program which required employees to promise they would not drink or use drugs. Long, Religious Freedom and Indian Rights 22–35 (2000).

2. ***The history of religious exemptions.*** The opinions in Smith allude to the text of the First Amendment and the Court's free exercise precedents, but do not discuss whether the Framers might have viewed some religious exemptions as mandatory. In "The Origins and Historical Understanding of Free Exercise of Religion," 103 Harv. L. Rev. 1409 (1990), Michael McConnell traces the historical origins of the Free Exercise Clause, notes that pressure for the Free Exercise Clause came from the evangelical religious movements of the colonial and founding periods, and argues that evangelicals viewed the constitutional guarantee of free exercise as protecting their right actively to fulfill religious obligations without state interference. He concludes that an interpretation of free exercise to mandate religious exemptions was both within the contemplation of the Framers and consistent with then-popular views about religious liberty and limited government. While he concedes that "exemptions were not common enough to compel the inference that the term 'free exercise of religion' necessarily included an enforceable right to exemption," he concludes nonetheless that "the modern doctrine of free exercise exemptions [before Smith] is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation." In "Free Exercise Revisionism and the Smith Decision," 57 U. Chi. L. Rev. 1109 (1990), McConnell criticizes the Court for failing to undertake in Smith "even a cursory inquiry into the history of the clause." For an alternative view of the same history, see Hamburger, "A Constitutional Right of Religious Exemption: An Historical Perspective," 60 Geo. Wash. L. Rev. 915 (1992), and Hamburger, Separation of Church and State (2002).

In **City of Boerne v. Flores**, 521 U.S. 507 (1997), which held that Congress lacked authority under the civil rights enforcement clauses to enact a statute applying the Sherbert rather than the Smith standard to claims of religious exemption from generally applicable state laws (see p. 902 above), Justices O'Connor and Scalia engaged in a lively colloquy on whether or not historical evidence supported the Smith standard:

Justice O'CONNOR's dissent argued that "the historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause." She

noted that various colonial charters and acts had stated that religious practice should not be interfered with unless it caused some specified public harm: for example, because it was "unfaithfull to the Lord Proprietary, or molest[ed] or conspire[d] against the civil Government" (Maryland Act Concerning Religion, 1649); or was "us[ed] to licentiousness and profaneness [or] to the civil injury, or outward disturbance of others" (Charter of Rhode Island, 1663). "In other words," she argued, "when religious beliefs conflicted with civil law, religion prevailed unless important state interests militated otherwise." Likewise, she noted, early state constitutions quite commonly "guaranteed free exercise of religion or liberty of conscience, limited by particular defined state interests." For example, the New York Constitution of 1777 guaranteed free exercise but provided that it "shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." Other states similarly provided for free exercise subject to the constraints of "the public peace" (New Hampshire) or the "peace or safety of the State" (Maryland, Georgia). Justice O'Connor also cited the Northwest Ordinance of 1787, which established a bill of rights for the Northwest Territory providing that: "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments."

From this evidence, Justice O'Connor concluded that, "around the time of the drafting of the Bill of Rights, it was generally accepted that the right to 'free exercise' required, where possible, accommodation of religious practice." She suggested that otherwise, "there would have been no need to specify" licentiousness or other justifications for interference. Rather, she argued, "these documents make sense only if the right to free exercise was viewed as generally superior to ordinary legislation, to be overridden only when necessary to secure important government purposes." A particularly protective example, she noted, could be found in James Madison's draft Free Exercise Clause for the Virginia Declaration of Rights, which, though not ultimately adopted, would have provided that "no man [ought] on account of religion to be [subjected] to any penalties or disabilities, unless under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered."

Justice O'Connor next cited early examples of religious accommodation in the colonies and states. For example, some colonial governments created alternatives to oath requirements to accommodate Quakers and other Protestant sects that did not permit the swearing of allegiance to civil government; some colonies and the Continental Congress exempted Quakers and Mennonites from military service; some states with established churches exempted religious objectors from tithes. From these examples she concluded that state legislatures favored religious accommodations when possible, and that "it is reasonable to presume that the drafters and ratifiers of the First Amendment—many of whom served in state legislatures—assumed courts would apply the Free Exercise Clause similarly."

