D. The Belief/Action Dichotomy

REYNOLDS v. UNITED STATES

98 U.S. 145 (1879)

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

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

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

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

Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment expressly forbids such legislation. The question to be determined is, whether the law now under consideration comes within this prohibition. The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

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

In our opinion, the statute immediately under consideration is within the legislative power of Congress. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a

new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief 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, 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)

MR. JUSTICE ROBERTS delivered the opinion of the Court.

Newton Cantwell and his two sons, Jesse and Russell, members of a group known as Jehovah's Witnesses, were arrested in New Haven, Connecticut, and each was charged by information in five counts. After trial each of them was convicted on the third count, which charged a violation of § 6294 of the General Statutes of Connecticut. On appeal the conviction of all three on the third count was affirmed.

The appellants pressed the contention that the statute under which the third count was drawn was offensive to the due process clause of the Fourteenth Amendment because it denied them freedom of speech and prohibited their free exercise of religion.

The facts adduced to sustain the convictions on the third count follow. On the day of their arrest the appellants were engaged in going singly from house to house on Cassius Street in New Haven. They were individually equipped with a bag containing books and pamphlets on religious subjects, a portable phonograph and a set of records, each of which, when played, introduced, and was a description of, one of the books. Each appellant asked the person who responded to his call for permission to play one of the records. If permission was granted he asked the person to buy the book described and, upon refusal, he solicited such contribution towards the publication of the pamphlets as the listener was willing to make. If a contribution was received a pamphlet was delivered upon condition that it would be read.

The statute under which the appellants were charged provides:

"No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting . . . unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of

efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. Such certificate may be revoked at any time. Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both."

The appellants claimed that their activities were not within the statute. The State Supreme Court construed the finding of the trial court to be that "in addition to the sale of the books and the distribution of the pamphlets the defendants were also soliciting donations of money for an alleged religious cause, and thereby came within the purview of the statute." It overruled the contention that the Act, as applied to appellants, offends the Fourteenth Amendment, because it abridges or denies religious freedom and liberty of speech and press. The court stated that it was the solicitation that brought the appellants within the sweep of the Act and not their other activities in the dissemination of literature. It declared the legislation constitutional as an effort by the State to protect the public against fraud in the solicitation of funds for what purported to be religious, charitable, or philanthropic causes.

First. We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, -- freedom to believe and freedom to act. The first is absolute but the second cannot be. Conduct remains subject to regulation for the protection of society. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right that the Act in question is not such a regulation. If a certificate is procured, solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited.

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

The general regulation of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional

objection, even though the collection be for a religious purpose. Such regulation would not constitute a prohibited restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise.

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

It is suggested that the statute is to be read as requiring the officer to issue a certificate unless the cause in question is clearly not a religious one; and that if he violates his duty his action will be corrected by a court. To this suggestion there are several sufficient answers. The line between a discretionary and a ministerial act is not always easy to mark and the statute has not been construed to impose a mere ministerial duty on the secretary of the welfare council. Upon his decision as to the nature of the cause, the right to solicit depends. Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible.

Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury. Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience. But to condition the solicitation of aid for the perpetuation of religious views upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

WEST VIRGINIA STATE BOARD OF EDUCATION v. BARNETTE

319 U.S. 624 (1943)

MR. JUSTICE JACKSON delivered the opinion of the Court.

Following the decision by this Court on June 3, 1940, in *Minersville School District* v. *Gobitis*, the Board of Education on January 9, 1942, adopted a resolution ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation

represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly." What is required is the "stiff-arm" salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."

Failure to conform is "insubordination" dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is "unlawfully absent" and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding $ 50 and jail term not exceeding thirty days.

Appellees brought suit asking to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider the flag an "image" within this command. For this reason they refuse to salute it.

Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency. The Board of Education moved to dismiss the complaint setting forth these facts and alleging that the law and regulations are an unconstitutional denial of religious freedom, and of freedom of speech.

This case calls upon us to reconsider a precedent. Before turning to *Gobitis*, however, it is desirable to notice certain characteristics by which this controversy is distinguished. The refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

As the present CHIEF JUSTICE said in dissent in the *Gobitis* case, the State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country." Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan.

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to

knit the loyalty of their followings to a flag or banner, a color or design. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The *Gobitis* decision, however, *assumed* that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority. We examine rather than assume existence of this power and, against this broader definition of issues in this case, reexamine specific grounds assigned for the *Gobitis* decision.

1. Public education, if faithful to the ideal of secular instruction and political neutrality,

will not be partisan or enemy of any class, creed, party, or faction.

2. The Fourteenth Amendment protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

3. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Freedoms of speech and of press, of assembly, and of worship are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.

4. National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment was designed to avoid these ends by avoiding these beginnings. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters

of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control. The decision in *Minersville School District* v. *Gobitis* [is] overruled.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, concurring:

No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths do not free individuals from responsibility to conduct themselves obediently to laws which are imperatively necessary to protect society from grave and pressingly imminent dangers. Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one, and in meeting it we cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation. Such a statutory exaction is a form of test oath, and the test oath has always been abhorrent in the United States.

Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.

Neither our domestic tranquillity in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes. The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution. As such, it is inconsistent with our Constitution's plan and purpose.

MR. JUSTICE MURPHY, concurring:

A reluctance to interfere with considered state action, the fact that the end sought is a desirable one, the emotion aroused by the flag as a symbol for which we have fought and are now fighting again, -- all of these are understandable. But there is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. As a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches.

Without wishing to disparage the purposes and intentions of those who hope to inculcate sentiments of loyalty and patriotism by requiring a declaration of allegiance as a feature of public education, I am impelled to conclude that such a requirement is not essential to the maintenance of effective government and orderly society. Any spark of love for country

which may be generated in a child by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.

MR. JUSTICE FRANKFURTER, dissenting:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. Otherwise each individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws.

The prohibition against any religious establishment by the government placed denominations on an equal footing. Any person may therefore believe or disbelieve what he pleases. He may practice what he will in his own house of worship or publicly within the limits of public order. But the lawmaking authority is not circumscribed by the variety of religious beliefs, otherwise the constitutional guaranty would be not a protection of the free exercise of religion but a denial of the exercise of legislation.

The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience. The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic

state that ecclesiastical doctrines measure legal right or wrong.

That claims are pressed on behalf of sincere religious convictions does not of itself establish their constitutional validity. Nor does waving the banner of religious freedom relieve us from examining into the power we are asked to deny the states. Otherwise the doctrine of separation of church and state would mean not the disestablishment of a state church but the establishment of all churches and of all religious groups.

The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples. Compulsory vaccination, food inspection regulations, testimonial duties, compulsory medical treatment -- these are but illustrations of conduct that has often been compelled in the enforcement of legislation of general applicability even though the religious consciences of particular individuals rebelled at the exaction.

Law is concerned with external behavior and not with the inner life of man. It rests in large measure upon compulsion. The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws. The state is not shut out from a domain because the individual conscience may deny the state's claim. One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's beliefs.

We are told that a flag salute is a doubtful substitute for adequate understanding of our institutions. The states that require such a school exercise do not have to justify it as the only means for promoting good citizenship in children, but merely as one of diverse means for accomplishing a worthy end. We may deem it a foolish measure, but the point is that this Court is not the organ of government to resolve doubts as to whether it will fulfill its purpose. Only if there be no doubt that any reasonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours. It is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings.

The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. Saluting the flag suppresses no belief. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction on the part both of children and their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents.

I am fortified in my view of this case by the history of the flag salute controversy in this Court. Five times has the precise question now before us been adjudicated. Four times the Court unanimously found that the requirement of such a school exercise was not beyond the powers of the states. Of course, judicial opinions are not immutable. As has been true in the past, the Court will from time to time reverse its position. But I believe that never before these Jehovah's Witnesses cases has this Court overruled decisions so as to restrict the powers of democratic government. Always heretofore, it has withdrawn narrow views of legislative

authority so as to authorize what formerly it had denied.

I think I appreciate fully the objections to the law before us. But to deny that it presents a question upon which men might reasonably differ appears to me to be intolerance. And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State of West Virginia.

Of course patriotism can not be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

PRINCE v. MASSACHUSETTS

321 U.S. 158 (1944)

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

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

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

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

The story told by the evidence has become familiar. Mrs. Prince is the mother of two young sons. She also has legal custody of Betty Simmons, who lives with them. The children too are Jehovah's Witnesses and both Mrs. Prince and Betty testified they were ordained ministers. The former was accustomed to go each week on the streets of Brockton to distribute "Watchtower" and "Consolation." She had permitted the children to engage in this activity previously, and had been warned against doing so by the school attendance officer. But, until December 18, 1941, she generally did not take them with her at night.

That evening, as Mrs. Prince was preparing to leave her home, the children asked to go. She at first refused. Childlike, they resorted to tears; and, motherlike, she yielded. Arriving

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

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

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

The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against assertion of state power, have had recognition here, most recently in *West Virginia State Board of Education* v. *Barnette*. And in *Meyer* v. *Nebraska*, children's rights to receive teaching in languages other than the nation's common tongue were guarded against the state's encroachment. It is cardinal with us that the custody, care and nurture of the child reside first in the parents. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds* v. *United States*, 98 U.S. 145. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory

vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. The catalogue need not be lengthened. It is sufficient to show that the state has a wide range of power for limiting parental authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

But it is said the state cannot do so here. This, first, because when state action impinges upon a claimed religious freedom, it must fall unless shown to be necessary for the child's protection against some clear and present danger, and, it is added, there was no such showing here. The child's presence on the street, with her guardian, distributing the magazines, it is urged, was in no way harmful to her, nor in any event more so than the presence of many other children at the same time and place, engaged in shopping and other activities not prohibited. Accordingly, in view of the preferred position the freedoms of the First Article occupy, the statute in its present application must fall.

Concededly a statute or ordinance identical in terms with § 69, except that it is applicable to adults or all persons generally, would be invalid. But the mere fact a state could not wholly prohibit this form of adult activity does not mean it cannot do so for children. Such a conclusion granted would mean that a state could impose no greater limitation upon child labor than upon adult labor.

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

It is true children have rights, in common with older people, in the primary use of highways. But even in such use streets afford dangers for them not affecting adults. And in other uses, whether in work or in other things, this difference may be magnified. What may be wholly permissible for adults therefore may not be so for children.

The case reduces itself therefore to the question whether the presence of the child's guardian puts a limit to the state's power. That fact may lessen the likelihood that some evils the legislation seeks to avert will occur. But it cannot forestall all of them. The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves. Massachusetts has determined that an absolute prohibition is necessary to accomplish its legitimate objectives. Its power to attain them is broad enough to reach these peripheral

instances in which the parent's supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct. We think that with reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, and the boundary of its power has not been crossed in this case.

Our ruling does not extend beyond the facts. The religious training and indoctrination of children may be accomplished in many ways, some of which, as we have noted, have received constitutional protection through decisions of this Court. These and all others except the public proclaiming of religion on the streets remain unaffected by the decision.

MR. JUSTICE JACKSON:

The novel feature of this decision is this: the Court holds that a state may apply child labor laws to restrict or prohibit an activity of which, as recently as last term, it held: "This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. . . the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books."

It is difficult for me to believe that going upon the streets to accost the public is the same thing for application of public law as withdrawing to a private structure for religious worship. But if worship in the churches and the activity of Jehovah's Witnesses on the streets "occupy the same high estate" and have the "same claim to protection" it would seem that child labor laws may be applied to both if to either.

This case brings to the surface the real basis of disagreement among members of this Court in previous Jehovah's Witness cases. Our basic difference seems to be as to the method of establishing limitations which of necessity bound religious freedom. My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free. But beyond these, many religious denominations or sects engage in collateral and secular activities. They raise money, not merely by passing the plate to those who voluntarily attend services or by contributions by their own people, but by solicitations and drives addressed to the public. All such money-raising activities on a public scale may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose.

The Court now draws a line based on age that cuts across both true exercise of religion and auxiliary secular activities. I think this is not a correct principle for defining the activities immune from regulation on grounds of religion. I have no alternative but to dissent.

MR. JUSTICE ROBERTS and MR. JUSTICE FRANKFURTER join in this opinion.

MR. JUSTICE MURPHY, dissenting:

This attempt by Massachusetts to prohibit a child from exercising her constitutional right to practice her religion on the public streets cannot, in my opinion, be sustained.

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

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

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

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

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

It is claimed, however, that such activity was likely to affect adversely the health, morals and welfare of the child. The bare possibility that such harms might emanate from distribution of religious literature is not, standing alone, sufficient justification for restricting freedom of

conscience and religion. The evils must be grave, immediate, substantial. Yet there is not the slightest indication in this record that children engaged in distributing literature pursuant to their religious beliefs have been or are likely to be subject to any of the harmful "diverse influences of the street." Indeed, the likelihood is that children engaged in serious religious endeavor are immune from such influences. Moreover, Jehovah's Witness children invariably make their distributions in groups subject at all times to adult or parental control, as was done in this case. The dangers are thus exceedingly remote, to say the least.

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

BRAUNFELD *v.* BROWN

366 U.S. 599 (1961)

MR. CHIEF JUSTICE WARREN announced the judgment of the Court and an opinion in which MR. JUSTICE BLACK, MR. JUSTICE CLARK, and MR. JUSTICE WHITTAKER concur.

This case concerns the constitutional validity of the application to appellants of the Pennsylvania criminal statute, enacted in 1959, which proscribes the Sunday retail sale of certain enumerated commodities. The only question for consideration is whether the statute interferes with the free exercise of appellants' religion.

Appellants are merchants in Philadelphia who engage in the retail sale of clothing and home furnishings within the proscription of the statute. Each of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from work from nightfall each Friday until nightfall each Saturday. They instituted a suit seeking a permanent injunction against the enforcement of the 1959 statute. Their complaint alleged that appellants had previously kept their places of business open on Sunday; that appellants had done a substantial amount of business on Sunday, compensating somewhat for their closing on Saturday; that Sunday closing will result in impairing the ability of all appellants to earn a livelihood and will render appellant Braunfeld unable to continue in his business; that the statute is unconstitutional for the reasons stated above.

Appellants contend that the enforcement against them of the Pennsylvania statute will prohibit the free exercise of their religion because, due to the statute's compulsion to close on Sunday, appellants will suffer substantial economic loss, to the benefit of their non-Sabbatarian competitors, if appellants also continue their Sabbath observance by closing their

businesses on Saturday; that this result will either compel appellants to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or will put appellants at a serious economic disadvantage if they continue to adhere to their Sabbath. Appellants also assert that the statute will operate so as to hinder the Orthodox Jewish faith in gaining new adherents. And the corollary to these arguments is that if the free exercise of appellants' religion is impeded, that religion is being subjected to discriminatory treatment by the State.

In *McGowan v. Maryland*, we took cognizance of the evolution of Sunday Closing Laws from wholly religious sanctions to legislation concerned with the establishment of a day of community tranquillity, respite and recreation, a day when the atmosphere is one of calm and relaxation rather than one of commercialism, as it is during the other six days of the week.

Concededly, appellants and all other persons who wish to work on Sunday will be burdened economically by the State's day of rest mandate; and appellants point out that their religion requires them to refrain from work on Saturday as well. Our inquiry then is whether, in these circumstances, the First and Fourteenth Amendments forbid application of the Sunday Closing Law to appellants.

Certain aspects of religious exercise cannot be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute. Thus, in *West Virginia State Board of Education* v. *Barnette*, this Court held that state action compelling school children to salute the flag, on pain of expulsion from public school, was contrary to the First and Fourteenth Amendments when applied to those students whose religious beliefs forbade saluting a flag. But this is not the case at bar; the statute before us does not make criminal the holding of any religious belief, nor does it force anyone to embrace any religious belief or to say anything in conflict with his religious tenets.

However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. As pointed out in *Reynolds* v. *United States*, legislative power may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion. Thus, in *Reynolds*, this Court upheld the polygamy conviction of a member of the Mormon faith. And, in *Prince*, this Court upheld a statute making it a crime for a girl under eighteen to sell any newspapers, periodicals or merchandise in public places.

It is to be noted that, in the two cases just mentioned, the religious practices themselves conflicted with the public interest. In such cases, to make accommodation between the religious action and an exercise of state authority is a particularly delicate task because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.

But, again, this is not the case before us because the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday. And even these are not faced with as serious a choice as forsaking their religious practices or subjecting

themselves to criminal prosecution. Fully recognizing that the alternatives open to appellants and others similarly situated -- retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor -- may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.

To strike down, without the most critical scrutiny, 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 latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

Needless to say, when entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference. These denominations number almost three hundred. Consequently, it cannot be required that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects. We do not believe that such an effect is an absolute test for determining whether the legislation violates freedom of religion.

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

As we pointed out in *McGowan*, we cannot find a State without power to set one day of the week apart from the others as a day of rest, repose, recreation and tranquillity. Also, in *McGowan*, we examined several suggested alternative means by which it was argued that the State might accomplish its secular goals without even remotely or incidentally affecting religious freedom. We found there that a State might well find that those alternatives would not accomplish bringing about a general day of rest. We need not examine them again.

However, appellants advance yet another means at the State's disposal which they would find unobjectionable. They contend that the State should cut an exception from the Sunday labor proscription for people who, because of religious conviction, observe a day of rest other than Sunday. A number of States provide such an exemption, and this may well be the wiser solution. But our concern is not with the wisdom of legislation but with its constitutional limitation. Thus, reason and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity. Although not dispositive, enforcement problems would be

more difficult since there would be two or more days to police rather than one.

Additional problems might also be presented by a regulation of this sort. To allow only people who rest on a day other than Sunday to keep their businesses open on that day might provide these people with an economic advantage over their competitors who must remain closed on that day. With this competitive advantage existing, there could be the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on their least profitable day. This might make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs, a practice which a State might believe would run afoul of the spirit of constitutionally protected religious guarantees. Finally, in order to keep disruption at a minimum, exempted employers would probably have to hire employees who qualified for the exemption, a practice which a State might feel to be opposed to its policy prohibiting religious discrimination in hiring. For these reasons, we cannot say that the Pennsylvania statute before us is invalid.

MR. JUSTICE BRENNAN, concurring and dissenting.

The Court has demonstrated the public need for a weekly surcease from worldly labor. I would approach this case differently, from the point of view of the individuals whose liberty is curtailed by these enactments. For the values of the First Amendment look primarily towards the preservation of personal liberty, rather than the fulfillment of collective goals.

The appellants allege that "one who does not observe the Sabbath [by refraining from labor] cannot be an Orthodox Jew." In appellants' business area Friday night and Saturday are busy times; yet appellants, true to their faith, close during the Jewish Sabbath, and make up some, but not all, of the business thus lost by opening on Sunday. "Each of the plaintiffs," the complaint continues, "does a substantial amount of business on Sundays, and the ability of the plaintiffs to earn a livelihood will be greatly impaired by closing their business on Sundays." Consequences even more drastic are alleged: "Plaintiff, Abraham Braunfeld, will be unable to continue in his business if he may not stay open on Sunday." In other words, the issue in this case is whether a State may put an individual to a choice between his business and his religion. The Court today holds that it may. But I dissent.

The honored place of religious freedom in our constitutional hierarchy must now be taken to be settled. Or so it appeared until today. For in this case the Court seems to say that any substantial state interest will justify encroachments on religious practice.

Admittedly, these laws do not compel overt affirmation of a repugnant belief, as in *Barnette*, nor do they prohibit outright any religious practices, as did the law in *Reynolds*. That is, the laws do not say that appellants must work on Saturday. But their effect is that appellants may not simultaneously practice their religion and their trade, without being hampered by a substantial disadvantage. Their effect is that no one may at the same time be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen.

What, then, is the compelling state interest which impels Pennsylvania to impede appellants' freedom of worship? What overbalancing need is so weighty that it justifies this substantial, though indirect, limitation of appellants' freedom? It is not the desire to stamp out a practice deeply abhorred by society, such as polygamy, as in *Reynolds*, for the custom of

resting one day a week is universally honored. Nor is it the State's traditional protection of children, as in *Prince*, for appellants are adults. It is not even the interest in seeing that everyone rests one day a week, for appellants' religion requires that they take such a rest. It is 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.

A majority -- 21 -- of the 34 States which have general Sunday regulations have exemptions of this kind. We are not told that those States are noisier, or that their police are more burdened. The Court conjures up several difficulties with such a system which seem to me more fanciful than real. Non-Sunday observers might get an unfair advantage, it is said. A similar contention against the draft exemption for conscientious objectors was rejected. Finally, I find the Court's mention of a problem under state antidiscrimination statutes almost chimerical. Most such statutes provide that hiring may be made on a religious basis if religion is a *bona fide* occupational qualification. Pennsylvania's statute has such a provision.

In fine, the Court, in my view, has exalted administrative convenience to a constitutional level high enough to justify making one religion economically disadvantageous. The Court would justify this result on the ground that the effect on religion, though substantial, is indirect. The Court forgets, I think, a warning uttered during the congressional discussion of the First Amendment itself: ". . . the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand."