Finally, Justice O'Connor interpreted the writings of various framers as supporting this interpretation. For example, she read Madison's Memorial and Remonstrance as suggesting that religious duty might prevail over civil law whether that law was directed at religion or was more generally applicable. She concluded: "As the historical sources [show,] the 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."

Justice SCALIA, the author of Smith, wrote a separate concurrence in Boerne disputing Justice O'Connor's historical claims. He argued that "[t]he material that the dissent claims is at odds with Smith either has little to say about the issue or is in fact more consistent with Smith than with the dissent's interpretation of the Free Exercise Clause." As he read the early colonial and state Free Exercise Clauses, they were "a virtual restatement of Smith: Religious exercise shall be permitted so long as it does not violate general laws governing conduct." On his reading, avoiding "licentiousness" or disturbance of public "peace" or "order" simply meant "obeying the laws" or avoiding " 'the occurrence of illegal actions.' " He argued that it was impossible to derive Sherbert's compelling interest test from caveats about mere "peace and order."

Justice Scalia also discounted evidence of early legislative accommodations: "that legislatures sometimes (though not always) found it 'appropriate' to accommodate religious practices does not establish that accommodation was understood to be constitutionally mandated by the Free Exercise Clause." Likewise, as to writings such as Madison's Remonstrance, there was "no reason to think they were meant to describe what was constitutionally required (and judicially enforceable), as opposed to what was thought to be legislatively or even morally desirable."

He concluded that "the most telling point made by the dissent is to be found, not in what it says, but in what it fails to say. Had the understanding in the period surrounding the ratification of the Bill of Rights been that the various forms of accommodation discussed by the dissent were constitutionally required (either by State Constitutions or by the Federal Constitution), it would be surprising not to find a single state or federal case refusing to enforce a generally applicable statute because of its failure to make accommodation. Yet the dissent cites none—and to my knowledge, [none] exists." Accordingly, he found, the "historical evidence does nothing to undermine the conclusion" in Smith that "the people" rather than the Court should decide questions of religious exemption.

3. ***The political economy of religious exemptions.*** In the famous footnote four of the Carolene Products case (p. 503 above), the Court suggested that judicial intervention is appropriate where the political process is unlikely to protect "discrete and insular" minorities. Are religious practitioners "discrete and insular minorities" in need of such judicial protection? Mainstream sects are likely to be able to obtain many exemptions through the political process. Sacramental wine used in Catholic and some Protestant ceremonies, for example, was exempted by statute from Prohibition. Recall too the legislative exemption of the Catholic church from the solicitation restrictions in Larson v. Valente (1982; p. 1575 above). Should the Court presume that members of minority faiths, like racial minorities and political dissenters, are unable similarly to protect their religious practices through the political process and are in need of judicial protection from majority prejudice?

Justice O'Connor took this view in Smith, suggesting that religious minorities are politically powerless and thus in need of judicial solicitude: "[T]he 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." Justice Scalia, in contrast, noted that "a number of States have made an exception to their drug laws for sacramental peyote use," suggesting that even minority faiths may obtain legislative exemptions without resort to the courts. He conceded that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in," but viewed that as an "unavoidable consequence of democratic government." Which of these views is more persuasive? Which view is borne out by Congress's passage of RFRA by overwhelming majorities, see p. 1607 below?

Are judges more likely than legislatures to be free of bias or selectivity toward minority religions? One empirical survey found the results of pre-Smith judicial accommodation cases skewed ("Minority religionists bring and lose more cases; majority religionists bring fewer cases and win a larger percentage of them"), and concludes that "Smith had the effect of increasing religious equality because overall it significantly reduced the differential success rates that prevailed under the pre-Smith regime." Krotoszynski, "If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith," 102 Nw. L. Rev. 1189 (2008).

Should judicially mandated religious exemptions be required to compensate for a special structural disadvantage the religious suffer in politics—namely, that the Establishment Clause disables them from using religious arguments as a basis for legislation? For such an argument, see Sullivan, "Religion and Liberal Democracy," 59 U. Chi. L. Rev. 195 (1992); Greene, "The Political Balance of the Religion Clauses," 102 Yale L.J. 1611 (1993). For the countervailing view that religion should not enjoy any special exemption from laws that reflect the majority's indifference or neglect, but rather should enjoy exemptions only insofar as similarly situated nonreligious practices would receive them, see Eisgruber & Sager, Religious Freedom and the Constitution (2007) (arguing for a theory of "equal liberty" that "denies that religion is a constitutional anomaly, a category of human experience that demands special benefits and/or necessitates special restrictions").

Is religious argument truly excluded from political debate? For expansive views of its permissibility, see Carter, The Culture of Disbelief (1993); Perry, Love and Power (1991); Perry, "Religious Arguments in Public Political Debate," 29 Loyola L. Rev. 1421 (1996). For a more cautiously approving view, see Greenawalt, Religious Convictions and Political Choice (1988); Greenawalt, "Religious Expression in the Public Square," 29 Loyola L. Rev. 1411 (1996). For arguments for greater restraint on religious participation in politics because the Establishment Clause forbids translation of religious commitments into public policy, see Teitel, "A Critique of Religion as Politics in the Public Sphere," 78 Cornell L. Rev. 747 (1993); Audi, "The Separation of Church and State and the Obligations of Citizenship," 18 Phil. & Pub. Affairs 259 (1989). Consider the following observations on this issue by Justice Scalia in his dissent in Edwards v. Aguillard (1987); p. 1660 below: "Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved. [We] do not presume that the sole purpose of a law is to advance

religion merely because it was supported strongly by organized religions or by adherents of particular faiths. To do so would deprive religious men and women of their right to participate in the political process. [Such] religious activism [resulted, for example,] in the abolition of slavery."

4. ***Smith and constitutional jurisprudence.*** Justice Scalia's opinion for the Court in Smith reflects a strong mistrust of judicial balancing. Indeed, in a footnote, Justice Scalia suggested that "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice." He found any judicial inquiry into the significance or "centrality" of a religious practice offensive to free exercise. For elaboration of Justice Scalia's general antipathy toward balancing, see Scalia, "The Rule of Law as a Law of Rules," 56 U. Chi. L. Rev. 1175 (1989). How warranted is Justice Scalia's concern that balancing in the free exercise area will invite subjective or arbitrary judicial discretion? See Marshall, "In Defense of Smith and Free Exercise Revisionism," 58 U. Chi. L. Rev. 308 (1990) ("Exemption analysis threatens free exercise values because it requires courts to consider the legitimacy of the religious claim."). But see McConnell, "Free Exercise Revisionism," supra: "Why is the Free Exercise Clause a particular target? [Unless] Smith is the harbinger of a wholesale retreat from judicial discretion across the range of constitutional law, there should be some explanation of why the problem in this field is more acute than it is elsewhere."

Justice O'Connor, in contrast, endorsed a "balancing, rather than categorical, approach," and argued that courts had adequately protected state interests even though they engaged in balancing under Sherbert, Yoder and their progeny. She favored continued case-by-case determination of "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." She denied any need to inquire into the centrality of religious practices. But can the Court determine whether a burden is "constitutionally significant" without making such a centrality inquiry? Is there a danger that courts making such an inquiry will exhibit unconscious bias, viewing minority religions through the lens of mainstream practices?

Was Smith consistent with the doctrine of stare decisis? Note that Justice Scalia sought to distinguish rather than overrule prior cases inconsistent with the deferential rule embraced in Smith. Are these distinctions persuasive? See McConnell, "Free Exercise Revisionism," supra (arguing that the Court's distinction of Yoder and the unemployment compensation cases "appears to have one function only: to enable the Court to reach the conclusion it desired in Smith without openly overruling any prior decisions"). Would candid overrule have been preferable? Did the pre-Smith decisions themselves lack candor? Did Smith simply state the rule immanent in the earlier decisions? Note Justice O'Connor's objection to "judg[ing] the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us."