MR. JUSTICE STEWART, dissenting.

I agree with substantially all that MR. JUSTICE BRENNAN has written. Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a choice which I think no State can constitutionally demand.

E. Free Exercise Challenges to Denial of Government Benefits

SHERBERT v. VERNER

374 U.S. 398 (1963)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellant, a member of the Seventh-day Adventist Church, was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith.[1] When she was unable to obtain other employment because from conscientious scruples she would not take Saturday work, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. That law provides that, to be eligible for benefits, a claimant must be "able to work and available for work"; and, further, that a claimant is ineligible for benefits "if he has failed, without good cause to accept available suitable work when offered him by the employment office or the employer." The appellee Employment Security Commission, in administrative proceedings under the statute, found that appellant's restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept "suitable work when offered by the employment office or the employer." The Commission's finding was sustained by the Court of Common Pleas for Spartanburg County. That court's judgment was in turn affirmed by the South Carolina Supreme Court, which rejected appellant's contention that, as applied to her, the disqualifying provisions of the South Carolina statute abridged her right to the free exercise of her religion.[2] We reverse the judgment of the South Carolina Supreme Court and remand for further proceedings not

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

[2] It has been suggested that appellant is not entitled to benefits under the South Carolina statute because her unemployment did not result from discharge or layoff due to lack of work. It is true that unavailability for work for some personal reasons not having to do with matters of conscience or religion has been held to be a basis of disqualification for benefits. But appellant claims that the Free Exercise Clause prevents the State from basing the denial of benefits upon the "personal reason" she gives for not working on Saturday. Where the consequence of disqualification so directly affects First Amendment rights, surely we should not conclude that every "personal reason" is a basis for disqualification. Nothing we have found in the statute or in the cited decisions, and certainly nothing in the South Carolina Court's opinion in this case so construes the statute. Indeed, the contrary seems to have been that court's basic assumption, for if the eligibility provisions were thus limited, it would have been unnecessary for the court to have decided appellant's constitutional challenge.

inconsistent with this opinion.

I.

If the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement of her rights of free exercise, or because any incidental burden on the free exercise of religion may be justified by a "compelling state interest."

II.

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

Significantly South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty. When in times of "national emergency" the textile plants are authorized by the State Commissioner of Labor to operate on Sunday, "no employee shall be required to work on Sunday who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious objections he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner." No question of the disqualification of a Sunday worshipper for benefits is likely to arise, since we cannot suppose that an employer will discharge him in violation of this statute. The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects.

III.

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 that possibility is not apposite here because no such objection appears to have been made before the South Carolina Supreme Court. Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit

as those which the respondents now advance. Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs, it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.

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

IV.

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

MR. JUSTICE STEWART, concurring in the result.

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

I.

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

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

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

South Carolina would deny unemployment benefits to a mother unavailable for work on Saturdays because she was unable to get a babysitter. Thus, we do not have before us a situation where a State provides unemployment compensation generally, and singles out for disqualification only persons who are unavailable for work on religious grounds. This is not a scheme which operates to discriminate against religion as such. But the Court nevertheless holds that the State must prefer a religious over a secular ground for being unavailable for work -- that state financial support of the appellant's religion is constitutionally required to carry out "the governmental obligation of neutrality in the face of religious differences."

Yet in cases decided under the Establishment Clause the Court has decreed otherwise. It has decreed that government must blind itself to the differing religious beliefs and traditions of the people. With all respect, I think it is the Court's duty to face up to the dilemma posed by the conflict between the Free Exercise Clause and the Establishment Clause as interpreted by the Court. It is a duty, I submit, which we owe to the people, the States, and the Nation, and a duty which we owe to ourselves. For so long as the fallacious fundamentalist rhetoric of

some of our Establishment Clause opinions remains on our books, to be disregarded at will as in the present case, or to be undiscriminatingly invoked as in the *Schempp* case, so long will the possibility of consistent and perceptive decision in this most difficult and delicate area of constitutional law be impeded and impaired. And so long, I fear, will the guarantee of true religious freedom in our pluralistic society be uncertain and insecure.

II.

My second difference with the Court's opinion is that I cannot agree that today's decision can stand consistently with *Braunfeld* v. *Brown*. The Court says that there was a "less direct burden upon religious practices" in that case than in this. With all respect, I think the Court is mistaken. The *Braunfeld* case involved a *criminal* statute. The undisputed effect of that statute was that "'Braunfeld will be unable to continue in his business if he may not open on Sunday and he will thereby lose his capital investment.' In other words, the issue in this case is whether a State may put an individual to a choice between his business and his religion."

The impact upon the appellant's religious freedom in the present case is considerably less onerous. We deal here not with a criminal statute, but with the particularized administration of South Carolina's Unemployment Compensation Act. Even upon the unlikely assumption that the appellant could not find 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 to reach this conclusion the Court must reject the reasoning of *Braunfeld*. I think the *Braunfeld* case was wrongly decided and should be overruled, and accordingly I concur in the result reached by the Court in the case before us.

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

South Carolina's Unemployment Compensation Law was enacted in 1936 in response to the grave social and economic problems that arose during the depression of that period. Thus the purpose of the legislature was to tide people over, and to avoid social and economic chaos, during periods when *work was unavailable*. But at the same time there was clearly no intent to provide relief for those who for purely personal reasons were or became *unavailable for work*. In accordance with this design, the legislature provided that "an unemployed insured worker shall be eligible to receive benefits with respect to any week *only* if the Commission finds that . . . he is able to work and is available for work."

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

In the present case all that the state court has done is to apply these accepted principles. The appellant was "unavailable for work," and thus ineligible for benefits, when personal considerations prevented her from accepting employment on a full-time basis in the industry and locality in which she had worked. The fact that these personal considerations sprang from her religious convictions was wholly without relevance to the state court's application of the law. Thus in no proper sense can it be said that the State discriminated against the appellant

on the basis of her religious beliefs. She was denied benefits just as any other claimant would be denied benefits who was not "available for work" for personal reasons.

With this background, this Court's decision comes into clearer focus. What the Court is holding is that if the State chooses to condition unemployment compensation on the applicant's availability for work, it is constitutionally compelled to *carve out an exception* -- and to provide benefits -- for those whose unavailability is due to their religious convictions. Such a holding has particular significance in two respects.

First, despite the Court's protestations to the contrary, the decision necessarily overrules *Braunfeld*. Just as in *Braunfeld* -- where exceptions to the Sunday closing laws for would have been inconsistent with the purpose to achieve a uniform day of rest and would have required case-by-case inquiry into religious beliefs -- so here, an exception to the rules of eligibility based on religious convictions would necessitate judicial examination of those convictions and would be at odds with the purpose of the statute to smooth out the economy during periods of industrial instability. Finally, the indirect financial burden of the present law is far less than that involved in *Braunfeld*. Here we are dealing only with temporary benefits, amounting to a fraction of regular weekly wages and running for not more than 22 weeks. 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 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. 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, I believe, enough flexibility to permit a legislative judgment accommodating an unemployment compensation law to the exercise of religious beliefs such as appellant's.

For very much the same reasons, however, 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.

THOMAS v. REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION

450 U.S. 707 (1981)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether the State's denial of unemployment compensation benefits to the petitioner, a Jehovah's Witness who terminated his job because his religious beliefs forbade participation in the production of armaments, constituted a violation of his First Amendment right to free exercise of religion.

I

Thomas terminated his employment in the Blaw-Knox Foundry & Machinery Co. when he was transferred from the roll foundry to a department that produced turrets for military tanks. He claimed his religious beliefs prevented him from participating in the production of war materials. The respondent Review Board denied him unemployment compensation benefits by applying disqualifying provisions of the Indiana Employment Security Act.

Thomas, a Jehovah's Witness, was hired initially to work in the roll foundry at Blaw-Knox. The function of that department was to fabricate sheet steel for a variety of industrial uses. On his application form, he listed his membership in the Jehovah's Witnesses, and noted that his hobbies were Bible study and Bible reading. However, he placed no conditions on his employment; and he did not describe his religious tenets in any detail on the form.

Approximately a year later, the roll foundry closed, and Blaw-Knox transferred Thomas to a department that fabricated turrets for military tanks. On his first day at this new job, Thomas realized that the work he was doing was weapons related. He checked the bulletin board where in-plant openings were listed, and discovered that all of the remaining departments at Blaw-Knox were engaged directly in the production of weapons. Since no transfer to another department would resolve his problem, he asked for a layoff. When that request was denied, he quit, asserting that he could not work on weapons without violating the principles of his religion. The record does not show that he was offered any nonweapons work by his employer, or that any such work was available.

Upon leaving Blaw-Knox, Thomas applied for unemployment compensation benefits under the Indiana Employment Security Act. At an administrative hearing, he testified that he believed that contributing to the production of arms violated his religion. He said that when he realized that his work on the tank turret line involved producing weapons for war, he consulted another Blaw-Knox employee -- a friend and fellow Jehovah's Witness. The friend advised him that working on weapons parts at Blaw-Know was not "unscriptural." Thomas was not able to "rest with" this view, however. He concluded that his friend's view was based upon a less strict reading of Witnesses' principles than his own.

When asked at the hearing to explain what kind of work his religious convictions would permit, Thomas said that he would have no difficulty doing the type of work that he had done at the roll foundry. He testified that he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms -- for example, as an

employee of a raw material supplier or of a roll foundry.

The hearing referee found that Thomas' religious beliefs precluded him from directly aiding in the manufacture of items used in warfare. He also found that Thomas had terminated his employment because of these religious convictions. The referee concluded nonetheless that Thomas' termination was not based upon a "good cause [arising] in connection with [his] work," as required by the Indiana unemployment compensation statute. Accordingly, he was held not entitled to benefits. The Review Board affirmed the denial of benefits.

The Indiana Court of Appeals, accepting the finding that Thomas terminated his employment "due to his religious convictions," reversed the decision of the Review Board, and held that § 22-4-15-1, as applied, improperly burdened Thomas' right to the free exercise of his religion. Accordingly, it ordered the Board to extend benefits to Thomas.

The Supreme Court of Indiana vacated the decision of the Court of Appeals, and denied Thomas benefits. The court held that Thomas had quit voluntarily for personal reasons, and therefore did not qualify for benefits. The judgment under review must be examined in light of our prior decisions, particularly *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

II

Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion. The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task. However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

In support of his claim for benefits, Thomas testified:

"Q. And then when it comes to actually producing the tank itself, hammering it out; that you will not do. . . .

"A. That's right, that's right when . . . I'm daily faced with the knowledge that these are tanks . . . . I really could not, you know, conscientiously continue to work with armaments. It would be against all of the . . . religious principles that . . . I have come to learn . . . ."

Based upon this and other testimony, the referee held that Thomas "quit due to his religious convictions." The Review Board adopted that finding, and the finding is not challenged in this Court.

The Indiana Supreme Court apparently took a different view of the record. It concluded that "although the claimant's reasons for quitting were described as religious, it was unclear what his belief was, and what the religious basis of his belief was." In that court's view, Thomas had made a merely "personal philosophical choice rather than a religious choice."

In reaching its conclusion, the Indiana court seems to have placed considerable reliance on the facts that Thomas was "struggling" with his beliefs and that he was not able to "articulate" his belief precisely. It noted, for example, that Thomas admitted before the referee that he would not object to "working for United States Steel or Inland Steel . . . [producing] the raw product necessary for the production of any kind of tank . . . [because I]

would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience. . . ."

The court found this position inconsistent with Thomas' stated opposition to participation in the production of armaments. But Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.

The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion. On this record, it is clear that Thomas terminated his employment for religious reasons.

III

More than 30 years ago, the Court held that a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program. A state may not "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947).

Later, in *Sherbert* the Court examined South Carolina's attempt to deny unemployment compensation benefits to a Sabbatarian who declined to work on Saturday. In sustaining her right to receive benefits, the Court held: "The ruling [disqualifying Mrs. Sherbert from benefits because of her refusal to work on Saturday in violation of her faith] 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 [her] for her Saturday worship."

The respondent Review Board argues, and the Indiana Supreme Court held, that the burden upon religion here is only the indirect consequence of public welfare legislation that the State clearly has authority to enact. "Neutral objective standards must be met to qualify

for compensation." Indiana requires applicants for unemployment compensation to show that they left work for "good cause in connection with the work."

A similar argument was made and rejected in *Sherbert*, however. It is true that, as in *Sherbert*, the Indiana law does not *compel* a violation of conscience. But, "this is only the beginning, not the end, of our inquiry." In a variety of ways we have said that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Here, as in *Sherbert*, the employee was put to a choice between fidelity to religious belief or cessation of work; the coercive impact on Thomas is indistinguishable from *Sherbert*,

The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."

The purposes urged to sustain the disqualifying provision of the Indiana unemployment compensation scheme are two-fold: (1) to avoid the widespread unemployment and the consequent burden on the fund resulting if people were permitted to leave jobs for "personal" reasons; and (2) to avoid a detailed probing by employers into job applicants' religious beliefs. These are by no means unimportant considerations. However, the interests advanced by the State do not justify the burden placed on free exercise of religion.

There is no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create "widespread unemployment." Similarly, although detailed inquiry by employers into applicants' religious beliefs is undesirable, there is no evidence in the record to indicate that such inquiries will occur in Indiana, or that they have occurred in any of the states that extend benefits to people in the petitioner's position. Nor is there any reason to believe that the number of people terminating employment for religious reasons will be so great as to motivate employers to make such inquiries.

Neither of the interests advanced is sufficiently compelling to justify the burden upon Thomas' religious liberty. Accordingly, Thomas is entitled to receive benefits unless such payment would violate the Establishment Clause.

IV

The respondents contend that to compel benefit payments to Thomas involves the State in fostering a religious faith. There is, in a sense, a "benefit" to Thomas deriving from his religious beliefs, but this manifests no more than the tension between the two Religious Clauses which the Court resolved in *Sherbert*. Unless we are prepared to overrule *Sherbert*, Thomas cannot be denied the benefits due him on the basis of findings that he terminated his employment because of his religious convictions.

JUSTICE REHNQUIST, dissenting.

Because I believe that the decision today adds mud to the already muddied waters of First

Amendment jurisprudence, I dissent.

I

The Court correctly acknowledges that there is a "tension" between the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution. The "tension" is of fairly recent vintage, unknown at the time of the framing and adoption of the First Amendment. The causes of the tension, it seems to me, are threefold. First, the growth of social welfare legislation during the latter part of the 20th century. Second, the decision by this Court that the First Amendment was "incorporated" into the Fourteenth Amendment and thereby made applicable against the States. The third, and perhaps most important, cause of the tension is our overly expansive interpretation of *both* Clauses. By broadly construing both Clauses, the Court has constantly narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny.

None of these developments could have been foreseen by those who framed and adopted the First Amendment. Because those who drafted and adopted the First Amendment could not have foreseen either the growth of social welfare legislation or the incorporation of the First Amendment into the Fourteenth Amendment, we simply do not know how they would view the scope of the two Clauses.

II

The decision today illustrates how far astray the Court has gone in interpreting the Free Exercise and Establishment Clauses. Although the Court holds that a State is constitutionally required to provide direct financial assistance to persons solely on the basis of their religious beliefs, it leaves the tension between the two Religion Clauses to be resolved on a case-by-case basis. As suggested above, however, I believe that the "tension" would diminish almost to the vanishing point if the Clauses were properly interpreted.

Just as it did in *Sherbert* v. *Verner*, the Court today reads the Free Exercise Clause more broadly than is warranted. As to the proper interpretation of the Free Exercise Clause, where, as here, a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not in my view require the State to conform that statute to the dictates of religious conscience of any group. As Justice Harlan recognized in his dissent in *Sherbert* v. *Verner*: "Those situations in which the Constitution may require special treatment on account of religion are few and far between." Like him I believe that although a State could choose to grant exemptions to religious persons from state unemployment regulations, a State is not constitutionally compelled to do so.[1]

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[1] To the extent *Sherbert* was correctly decided, it might be argued that cases such as *McCollum*, *Engel*, *Schempp*, *Lemon*, and *Nyquist* were wrongly decided. The "aid" rendered to religion in these latter cases may not be significantly different than the "aid" afforded Mrs. Sherbert or Thomas. For example, if the State in *Sherbert* could not deny compensation to one refusing work for religious reasons, it might be argued that a State may not deny reimbursement to students who choose for religious reasons to attend parochial schools. The argument would be that although a State need not allocate any funds to education, once it has done so, it may not require any person to sacrifice his religious beliefs in order to obtain an equal education. And

The Court's treatment of the Establishment Clause issue is equally unsatisfying. Although today's decision requires a State to provide direct financial assistance to persons solely on the basis of their religious beliefs, the Court nonetheless blandly assures us, just as it did in *Sherbert*, that its decision "plainly" does not foster the "establishment" of religion. I would agree that the Establishment Clause, properly interpreted, would not be violated if Indiana voluntarily chose to grant unemployment benefits to those persons who left their jobs for religious reasons. But I also believe that the decision below is inconsistent with many of our prior Establishment Clause cases. Those cases, if faithfully applied, would require us to hold that such voluntary action by a State *did* violate the Establishment Clause.

JUSTICE STEWART noted this point in his concurring opinion in *Sherbert*. He observed that decisions like *Sherbert*, and the one rendered today, squarely conflict with the more extreme language of many of our prior Establishment Clause cases. In *Everson*, the Court stated that the Establishment Clause bespeaks a "government stripped of all power to support, or otherwise to assist any or all religions," and no State "can pass laws which aid one religion [or] all religions." In *Torcaso* v. *Watkins*, the Court asserted that the government cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers."

In recent years the Court has moved away from the mechanistic "no-aid-to-religion" approach to the Establishment Clause and has stated a three-part test to determine the constitutionality of governmental aid to religion. It is not surprising that the Court today makes no attempt to apply those principles to the facts of this case. If Indiana were to legislate what the Court today requires -- an unemployment compensation law which permitted benefits to be granted to those persons who quit their jobs for religious reasons -- the statute would "plainly" violate the Establishment Clause as interpreted in such cases as *Lemon* and *Nyquist*. First, although the statute as a whole would be enacted to serve a secular legislative purpose, the proviso would clearly serve only a religious purpose. It would grant financial benefits for the sole purpose of accommodating religious beliefs. Second, there can be little doubt that the primary effect of the proviso would be to "advance" religion by facilitating the exercise of religious belief. Third, any statute including such a proviso would surely "entangle" the State in religion. By granting financial benefits to persons solely on the basis of their religious beliefs, the State must necessarily inquire whether the claimant's belief is "religious" and whether it is sincerely held. Otherwise any dissatisfied employee may leave his job without cause and claim that he did so because his own particular beliefs required it.

It is unclear from the Court's opinion whether it has temporarily retreated from its expansive view of the Establishment Clause, or wholly abandoned it. I would welcome the latter. Just as I think that Justice Harlan in *Sherbert* correctly stated the proper approach to free exercise questions, I believe that JUSTICE STEWART, dissenting *Schempp* accurately stated the reach of the Establishment Clause. He explained that governmental assistance

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even if such "aid" were not constitutionally compelled by the Free Exercise Clause, Justice Harlan may well have been right in *Sherbert* when he found sufficient flexibility in the Establishment Clause to permit the States to voluntarily choose to grant such benefits.

which does not have the effect of "inducing" religious belief, but instead merely "accommodates" or implements an independent religious choice does not impermissibly involve the government in religious choices and therefore does not violate the Establishment Clause of the First Amendment. I would think that in this case, as in *Sherbert*, had the State voluntarily chosen to pay unemployment compensation benefits to persons who left their jobs for religious reasons, such aid would be constitutionally permissible.

In sum, my difficulty with today's decision is that it reads the Free Exercise Clause too broadly and it fails to squarely acknowledge that such a reading conflicts with many of our Establishment Clause cases. As such, the decision simply exacerbates the "tension" between the two Clauses. I regret that the Court cannot see its way clear to restore what was surely intended to have been a greater degree of flexibility to the Federal and State Governments in legislating consistently with the Free Exercise Clause.

HOBBIE v. UNEMPLOYMENT APPEALS COMMISSION OF FLORIDA

480 U.S. 136 (1987)

JUSTICE BRENNAN delivered the opinion of the Court.

Appellant's employer discharged her when she refused to work certain scheduled hours because of sincerely held religious convictions adopted after beginning employment. The question to be decided is whether Florida's denial of unemployment compensation benefits to appellant violates the Free Exercise Clause.

I

Lawton and Company (Lawton), a Florida jeweler, hired appellant Paula Hobbie in October 1981. She was employed by Lawton for 2 1/2 years. In April 1984, Hobbie informed her immediate supervisor that she was to be baptized into the Seventh-day Adventist Church and that, for religious reasons, she would no longer be able to work on her Sabbath, from sundown on Friday to sundown on Saturday. The supervisor devised an arrangement with Hobbie: she agreed to work evenings and Sundays, and he agreed to substitute for her whenever she was scheduled to work on a Friday evening or a Saturday.