5. ***A ministerial exemption from antidiscrimination laws?*** Where the Americans with Disabilities Act (ADA) would otherwise permit an action against a religious congregation for employment discrimination against a religious instruction teacher, do the First Amendment Religion Clauses compel a "ministerial" exception to the Act? In **Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment**

Opportunity Commission, 565 U.S. 171 (2012), the Supreme Court unanimously answered that question "yes." The EEOC and a teacher brought suit under the ADA against the Hosanna-Tabor Evangelical Lutheran Church and School, alleging that the teacher had been fired in retaliation for threatening to file an ADA lawsuit after the church did not reinstate her after a disability leave. In finding that action foreclosed by both the Free Exercise and Establishment Clauses, Chief Justice ROBERTS wrote for a unanimous Court:

"Until today, we have not had occasion to consider whether [the] freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment. The Courts of Appeals, in contrast, have had extensive experience with this issue, [and have] uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers. We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."

The Chief Justice rejected the EEOC's argument that Employment Division v. Smith precludes recognition of a ministerial exception: "It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. Smith involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself." Based on the record in the case, he held that the teacher qualified as a minister, noting that she had undergone extensive religious training, examination, and certification as a "called" teacher and that her "job duties reflected a role in conveying the Church's message and carrying out its mission." He concluded that, because the teacher "was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer."

Justice THOMAS filed a brief concurrence noting that he would "defer to a religious organization's good-faith understanding of who qualifies as its minister" out of respect for the autonomy of religious decision-making. Justice ALITO, joined by Justice KAGAN, filed a concurrence noting that, given the variety of religious practices protected by the Religion Clauses, the "ministerial" exception should turn on an employee's religious function rather than formal title or any specific process of "ordination": "The 'ministerial' exception should [apply] to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. If a religious group

believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position."

What do you make of Chief Justice Roberts's suggested distinction under Smith between the "outward act" of ingesting peyote for religious purposes and "government interference with an internal church decision"? For an argument that the religion clauses prohibit the government from interfering with international church affairs—the increasingly influential "church autonomy" theory—see Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy," 81 Colum. L. Rev. 1373 (1981). What else might qualify as an "internal church decision"? Does Hosanna-Tabor carve out a new exception to Smith? If so, what is its nature?

CONSTITUTIONAL LAW BY STATUTE: LEGISLATIVE REPONSES TO SMITH

1. ***The federal Religious Freedom Restoration Act of 1993 and its invalidation.*** After the Court issued the Smith decision, a broad coalition of religious groups began working on legislation that would contain Smith's effects by restoring a range of religious exemptions. The coalition attracted strong bipartisan support in Congress, and in 1993, the Congress overwhelmingly passed and the President signed the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb et seq. The Act contained formal findings that "laws 'neutral' toward religion may burden religious exercise without compelling justification," and that Smith had "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." The Act identified as one of its purposes "to restore the compelling interest test as set forth in [Sherbert] and [Yoder]."

The Act, 42 U.S.C. §§ 2000bb–1, provided that: "(a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section. (b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

Did Congress have the authority to enact RFRA under § 5 of the Fourteenth Amendment, which permits Congress to "enforce, by appropriate legislation," the substantive guarantees of the Fourteenth Amendment? The Court ruled that it did not in **City of Boerne v. Flores**, 521 U.S. 507 (1997). See p. 902 above. The Boerne decision reasoned that RFRA had rewritten rather than merely enforced the protections of free exercise as the Court had previously interpreted them, exceeding Congress's authority and infringing the prerogatives of the states. At least as to state legislation, RFRA now furnishes no cause of action; but RFRA still binds federal actors.

2. ***The continuing constraints of RFRA on the federal government.*** While Boerne held the application of RFRA to the States to be

beyond Congress' legislative authority under § 5 of the Fourteenth Amendment, it did not invalidate RFRA's application to the federal government. In **Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal**, 546 U.S. 418 (2006), Chief Justice ROBERTS reaffirmed the stringency of RFRA's test for denial of free exercise exemptions in an 8–0 opinion joined by all justices except Justice Alito, who was not yet sitting when the case was heard. The case involved a small religious sect (UDV) that receives communion by drinking a hallucinogenic tea called *hoasca*, brewed from Amazon rainforest plants and containing DMT, a controlled substance under the federal narcotics laws. The Court permitted a suit against the Government to proceed challenging a U.S. Customs interception of a shipment of *hoasca*. The Court held that the Government had failed to demonstrate a compelling interest in barring the tea's sacramental use: "Under the [focused] inquiry required by RFRA and the compelling interest test, the Government's mere invocation of [the] Controlled Substances Act cannot carry the day. It is true, of course, that Schedule I substances such as DMT are exceptionally dangerous. [But] there is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here—the circumscribed, sacramental use of *hoasca* by the UDV. [For] the past 35 years, there has been a regulatory exemption for use of peyote—a Schedule I substance—by the Native American Church. [If] such use is permitted [for] hundreds of thousands of Native Americans practicing their faith, it is difficult to see how those same findings alone can preclude any consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs."

RFRA engendered greater judicial disagreement—and public controversy—in **Burwell v. Hobby Lobby**, 573 U.S. 682 (2014), a case that raised so many distinct issues it reads like a law school exam. The case arose from the so-called contraceptive mandate derived from the Patient Protection and Affordable Care Act of 2010 (ACA), popularly known as Obamacare. The ACA requires employers with 50 or more full-time employees to offer "a group health plan or group health insurance coverage" that provides "minimum essential coverage." 26 U.S.C. § 5000A(f)(2). In turn, the law requires a group plan to provide "preventive care and screenings" for women without "any cost sharing requirements." 42 U.S.C. § 300gg–13(a)(4). Congress delegated the content of the provision to the Health Resources and Services Administration (HRSA), a part of the Department of Health and Human Services (HHS). HRSA promulgated guidelines under which nonexempt employers are generally required to provide "coverage, without cost sharing" for "all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling." 77 Fed. Reg. 8725.

HHS through the HRSA exempted certain "religious employers" from the contraceptive mandate. That category included "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." When an insurer receives notice that one of its clients has invoked this provision, the issuer must then exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. The procedure requires the insurer to bear the cost of these services. Yet HHS determined that this obligation would not impose any net expense on the insurer because

its cost would be less than or equal to the cost savings resulting from the services.

Hobby Lobby is a for-profit chain of 500 arts-and-crafts stores with more than 13,000 employees. A closely-held corporation, it is controlled by David and Barbara Green and their children. The firm's statement of purpose says the owners will "honor[ ] the Lord in all [they] do by operating the company in a manner consistent with Biblical principles." Another plaintiff, Conestoga Wood Specialties, is also a for-profit closely held corporation (with 950 employees) controlled by a family who are devout members of the Mennonite Church, which opposes abortion and believes that "[t]he fetus in its earliest stages . . . shares humanity with those who conceived it." As for-profit corporations, Hobby Lobby and Conestoga Wood could not invoke the "religious employers" exemption, and the corporations challenged the contraceptive mandate as applied to them under RFRA.

The Court held 5–4 that Hobby Lobby was entitled to an exception from the regulatory mandate under RFRA. Justice ALITO, joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas, wrote the opinion for the Court. Relying on the Dictionary Act's definition of "person" to include artificial persons, the Court first held that corporations were persons for purposes of RFRA analysis. It then rejected the argument that for-profit corporations were not protected by RFRA on the ground that Braunfeld v. Brown [1961; p. 1582] had considered (and rejected on the merits) the free exercise claims of Sabbath-observant Jewish business owners. The Court further rejected the view that RFRA necessarily encompassed only claims that could have been made under the Free Exercise Clause before Smith.

Next, the Court considered and rejected the argument made by HHS that the sincere beliefs of a for-profit corporation could not be ascertained. Justice Alito wrote: "These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable. In any event, we have no occasion in these cases to consider RFRA's applicability to such companies. The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs." Justice Alito explained that "the owners of closely held corporations may—and sometimes do—disagree about the conduct of business. And even if RFRA did not exist, the owners of a company might well have a dispute relating to religion. For example, some might want a company's stores to remain open on the Sabbath in order to make more money, and others might want the stores to close for religious reasons. State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure."

After finding that the law imposed a substantial burden on the "ability of the objecting parties to conduct business in accordance with their religious beliefs," the Court bracketed the question of compelling government interest and turned to whether HHS had adopted the least restrictive means of furthering the government's interest. It held that HHS had not: "The most

Court, reflects 'an obvious effort to effect a complete separation from First Amendment case law.' The Court's reading is not plausible. RLUIPA's alteration clarifies that courts should not question the centrality of a particular religious exercise. But the amendment in no way suggests that Congress meant to expand the class of entities qualified to mount religious accommodation claims, nor does it relieve courts of the obligation to inquire whether a government action substantially burdens a religious exercise."