This arrangement continued until the general manager learned of it. At that time, the general manager informed appellant that she could either work her scheduled shifts or submit her resignation to the company. When Hobbie refused to do either, Lawton discharged her.

Appellant filed a claim for unemployment compensation. Under Florida law, unemployment compensation benefits are available to persons who become "unemployed through no fault of their own." Lawton contested the payment of benefits on the ground that Hobbie was "disqualified for benefits" because she had been discharged for "misconduct connected with [her] work."[1] A claims examiner denied Hobbie's claim and she appealed. The

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[1] The Florida statute defines "misconduct" as follows:

"'Misconduct' includes, but is not limited to, the following, which shall not be construed in

Appeals Commission affirmed the denial of benefits, agreeing that Hobbie's refusal to work scheduled shifts constituted "misconduct connected with [her] work."

II

Under our precedents, the Appeals Commission's disqualification of appellant from receipt of benefits violates the Free Exercise Clause. *Sherbert v. Verner*; *Thomas* v. *Review Bd. of Indiana Employment Security Div*. We see no meaningful distinction among the situations of Sherbert, Thomas, and Hobbie.

The Appeals Commission attempts to distinguish this case by arguing that, unlike the employees in *Sherbert* and *Thomas*, Hobbie was the "agent of change" and is therefore responsible for the consequences of the conflict between her job and her religious beliefs. In *Sherbert* and *Thomas*, the employees held their respective religious beliefs at the time of hire; subsequent changes in the conditions of employment made *by the employer* caused the conflict between work and belief. In this case, Hobbie's beliefs changed during the course of her employment, creating a conflict between job and faith that had not previously existed. The Appeals Commission contends that "it is . . . unfair for an employee to adopt religious beliefs that conflict with existing employment and expect to continue the employment without compromising those beliefs" and that this "intentional disregard of the employer's interests constitutes misconduct."

In effect, the Appeals Commission asks us to single out the religious convert for different, less favorable treatment than that given an individual whose adherence to his or her faith precedes employment. We decline to do so. The First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired.[2] The timing of Hobbie's conversion is immaterial to our determination that her free exercise rights have been burdened; the salient inquiry under the Free Exercise Clause is the burden involved. In *Sherbert, Thomas*, and the present case, the employee was forced to choose between fidelity to religious belief and continued employment; the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice.

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pari materia with each other:

"(a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or

"(b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer."

[2] Cf. *Callahan* v. *Woods*, 658 F.2d 679, 687 (9th Cir. 1981) ("If judicial inquiry into the truth of one's religious beliefs would violate the free exercise clause, an inquiry into one's reasons for adopting those beliefs is similarly intrusive. So long as one's faith is religiously based at the time it is asserted, it should not matter whether that faith derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible")

Finally, we reject the Appeals Commission's argument that the awarding of benefits to Hobbie would violate the Establishment Clause. As in *Sherbert*, the accommodation at issue here does not entangle the State in an unlawful fostering of religion.

We conclude that Florida's refusal to award unemployment compensation benefits to appellant violated the Free Exercise Clause of the First Amendment.

CHIEF JUSTICE REHNQUIST, dissenting.

I adhere to the views I stated in dissent in *Thomas*.

FRAZEE v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY

489 U.S. 829 (1989)

JUSTICE WHITE delivered the opinion of the Court.

The Illinois Unemployment Insurance Act provides that "[a]n individual shall be ineligible for benefits if he has failed, without good cause, either to apply for available, suitable work when so directed or to accept suitable work when offered him." In April 1984, William Frazee refused a temporary retail position offered him by Kelly Services because the job would have required him to work on Sunday. Frazee told Kelly that, as a Christian, he could not work on "the Lord's day." Frazee then applied to the Illinois Department of Employment Security for unemployment benefits claiming that there was good cause for his refusal to work on Sunday. His application was denied. Frazee appealed the denial of benefits to the Department of Employment Security's Board of Review, which also denied his claim. The Board of Review stated: "When a refusal of work is based on religious convictions, the refusal must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and noncompelling and does not render the work unsuitable." The Board of Review concluded that Frazee had refused an offer of suitable work without good cause.

We have had more than one occasion before today to consider denials of unemployment compensation benefits to those who have refused work on the basis of their religious beliefs. *Sherbert* v. *Verner*, *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, *Hobbie v. Unemployment Appeals Comm'n of Florida*. In each of these cases, the appellant was "forced to choose between fidelity to religious belief and employment," and we found "the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice." In each of these cases, we concluded that the denial of unemployment compensation benefits violated the Free Exercise Clause.

It is true that each of the claimants in those cases was a member of a particular religious sect, but none of those decisions turned on that consideration. Our judgments in those cases rested on the fact that each of the claimants had a sincere belief that religion required him or her to refrain from the work in question. Never did we suggest that unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed a

purely personal preference rather than a religious belief. Indeed, in *Thomas*, there was disagreement among sect members as to whether their religion made it sinful to work in an armaments factory; but we considered this to be an irrelevant issue. Because Thomas unquestionably had a sincere belief that his religion prevented him from doing such work, he was entitled to invoke the protection of the Free Exercise Clause.

There is no doubt that "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause." Purely secular views do not suffice. Nor do we underestimate the difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held. States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause. We do not face problems about sincerity or about the religious nature of Frazee's convictions, however. The courts below did not question his sincerity, and the State concedes it. Furthermore, the Board of Review characterized Frazee's views as "religious convictions," and the Illinois Appellate Court referred to his refusal to work on Sunday as based on a "personal professed religious belief."[1]

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

The State offers no justification for the burden that the denial of benefits places on Frazee's right to exercise his religion. The Illinois Appellate Court ascribed great significance to America's weekend way of life: "Today Sunday is not only a day for religion, but for recreation and labor. Today the supermarkets are open, service stations dispense fuel, and factories continue to belch smoke," concluding that "[i]f all Americans were to abstain from working on Sunday, chaos would result." We are unpersuaded, however, that there will be a mass movement away from Sunday employ if William Frazee succeeds in his claim.

As was the case in *Thomas* where there was "no evidence to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create 'widespread unemployment,' or even to seriously affect unemployment," there is nothing before us in this case to suggest that Sunday shopping, or Sunday sporting, for that matter, will grind to a halt as a result of our decision today. And, as we have said in the past, there may exist state interests sufficiently compelling to override a legitimate claim to the free exercise of religion. No such interest has been presented here.

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[1] Frazee stated: "I refused the job which required me to work on Sunday based on Biblical principles, scripture Exodus 20: 8, 9, 10. Remember the Sabbath day by keeping it holy. Six days you shall labour and do all your work but the seventh day is a Sabbath to the Lord your God. On it you shall not do any work."

F. Free Exercise Claims to Special Treatment

WISCONSIN v. YODER

406 U.S. 205 (1972)

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

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

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

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

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

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

Formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs, but also because it takes them away from their community during the crucial and formative adolescent period. During this period, the children must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife. Once a child has learned basic reading, writing, and mathematics, these traits, skills, and attitudes admittedly fall within the category of those best learned through example and "doing" rather than in a classroom. And, at this time in life, the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism. In short, high school attendance interposes a serious barrier to the integration of the Amish child into the Amish religious community.

The Amish do not object to elementary education through the first eight grades because they agree that their children must have basic skills in the "three R's" in order to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs. They view such a basic education as acceptable because it does not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period.

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

I

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

It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause. Only those interests of the highest order can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.

II

We come then to the quality of the claims of the respondents concerning the alleged encroachment on their rights and the rights of their children to the free exercise of religious beliefs. In evaluating those claims we must be careful to determine whether the Amish

religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, "be not conformed to this world." This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.

The record shows that the respondents' religious beliefs and attitude toward life, family, and home have remained constant. The respondents freely concede that their religious beliefs and what we would today call "life style" have not altered in fundamentals for centuries. Their way of life in a church-oriented community, separated from the outside world and "worldly" influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform. Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do indeed set them apart from much of contemporary society; these customs are both symbolic and practical.

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

religion; modern laws requiring compulsory secondary education have accordingly engendered great concern and conflict. The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.

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

In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs.

III

Neither the findings of the trial court nor the Amish claims as to the nature of their faith are challenged in this Court by the State of Wisconsin. Its position is that the State's interest in universal compulsory formal secondary education to age 16 is so great that it is paramount to the undisputed claims of respondents.

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

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

However, the evidence adduced by the Amish in this case is persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. Respondents' experts testified at trial, without challenge, that the value of all

education must be assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society, but it is quite another if the goal of education be viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.

The State attacks respondents' position as one fostering "ignorance" from which the child must be protected by the State. No one can question the State's duty to protect children from ignorance but this argument does not square with the facts disclosed in the record. This record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional "mainstream." Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. The Congress itself recognized their self-sufficiency by authorizing exemption of such groups as the Amish from the obligation to pay social security taxes.

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

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

There is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society. Absent some contrary evidence supporting the State's position, we are unwilling to assume that persons possessing such valuable vocational skills and habits are doomed to become burdens on society should they determine to leave the Amish faith, nor is there any basis in the record to warrant a finding that an additional one or two years of formal school education beyond the eighth grade would serve to eliminate any such problem that might exist.

Insofar as the State's claim rests on the view that a brief additional period of formal education is imperative to enable the Amish to participate effectively and intelligently in our democratic process, it must fall. The Amish alternative to formal secondary school education has enabled them to function effectively in their day-to-day life under self-imposed limitations on relations with the world, and to survive and prosper in contemporary society as

a separate, sharply identifiable and highly self-sufficient community for more than 200 years in this country. In itself this is strong evidence that they are capable of fulfilling the social and political responsibilities of citizenship without compelled attendance beyond the eighth grade at the price of jeopardizing their free exercise of religious belief.

The requirement for compulsory education beyond the eighth grade is a relatively recent development. Less than 60 years ago, the educational requirements of almost all States were satisfied by completion of the elementary grades. The independence and successful social functioning of the Amish community for more than 200 years in this country are strong evidence that there is at best a speculative gain from an additional one or two years of compulsory formal education. Against this background it would require a more particularized showing from the State on this point to justify the severe interference with religious freedom such additional compulsory attendance would entail.

IV

This case involves the fundamental interest of parents to guide the religious future and education of their children. This primary role of the parents in the upbringing of their children is now established as an enduring American tradition. Perhaps the most significant statements of the Court in this area are found in *Pierce* v. *Society of Sisters*, in which the Court observed:

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

The Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And when the interests of parenthood are combined with a free exercise claim more than a "reasonable relation to some purpose within the competency of the State" is required. To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. But in this case, the record strongly indicates that accommodating the religious objections of the Amish will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the responsibilities of citizenship, or in any other way detract from the welfare of society.[1]

The Amish have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, and the hazards presented by the State's enforcement of a statute generally valid as to others. Beyond this, they have carried the even more difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those interests that the State advances in support of its program of compulsory high school education. In light of this convincing

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

showing, one 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 strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.

There is no basis for assuming that reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance, provided that state regulations are not inconsistent with what we have said in this opinion.[2]

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

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

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

In the present case, the State is not concerned with the maintenance of an educational system as an end in itself, it is rather attempting to nurture and develop the human potential of its children: to expand their knowledge, broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance. It is possible that most Amish children will continue living the rural life of their parents, in which case their training at home will adequately equip them. Others, however, may wish to become nuclear physicists, ballet dancers, computer programmers, or historians, and for these occupations, formal training will be necessary. There is evidence in the record that many children desert the Amish faith when they come of age. A State has a legitimate interest not only in seeking to develop the latent talents of its children but also in seeking to prepare them for the life style that they may later choose, or at least to provide them with an option other than the life they have led in the past. In this case, although the question is close, I am unable to say that the State has demonstrated that Amish children who leave school in the eighth grade will be intellectually stultified or unable to acquire new academic skills later.

Decision in cases such as this will inevitably involve the kind of close scrutiny of religious practices which the Court has been anxious to avoid. But such entanglement does not create a forbidden establishment of religion where it is essential to implement free exercise values. I join the Court because the sincerity of the Amish religious policy here is uncontested, because the potentially adverse impact of the state requirement is great, and because the State's valid interest in education has already been largely satisfied.

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[2] Several States have adopted plans to accommodate Amish religious beliefs through the establishment of an "Amish vocational school." These are not schools in the traditional sense. Respondents attempted to reach a compromise patterned after the Pennsylvania plan, but those efforts were not productive. There is no basis to assume that Wisconsin will be unable to reach a satisfactory accommodation in light of what we now hold.

MR. JUSTICE DOUGLAS, dissenting in part.

The Court's analysis assumes that the only interests at stake are those of the Amish parents and the State. The difficulty with this approach is that the parents are seeking to vindicate not only their own free exercise claims, but also those of their children.

If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. On this important and vital matter of education, I think the children should be entitled to be heard. It is the future of the student, not the future of the parents, that is imperiled by today's decision. It is the student's judgment, not his parents', that is essential if we are to give full meaning to the Bill of Rights and the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.

I think the emphasis of the Court on the "law and order" record of this Amish group of people is quite irrelevant. A religion is a religion irrespective of what the misdemeanor or felony records of its members might be. The Amish, whether with a high or low criminal record,[1] certainly qualify by all historic standards as a religion.

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

UNITED STATES v. LEE

455 U.S. 252 (1982)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

I

Appellee, a member of the Old Order Amish, is a farmer and carpenter. From 1970 to 1977, appellee employed several other Amish on his farm and in his carpentry shop. He failed to file the social security tax returns required of employers, withhold social security tax from

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[1] The observation of Justice Heffernan, dissenting below, that the principal opinion in his court portrayed the Amish as leading a life of "idyllic agrarianism," is equally applicable to the majority opinion in this Court. So, too, is his observation that such a portrayal rests on a "mythological basis." Professor Hostetler has noted that "drinking among the youth is common in all the large Amish settlements." Moreover, "it would appear that among the Amish the rate of suicide is just as high, if not higher, than for the nation." He also notes an unfortunate Amish "preoccupation with filthy stories," as well as significant "rowdyism and stress." These are not traits peculiar to the Amish. The point is that the Amish are not people set apart and different.

his employees, or pay the employer's share of social security taxes. The IRS assessed appellee $ 27,000 for unpaid employment taxes; he paid $ 91 and then sued for a refund, claiming that imposition of the taxes violated his free exercise rights and those of his Amish employees.

The District Court held the statutes requiring appellee to pay social security and unemployment insurance taxes unconstitutional as applied. The court noted that the Amish believe it sinful not to provide for their own elderly and needy and therefore are religiously opposed to the national social security system.[1] The court also accepted appellee's contention that the Amish religion not only prohibits the acceptance of social security benefits, but also bars all contributions to the social security system. The District Court observed that in light of their beliefs, Congress has accommodated self-employed Amish and members of other religious groups with similar beliefs by providing exemptions from social security taxes.

II

The exemption provided by § 1402(g) is available only to self-employed individuals and does not apply to employers or employees. Thus any exemption from the employer's share of social security taxes must come from a constitutionally required exemption.

A

The preliminary inquiry in determining the existence of a constitutionally required exemption is whether the payment of social security taxes and the receipt of benefits interferes with the free exercise rights of the Amish. The Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system. Although the Government does not challenge the sincerity of this belief, the Government does contend that payment of social security taxes will not threaten the integrity of the Amish religious belief or observance. It is not within "the judicial function and judicial competence," however, to determine whether appellee or the Government has the proper interpretation of the Amish faith; "[courts] are not arbiters of scriptural interpretation." *Thomas*.[2] We therefore accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith. Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights.

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

B

The social security system is by far the largest domestic governmental program in the

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[1] Appellee [states] that his scriptural basis for this belief was: "But if any provide not for those of his own house, he hath denied the faith, and is worse than an infidel." (I Timothy 5: 8.)

[2] This is not an instance in which the asserted claim is "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause."

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

C

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

III

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

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

JUSTICE STEVENS, concurring in the judgment.

The clash between appellee's religious obligation and his civic obligation is irreconcilable. According to the Court, the religious duty must prevail unless the Government shows that enforcement of the civic duty "is essential to accomplish an overriding governmental interest." That formulation suggests that the Government always bears 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 Court rejects the particular claim of this appellee because of the risk that a myriad of other claims would be too difficult to process. The Court overstates the magnitude of this risk because the Amish claim applies only to a small religious community with an established welfare system of its own. Nevertheless, I agree with the Court's conclusion that the difficulties associated with processing other claims to tax exemption on religious grounds justify a rejection of this claim.[1] I believe, however, that this reasoning supports the adoption of a different constitutional standard than the Court purports to apply. The Court's analysis supports a holding that there is virtually no room for a "constitutionally required exemption" on religious grounds from a valid tax law that is entirely neutral in its general application.[2]

BOB JONES UNIVERSITY v. UNITED STATES

461 U.S. 574 (1983)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether petitioners, nonprofit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine, qualify as tax-exempt organizations under § 501(c)(3) of the Internal Revenue Code.

Until 1970, the Internal Revenue Service granted tax-exempt status to private schools, without regard to their racial admissions policies, under § 501(c)(3) of the Internal Revenue Code, and granted charitable deductions for contributions to such schools under § 170.

In July 1970, the IRS concluded that it could "no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination." At the same time, the IRS announced that it could not "treat gifts to such schools as charitable deductions for income tax purposes." By letter dated November 30, 1970, the IRS formally notified private schools, including those involved in this litigation, of this change in policy. The revised policy on discrimination was formalized in Revenue Ruling 71-447, 1971-2 Cum. Bull. 230. The application of these provisions to petitioners, two private schools with racially

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[1] In my opinion, the principal reason for adopting a strong presumption against such claims is the overriding interest in keeping the government out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.

[2] Today's holding is limited to a claim to a tax exemption. I believe, however, that a standard that places an almost insurmountable burden on any individual who objects to a neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes better explains most of this Court's holdings than does the standard articulated by the Court today. The principal exception is Wisconsin v. Yoder. The Court's attempt to distinguish *Yoder* is unconvincing because Wisconsin's interest in requiring its children to attend school until age 16 is surely not inferior to the federal interest in collecting these social security taxes.

discriminatory admissions policies, is now before us.

No. 81-3, Bob Jones University v. *United States*

Bob Jones University is a nonprofit corporation located in Greenville, S. C. Its purpose is "to conduct an institution of learning giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures." Bob Jones University is dedicated to the teaching and propagation of its fundamentalist Christian religious beliefs. The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage. To effectuate these views, a disciplinary rule prohibits interracial dating and marriage. Until 1970, the IRS extended tax-exempt status to Bob Jones University. By the letter of November 30, 1970, the IRS formally notified the University of the change in IRS policy. On January 19, 1976, the IRS officially revoked the University's tax-exempt status.

No. 81-1, Goldsboro Christian Schools, Inc. v. *United States*

Goldsboro Christian Schools is a nonprofit corporation located in Goldsboro, N. C. It was established "to conduct an institution of learning giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures." The school offers classes from kindergarten through high school. Since its incorporation in 1963, Goldsboro Christian Schools has maintained a racially discriminatory admissions policy based upon its interpretation of the Bible.

Petitioners contend that the Commissioner's policy cannot constitutionally be applied to schools that engage in racial discrimination on the basis of sincerely held religious beliefs. As to such schools, it is argued that the IRS construction of § 170 and § 501(c)(3) violates their free exercise rights under the Religion Clauses of the First Amendment.

As interpreted by this Court, the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief. However, "[not] all burdens on religion are unconstitutional. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *United States* v. *Lee*.

On occasion this Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct. In *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), for example, the Court held that neutrally cast child labor laws prohibiting sale of printed materials on public streets could be applied to prohibit children from dispensing religious literature. See also *Reynolds* v. *United States*; *United States v. Lee*.

The governmental interest at stake here is compelling. The Government has a fundamental, overriding interest in eradicating racial discrimination in education -- discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, and no "less restrictive means" are available to achieve the governmental interest.[1]

[1] Bob Jones University also contends that denial of tax exemption violates the Establishment Clause by preferring religions whose tenets do not require racial discrimination

TONY AND SUSAN ALAMO FOUNDATION v. SECRETARY OF LABOR

471 U.S. 290 (1985)

JUSTICE WHITE delivered the opinion of the Court.

I

The Tony and Susan Alamo Foundation is a nonprofit religious organization. Among its primary purposes are to "establish, conduct and maintain an Evangelistic Church; to conduct religious services, to minister to the sick and needy, to care for the fatherless and to rescue the fallen, and to do those things needful for the promotion of Christian faith, virtue, and charity." The Foundation derives its income largely from the operation of commercial businesses, which include service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a recordkeeping company, a motel, and companies engaged in the production and distribution of candy. The businesses are staffed largely by the Foundation's "associates," most of whom were drug addicts, derelicts, or criminals before their conversion and rehabilitation by the Foundation. These workers receive no cash salaries, but the Foundation provides them with food, clothing, shelter, and other benefits.

In 1977, the Secretary of Labor filed an action against the Foundation alleging violations of the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act with respect to approximately 300 associates. The District Court found that despite the Foundation's incorporation as a nonprofit religious organization, its businesses were "engaged in ordinary commercial activities in competition with other commercial businesses."

The District Court further ruled that the associates who worked in these businesses were "employees" within the meaning of the Act. The associates who testified protested the payment of wages, asserting that they considered themselves volunteers who were working only for religious and evangelical reasons. Nevertheless, the District Court found that the associates did expect the Foundation to provide them "food, shelter, clothing, transportation and medical benefits." These benefits were simply wages in another form, and the associates were employees. The District Court also rejected petitioners' arguments that application of the Act to the Foundation violated the Free Exercise and Establishment Clauses.

II

In order for the Foundation's commercial activities to be subject to the Fair Labor Standards Act, two conditions must be satisfied. First, the Foundation's businesses must

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over those which believe racial intermixing is forbidden. It is well settled that neither a state nor the Federal Government may pass laws which "prefer one religion over another," but "[it] is equally true" that a regulation does not violate the Establishment Clause merely because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961). The IRS policy at issue is founded on a "neutral, secular basis," and does not violate the Establishment Clause. In addition, "the uniform application of the rule to all religiously operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief."

constitute an "[enterprise] engaged in commerce or in the production of goods for commerce." Second, the associates must be "employees" within the meaning of the Act.

Petitioners contend that the Foundation is not an "enterprise" because its activities are not performed for "a common business purpose." The Court has consistently construed the Act liberally. The statute contains no express or implied exception for commercial activities conducted by religious organizations, and the agency charged with its enforcement has consistently interpreted the statute to reach such businesses.

Petitioners contend that the various businesses they operate differ from "ordinary" commercial businesses because they are infused with a religious purpose. The lower courts found that the Foundation's businesses serve the general public in competition with ordinary commercial enterprises, and the payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of "unfair method of competition" that the Act was intended to prevent, and the admixture of religious motivations does not alter a business' effect on commerce.

That the Foundation's commercial activities are within the Act's definition of "enterprise" does not end the inquiry. An individual may work for a covered enterprise and not be an "employee." The test of employment is one of "economic reality." The District Court's finding that the associates expected to receive in-kind benefits in exchange for their services is not clearly erroneous. The fact that the compensation was received in the form of benefits rather than cash is in this context immaterial. These benefits are wages in another form.

III

Petitioners further contend that application of the Act infringes on rights protected by the Religion Clauses. They argue that imposition of the minimum wage requirements will violate the rights of the associates to freely exercise their religion and the right of the Foundation to be free of excessive government entanglement. Neither of these contentions has merit.

The Free Exercise Clause does not require an exemption from a governmental program unless inclusion in the program burdens the claimant's free exercise rights. Petitioners claim that the receipt of "wages" would violate the religious convictions of the associates. The Act, however, does not require the payment of cash wages. Section 203(m) defines "wage" to include "the reasonable cost of furnishing [an] employee with board, lodging, or other facilities." Since the associates currently receive such benefits in exchange for working in the Foundation's businesses, application of the Act will work little or no change in their situation: the associates may continue to be paid in the form of benefits. Even if the Foundation were to pay wages in cash, or if the associates' beliefs precluded them from accepting the statutory amount, there is nothing to prevent the associates from returning the amounts to the Foundation, provided that they do so voluntarily. We therefore fail to perceive how application of the Act would interfere with the right to freely exercise their religious beliefs.

Petitioners also argue that application of the Act's recordkeeping requirements would foster '"an excessive government entanglement with religion,'" thereby violating the Establishment Clause. The Act merely requires a covered employer to keep records "of the persons employed by him and of the wages, hours, and other conditions of employment maintained by him." The routine inquiries required by § 211(c) bear no resemblance to the

kind of government surveillance held to pose an intolerable risk of government entanglement with religion. The Establishment Clause does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations, and the recordkeeping requirements of the Fair Labor Standards Act.

GOLDMAN v. WEINBERGER

475 U.S. 503 (1986)

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner S. Simcha Goldman contends that the Free Exercise Clause of the First Amendment permits him to wear a yarmulke while in uniform, notwithstanding an Air Force regulation mandating uniform dress for Air Force personnel.

Petitioner Goldman is an Orthodox Jew and ordained rabbi. In 1973, he was accepted into the Armed Forces Health Professions Scholarship Program while he studied clinical psychology. After completing his Ph.D. in psychology, petitioner entered active service in the United States Air Force as a commissioned officer, in accordance with a requirement that participants in the scholarship program serve one year of active duty for each year of subsidized education. Petitioner was stationed at March Air Force Base in Riverside, California, and served as a clinical psychologist at the mental health clinic on the base.

Until 1981, petitioner was not prevented from wearing his yarmulke on the base. He avoided controversy by remaining close to his duty station in the health clinic and by wearing his service cap over the yarmulke when out of doors. But in April 1981, after he testified as a defense witness at a court-martial wearing his yarmulke but not his service cap, opposing counsel lodged a complaint with Colonel Joseph Gregory, the Hospital Commander, arguing that petitioner's practice of wearing his yarmulke was a violation of Air Force Regulation (AFR) 35-10. This regulation states in pertinent part that "[headgear] will not be worn . . . [while] indoors except by armed security police in the performance of their duties."

Colonel Gregory informed petitioner that wearing a yarmulke while on duty does indeed violate AFR 35-10, and ordered him not to violate this regulation outside the hospital. Although virtually all of petitioner's time on the base was spent in the hospital, he refused. Later, after petitioner's attorney protested to the Air Force General Counsel, Colonel Gregory revised his order to prohibit petitioner from wearing the yarmulke even in the hospital. Petitioner's request to report for duty in civilian clothing pending legal resolution of the issue was denied. The next day he received a formal letter of reprimand, and was warned that failure to obey AFR 35-10 could subject him to a court-martial. Colonel Gregory also withdrew a recommendation that petitioner's application to extend the term of his active service be approved, and substituted a negative recommendation.

Petitioner then sued respondent Secretary of Defense and others. Petitioner argues that AFR 35-10, as applied to him, prohibits religiously motivated conduct and should be analyzed under the standard enunciated in *Sherbert* v. *Verner*. See also *Wisconsin* v. *Yoder*. But we have repeatedly held that "the military is, by necessity, a specialized society separate

from civilian society." "[The] military must insist upon a respect for duty and a discipline without counterpart in civilian life," in order to prepare for and perform its vital role.

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

These aspects of military life do not, of course, render entirely nugatory the guarantees of the First Amendment. But "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.

The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war; the necessary habits of discipline and unity must be developed in advance of trouble.

To this end, the Air Force promulgated AFR 35-10, a 190-page document, which states that "Air Force members will wear the Air Force uniform while performing their military duties, except when authorized to wear civilian clothes on duty." The rest of the document describes in minute detail all of the various items of apparel that must be worn as part of the Air Force uniform. It authorizes a few individualized options with respect to certain pieces of jewelry and hairstyle, but even these are subject to severe limitations. In general, authorized headgear may be worn only out of doors. A narrow exception to this rule exists for headgear worn during indoor religious ceremonies. In addition, military commanders may in their discretion permit visible religious headgear and other such apparel in designated living quarters and nonvisible items generally.

Petitioner Goldman contends that the Free Exercise Clause requires the Air Force to make an exception to its uniform dress requirements for religious apparel unless the accouterments create a "clear danger" of undermining discipline and esprit de corps. He asserts that in general, visible but "unobtrusive" apparel will not create such a danger and must therefore be accommodated. He argues that the Air Force failed to prove that a specific exception for his practice of wearing an unobtrusive yarmulke would threaten discipline. He contends that the Air Force's assertion to the contrary is contradicted by expert testimony.

But whether or not expert witnesses may feel that religious exceptions to AFR 35-10 are desirable is quite beside the point. The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment. Quite obviously, to the extent the

regulations do not permit the wearing of religious apparel, military life may be more objectionable for petitioner and probably others. But the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations. The Air Force has drawn the line essentially between religious apparel that is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity. The First Amendment therefore does not prohibit them from being applied to petitioner.

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE POWELL join, concurring.

Captain Goldman presents an especially attractive case for an exception from the uniform regulations. His devotion to his faith is readily apparent. The yarmulke is a familiar and accepted sight. Captain Goldman's military duties are performed in a setting in which a modest departure from the uniform regulation creates almost no danger of impairment of the Air Force's military mission. Moreover, on the record before us, there is reason to believe that the strict enforcement against Captain Goldman had a retaliatory motive. Nevertheless, I believe we must test the validity of the Air Force's rule not merely as it applies to Captain Goldman but also as it applies to all service personnel who have sincere religious beliefs.

JUSTICE BRENNAN is unmoved by the Government's concern that "while a yarmulke might not seem obtrusive to a Jew, neither does a turban to a Sikh, a saffron robe to a Satchidananda Ashram-Integral Yogi, nor do dreadlocks to a Rastafarian." He correctly points out that "turbans, saffron robes, and dreadlocks are not before us in this case." This approach attaches no weight to the separate interest in uniformity itself. Because professionals in the military service attach great importance to that plausible interest, it is one that we must recognize as legitimate and rational even though personal experience or admiration for the performance of the "rag-tag band of soldiers" that won us our freedom in the Revolutionary War might persuade us that the Government has exaggerated the importance of that interest.

The interest in uniformity, however, has a dimension that is of still greater importance for me. It is the interest in uniform treatment for the members of all religious faiths. 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. For the difference between a turban or a dreadlock on the one hand, and a yarmulke on the other, is not merely a difference in "appearance" -- it is also the difference between a Sikh or a Rastafarian, on the one hand, and an Orthodox Jew on the other. The Air Force has no business drawing distinctions between such persons when it is enforcing commands of universal application.

As the Court demonstrates, the rule that is challenged in this case is based on a neutral, completely objective standard -- visibility. It was not motivated by hostility against, or any

special respect for, any religious faith. An exception for yarmulkes would represent a fundamental departure from the true principle of uniformity that supports that rule. For that reason, I join the Court's opinion and its judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I

In ruling that the interests of the Air Force override Dr. Goldman's free exercise claim, the Court overlooks the serious nature of his claim. Dr. Goldman spent most of his time in uniform indoors, where the dress code forbade him to cover his head. Consequently, he was asked to violate the tenets of his faith virtually every minute of every workday.

II

Dr. Goldman has asserted a substantial First Amendment claim, which is entitled to meaningful review by this Court. The Court, however, evades its responsibility by eliminating, in all but name only, judicial review of military regulations that interfere with the fundamental constitutional rights of service personnel.

Today the Court adopts a subrational-basis standard -- absolute, uncritical "deference to the professional judgment of military authorities." A deferential standard of review, however, should not mean that the Court must credit arguments that defy common sense. When a military service burdens the free exercise rights of its members in the name of necessity, it must provide, at a minimum, a *credible* explanation of how the contested practice is likely to interfere with the proferred military interest.[1]

In the present case, the Air Force asserts that its interests in discipline and uniformity would be undermined by an exception to the dress code. The contention that discipline will be subverted if Orthodox Jews are allowed to wear yarmulkes with their uniforms surpasses belief. It lacks support in the record, and the Air Force offers no basis for it. While the perilous slope permits the services arbitrarily to refuse exceptions requested to satisfy mere personal preferences, before the Air Force may burden free exercise rights it must advance, at the *very least*, a rational reason.

The Government also argues that the services have an important interest in uniform dress, because such dress establishes the preeminence of group identity, thus fostering esprit de corps and loyalty to the service that transcends individual bonds. In its brief, the Government characterizes the yarmulke as an assertion of individuality and as a badge of religious and ethnic identity, strongly suggesting that, as such, it could drive a wedge of divisiveness between members of the services.

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[1] I continue to believe that Government restraints on First Amendment rights, including limitations placed on military personnel, may be justified only upon showing a compelling state interest which is precisely furthered by a narrowly tailored regulation. I think that any special needs of the military can be accommodated in the compelling-interest prong of the test. My point here is simply that even under a more deferential test Dr. Goldman should prevail.

First, the purported interests of the Air Force in complete uniformity of dress and in elimination of individuality or visible identification with any group other than itself are belied by the service's own regulations. The dress code expressly abjures the need for total uniformity: "Neither the Air Force nor the public expects absolute uniformity of appearance. Each member has the right, within limits, to express individuality through his or her appearance. However, the image of a disciplined service member who can be relied on to do his or her job excludes the extreme, the unusual, and the fad."

It cannot be seriously contended that a serviceman in a yarmulke presents so extreme, so unusual, or so faddish an image that public confidence in his ability to perform his duties will be destroyed. Under the Air Force's own standards, then, Dr. Goldman should have and could have been granted an exception to wear his yarmulke.

The dress code also allows men to wear up to three rings and one identification bracelet of "neat and conservative," but nonuniform, design. This jewelry is apparently permitted even if it associates the wearer with a denominational school or a religious or secular fraternal organization. If these emblems of religious, social, and ethnic identity are not unacceptably divisive, the Air Force cannot rationally justify its bar against yarmulkes on that basis.

I find totally implausible the suggestion that the overarching group identity of the Air Force would be threatened if Orthodox Jews were allowed to wear yarmulkes with their uniforms. To the contrary, a yarmulke worn with a United States military uniform is an eloquent reminder that the shared and proud identity of United States serviceman embraces and unites religious and ethnic pluralism.

Finally, the Air Force argues that while Dr. Goldman describes his yarmulke as an "unobtrusive" addition to his uniform, obtrusiveness is a purely relative, standardless judgment. The Government notes that while a yarmulke might not seem obtrusive to a Jew, neither does a turban to a Sikh, a saffron robe to a Satchidananda Ashram-Integral Yogi, nor dreadlocks to a Rastafarian. If the Court were to require the Air Force to permit yarmulkes, the service must also allow all of these other forms of dress and grooming.

The Government dangles before the Court a classic parade of horribles. 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.

Furthermore, contrary to its intimations, the Air Force has available to it a familiar standard for determining whether a particular style of yarmulke is consistent with a polished, professional military appearance -- the "neat and conservative" standard by which the service judges jewelry. No rational reason exists why yarmulkes cannot be judged by the same criterion. Indeed, at argument Dr. Goldman declared himself willing to wear whatever style and color yarmulke the Air Force believes best comports with its uniform.

Department of Defense Directive 1300.17 (June 18, 1985) grants commanding officers the

discretion to permit service personnel to wear religious items and apparel that are not visible with the uniform, such as crosses, temple garments, and scapulars. JUSTICE STEVENS favors this "visibility test" because he believes that it does not involve the Air Force in drawing distinctions among faiths. But, the visibility test permits *only* individuals whose outer garments and grooming are indistinguishable from those of mainstream Christians to fulfill their religious duties. In my view, the Constitution requires the selection of criteria that permit the greatest possible number of persons to practice their faiths freely.

Implicit in JUSTICE STEVENS' concurrence, and in the Government's arguments, is what might be characterized as a fairness concern. While I appreciate and share this concern for the feelings and the free exercise rights of members of these other faiths, I am baffled by this formulation of the problem. What puzzles me is the implication that a neutral standard that could result in the disparate treatment of Orthodox Jews and, for example, Sikhs is *more* troublesome or unfair than the existing neutral standard that does result in the different treatment of Christians, on the one hand, and Orthodox Jews and Sikhs on the other. *Both* standards are constitutionally suspect; before either can be sustained, it must be shown to be a narrowly tailored means of promoting important military interests.

I am also perplexed by the related notion that for purposes of constitutional analysis religious faiths may be divided into two categories -- those with visible dress and grooming requirements and those without. This dual category approach seems to require all faiths belonging to the same category to be treated alike, but permit a faith in one category to be treated differently from a faith belonging to the other category. The practical effect of this categorization is that, under the guise of neutrality and evenhandedness, majority religions are favored over distinctive minority faiths. This dual category analysis is fundamentally flawed and leads to a result that the First Amendment was intended to prevent.

Unless the visible/not visible standard for evaluating requests for religious exceptions to the dress code promotes a significant military interest, it is constitutionally impermissible. JUSTICE STEVENS believes that this standard advances an interest in the "uniform treatment" of all religions. As I have shown, that uniformity is illusory, unless uniformity means uniformly accommodating majority religious practices and uniformly rejecting distinctive minority practices. But, more directly, Government agencies are not free to define their own interests in uniform treatment of different faiths. That function has been assigned to the First Amendment. The First Amendment requires that burdens on free exercise rights be justified by independent and important interests that promote the function of the agency. The only independent military interest furthered by the visibility standard is uniformity of dress. And, that interest does not support a prohibition against yarmulkes.

The Air Force has failed utterly to furnish a credible explanation why an exception to the dress code permitting Orthodox Jews to wear neat and conservative yarmulkes while in uniform is likely to interfere with its interest in discipline and uniformity. Under any meaningful level of judicial review, Simcha Goldman should prevail.

III

The Court and the military services have presented patriotic Orthodox Jews with a painful dilemma -- the choice between fulfilling a religious obligation and serving their country.

Although the pain the services inflict on Orthodox Jewish servicemen is clearly the result of insensitivity rather than design, it is unworthy of our military because it is unnecessary. The Court and the military have refused these servicemen their constitutional rights; we must hope that Congress will correct this wrong.

JUSTICE BLACKMUN, dissenting.

I would reverse the judgment of the Court of Appeals, but for reasons somewhat different from those respectively enunciated by JUSTICE BRENNAN and JUSTICE O'CONNOR. I feel that the Air Force is justified in considering not only the costs of allowing Captain Goldman to cover his head indoors, but also the cumulative costs of accommodating constitutionally indistinguishable requests for religious exemptions. Because, however, the Government has failed to make any meaningful showing that either set of costs is significant, I dissent from the Court's rejection of Goldman's claim.

In my view, this case does not require us to determine the extent to which the ordinary test for inroads on religious freedom must be modified in the military context, because the Air Force has failed to produce even a minimally credible explanation for its refusal to allow Goldman to keep his head covered indoors. I agree with the Court that deference is due the considered judgment of military professionals that, as a general matter, standardized dress serves to promote discipline and esprit de corps. But Goldman's modest supplement to the uniform clearly poses by itself no threat to military readiness.

The Air Force argues that it has no way of distinguishing fairly between Goldman's request for an exemption and the potential requests of others whose religious practices may conflict with the appearance code. In theory, this argument makes some sense. To allow noncombat personnel to wear yarmulkes but not turbans or dreadlocks because the latter seem more obtrusive would be to discriminate in favor of this country's more established, mainstream religions. In general, I see no constitutional difficulty in distinguishing between religious practices based on how difficult it would be to accommodate them, but favoritism based on how unobtrusive a practice appears to the majority could create serious problems, problems the Air Force has a strong interest in avoiding by drawing an objective line at visibility. The problem with this argument is not doctrinal but empirical. The Air Force has not shown any reason to fear that a significant number of enlisted personnel and officers 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 image of the service.

In these circumstances, deference seems unwarranted. Reasoned military judgments, of course, are entitled to respect, but the military has failed to show that this particular judgment is a reasoned one. If, in the future, the Air Force is besieged with requests for religious exemptions, and those requests cannot be distinguished on functional grounds from Goldman's, the service may be able to argue that circumstances warrant a flat rule against any visible religious apparel. That, however, would be a case different from the one at hand.

JUSTICE O'CONNOR, with whom JUSTICE MARSHALL joins, dissenting.

The Court rejects Captain Goldman's claim without even the slightest attempt to weigh his

asserted right against the interest of the Air Force. No test for free exercise claims in the military context is even articulated, much less applied. I believe that the Court should attempt to articulate and apply an appropriate standard for a free exercise claim in the military context, and should examine Captain Goldman's claim in light of that standard.

Like the Court today, the Court in the past has had some difficulty, even in the civilian context, in articulating a standard for evaluating free exercise claims that result from the application of general laws burdening religious conduct. One can, however, glean at least two consistent themes from this Court's precedents. First, when the government attempts to deny a free exercise claim, it must show that an unusually important interest is at stake. Second, the government must show that granting the exemption will do substantial harm to that interest.

There is no reason why these principles should not apply in the military, as well as the civilian, context. The test is sufficiently flexible to take into account the special importance of defending our Nation without abandoning completely the freedoms that make it worth defending. The first question that the Court should face here, therefore, is whether the interest that the Government asserts is of unusual importance. The need for military discipline and esprit de corps is unquestionably an especially important governmental interest.

But the mere presence of such an interest cannot end the analysis. The second question in the analysis of a free exercise claim must also be reached here: will granting an exemption of the type requested do substantial harm to the especially important governmental interest? The Government can present no sufficiently convincing proof in *this* case to support an assertion that granting an exemption of the type requested here would do substantial harm to military discipline and esprit de corps. On the facts of this case, therefore, I would require the Government to accommodate the sincere religious belief of Captain Goldman.

Note: Congress reacted to the decision in *Goldman* by enacting a statute providing members of the military with greater freedom to wear religious garb. The law provides that "a member of the armed forces may 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(a)-(b).

BOWEN v. ROY

476 U.S. 693 (1986)

CHIEF JUSTICE BURGER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Part III, in which JUSTICE POWELL and JUSTICE REHNQUIST join.