Turning to the RFRA analysis, Justice Ginsburg first rejected the idea that a for-profit corporation had rights under the law: "Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries ago, a corporation is 'an artificial being, invisible, intangible, and existing only in contemplation of law.' Dartmouth College v. Woodward [1819; p. 637]. Corporations, Justice Stevens more recently reminded [in dissent], 'have no consciences, no beliefs, no feelings, no thoughts, no desires.' Citizens United v. Federal Election Comm'n [2010; p. 1494]. The Court's special solicitude to the rights of religious organizations [is] just that. No such solicitude is traditional for commercial organizations. Indeed, until today, religious exemptions had never been extended to any entity operating in the commercial, profit-making world. The reason why is hardly obscure. Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations. The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court's attention. One can only wonder why the Court shuts this key difference from sight. [Had] Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation."

Justice Ginsburg then challenged the Court's substantial burden analysis: "I agree with the Court that the Green and Hahn families' religious convictions regarding contraception are sincerely held. But those beliefs, however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature, which a court must accept as true, and the legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened, an inquiry the court must undertake. That distinction is a facet of the pre-Smith jurisprudence RFRA incorporates. Bowen v. Roy. Undertaking the inquiry that the Court forgoes, I would conclude that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. [Importantly,] the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health

care providers. [It] is doubtful that Congress, when it specified that burdens must be substantial, had in mind a linkage thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed."

Justice Ginsburg went on to argue that "the Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. To recapitulate, the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain."

Finally, Justice Ginsburg rejected the Court's least restrictive means analysis: "A least restrictive means cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere unreservedly to their religious tenets." Although the Court suggested that the government pay for the coverage, "the ACA [requires] coverage of preventive services through the existing employer-based system of health insurance 'so that [employees] face minimal logistical and administrative obstacles.' 78 Fed. Reg. 39888. Impeding women's receipt of benefits 'by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit' was scarcely what Congress contemplated. [And] where is the stopping point to the 'let the government pay' alternative? Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work. Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection? Because the Court cannot easily answer that question, it proposes something else: Extension to commercial enterprises of the accommodation already afforded to nonprofit religion-based organizations. [I] have already discussed the 'special solicitude' generally accorded nonprofit religion-based organizations that exist to serve a community of believers, solicitude never before accorded to commercial enterprises comprising employees of diverse faiths.

"[Would] the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists, among others)? [The] Court, however, sees nothing to worry about. Today's cases, the Court concludes, are 'concerned solely with the contraceptive mandate.' [But] the Court has assumed, for RFRA purposes, that the interest in women's health and well being is compelling and has come up with no means adequate to serve that interest, the one motivating Congress to adopt the Women's Health Amendment. There is an overriding interest, I believe, in keeping the courts out of the business of evaluating the relative merits of differing religious

claims, or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be perceived as favoring one religion over another, the very risk the Establishment Clause was designed to preclude. The Court, I fear, has ventured into a minefield by its immoderate reading of RFRA. I would confine religious exemptions under that Act to organizations formed for a religious purpose, engaged primarily in carrying out that religious purpose, and not engaged substantially in the exchange of goods or services for money beyond nominal amounts."

3. ***The continuing constraints of RLUIPA on state governments.*** In 2000, three years after City of Boerne, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), which requires a compelling interest for denying free exercise exemptions in a narrower range of contexts than RFRA: prisons and zoning. RLUIPA applies if the substantial burden on religious exercise arises from a federally funded program; if the substantial burden affects interstate commerce; or if "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make individualized assessments of the proposed uses for the property involved." How may Congress permissibly regulate this final situation consistent with Smith and City of Boerne?

The Court applied RLUIPA in **Holt v. Hobbs**, 574 U.S. ___, 135 S. Ct. 853 (2015). In an opinion by Justice ALITO, a unanimous Court ruled that the Arkansas Department of Correction could not forbid a Muslim prisoner from growing a half-inch beard in accordance with his faith. The Court found that while the Department had a compelling interest in being able to identify prisoners and prevent them from hiding contraband in their hair, it was not clear the policy would actually further those interests, and at the very least it was not narrowly tailored: prisoners with dermatological conditions were permitted to grow short beards, and all prisoners could have more than half an inch of hair on their heads.