I

Appellees Stephen J. Roy and Karen Miller applied for and received benefits under the Aid to Families with Dependent Children program and the Food Stamp program. They refused to comply, however, with the requirement that participants in these programs furnish their state welfare agencies with the Social Security numbers of the members of their

household as a condition of receiving benefits. Appellees contended that obtaining a Social Security number for their 2-year-old daughter, Little Bird of the Snow, would violate their Native American religious beliefs. The Pennsylvania Department of Public Welfare thereafter terminated AFDC and medical benefits payable to appellees on the child's behalf and instituted proceedings to reduce the level of food stamps that appellees' household was receiving. Appellees then filed this action arguing that the Free Exercise Clause entitled them to an exemption from the Social Security number requirement.

At trial, Roy testified that he had recently developed a religious objection to obtaining a Social Security number for Little Bird of the Snow. Roy is a Native American descended from the Abenaki Tribe, and he asserts a religious belief that control over one's life is essential to spiritual purity and indispensable to "becoming a holy person." Roy believes that technology is "robbing the spirit of man." In order to prepare his daughter for greater spiritual power, therefore, Roy testified to his belief that he must keep her person and spirit unique and that the uniqueness of the Social Security number as an identifier, coupled with the other uses of the number over which she has no control, will serve to "rob the spirit" of his daughter and prevent her from attaining greater spiritual power.

For purposes of determining the breadth of Roy's religious concerns, the trial judge raised the possibility of using the phonetics of his daughter's name to derive a Social Security number. Although Roy saw "a lot of good" in this suggestion, he stated it would violate his religious beliefs because the special number still would apply uniquely and identify her. Roy also testified that his religious objection would not be satisfied even if the Social Security Administration appended the daughter's full tribal name to her Social Security number.

In Roy's own testimony, he emphasized the evil that would flow simply from *obtaining* a number. On the last day of trial, however, a federal officer inquired whether Little Bird of the Snow already had a Social Security number; he learned that a number had been assigned -- under first name "Little," middle name "Bird of the Snow," and last name "Roy." The Government at this point suggested that the case had become moot. Roy, however, was recalled to the stand and testified that her spirit would be robbed only by "use" of the number. Since no known use of the number had yet been made, Roy expressed his belief that her spirit had not been damaged. The District Court concluded that the case was not moot.

After hearing all of the testimony, the District Court denied appellees' request for damages and benefits, but granted injunctive relief. The District Court concluded that the public "interest in maintaining an efficient and fraud resistant system can be met without requiring use of a social security number for Little Bird of the Snow. We vacate and remand.

II

Appellees raise a constitutional challenge to two features of the statutory scheme here. They object to Congress' requirement that a state AFDC plan *"must . . .* provide (A) that, *as a condition of eligibility* under the plan, *each* applicant for or recipient of aid *shall* furnish to the State agency his social security account number." They also object to Congress' requirement that "such State agency *shall utilize* such account numbers in the administration of such plan." We analyze each of these contentions, turning to the latter contention first.

Our cases have long recognized a distinction between the freedom of individual belief,

which is absolute, and the freedom of individual conduct, which is not absolute. Roy objects to the statutory requirement that state agencies "shall utilize" Social Security numbers not because it places any restriction on what he may believe or what he may do, but because he believes the use of the number may harm his daughter's spirit.

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 or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter.

As a result, Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets. The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures. Consequently, appellees' objection to the statutory requirement that each state agency "shall utilize" a Social Security number is without merit. It follows that their request for an injunction against use of the Social Security number in processing benefit applications should have been rejected. We therefore hold that the portion of the District Court's injunction that permanently restrained the Secretary from making any use of the Social Security number that had been issued in the name of Little Bird of the Snow Roy must be vacated.

III

Roy also challenges Congress' requirement that a state AFDC plan *"must* . . . provide (A) that, *as a condition of eligibility* under the plan, *each* applicant for or recipient of aid *shall furnish* to the State agency his social security account number." The statutory requirement that applicants provide a Social Security number is wholly neutral in religious terms and uniformly applicable. There is no claim that there is any attempt by Congress to discriminate invidiously or any covert suppression of particular religious beliefs. The administrative requirement does not create any danger of censorship or place a direct condition or burden on the dissemination of religious views. It does not intrude on the organization of a religious institution or school. It may confront some applicants for benefits with choices, but in no sense does it affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons. Rather, it is appellees who seek benefits from the Government and who assert that, because of certain religious beliefs, they should be excused from compliance with a condition that is binding on all other persons who seek the same benefits from the Government.

We are not unmindful of the importance of many government benefits today or of the value of sincerely held religious beliefs. However, we cannot ignore the reality that denial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications.

This distinction is clearly revealed in the Court's opinions. Decisions rejecting religiously based challenges have often recited the fact that a mere denial of a governmental benefit by a uniformly applicable statute does not constitute infringement of religious liberty. In cases upholding First Amendment challenges, on the other hand, the Court has often relied on the showing that compulsion of certain activity with religious significance was involved. *West Virginia Bd. of Ed*. v. *Barnette*, 319 U.S. 624 (1943).

We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons. Although the denial of government benefits over religious objection can raise serious Free Exercise problems, these two very different forms of government action are not governed by the same constitutional standard. A governmental burden on religious liberty is not insulated from review simply because it is indirect, but the nature of the burden is relevant to the standard the government must meet to justify the burden.

The general governmental interests involved here buttress this conclusion. Governments today grant a broad range of benefits; inescapably at the same time the administration of complex programs requires certain conditions and restrictions. Although in some situations a mechanism for individual consideration will be created, a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to substantial deference. Moreover, legitimate interests are implicated in the need to avoid any appearance of favoring religious over nonreligious applicants.

The test applied in cases like *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), is not appropriate in this setting. In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be required to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest. Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.

We reject appellees' contention that *Sherbert* and *Thomas* compel affirmance. The statutory conditions in those cases provided that a person was not eligible for unemployment compensation benefits if, "without good cause," he had quit work or refused available work. The "good cause" standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. In those cases, therefore, it was appropriate to require the State to demonstrate a compelling reason for denying the requested exemption.

Here there is nothing whatever suggesting antagonism by Congress towards religion generally or towards any particular religious beliefs. The requirement that applicants provide a Social Security number is facially neutral and applies to all applicants for the benefits.

Congress has made no provision for individual exemptions to the requirement. The Social Security number requirement clearly promotes a legitimate and important public interest. No one can doubt that preventing fraud in these benefits programs is an important goal. Because of the tremendous administrative problems associated with managing programs of this size, the District Court found: "Social security numbers are used in making the determination that benefits in the programs are properly paid and that there is no duplication of benefits or failure of payment. . . . Utilization in the computer system of the name of a benefit recipient alone frequently is not sufficient to ensure the proper payment of benefits."

Social Security numbers are unique numerical identifiers and are used pervasively in these programs. The numbers are used, for example, to keep track of persons no longer entitled to receive food stamps because of past fraud or abuses of the program. Moreover, the existence of this unique numerical identifier creates opportunities for ferreting out fraudulent applications through computer "matching" techniques. The Grace Commission recently reported that matching "is the Federal Government's most cost-effective tool for verification or investigation in the prevention and detection of fraud, waste and abuse."

Appellees may not use the Free Exercise Clause to demand Government benefits, but only on their own terms, particularly where that insistence works a demonstrable disadvantage to the Government in the administration of the programs. We conclude that the Congress' refusal to grant appellees a special exemption does not violate the Free Exercise Clause.

JUSTICE BLACKMUN, concurring in part.

I join only Parts I and II of the opinion written by THE CHIEF JUSTICE.

I agree that the portion of the District Court's judgment that enjoins the Government from using or disseminating the social security number already assigned to Little Bird of the Snow must be vacated. I would also vacate the remainder of the judgment and remand the case for further proceedings, because once the injunction against use or dissemination is set aside, it is unclear on the record presently before us whether a justiciable controversy remains with respect to the rest of the relief ordered by the District Court. Roy and Miller evidently objected to the social security number requirement primarily because they did not want the *Government* to be able to use a unique numerical identifier for Little Bird of the Snow, and that injury cannot be redressed if, as the Court today holds, the Government cannot be enjoined from using the pre-existing number. It is possible, however, that appellees still would have an independent religious objection to their being forced to cooperate actively with the Government by providing their daughter's social security number on benefit applications.

In my view, the record is ambiguous on this score. Since the proceedings on remand might well render unnecessary any discussion of whether appellees constitutionally may be required to provide a social security number for Little Bird of the Snow in order to obtain Government assistance on her behalf, that question could be said not to be properly before us. I nonetheless address it, partly because the rest of the Court has seen fit to do so, and partly because I think it is not difficult. Indeed, for the reasons expressed by JUSTICE O'CONNOR, I think the question requires a straightforward application of *Sherbert*, *Thomas*, and *Yoder*. If it proves necessary to reach the issue on remand, the Government may not deny assistance to

Little Bird of the Snow solely because her parents' religious convictions prevent them from supplying the Government with a social security number for their daughter.

JUSTICE STEVENS, concurring in part and concurring in the result.

The parents of Little Bird of the Snow have advanced [two claims]. They claim, first, that they are entitled to an injunction preventing the Government from making any use of a Social Security number assigned to Little Bird of the Snow; and second, that they are entitled to receive a full allowance of food stamps and cash assistance for Little Bird of the Snow without providing a Social Security number for her. As the Court holds in Part II of its opinion, which I join, the first claim must fail because the Free Exercise Clause does not give an individual the right to dictate the Government's method of recordkeeping. The second claim, I submit, is either moot or not ripe for decision.

I

At the outset of the litigation, the parties assumed a critical fact that was discovered to be inaccurate on the last day of the trial. Although the parties believed that Little Bird of the Snow did not have a Social Security number, the District Court found, and the parties now agree, that she has had a Social Security number since birth. The contrary belief had been central to the parties' perception of the litigation, and to the requested relief.

As the case comes to us, the first question to be decided is whether the District Court erred in effectively canceling the number that had already been issued. The Court correctly holds that "the portion of the injunction that permanently restrained the Secretary from making any use of the Social Security number that had been issued must be vacated."

II

Once we vacate the injunction preventing the Government from making use of the number that has already been assigned, there is nothing to prevent the appellees from receiving the payments that are in dispute. The only issue that prevented the case from becoming moot was the claim by Roy that he was entitled to an injunction that effectively canceled the existing number. Since that issue has now been resolved, nothing remains of the case. Because there is nothing in the record to suggest that the Government will not pay the benefits in dispute as soon as the District Court's injunction against the use of the number has been vacated, I concur in the judgment vacating the remainder of the injunction. No matter how interesting, I would not address the hypothetical questions debated by THE CHIEF JUSTICE and JUSTICE O'CONNOR because they are not properly presented by the record.

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and dissenting in part.

I

I join Parts I and II of THE CHIEF JUSTICE's opinion, and I would vacate that portion of the District Court's judgment that enjoins the Government from using or disseminating the Social Security number already assigned to Little Bird of the Snow.

In all, eight Members of the Court believe that the District Court's injunction was overbroad in preventing the Government from using information already in its possession. A logical next step is to consider whether the case is moot. I agree with THE CHIEF JUSTICE that the case is not moot.

The District Court enjoined the Government not only from disseminating or using the Social Security number already in its possession, but "from denying Plaintiff Roy cash assistance and medical assistance benefits for Little Bird of the Snow for the Plaintiffs' failure to provide a social security number for her." Because of this portion of the injunction, we continue to have before us a live case or controversy.

II

The Government has identified its goal as preventing fraud and abuse in the welfare system, a goal that is both laudable and compelling. The District Court, however, soundly rejected the Government's assertion that provision of the Social Security number was necessary to prevent such fraud and abuse. Among the means for which the Social Security number is used to reduce such fraud is "cross-matching." But the District Court found that, while cross-matching is "more difficult" without Social Security numbers, "[the] file on a particular benefit recipient can be identified and cross-matching performed, if the recipient's full name, date of birth, and parents' names are entered into the computerized systems." The District Court's evaluation of the asserted indispensability of the Social Security number undermines the Government's claim here.

Faced with these facts, however, THE CHIEF JUSTICE not only believes appellees themselves must provide a Social Security number to the Government, but he also finds it necessary to invoke a new standard to be applied to test the validity of Government regulations under the Free Exercise Clause. He would uphold any facially neutral and uniformly applicable governmental requirement if the Government shows its rule to be "a reasonable means of promoting a legitimate public interest." Such a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny. I would apply our long line of precedents to hold that the Government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means.

Appellants have rested their case on vague allegations of administrative inconvenience and harm to the public fisc that are wholly unsubstantiated. The Court simply cannot, consistent with its precedents, distinguish this case from the wide variety of factual situations in which the Free Exercise Clause indisputably imposes significant constraints upon government. Indeed, five Members of the Court agree that *Sherbert* and *Thomas*, in which the government was required to accommodate sincere religious beliefs, control the outcome of this case to the extent it is not moot.

THE CHIEF JUSTICE's distinction between this case and the Court's previous decisions on free exercise claims -- that here "it is appellees who seek benefits from the Government and who assert that they should be excused from compliance with a condition that is binding on all other persons who seek the same benefits from the Government" -- has been directly rejected. 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. Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation.

Our precedents have long required the Government to show that a compelling state interest is served by its refusal to grant a religious exemption. The Government here has clearly and easily met its burden of showing that the prevention of welfare fraud is a compelling governmental goal. If the Government could meet its compelling needs only by refusing to grant a religious exemption, and chose a narrowly tailored means to do so, then the Government would prevail. But the Government has failed to show that granting a religious exemption to those who legitimately object to providing a Social Security number will do any harm to its compelling interest in preventing welfare fraud.

JUSTICE WHITE, dissenting.

Being of the view that *Thomas* and *Sherbert* control this case, I cannot join the Court's opinion and judgment.

O'LONE v. ESTATE OF SHABAZZ

482 U.S. 342 (1987)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents, members of the Islamic faith, were prisoners in New Jersey's Leesburg State Prison. They challenged policies adopted by prison officials which resulted in their inability to attend Jumu'ah, a weekly Muslim congregational service regularly held in the main prison building and in a separate facility known as "the Farm." Jumu'ah is commanded by the Koran and must be held every Friday after the sun reaches its zenith and before the Asr, or afternoon prayer. There is no question that respondents' sincerely held religious beliefs compelled attendance at Jumu'ah. We hold that the prison regulations here challenged did not violate respondents' rights under the Free Exercise Clause of the First Amendment.

Inmates at Leesburg are placed in one of three custody classifications. Maximum security and "gang minimum" security inmates are housed in the main prison building, and those with the lowest classification -- full minimum -- live in "the Farm." Several changes in prison policy prompted this litigation. In April 1983, the Department of Corrections issued Standard 853, which provided that inmates could no longer move directly from maximum security to full minimum status, but were instead required to first spend time in the intermediate gang minimum status. This change was designed to redress problems that had arisen when inmates were transferred directly from maximum security status to full minimum status, with its markedly higher level of freedom. Because of serious overcrowding in the main building, Standard 853 further mandated that gang minimum inmates ordinarily be assigned jobs outside the main building. These inmates work in details of 8 to 15 persons, supervised by one guard. Standard 853 also required that full minimum inmates work outside the main institution, whether on or off prison grounds, or in a satellite building such as the Farm.

Corrections officials at Leesburg implemented these policies gradually. In the initial stages of outside work details for gang minimum prisoners, officials apparently allowed some Muslim inmates to work inside the main building on Fridays so that they could attend Jumu'ah. This alternative was eventually eliminated in light of the directive of Standard 853 that all gang minimum inmates work outside the main building.

Significant problems arose with those inmates assigned to outside work details. Some avoided reporting for their assignments, while others found reasons for returning to the main building during the course of the workday (including to attend religious services). Evidence showed that the return of prisoners during the day resulted in security risks and administrative burdens that prison officials found unacceptable. Because details of inmates were supervised by only one guard, the whole detail was forced to return to the main gate when one prisoner desired to return to the facility. The gate was the site of all incoming foot and vehicle traffic during the day, and prison officials viewed it as a high security risk area. When an inmate returned, vehicle traffic was delayed while the inmate was logged in and searched.

In response to these burdens, Leesburg officials took steps to ensure that those assigned to outside details remained there for the whole day. Thus, arrangements were made to have lunch and required medications brought out to the prisoners, and appointments with doctors and social workers were scheduled for the late afternoon. These changes proved insufficient, however, and prison officials began to study alternatives. After consulting with the director of social services, the director of professional services, and the prison's imam and chaplain, prison officials issued a policy memorandum which prohibited inmates assigned to outside work details from returning to the prison during the day except in the case of emergency.

The prohibition of returns prevented Muslims assigned to outside work details from attending Jumu'ah. Respondents filed suit alleging that the prison policies denied them their Free Exercise rights under the First Amendment.

Several general principles guide our consideration of the issues presented here. First, "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." Inmates clearly retain protections afforded by the First Amendment, including its directive that no law shall prohibit the free exercise of religion. Second, "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights." The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives -- including deterrence of crime, rehabilitation of prisoners, and institutional security.

To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a "reasonableness" test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights: "When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner* v. Safley. This approach ensures the ability of corrections officials "to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration," and avoids unnecessary intrusion of the judiciary into problems ill suited to "resolution by decree."

Turning to consideration of the policies challenged in this case, we think the findings of the District Court establish clearly that prison officials have acted in a reasonable manner. *Turner* v. *Safley* drew upon our previous decisions to identify several factors relevant to this reasonableness determination. First, a regulation must have a logical connection to legitimate governmental interests invoked to justify it. The policies at issue here clearly meet that standard. The requirement that full minimum and gang minimum prisoners work outside the main facility was justified by concerns of institutional order and security, for the District Court found that it was "in part a response to overcrowding in the state's prisons, and in part designed to ease tension and drain on the facilities during that part of the day when inmates were outside the main buildings." We think the standard is related to this legitimate concern.

The subsequent policy prohibiting returns to the institution during the day also passes muster under this standard. Prison officials testified that the returns from outside work details generated congestion and delays at the main gate, a high risk area in any event. Return requests also placed pressure on guards supervising outside details, who were required to "evaluate each reason possibly justifying a return and accept or reject that reason." Rehabilitative concerns further supported the policy; corrections officials sought a simulation of working conditions and responsibilities in society. These legitimate goals were advanced by the prohibition on returns; it cannot seriously be maintained that "the logical connection between the regulation and the asserted goal is so remote as to render the policy irrational."

Our decision in *Turner* also found it relevant that "alternative means of exercising the right remain open to prison inmates." There are, of course, no alternative means of attending Jumu'ah. The very stringent requirements as to the time at which Jumu'ah may be held make it extraordinarily difficult for prison officials to assure that every Muslim prisoner is able to attend that service. While we in no way minimize the central importance of Jumu'ah to respondents, we are unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that end. We think it appropriate to see whether under these regulations respondents retain the ability to participate in other Muslim religious ceremonies. The record establishes that respondents are not deprived of all forms of religious exercise. The right to congregate for prayer or discussion is "virtually unlimited except during working hours," and the state-provided imam has free access to the prison. Muslim prisoners are given different meals whenever pork is served in the cafeteria. Special arrangements are also made during the month-long observance of Ramadan, a period of fasting and prayer. During Ramadan, Muslim prisoners are awakened for an early breakfast, and receive dinner at 8:30 each evening. We think this ability to participate in other religious observances of their faith supports the conclusion that the restrictions at issue were reasonable.

Finally, the case for the validity of these regulations is strengthened by examination of the impact that accommodation of respondents' asserted right would have on other inmates, on prison personnel, and on allocation of prison resources generally. Respondents suggest several accommodations of their practices, including placing all Muslim inmates in one or two inside work details or providing weekend labor for Muslim inmates. Each of respondents' suggested accommodations would, in the judgment of prison officials, have adverse effects on the institution. Inside work details for gang minimum inmates would be inconsistent with the legitimate concerns underlying Standard 853, and the District Court found that the extra

supervision necessary to establish weekend details for Muslim prisoners "would be a drain on scarce human resources" at the prison. Prison officials determined that the alternatives would also threaten prison security by allowing "affinity groups" in the prison to flourish. Finally, the officials determined that special arrangements for one group would create problems as "other inmates [see] that a certain segment is escaping a rigorous work detail" and perceive favoritism. These concerns of prison administrators provide adequate support for the conclusion that accommodations of respondents' request to attend Jumu'ah would have undesirable results in the institution. These difficulties also make clear that there are no "obvious, easy alternatives to the policy adopted by petitioners."

We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to "substitute our judgment on . . . difficult and sensitive matters of institutional administration" for the determinations of those charged with the formidable task of running a prison. The regulations in question do not offend the Free Exercise Clause.

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

The religious ceremony that these respondents seek to attend is not presumptively dangerous, and the prison has completely foreclosed respondents' participation in it. I therefore would require prison officials to demonstrate that the restrictions they have imposed are necessary to further an important government interest, and that these restrictions are no greater than necessary to achieve prison objectives. Even were I to accept the Court's standard of review, however, I would remand the case to the District Court, since that court has not had the opportunity to review respondents' claim under the new standard established by this Court in *Turner*. As the record now stands, the reasonableness of foreclosing respondents' participation in Jumu'ah has not been established.

I

In reviewing a prisoner's claim of the infringement of a constitutional right, we must begin from the premise that prisoners retain constitutional rights that limit the exercise of official authority against them. At the same time, we must acknowledge that incarceration changes an individual's status in society. Prison officials have the difficult job of preserving security in a potentially explosive setting, as well as of attempting to provide rehabilitation that prepares some inmates for re-entry into the social mainstream. Both these demands require the curtailment of certain rights.

The challenge for this Court is to determine how best to protect those prisoners' rights that remain. Our objective in selecting a standard of review is *not*, as the Court declares, "to ensure that courts afford appropriate deference to prison officials." While we must give due consideration to the needs of those in power, this Court's role is to ensure that fundamental *restraints* on that power are enforced. In my view, adoption of "reasonableness" as a standard of review for *all* constitutional challenges by inmates is inadequate to this task. Such a standard is categorically deferential, and does not discriminate among degrees of deprivation.

The use of differing levels of scrutiny proclaims that on some occasions official power must justify itself in a way that otherwise it need not. Thus, even if the absolute nature of the

deprivation may be taken into account in the Court's formulation, this is merely one factor in determining if official conduct is "reasonable." Once we provide such an elastic and deferential principle of justification, "the principle lies about like a loaded weapon ready for the hand of any authority that can bring forth a plausible claim of an urgent need."

An approach better suited to the sensitive task of protecting the constitutional rights of inmates is laid out by Judge Kaufman in *Abdul Wali* v. *Coughlin,* 754 F.2d 1015 (2d Cir. 1985). That approach maintains that the degree of scrutiny of prison regulations should depend on "the nature of the right being asserted by prisoners, the type of activity in which they seek to engage, and whether the challenged restriction works a total deprivation (as opposed to a mere limitation) on the exercise of that right." Essentially, if the activity in which inmates seek to engage is presumptively dangerous, or if a regulation merely restricts the time, place, or manner in which prisoners may exercise a right, a prison regulation will be invalidated only if there is no reasonable justification for official action. Where exercise of the asserted right is not presumptively dangerous, however, and where the prison has completely deprived an inmate of that right, then prison officials must show that "a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restrictions are no greater than necessary to effectuate the governmental objective involved."

The court's analytical framework in *Abdul Wali* recognizes that in many instances it is inappropriate for courts "to substitute our judgments for those of trained professionals." At the same time, the *Abdul Wali* approach takes seriously the Constitution's function of requiring that official power be called to account when it completely deprives a person of a right that society regards as basic. In this limited number of cases, it would require more than a demonstration of "reasonableness" to justify such infringement.

The prison in this case has completely prevented respondent inmates from attending the central religious service of their Muslim faith. I would therefore hold prison officials to the standard articulated in *Abdul Wali,* and would find their proffered justifications wanting. The State has neither demonstrated that the restriction is necessary to further an important objective nor proved that less extreme measures may not serve its purpose. Even if I accepted the Court's standard of review, however, I could not conclude on this record that prison officials have proved that it is reasonable to preclude respondents from attending Jumu'ah. Petitioners have provided mere unsubstantiated assertions that the plausible alternatives proposed by respondents are infeasible.

II

In *Turner,* the Court set forth a framework for reviewing allegations that a constitutional right has been infringed by prison officials. The Court found relevant to that review "whether there are alternative means of exercising the right that remain open to prison inmates." The Court in this case acknowledges that "respondents' sincerely held religious beliefs compe[l] attendance at Jumu'ah," and concedes that there are "no alternative means of attending Jumu'ah." Nonetheless, the Court finds that prison policy does not work a complete deprivation of respondents' asserted religious right, because respondents have the opportunity to participate in other religious activities. This analysis ignores the fact that Jumu'ah is the central religious ceremony of Muslims. As with other faiths, this ceremony provides a special

time in which Muslims "assert their identity as a community covenanted to God."

Jumu'ah therefore cannot be regarded as one of several essentially fungible religious practices. The ability to engage in other religious activities cannot obscure the fact that the denial at issue in this case is absolute: respondents are completely foreclosed from participating in the core ceremony that reflects their membership in a particular religious community. Prison officials in this case therefore cannot show that "'other avenues' remain available for the exercise of the asserted right."

In *Turner*, the Court found that the practices of the Federal Bureau of Prisons were relevant to the availability of reasonable alternatives. In the present case, it is therefore worth noting that Muslim inmates are able to participate in Jumu'ah throughout the entire federal prison system. Indeed, the Leesburg State Prison permitted participation in this ceremony for five years, and experienced no threats to security or safety as a result. In light of both standard federal prison practice and Leesburg's own past practice, a reasonableness test in this case demands at least minimal substantiation by prison officials that alternatives that would permit participation in Jumu'ah are infeasible. Examination of the alternatives proposed in this case indicates that prison officials have not provided such substantiation.

III

Respondents' first proposal is that gang minimum prisoners be assigned to an alternative inside work detail on Friday. Respondents' second proposal is that gang minimum inmates be assigned to work details inside the main building on a regular basis. Third, respondents suggested that gang minimum inmates be assigned to Saturday or Sunday work details, which would allow them to make up any time lost by attending Jumu'ah on Friday. Finally, respondents proposed that minimum security inmates living at the Farm be assigned to jobs either in the Farm building or in its immediate vicinity.

Despite the plausibility of the alternatives proposed by respondents in light of federal practice and the prison's own past practice, officials have essentially provided mere pronouncements that such alternatives are not workable. If this Court is to take seriously its commitment to the principle that "prison walls do not form a barrier separating prison inmates from the protections of the Constitution," it must demand more than this record provides to justify a Muslim inmate's complete foreclosure from participation in the central religious service of the Muslim faith.

LYNG v. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION

485 U.S. 439 (1988)

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider whether the Free Exercise Clause forbids the Government from permitting timber harvesting in, or constructing a road through, a portion of a National Forest that has traditionally been used for religious purposes by members of three American Indian tribes in northwestern California. We conclude that it does not.

I

As part of a project to create a paved 75-mile road linking two California towns, Gasquet and Orleans, the United States Forest Service has upgraded 49 miles of previously unpaved roads on federal land. To complete this project (the G-O road), the Forest Service must build a 6-mile paved segment through the Chimney Rock section of the Six Rivers National Forest. That section is situated between two other portions of the road that are already complete.

In 1977, the Forest Service issued a draft environmental impact statement that discussed proposals for upgrading an existing unpaved road that runs through the Chimney Rock area. In response to comments on the draft, the Forest Service commissioned a study of American Indian cultural and religious sites in the area. The Hoopa Valley Indian reservation adjoins the Six Rivers National Forest, and the Chimney Rock area has historically been used for religious purposes by Yurok, Karok, and Tolowa Indians. The commissioned study found that the entire area "is significant as an integral and indispensible [sic] part of Indian religious practice." Specific sites are used for certain rituals, and "successful use of the [area] is dependent upon certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting." The study concluded that constructing a road along the available routes "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." The report recommended that the G-O road not be completed.

In 1982, the Forest Service decided not to adopt this recommendation, and it prepared a final environmental impact statement for construction of the road. The Regional Forester selected a route that avoided archeological sites and was removed as far as possible from the sites used by contemporary Indians for specific spiritual activities. Alternative routes that would have avoided the Chimney Rock area altogether were rejected because they would have required the acquisition of private land, had serious soil stability problems, and would in any event have traversed areas having ritualistic value to American Indians. At about the same time, the Forest Service adopted a management plan allowing for the harvesting of significant amounts of timber in this area of the forest. The management plan provided for one-half mile protective zones around all the religious sites identified in the report.

Respondents challenged both the road-building and timber-harvesting decisions in the United States District Court. Respondents claimed that the Forest Service's decisions violated the Free Exercise Clause.

. . . .

III

A

It is undisputed that the Indian respondents' beliefs are sincere and that the proposed actions will have severe adverse effects on the practice of their religion. Respondents contend that the burden on their religious practices is heavy enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to complete the road or to engage in timber harvesting in the Chimney Rock area. We disagree.

In *Bowen v. Roy*, 476 U. S. 693 (1986), we considered a challenge to a federal statute that

required the States to use Social Security numbers in administering certain welfare programs. The Court rejected this challenge in *Roy*:

"The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that [the Roys] engage in any set form of religious observance, so [they] may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter . . . .

". . . The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."

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 neither case would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privilege enjoyed by other citizens. We are asked to distinguish this case from *Roy* on the ground that the infringement on religious liberty here is "significantly greater." Similarly, we are told that this case can be distinguished because "the government action is not at some physically removed location where it places no restriction on what a practitioner may do."

These efforts to distinguish *Roy* are unavailing. This Court cannot weigh the adverse effects on the Roys and compare them with the adverse effects on respondents. Without the ability to make such comparisons, we cannot say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other.

Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. The Government does not dispute that the projects in this case could have devastating effects on traditional Indian religious practices. Those practices are inextricably bound up with the unique features of the Chimney Rock area. Individual practitioners use this area for personal spiritual development; some of their activities are believed to be critically important in advancing the welfare of the tribe, and indeed, of mankind itself. The Indians use this area, as they have for a very long time, to conduct a wide variety of specific rituals that aim to accomplish their religious goals. According to their beliefs, the rituals would not be efficacious if conducted at other sites, and too much disturbance of the area's natural state would render any meaningful continuation of traditional practices impossible.

Even if we assume that the G-O road will "virtually destroy the Indians' ability to practice their religion," the Constitution does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities will always be considered essential to the spiritual well-being of some citizens often on the basis of sincerely held religious beliefs.

Others will find the very same activities deeply offensive, and perhaps incompatible with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over 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.

One need not look far beyond the present case to see why the analysis in *Roy* offers a sound reading of the Constitution. Respondents attempt to stress the limits of the religious servitude that they are now seeking to impose on the Chimney Rock area. They apparently do not at present object to the area's being used by recreational visitors, other Indians, or forest rangers. Nothing in the principle for which they contend, however, would distinguish this case from another lawsuit in which they might seek to exclude all human activity but their own from sacred areas of public lands. The Indian respondents insist that "privacy during the power quests is required for the practitioners to maintain the purity needed for a successful journey." Similarly: "The practices conducted in the high country entail intense meditation. The practitioner must be surrounded by undisturbed naturalness." No disrespect for these practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some spacious tracts of public property. Even without anticipating future cases, the diminution of the Government's property rights, and the concomitant subsidy of the Indian religion, would in this case be far from trivial.

The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law forbidding the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land.

B

Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use its own land, for example, need not and should not discourage it from accommodating religious practices. It is worth emphasizing, therefore, that the Government has taken numerous steps to minimize the impact that construction of the G-O road will have on the Indians' religious activities. Except for abandoning its project entirely, and thereby leaving the two existing segments of road to deadend, it is difficult to see how the Government could have been more solicitous.

C

Notwithstanding the sympathy that we all must feel for the plight of the respondents, it is plain that the approach taken by the dissent cannot withstand analysis. On the contrary, the path towards which it points us is incompatible with the text of the Constitution, with the precedents of this Court, and with a responsible sense of our own institutional role.

The dissent begins by asserting that the "constitutional guarantee we interpret today . . . is directed against any form of government action that frustrates or inhibits religious practice." The Constitution, however, says no such thing. Rather, it states: "Congress shall make no law . . . prohibiting the free exercise [of religion]."

As we explained above, *Bowen v. Roy* rejected a First Amendment challenge to government activities that the religious objectors sincerely believed would "'rob the spirit' of [their] daughter and prevent her from attaining greater spiritual power." The dissent now offers to distinguish that case by saying that the Government was acting there "in a purely internal manner," whereas land-use decisions "are likely to have substantial external effects." The dissent's distinction has no basis in *Roy*. Robbing the spirit of a child, and preventing her from attaining greater spiritual power, is both a "substantial external effect" and one that is remarkably similar to the injury claimed by respondents in the case before us today. The dissent's reading of *Roy* would effectively overrule that decision, without providing any compelling justification for doing so. The dissent also misreads *Wisconsin v. Yoder*. There is nothing whatsoever in the *Yoder* opinion to support the proposition that the "impact" on the Amish religion would have been constitutionally problematic if the statute at issue had not been coercive in nature.

Seeing the Court as the arbiter, the dissent proposes a legal test under which it would decide which public lands are "central" or "indispensable" to which religions, and by implication which are "dispensable" or "peripheral," and would then decide which government programs are "compelling" enough to justify "infringement of those practices." We would accordingly be required to weigh the value of every religious belief and practice that is said to be threatened by any government program. Unless a "showing of 'centrality,'" is nothing but an assertion of centrality, the dissent thus offers us the prospect of this Court holding that some sincerely held religious beliefs and practices are not "central" to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, the dissent's approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the judiciary in a role that we were never intended to play.

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

The Court concludes that federal land-use decisions that render the practice of a given religion impossible do not burden that religion in a manner cognizable under the Free Exercise Clause, because such decisions neither coerce conduct inconsistent with religious belief nor penalize religious activity. The constitutional guarantee we interpret today, however, 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. Because the Court today refuses even to acknowledge the constitutional injury respondents will suffer, and because this refusal leaves Native Americans with absolutely no constitutional protection against the gravest threat to their religious practices, I dissent.

I

For Native Americans religion is not a discrete sphere of activity separate from all others. Thus, for most Native Americans, "the area of worship cannot be delineated from social, political, cultural and other areas of Indian lifestyle." A pervasive feature of this lifestyle is

the individual's relationship with the natural world; this relationship forms the core of what might be called, for want of a better nomenclature, the Indian religious experience. While traditional western religions view creation as the work of a deity, tribal religions regard creation as an ongoing process in which they are morally and religiously obligated to participate. Native Americans fulfill this duty through ceremonies and rituals designed to preserve and stabilize the earth and to protect humankind from disease and other catastrophes. Failure to conduct these ceremonies in the manner and place specified, adherents believe, will result in great harm to the earth and to the people whose welfare depends upon it.

In marked contrast to traditional western religions, the belief systems of Native Americans do not rely on doctrines, creeds, or dogmas. Established or universal truths -- the mainstay of western religions -- play no part in Indian faith. Ceremonies are communal efforts undertaken for specific purposes in accordance with instructions handed down from generation to generation. Commentaries on or interpretations of the rituals themselves are deemed absolute violations of the ceremonies, whose value lies not in their ability to explain the natural world or to enlighten individual believers but in their efficacy as protectors and enhancers of tribal existence. Where dogma lies at the heart of western religions, Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being. Rituals are performed in prescribed locations because land, like all other living things, is unique, and specific sites possess different spiritual properties and significance.

For respondent Indians, the most sacred of lands is the high country where, they believe, pre-human spirits moved with the coming of humans to the earth. Because these spirits are seen as the source of religious power, or "medicine," many of the tribes' rituals and practices require frequent journeys to the area. Among the most powerful of sites are Chimney Rock, Doctor Rock, and Peak 8, all of which are elevated rock outcroppings. "Successful use of the high country is dependent upon certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting."

II

The Court does not suggest that the interests served by the G-O road are compelling, or that they outweigh the destructive effect the road will have on respondents' religious practices. Instead, the Court embraces the Government's contention that its prerogative as landowner should always take precedence over a claim that a particular use of federal property infringes religious practices. Attempting to justify this rule, the Court argues that the First Amendment bars only outright prohibitions, indirect coercion, and penalties on the free exercise of religion. All other "incidental effects of government programs," it concludes, even those "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," simply do not give rise to constitutional concerns. Since our recognition that restraints on religious conduct implicate the Free Exercise Clause, we have never suggested that the protections of the guarantee are limited to so narrow a range of governmental burdens. The land-use decision challenged here will restrain respondents from practicing their religion as completely as any of the governmental actions we have struck down in the past, and the Court's efforts to define away respondents' injury as nonconstitutional is both unjustified and unpersuasive.

A

I cannot accept the Court's premise that the form of the Government's restraint, rather than its effect, controls our analysis. Respondents have demonstrated that construction of the G-O road will completely frustrate the practice of their religion. Indeed, the Government's proposed activities will restrain religious practice to a far greater degree than in any of the cases cited by the Court. None of the religious adherents in *Hobbie*, *Thomas*, and *Sherbert*, for example, could have claimed that the denial of unemployment benefits rendered the practice of their religions impossible; at most, the challenged laws made those practices more expensive. Here, in stark contrast, respondents have proved that the desecration of the high country will prevent religious leaders from attaining the religious power or medicine indispensable to the success of virtually all their rituals and ceremonies. Similarly, the threat posed by the desecration of sacred lands that are indisputably essential to respondents' religious practices is both more direct and more substantial than that raised by a compulsory school law that exposed Amish children to an alien value system. And of course respondents here do not even have the option, however unattractive it might be, of migrating to more hospitable locales; the site-specific nature of their belief system renders it non-transportable.

Ultimately, the Court's coercion test turns on a distinction between governmental actions that compel conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief. In my view, such a distinction is without constitutional significance. The crucial word in the constitutional text is "prohibit," a comprehensive term that in no way suggests that the intended protection is aimed only at governmental actions that coerce affirmative conduct. Religious freedom is threatened no less by governmental action that makes the practice of one's chosen faith impossible than by governmental programs that pressure one to engage in conduct inconsistent with religious beliefs. The Court attempts to explain the line it draws by arguing that, in a society as diverse as ours, the Government cannot help but offend the "religious needs and desires" of some citizens. While I agree that governmental action that simply offends religious sensibilities may not be challenged under the Clause, we have recognized that laws that affect spiritual development by impeding the integration of children into the religious community or by increasing the expense of adherence to religious principles -- in short, laws that frustrate or inhibit religious practice -- trigger the protections of the constitutional guarantee. Both common sense and our prior cases teach us, therefore, that governmental action that makes the practice of a given faith more difficult necessarily penalizes that practice and thereby tends to prevent adherence to religious belief. The harm to the practitioners is the same regardless of the manner in which the Government restrains their religious expression.

B

Nor can I agree with the Court's assertion that respondents' constitutional claim is foreclosed by our decision in *Bowen v. Roy*. In rejecting that challenge, we stated that "the Free Exercise Clause cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." Accordingly, we explained that Roy could "no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a religious objection to the size or color of the Government's filing cabinets. The Free Exercise Clause

affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."

Today the Court professes an inability to differentiate *Roy* from the present case. I find this inability altogether remarkable. In *Roy*, we repeatedly stressed the "internal" nature of the Government practice at issue. When the Government processes information, of course, it acts in a purely internal manner, and any free exercise challenge to such internal recordkeeping in effect seeks to dictate how the Government conducts its own affairs. Federal land-use decisions, by contrast, are likely to have substantial external effects that government decisions concerning office furniture and information storage obviously will not.

The Court, however, ignores *Roy*'s emphasis on the internal nature of the government practice, and instead construes that case as support for the proposition that governmental action that does not coerce conduct inconsistent with religious faith simply does not implicate the Free Exercise Clause. That such a reading is wholly untenable, however, is demonstrated by the cruelly surreal result it produces here: governmental action that will virtually destroy a religion is deemed not to "burden" that religion. Ultimately, in *Roy* we concluded that, however much the Government's recordkeeping system may have offended Roy's religious sensibilities, he could not challenge that system under the Free Exercise Clause because the Government's practice did not "in any degree impair his freedom to believe, express, and exercise' his religion." That determination distinguishes the injury at issue here, for respondents have made an uncontroverted showing that the construction and logging activities will impair their freedom to exercise their religion in the greatest degree imaginable.

C

In the final analysis, the Court's refusal to recognize the constitutional dimension of respondents' injuries stems from its concern that acceptance of respondents' claim could potentially strip the Government of its ability to manage and use vast tracts of federal property. In addition, the nature of respondents' site-specific religious practices raises the specter of future suits in which Native Americans seek to exclude all human activity from such areas. These concededly legitimate concerns lie at the very heart of this case, which represents yet another stress point in the longstanding conflict between two disparate cultures -- the dominant western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred. Rather than address this conflict in any meaningful fashion, the Court disclaims all responsibility for balancing these competing and potentially irreconcilable interests, choosing to turn this difficult task over to the federal legislature. Such an abdication is more than merely indefensible as an institutional matter: by defining respondents' injury as "non-constitutional," the Court has effectively bestowed on one party to this conflict the unilateral authority to resolve all future disputes in its favor. In my view, however, Native Americans deserve -- and the Constitution demands -- more than this.

Prior to today's decision, several courts of appeals had attempted to fashion a test that accommodates the competing "demands" placed on federal property by the two cultures. The courts of appeals required Native Americans to demonstrate that any land-use decisions they challenged involved lands that were "central" or "indispensable" to their religious practices. This requirement has been criticized as inherently ethnocentric, for it incorrectly assumes that

Native American belief systems ascribe religious significance to land in a traditionally western hierarchical manner. It is frequently the case in constitutional litigation, however, that courts are called upon to balance interests that are not readily translated into rough equivalents. At their most absolute, the competing claims that both the Government and Native Americans assert in federal land are fundamentally incompatible, and unless they are tempered by compromise, mutual accommodation will remain impossible.