4. ***State RFRAs and the changing politics of religious exemptions.*** As evidenced by the overwhelming margins by which RFRA and RLUIPA were passed in Congress, there was a robust political consensus on the importance of religious exemptions not so long ago. This consensus produced legislation at the state as well as the federal level: as of 2019, 21 states had passed RFRAs of their own (including "majority-Democratic states such as Connecticut, Illinois, and Pennsylvania), thereby re-imposing on themselves the constraint that City of Boerne lifted. Other states have developed RFRA-like free-exercise standards through judicial interpretation of their state constitutions.

The early state RFRAs were passed with little opposition. However, two recent judicial developments have dramatically changed the politics of state RFRAs, and of religious exemptions more generally. The first is the Supreme Court's decision to grant a religious exemption from the Affordable Care Act's contraceptive coverage mandate in Hobby Lobby. The second development was the rapid success of the gay-rights movement, culminating in the Supreme Court's decision in Obergefell. As same-sex marriage was legalized in more and more jurisdictions in the run-up to Obergefell, some religious bakers, photographers, and others have argued for a free exercise right to refuse to provide their services in connection with same-sex

weddings. In 2013, the New Mexico Supreme Court rejected such an argument in Elane Photography v. Willock, 296 P. 3d 491 (2012), holding that the state Human Rights Act required a Christian wedding photographer to serve a same-sex wedding, despite the state's RFRA, which did not apply to disputes between private parties. After Elane Photography and Hobby Lobby, several state RFRAs were proposed that would have applied to for-profit corporations and disputes between private parties. National controversy erupted over a proposed bill in Arizona, which was ultimately vetoed by the governor, and later one in Indiana, which was passed and signed into law.

The debates over Hobby Lobby and the state RFRAs reflect a notable change in substance and tone from the 1990s and 2000s. Religious exemptions were then primarily about accommodating the beliefs of minority religious groups; now, the discussion of religious exemptions centers around claims by Protestant and Catholic Christians, members of the largest religious groups in America. Many have come to believe that all religious people, even Christians, need protection from a secular state that will otherwise "vilify" those who refuse to assent to "the new orthodoxy," as Justice Alito put it in his Obergefell dissent. On the other side, some liberals have come to see religious exemptions as a way for social conservatives to evade the consequences of political battles that they have lost. For more on the changing politics of religious exemptions, and in particular liberals' waning commitment to exemptions, see Paul Horwitz, The Hobby Lobby Moment, 128 Harv. L. Rev. 154 (2014). For an early version of the liberal case against religious exemptions, see Marci Hamilton, God vs. the Gavel (2005).

SECTION 4. THE ESTABLISHMENT CLAUSE

All interpretations of the Establishment Clause agree that it prohibits the creation of an official church and the mandating of religious conduct. Thus, requiring oaths of fidelity to a faith, or tithes, or other financial support for a church would be paradigmatic violations of the clause. There, however, agreement ends. Modern debates over the scope of the Establishment Clause have centered on what the clause might prohibit beyond official oaths or tithes. Does the Establishment Clause bar official sponsorship of religious tenets or symbols, even if no citizen is coerced to support them? Should psychological "coercion" count? Is government "endorsement" of religion troubling even in the absence of coercion? Must religious entities and functions be excluded from all forms of public financial support? May they be included on an equal footing with other recipients of government largesse? Or should there be an absolute bar on government aid to religious evangelism? This section explores these questions in the context of three kinds of Establishment Clause claims: claims that government has impermissibly provided aid to religion, claims that government has impermissibly allowed religion to intrude into public schools, and claims that government has impermissibly sponsored religious doctrines or symbols.

At the outset, it must be noted that the Court set forth an influential test for Establishment Clause violations in **Lemon v. Kurtzman**, 403 U.S. 602 (1971), that is often referred to in the materials that follow as the "Lemon test." Lemon struck down certain types of financial aid to nonpublic schools. Summarizing past decisions, Lemon held that a statute must meet three criteria in order to withstand Establishment Clause attack: "First, the