I believe it appropriate, therefore, to require some showing of "centrality" before the Government can be required either to come forward with a compelling justification for its proposed use of federal land or to forego that use altogether. "Centrality," however, should not be equated with the survival of the religion itself. Thus, while Native Americans need not demonstrate that the Government's land-use decision will eradicate their faith, I do not think it is enough to allege simply that the land is held sacred. Rather, adherents should be required to show that the decision poses a substantial threat of frustrating their religious practices. Once such a showing is made, the burden should shift to the Government to come forward with a compelling state interest sufficient to justify the infringement of those practices.

The Court suggests that such an approach would place courts in the untenable position of deciding which practices and beliefs are "central" to a given faith. In fact, however, courts need not undertake any such inquiries: Native Americans would be the arbiters of which practices are central to their faith, subject only to the normal requirement that their claims be genuine and sincere. The question for the courts, then, is whether the Native American claimants have discharged their burden of demonstrating, as the Amish did in *Yoder*, that the land-use decision poses a substantial threat of undermining their religious practices.

Similarly, the Court's concern that the claims of Native Americans will place "religious servitudes" upon vast tracts of federal property cannot justify its refusal to recognize the constitutional injury respondents will suffer. It is true that respondents' religious use of the high country requires privacy and solitude. The fact remains, however, that respondents have never asked the Forest Service to exclude others from the area. Should respondents or any other group seek to force the Government to protect their religious practices from the interference of private parties, such a demand would implicate not only the Free Exercise Clause, but the Establishment Clause as well. That case, however, is not before us, and cannot justify the Court's refusal to acknowledge that the injuries respondents will suffer as a result of the Government's proposed activities are sufficient to state a constitutional cause of action.

III

Today, the Court holds that a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause. Having thus stripped respondents and other Native Americans of any constitutional protection against perhaps the most serious threat to their age-old religious practices, and indeed to their entire way of life, the Court assures us that nothing in its decision "should be read to encourage governmental insensitivity to the religious needs of any citizen." I find it difficult, however, to imagine conduct more insensitive to religious needs than the Government's determination to build a marginally useful road in the face of uncontradicted evidence that the road will render the practice of respondents' religion impossible. I dissent.

G. The Free Exercise Clause Since 1990 and Statutory Substitutes

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

494 U.S. 872 (1990)

JUSTICE SCALIA delivered the opinion of the Court.

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

I

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

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

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

On remand, the Oregon Supreme Court held that respondents' religiously inspired use of peyote fell within the prohibition of the Oregon statute, which "makes no exception for the sacramental use" of the drug. It then considered whether that prohibition was valid under the Free Exercise Clause, and concluded that it was not. The court therefore reaffirmed its

previous ruling that the State could not deny unemployment benefits to respondents for having engaged in that practice. We again granted certiorari.

II

Respondents' claim for relief rests on our decisions in *Sherbert*, *Thomas*, and *Hobbie*, in which we held that a State could not condition 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. We held that distinction to be critical. Now that the Oregon Supreme Court has confirmed that Oregon does prohibit the religious use of peyote, we 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, that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.

Respondents 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.

We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Ed.* v. *Gobitis*: "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." We first had occasion to assert that principle in *Reynolds* v. *United States*. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the 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."

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Prince v. Massachusetts*, *Braunfeld v. Brown*, *Gillette v. United States*. Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion was *United States* v. *Lee*. There, we observed

that "The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut*, or the right of parents to direct the education of their children, see *Wisconsin* v. *Yoder*. Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *West Virginia Bd. of Education* v. *Barnette*. And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.

The present case does not present such a hybrid situation, 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* v. *Verner*. Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. Applying that test we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied, see *United States* v. *Lee*, 455 U.S. 252 (1982). In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all. *Bowen* v. *Roy*, *Lyng*, *Goldman* v. *Weinberger*, *O'Lone*.

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: "The statutory conditions [in *Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions." As the plurality pointed out in *Roy*, our decisions

in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.

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

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

Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. It is no more appropriate for judges to determine the "centrality" of religious beliefs in the free exercise field, than it would be for them to determine the "importance" of ideas in the free speech field. Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims."

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, many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind -- ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.

Values that are protected against government interference through enshrinement in the

Bill of Rights are not thereby banished from the political process. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of laws against the centrality of religious beliefs.

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

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

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

II

The Court today extracts from our long history of free exercise precedents the single categorical rule that "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." To reach this sweeping result, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.

A

The Free Exercise Clause commands that "Congress shall make no law . . . prohibiting the free exercise [of religion]." As the Court recognizes, the "free *exercise*" of religion often requires the performance of (or abstention from) certain acts. The Court today, however, interprets the Clause to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as that prohibition is generally applicable. But a law that prohibits certain conduct -- conduct that happens to be an act of worship for someone -- manifestly does prohibit that person's free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion, even if the law is generally applicable.

The Court responds that generally applicable laws are "one large step" removed from laws aimed at specific religious practices. The First Amendment, however, does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment

is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.

To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act 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, in cases such as *Cantwell* and *Yoder* we have in fact interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct. Indeed, in *Yoder* we expressly rejected the interpretation the Court now adopts:

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

The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them "hybrid" decisions, but 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 constitutional claims before us only after carefully weighing the competing interests. See *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 come before us.

B

Respondents invoke our traditional compelling interest test to argue that the Free Exercise Clause requires the State to grant them a limited exemption from its general criminal prohibition against the possession of peyote. The Court today, however, denies them even the opportunity to make that argument, concluding that "the sounder approach is to hold the [compelling interest] test inapplicable to" challenges to general criminal prohibitions.

In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws

that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it "results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution." I would have thought it beyond argument that such laws implicate free exercise concerns.

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

Legislatures, of course, have always been "left free to reach actions which were in violation of social duties or subversive of good order." Yet because of the close relationship between conduct and religious belief, "[i]n every case the power to regulate must be so exercised as not unduly to infringe the protected freedom." Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest," or represents "the least restrictive means of achieving some compelling state interest," To me, the sounder approach 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. Given the range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment *never* requires the State to grant a limited exemption for religiously motivated conduct.

Moreover, we have not "rejected" or "declined to apply" the compelling interest test in our recent cases. The cases cited by the Court signal no retreat from our consistent adherence to the compelling interest test. In both *Roy* and *Lyng*, for example, we expressly distinguished *Sherbert* on the ground that the "Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." This distinction makes sense because "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."

Similarly, the other cases cited by the Court for the proposition that we have rejected application of the *Sherbert* test outside the unemployment compensation field are distinguishable because they arose in the narrow, specialized contexts in which we have not traditionally required the government to justify a burden on religious conduct by articulating a compelling interest. See *Goldman*; *O'Lone*. That we did not apply the compelling interest test in these cases says nothing about whether the test should continue to apply in paradigm free exercise cases such as the one presented here.

The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result in a "constitutional anomaly," the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a "constitutional nor[m]," not an "anomaly." An individual's free exercise of religion is a preferred constitutional activity. 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. 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 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 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.

III

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

There is no dispute that Oregon's criminal prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion. Peyote is a sacrament of the Native American Church and is regarded as vital to respondents' ability to practice their religion. Under Oregon law, members of the Native American Church must choose between carrying out the ritual embodying their religious beliefs and avoidance of criminal prosecution. That choice is, in my view, more than sufficient to trigger First Amendment scrutiny.

There is also no dispute that Oregon has a significant interest in enforcing laws that control the possession and use of controlled substances by its citizens. As we recently noted, drug abuse is "one of the most serious problems confronting our society today." Respondents do not seriously dispute that Oregon has a compelling interest in prohibiting the possession of peyote by its citizens.

Thus, the critical question in this case is whether exempting respondents from the State's general criminal prohibition "will unduly interfere with fulfillment of the governmental interest." Although the question is close, I would conclude that uniform application of Oregon's criminal prohibition is "essential to accomplish" its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance. Oregon's criminal prohibition represents that State's judgment that the possession and use of controlled

substances, even by only one person, is inherently harmful and dangerous. Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them. Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon's stated interest in preventing any possession of peyote.

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

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

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

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

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

Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a "constitutional anomaly." The majority is able to arrive at this view only by mischaracterizing this Court's precedents. The Court discards leading cases such as *Cantwell* v. *Connecticut* and *Wisconsin* v. *Yoder* as "hybrid." The Court views traditional free exercise analysis as somehow inapplicable to criminal prohibitions and to state laws of general applicability. The Court cites cases in which, due to various exceptional circumstances, we found strict scrutiny inapposite, to hint that the Court has repudiated that standard altogether. In short, it effectuates a wholesale overturning of settled law concerning the Religion Clauses.

This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a "luxury" that a well-ordered society cannot afford, and that the repression of minority religions is an "unavoidable consequence of democratic government." I do not believe the Founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty -- and they could not

have thought religious intolerance "unavoidable," for they drafted the Religion Clauses precisely in order to avoid that intolerance.

In weighing the clear interest of respondents Smith and Black (hereinafter respondents) 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 "war on drugs," but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote.

The State's interest in enforcing its prohibition, in order to be sufficiently compelling, cannot be merely abstract or symbolic. The State cannot plausibly assert that unbending application of a criminal prohibition is essential to fulfill any compelling interest if it does not, in fact, attempt to enforce that prohibition. In this case, 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.

Similarly, this Court's prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded evidentiary support for a refusal to allow a religious exception. In this case, the State's justification for refusing to recognize an exception to its criminal laws for religious peyote use is entirely speculative. 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 factual findings of other courts cast doubt on the State's assumption that religious use of peyote is harmful. See *State* v. *Whittingham*, 19 Ariz. App. 27, 30 (1973).

The fact that peyote is classified as a Schedule I controlled substance does not, by itself, show that any and all uses of peyote, in any circumstance, are inherently harmful and dangerous. The Federal Government, which created the classifications of unlawful drugs from which Oregon's drug laws are derived, apparently does not find peyote so dangerous as to preclude an exemption for religious use.[1]

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs. The Native American Church's internal restrictions on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns.[2]

The State also seeks to support its refusal to make an exception for religious use of peyote

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[1] See 21 CFR § 1307.31 (1989) ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration."). Moreover, 23 States have statutory or judicially crafted exemptions in their drug laws for religious use of peyote.

[2] The use of peyote is, to some degree, self-limiting. The peyote plant is extremely bitter, and eating it is an unpleasant experience, which would tend to discourage recreational use.

by invoking its interest in abolishing drug trafficking. There is, however, practically no illegal traffic in peyote. Also, the availability of peyote for religious use, even if Oregon were to allow an exemption, would still be strictly controlled by federal regulations, and by the State of Texas, the only State in which peyote grows in significant quantities. Peyote simply is not a popular drug; its distribution for use in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country.

Finally, the State argues that granting an exception for religious peyote use would erode its interest in the uniform, fair, and certain enforcement of its drug laws. The State fears that, if it grants an exemption for religious peyote use, a flood of other claims to religious exemptions will follow. The State's apprehension is purely speculative. Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions.[3] Allowing an exemption for religious peyote use would not necessarily oblige the State to grant a similar exemption to other religious groups. Some religions, for example, might not restrict drug use to a limited ceremonial context. Some religious claims involve drugs in which there is significant illegal traffic. That the State might grant an exemption for religious peyote use, but deny other religious claims, would not violate the Establishment Clause. Though the State must treat all religions equally, and not favor one over another, this obligation is fulfilled by the uniform application of the "compelling interest" *test* to all free exercise claims, not by reaching uniform *results* as to all claims.

Although I agree with Justice O'Connor that courts should refrain from delving into questions 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 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.

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

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

CHURCH OF THE LUKUMI BABALU AYE, INC. v. CITY OF HIALEAH

508 U.S. 520 1993

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part II-A-2. THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join all but Part II-A-2 of this opinion. JUSTICE WHITE joins all but Part II-A of this opinion. JUSTICE SOUTER joins only Parts I, III, and IV of this opinion.

The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. Concerned that this fundamental nonpersecution principle of the First Amendment was implicated here, however, we granted certiorari.

Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs. We invalidate the challenged enactments.

I

A

This case involves practices of the Santeria religion, which originated in the 19th century. When hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting fusion is Santeria, "the way of the saints." The Cuban Yoruba express their devotion to spirits, called *orishas*, through the iconography of Catholic saints, Catholic symbols, and Catholic sacraments.

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. The sacrifice of animals as part of religious rituals has ancient roots. Animal sacrifice is mentioned throughout the Old Testament. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son.

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 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 religion was brought to this Nation most often by exiles from the Cuban revolution. The

District Court estimated that there are at least 50,000 practitioners in South Florida today.

B

Petitioner Church of the Lukumi Babalu Aye, Inc. (Church) and its congregants practice the Santeria religion. In April 1987, the Church leased land in the city of Hialeah, Florida, and announced plans to establish a house of worship as well as a school, cultural center, and museum. The Church began the process of obtaining utility service and receiving the necessary licensing, inspection, and zoning approvals. It received all needed approvals by early August 1987.

The prospect of a Santeria church in their midst was distressing to many members of the Hialeah community, and prompted the city council to hold an emergency public session on June 9, 1987. First, 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." Next, the council approved an emergency ordinance, Ordinance 87-40, which incorporated Florida's animal cruelty laws. Among other things, the incorporated state law subjected to criminal punishment "whoever . . . unnecessarily or cruelly . . . kills any animal."

The city council desired to undertake further legislative action, but Florida law prohibited a municipality from enacting legislation relating to animal cruelty that conflicted with state law. To obtain clarification, Hialeah's city attorney requested an opinion from the attorney general of Florida. The attorney general advised that religious animal sacrifice was against state law, so that a city ordinance prohibiting it would not be in conflict.

The city council responded at first with Resolution 87-90, that noted its residents' "great concern regarding the possibility of public ritualistic animal sacrifices." The resolution declared the city policy "to oppose the ritual sacrifices of animals" within Hialeah and announced that any person or organization practicing animal sacrifice "will be prosecuted."

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 establishment[s]" of animals "specifically raised for food purposes." Declaring, moreover, that the city council "has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community," the city council adopted Ordinance 87-71. That ordinance 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 of each of the four ordinances were punishable by fines not exceeding $ 500 or imprisonment not exceeding 60 days, or both.

II

The city does not argue that Santeria is not a "religion" within the First Amendment. Nor could it. Although animal sacrifice may seem abhorrent to some, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection." Given the historical association between animal sacrifice and religious worship, petitioners' assertion that animal sacrifice is an integral part of their religion "cannot be deemed bizarre or incredible." Neither the city nor the courts below have questioned the sincerity of petitioners' desire to conduct animal sacrifices for religious reasons.

In addressing the free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *Employment Div., Dept. of Human Resources of Ore.* v. *Smith.* Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. These ordinances fail to satisfy the *Smith* requirements.

A

Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the Free Exercise Clause is dispositive in our analysis. 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." These principles, though not often at issue in our Free Exercise Clause cases, have played a role in some. In *McDaniel* v. *Paty,* for example, we invalidated a state law that disqualified members of the clergy from holding certain public offices, because it "impose[d] special disabilities on the basis of . . . religious status." On the same principle, in *Fowler* v. *Rhode Island,* we found that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service.

1

Although a law targeting religious beliefs as such is never permissible, 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. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context. 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. The ordinances, furthermore, define "sacrifice" in secular terms, without referring to religious practices.

We reject the contention advanced by the city that our inquiry must end with the text of the laws at issue. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. 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. Resolution 87-66, adopted June 9, 1987, recited that "residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and "reiterate[d]" the city's commitment to prohibit "any and all [such] acts of any and all religious groups." No one suggests that city officials had in mind a religion other than Santeria.

It becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will not always lead to a finding of impermissible targeting. The subject at hand does implicate, of course, concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal. But the ordinances when considered together disclose an object remote from these legitimate concerns. The design of these laws accomplishes a "religious gerrymander," *Walz* v. *Tax Comm'n of New York City* (Harlan, J., concurring), an impermissible attempt to target petitioners and their religious practices.

Almost the only conduct subject to Ordinances 87-40, 87-52, and 87-71 is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result. Ordinance 87-71 prohibits the sacrifice of animals, but defines sacrifice as "to unnecessarily kill . . . an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." The definition 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. This feature of the law support[s] our conclusion that Santeria alone was the exclusive legislative concern. The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the *orishas*, not food consumption.

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." This prohibition applies if the animal is killed in "any type of ritual" and there is an intent to use the animal for food, whether or not it is in fact consumed for food. The ordinance exempts, however, "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. Again, the burden of the

ordinance, in practical terms, falls on Santeria adherents but almost no others: If the killing is -- unlike most Santeria sacrifices -- unaccompanied by the intent to use the animal for food, then it is not prohibited by Ordinance 87-52; if the killing is specifically for food but does not occur during the course of "any type of ritual," it again falls outside the prohibition; and if the killing is for food and occurs during the course of a ritual, it is still exempted if it occurs in a properly zoned and licensed establishment and involves animals "specifically raised for food purposes." A pattern of exemptions parallels the pattern of narrow prohibitions.

Ordinance 87-40 incorporates the Florida animal cruelty statute punishing "whoever . . . unnecessarily . . . kills any animal." The city claims this ordinance is the epitome of a neutral prohibition. The problem, however, is the interpretation given to the ordinance. Killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition. The city deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. Further, because it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct." As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." Respondent's application of the test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is singled out for discriminatory treatment.

We also find significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends. It is not unreasonable to infer that a law which visits "gratuitous restrictions" on religious conduct seeks to suppress the conduct because of its religious motivation.

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. If improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage. It did not do so. Indeed, 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. Thus, these broad ordinances prohibit Santeria sacrifice even when it does not threaten the city's interest in the public health.

Under similar analysis, narrower regulation would achieve the city's interest in preventing cruelty to animals. 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. The same is true for the city's interest in prohibiting cruel methods of killing. Under federal and Florida law and Ordinance 87-40, killing an animal by the "simultaneous and instantaneous severance of the carotid arteries with a sharp instrument" -- the method used in kosher slaughter -- is approved as humane. The District Court found that, though Santeria sacrifice also results in severance of the carotid arteries, the method used during sacrifice is less reliable and therefore not humane. If the city has a real concern that other methods are less humane, however, the subject of the regulation should be the method of slaughter itself,

not a religious classification that is said to bear some general relation to it.

2

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. Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body. These objective factors bear on the question of discriminatory object.

That the ordinances were enacted '"because of,' not merely 'in spite of,'" their suppression of Santeria religious practice is revealed by the events preceding their enactment. The minutes and taped excerpts of the June 9 session 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. When Councilman Martinez stated that in prerevolution Cuba "people were put in jail for practicing this religion," the audience applauded. Other statements by members of the city council were in a similar vein. The president of the city council asked: "What can we do to prevent the Church from opening?" Various Hialeah city officials made comparable comments. 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.

3

In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their 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 necessary to achieve legitimate ends. These ordinances are not neutral.

B

We turn next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability. The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause. In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.

Respondent claims that Ordinances 87-40, 87-52, and 87-71 advance two interests: protecting the public health and preventing cruelty to animals. The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express

provision. For example, fishing is legal. Extermination of mice and rats within a home is also permitted. Florida law incorporated by Ordinance 87-40 sanctions euthanasia of "stray, neglected, abandoned, or unwanted animals," destruction of animals judicially removed from their owners "for humanitarian reasons" or when the animal "is of no commercial value," the infliction of pain or suffering "in the interest of medical science," the placing of poison in one's yard or enclosure, and the use of a live animal "to pursue or take wildlife or to participate in any hunting," and "to hunt wild hogs."

The city concedes that "neither the State of Florida nor the City has enacted a generally applicable ban on the killing of animals." It asserts, however, that animal sacrifice is "different" from the animal killings that are permitted by law. According to the city, it is "self-evident" that killing animals for food is "important"; the eradication of insects and pests is "obviously justified"; and the euthanasia of excess animals "makes sense." These *ipse dixits* do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing cruel treatment of animals.

The ordinances are also underinclusive with regard to the city's interest in public health, which is threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat. Neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. The city does not prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity. Despite testimony that health hazards result from improper disposal by restaurants, restaurants are outside the scope of the ordinances. Improper disposal is a general problem that causes health risks, but which respondent addresses only when it results from religious exercise.

The ordinances are underinclusive as well with regard to the health risk posed by consumption of uninspected meat. Hunters may eat their kill and fishermen may eat their catch without undergoing inspection. Likewise, state law requires inspection of meat that is sold but exempts meat from animals raised for the use of the owner. The asserted interest in inspected meat is not pursued in contexts similar to that of religious animal sacrifice.

Ordinance 87-72, which prohibits the slaughter of animals outside of areas zoned for slaughterhouses, is underinclusive on its face. The ordinance includes an exemption for "any person, group, or organization" that "slaughters or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." Although the city has classified Santeria sacrifice as slaughter, subjecting it to this ordinance, it does not regulate other killings for food in like manner.

We conclude, in sum, that each of Hialeah's ordinances pursues the city's interests only against conduct motivated by religious belief. This precise evil is what the requirement of general applicability is designed to prevent.

III

A law burdening religious practice that is not neutral or not of general application must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows that these ordinances cannot withstand this scrutiny.

First, even were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests. As we have discussed, all four ordinances are overbroad or underinclusive in substantial respects. The proffered objectives are not pursued with respect to analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. The absence of narrow tailoring suffices to establish the invalidity of the ordinances.

Respondent has not demonstrated, moreover, that, in the context of these ordinances, its governmental interests are compelling. It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, concurring in part and concurring in the judgment.

The Court analyzes "neutrality" and "general applicability" in separate sections. If it were necessary to make a clear distinction between the two terms, I would draw a line somewhat different from the Court's. But I think it is not necessary, and would frankly acknowledge that the terms are not only "interrelated," but substantially overlap.

In my view, the defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (*e.g.*, a law excluding members of a certain sect from public benefits); whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment. But certainly a law that is not of general applicability (in the sense I have described) can be considered "nonneutral" and certainly no law that is nonneutral (in the relevant sense) can be thought to be of general applicability. Because I agree with most of the invalidating factors set forth in Part II of the Court's opinion, and because it seems to me a matter of no consequence under which rubric each invalidating factor is discussed, I join the judgment of the Court and all of its opinion except section 2 of Part II-A.

I do not join that section 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*. As I have noted elsewhere, it is virtually impossible to determine the singular "motive" of a legislative body. Perhaps there are contexts in which determination of legislative motive *must* be undertaken. But I do not think that is true of the First Amendment. The First Amendment does not put us in the business of invalidating laws by reason of the evil motives of their authors.

JUSTICE SOUTER, concurring in part and concurring in the judgment.

This case turns on a principle about which there is no disagreement, that the Free Exercise Clause bars government action aimed at suppressing religious belief or practice. The Court holds that Hialeah's animal-sacrifice laws violate that principle, and I concur in that holding without reservation.

Because prohibiting religious exercise is the object of the laws at hand, this case does not

present the more difficult issue addressed in our last free-exercise case, *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, which announced the rule that a "neutral, generally applicable" law does not run afoul of the Free Exercise Clause even when it prohibits religious exercise in effect. The Court today refers to that rule in dicta, and despite my general agreement with the Court's opinion I do not join Part II, where the dicta appear, for I have doubts about whether the *Smith* rule merits adherence. I write separately to explain why the *Smith* rule is not germane to this case and to express my view that, in a case presenting the issue, the Court should reexamine the rule *Smith* declared.

I

According to *Smith*, if prohibiting the exercise of religion results from enforcing a "neutral, generally applicable" law, the Free Exercise Clause has not been offended. I call this the *Smith* rule to distinguish it from the noncontroversial principle, also expressed in *Smith* though established long before, that the Free Exercise Clause is offended when prohibiting religious exercise results from a law that is not neutral or generally applicable. It is this noncontroversial principle, that the Free Exercise Clause requires neutrality and general applicability, that is at issue here. But before turning to the relationship of *Smith* to this case, it will help to get the terms in order, for the significance of the *Smith* rule is not only in its statement that the Free Exercise Clause requires no more than "neutrality" and "general applicability," but also in its adoption of a narrow conception of free-exercise neutrality.

While general applicability is, for the most part, self-explanatory, free-exercise neutrality is not self-revealing. A law that is religion neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids. A secular law, applicable to all, that prohibits consumption of alcohol, for example, will affect members of religions that require the use of wine differently from members of other religions and nonbelievers, disproportionately burdening the practice of, say, Catholicism or Judaism. Without an exemption for sacramental wine, Prohibition may fail the test of religion neutrality.[1]

It does not necessarily follow from that observation, of course, that the First Amendment requires an exemption from Prohibition; that depends on the meaning of neutrality as the Free Exercise Clause embraces it. The point here is the unremarkable one that our common notion of neutrality is broad enough to cover not merely what might be called formal neutrality, which as a free-exercise requirement would only bar laws with an object to discriminate against religion, but also what might be called substantive neutrality, which, in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws. If the Free Exercise Clause secures only protection against deliberate discrimination, a formal requirement will exhaust the Clause's neutrality command; if the Free Exercise Clause, rather, safeguards a

[1] Our cases make clear, to look at this from a different perspective, that an exemption for sacramental wine use would not deprive Prohibition of neutrality. Rather, "such an accommodation [would] 'reflect nothing more than the governmental obligation of neutrality in the face of religious differences.'"

right to engage in religious activity free from unnecessary governmental interference, the Clause requires substantive, as well as formal, neutrality.

Though *Smith* used the term "neutrality" without a modifier, the rule it announced plainly assumes that free-exercise neutrality is of the formal sort. Distinguishing between laws whose "object" is to prohibit religious exercise and those that prohibit religious exercise as an "incidental effect," *Smith* placed only the former within the reaches of the Free Exercise Clause. The four Justices who rejected the *Smith* rule, by contrast, read the Free Exercise Clause as embracing what I have termed substantive neutrality.

The proposition for which the *Smith* rule stands, that formal neutrality, along with general applicability, are sufficient conditions for constitutionality under the Free Exercise Clause is not at issue in this case. This case, rather, involves the noncontroversial principle repeated in *Smith*, that formal neutrality and general applicability are necessary conditions for constitutionality. In applying that principle the Court does not tread on troublesome ground.

II

In being so readily susceptible to resolution by applying the Free Exercise Clause's "fundamental nonpersecution principle," this is far from a representative free-exercise case. While, as the Court observes, the Hialeah City Council has provided a rare example of a law actually aimed at suppressing religious exercise, *Smith* was typical of our free-exercise cases, involving as it did a formally neutral, generally applicable law. The rule *Smith* announced, however, was decidedly untypical of the cases involving the same type of law. Because *Smith* left those prior cases standing, we are left with a free-exercise jurisprudence in tension with itself, a tension that may legitimately be addressed by reexamining the *Smith* rule in the next case that would turn upon its application.

In developing standards to judge the enforceability of formally neutral, generally applicable laws against the mandates of the Free Exercise Clause, the Court has addressed the concepts of neutrality and general applicability by indicating, in language hard to read as not foreclosing the *Smith* rule, that the Free Exercise Clause embraces more than mere formal neutrality, and that formal neutrality and general applicability are not sufficient conditions for free-exercise constitutionality: "In a variety of ways we have said that '[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.'" *Thomas*, 450 U.S. at 717 (quoting *Yoder*). Not long before the *Smith* decision, indeed, the Court specifically rejected the argument that "neutral and uniform" requirements for governmental benefits need satisfy only a reasonableness standard, in part because "such a test has no basis in precedent." *Hobbie v. Unemployment Appeals Comm'n of Florida*. Thus we have applied the same rigorous scrutiny to burdens on religious exercise resulting from the enforcement of formally neutral, generally applicable laws as we have applied to burdens caused by laws that single out religious exercise.

Though *Smith* sought to distinguish the free-exercise cases in which the Court mandated exemptions from secular laws of general application, I am not persuaded. *Yoder* and *Cantwell*, according to *Smith*, were not true free-exercise cases but "hybrid[s]" involving "the Free Exercise Clause in conjunction with other constitutional protections." Neither opinion,

however, leaves any doubt that "fundamental claims of religious freedom [were] at stake."[2] And the distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls hybrid cases to have mentioned the Free Exercise Clause at all.

Smith sought to confine the remaining free-exercise exemption victories, which involved unemployment compensation systems, as "stand[ing] 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." But prior to *Smith* the Court had already refused to accept that explanation of the unemployment compensation cases. *Smith* also distinguished the unemployment compensation cases on the ground that they did not involve "an across-the-board criminal prohibition." But even Chief Justice Burger's plurality opinion in *Bowen* v. *Roy*, on which *Smith* drew, would have applied its reasonableness test only to "denial of government benefits" and not to "governmental action or legislation that criminalizes religiously inspired activity"; to the latter category of governmental action, it would have applied the test employed in *Yoder*, which Chief Justice Burger's opinion treated as an ordinary free-exercise case.

Since holding in 1940 that the Free Exercise Clause applies to the States, the Court repeatedly has stated that the Clause sets strict limits on the government's power to burden religious exercise, whether it is a law's object to do so or its unanticipated effect. *Smith* responded to these statements by suggesting that the Court did not really mean what it said, detecting in recent opinions a lack of commitment to the compelling-interest test in the context of formally neutral laws. But even if the Court's commitment were that palid, it would argue only for moderating the test, not for eliminating scrutiny altogether. In any event, I would have trouble concluding that the Court has not meant what it has said in more than a dozen cases over several decades, particularly when it repeatedly applied the compelling-interest test to require exemptions. In sum, it seems to me difficult to escape the conclusion that, whatever *Smith's* virtues, they do not include a comfortable fit with settled law.

III

The extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our

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[2] *Yoder* mentioned the parental rights recognized in *Pierce* v. *Society of Sisters*. But *Yoder* did so only to distinguish *Pierce*. Where parents make a "free exercise claim," the Court said, the *Pierce* reasonableness test is inapplicable and the State's action must be measured by a stricter test. The Yoders raised only a free-exercise defense and certiorari was granted only on the free-exercise issue; and the Court plainly understood the case to involve "conduct protected by the Free Exercise Clause." As for *Cantwell*, the quote to which *Smith* refers occurs in a portion of the opinion that discusses an entirely different issue from the section of *Cantwell* that *Smith* cites as involving a "neutral, generally applicable law."

constitutional democracy of the individual to government and to God. "Neutral, generally applicable" laws, drafted as they are from the perspective of the nonadherent, have the unavoidable potential of putting the believer to a choice between God and government. Our cases now present competing answers to the question when government, while pursuing secular ends, may compel disobedience to what one believes religion commands. The case before us is rightly decided without resolving the existing tension, which remains for another day when it may be squarely faced.

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

I write separately to emphasize that the First Amendment's protection of religion extends beyond those rare occasions on which the government explicitly targets religion for disfavored treatment, as in this case. In my view, a statute that burdens the free exercise of religion "may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means." The Court, however, applies a different test. It applies the test announced in *Smith*. I continue to believe that *Smith* was wrongly decided, because it ignored the value of religious freedom as an individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle. Thus, while I agree with the result the Court reaches in this case, I arrive at that result by a different route.

When the State enacts legislation that intentionally or unintentionally places a burden upon religiously motivated practice, it must justify that burden by "showing that it is the least restrictive means of achieving some compelling state interest." When a law discriminates against religion as such, as do the ordinances in this case, it automatically will fail strict scrutiny under *Sherbert* v. *Verner*. This is true because a law that targets religious practice for disfavored treatment both burdens the free exercise of religion and, by definition, is not precisely tailored to a compelling governmental interest.

Thus, unlike the majority, I do not believe that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." In my view, regulation that targets religion in this way, *ipso facto*, fails strict scrutiny. It is for this reason that a statute that explicitly restricts religious practices violates the First Amendment. Otherwise, however, "the First Amendment does not distinguish between laws that are generally applicable and laws that target particular religious practices."

It is only in the rare case that a state or local legislature will enact a law directly burdening religious practice as such. Because respondent here does single out religion in this way, the present case is an easy one to decide. A harder case would be presented if petitioners were requesting an exemption from a generally applicable anticruelty law. This case does not present, and I therefore decline to reach, the question whether the Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment. The number of organizations that have filed *amicus* briefs on behalf of this interest, however, demonstrates that it is not a concern to be treated lightly.

LOCKE v. DAVEY

540 U.S. 712 (2004)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The State of Washington established the Promise Scholarship Program to assist academically gifted students with postsecondary education expenses. In accordance with the State Constitution, students may not use the scholarship at an institution where they are pursuing a degree in devotional theology. We hold that such an exclusion from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment.

The Washington State Legislature found that "[s]tudents who complete high school with high academic marks may not have the financial ability to attend college." In 1999, to assist these high-achieving students, the legislature created the Promise Scholarship Program. The scholarships are funded through the State's general fund. The scholarship was worth $1,125 for academic year 1999-2000 and $1,542 for 2000-2001.

To be eligible for the scholarship, a student must meet academic, income, and enrollment requirements. The student must enroll "at least half time in an eligible postsecondary institution in the state of Washington," and may not pursue a degree in theology at that institution while receiving the scholarship. Private institutions, including those religiously affiliated, qualify as "eligible postsecondary institution[s]" if they are accredited by a nationally recognized accrediting body. A "degree in theology" is not defined, but the statute simply codifies the State's constitutional prohibition on providing funds to pursue degrees that are "devotional in nature or designed to induce religious faith."

A student who applies for the scholarship and meets the academic and income requirements is notified that he is eligible if he meets the enrollment requirements. Once the student enrolls at an eligible institution, the institution must certify that the student is enrolled at least half time and that the student is not pursuing a degree in devotional theology. The institution, rather than the State, determines whether the student's major is devotional. If the student meets the enrollment requirements, the scholarship funds are sent to the institution for distribution to the student to pay for tuition or other educational expenses.

Respondent, Joshua Davey, was awarded a Promise Scholarship, and chose to attend Northwest College. Northwest is a private, Christian college affiliated with the Assemblies of God denomination, and is an eligible institution under the Promise Scholarship Program. Davey had "planned for many years to attend a Bible college and to prepare [himself] through that college training for a lifetime of ministry, specifically as a church pastor." To that end, when he enrolled in Northwest College, he decided to pursue a double major in pastoral ministries and business management/administration. There is no dispute that the pastoral ministries degree is devotional and therefore excluded under the Scholarship Program.

At the beginning of the 1999-2000 academic year, Davey learned for the first time that he could not use his scholarship to pursue a devotional theology degree. Davey then brought an action to enjoin the State from refusing to award the scholarship solely because a student is pursuing a devotional theology degree, and for damages.

The Religion Clauses of the First Amendment are frequently in tension. Yet we have long said that "there is room for play in the joints" between them. There are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.

This case involves that "play in the joints" described above. Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients. As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology. The question before us, however, is whether Washington, pursuant to its own constitution,[1] which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, can deny them such funding without violating the Free Exercise Clause.

Davey urges us to answer that question in the negative. He contends that under the rule we enunciated in *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, the program is presumptively unconstitutional because it is not facially neutral with respect to religion.[2] We reject his claim of presumptive unconstitutionality, however; to do otherwise would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning. In *Lukumi*, we found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any religious service or rite. And it does not require students to choose between their religious beliefs and receiving a government benefit.[3] The State has merely chosen not to fund a distinct category of instruction.

Justice Scalia argues, however, that generally available benefits are part of the "baseline against which burdens on religion are measured." Because the Promise Scholarship Program

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[1] The relevant provision of the Washington Constitution, Art. I, § 11, states:

"Religious Freedom. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."

[2] Davey contends that the Promise Scholarship Program is an unconstitutional viewpoint restriction on speech. But the Promise Scholarship Program is not a forum for speech. Our cases dealing with speech forums are simply inapplicable. Davey also argues that the Equal Protection Clause protects against discrimination on the basis of religion. Because we hold that the program is not a violation of the Free Exercise Clause, however, we apply rational-basis scrutiny to his equal protection claims. For the reasons stated herein, the program passes such review.

[3] Promise Scholars may still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology.

funds training for all secular professions, Justice Scalia contends the State must also fund training for religious professions. But training for religious professions and training for secular professions are not fungible. Training someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit. And the subject of religion is one in which both the United States and state constitutions embody distinct views--in favor of free exercise, but opposed to establishment--that find no counterpart with respect to other callings or professions. That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.

Even though the Washington Constitution draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel. In fact, we can think of few areas in which a State's antiestablishment interests come more into play. Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an "established" religion.

Most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry. *E.g.*, Ga. Const., Art. IV, § 5 (1789) ("All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own"); Pa. Const., Art. II (1776) ("[N]o man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent"). The plain text of these constitutional provisions prohibited *any* tax dollars from supporting the clergy. We have found nothing to indicate, as Justice Scalia contends, that these provisions would not have applied so long as the State equally supported other professions or if the amount at stake was *de minimis.* That early state constitutions saw no problem in explicitly excluding *only* the ministry from receiving state dollars reinforces our conclusion that religious instruction is of a different ilk.

Far from evincing the hostility toward religion which was manifest in *Lukumi*, we believe that the Promise Scholarship Program goes a long way toward including religion in its benefits. The program permits students to attend pervasively religious schools, so long as they are accredited. And under the Promise Scholarship Program's current guidelines, students are still eligible to take devotional theology courses.[4] Davey notes all students at Northwest are required to take at least four devotional courses, and some students may have additional religious requirements as part of their majors.

In short, we find neither in the history or text of Article I, § 11 of the Washington Constitution, nor in the operation of the Promise Scholarship Program, anything that suggests animus towards religion. Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.

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[4] The State notes that it is an open question as to whether the Washington Constitution prohibits nontheology majors from taking devotional theology courses. At this point, however, the Program guidelines only exclude students who are pursuing a theology degree.

Without a presumption of unconstitutionality, Davey's claim must fail. The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here. We need not venture further into this difficult area in order to uphold the Promise Scholarship Program.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

In *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, the majority opinion held that "[a] law burdening religious practice that is not neutral must undergo the most rigorous of scrutiny," and that "the minimum requirement of neutrality is that a law not discriminate on its face." The concurrence of two Justices stated that "[w]hen a law discriminates against religion as such, it automatically will fail strict scrutiny." These opinions are irreconcilable with today's decision, which sustains a public benefits program that facially discriminates against religion.

I

We articulated the principle that governs this case more than 50 years ago in *Everson* v. *Board of Ed. of Ewing*, 330 U.S. 1 (1947):

> New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.

When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.

That is precisely what the State of Washington has done here. It has created a generally available public benefit, whose receipt is conditioned only on academic performance, income, and attendance at an accredited school. It has then carved out a solitary course of study for exclusion: theology. No field of study but religion is singled out for disfavor in this fashion. Davey is not asking for a special benefit to which others are not entitled. He seeks only *equal* treatment--the right to direct his scholarship to his chosen course of study, a right every other Promise Scholar enjoys.

The Court does not dispute that the Free Exercise Clause places some constraints on public benefits programs, but finds none here, based on a principle of "'play in the joints.'" I use the term "principle" loosely, for that is not so much a legal principle as a refusal to apply *any* principle when faced with competing constitutional directives. Even if "play in the joints" were a valid legal principle, surely it would apply only when it was a close call whether complying with one of the Religion Clauses would violate the other. But that is not the case here. It is not just that "the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology." The establishment question *would not even be close*, as is evident from the fact that this Court's decision in *Witters* v.

Washington Dept. of Servs. for Blind, 474 U.S. 481 (1986), was unanimous.

In any case, the State already has all the play in the joints it needs. There are any number of ways it could respect both its unusually sensitive concern for the conscience of its taxpayers *and* the Free Exercise Clause. It could make the scholarships redeemable only at public universities or only for select courses of study. Either option would replace a program that facially discriminates against religion with one that just happens not to subsidize it. The State could also simply abandon the scholarship program altogether. If that seems a dear price to pay for freedom of conscience, it is only because the State has defined that freedom so broadly that it would be offended by a program with an incidental, indirect religious effect.

What is the nature of the State's interest here? It cannot be protecting the pocketbooks of its citizens; given the tiny fraction of Promise Scholars who would pursue theology degrees. It cannot be preventing mistaken appearance of endorsement; where a State merely declines to penalize students for selecting a religious major, "[n]o reasonable observer is likely to draw an inference that the State itself is endorsing a religious practice or belief." Nor can Washington's exclusion be defended as a means of assuring that the State will neither favor nor disfavor Davey in his religious calling. Davey will throughout his life contribute to the public fisc through sales taxes on personal purchases, property taxes on his home, and so on; and nothing in the Court's opinion turns on whether Davey winds up a net winner or loser in the State's tax-and-spend scheme.

No, the interest to which the Court defers is not fear of a conceivable Establishment Clause violation, budget constraints, avoidance of endorsement, or substantive neutrality – none of these. It is a pure philosophical preference: the State's opinion that it would violate taxpayers' freedom of conscience *not* to discriminate against candidates for the ministry. This sort of protection of "freedom of conscience" has no logical limit and can justify the singling out of religion for exclusion from public programs in virtually any context. The Court never says whether it deems this interest compelling (the opinion is devoid of any mention of standard of review) but, self-evidently, it is not.[1]

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[1] The Court argues that those pursuing theology majors are not comparable to other Promise Scholars because "training for religious professions and training for secular professions are not fungible." That may well be, but all it proves is that the State has a *rational basis* for treating religion differently. If that is all the Court requires, its holding is contrary not only to precedent, but to common sense. If religious discrimination required only a rational basis, the Free Exercise Clause would impose no constraints other than those the Constitution already imposes on all government action. The question is not whether theology majors are different, but whether the differences are substantial enough to justify a discriminatory financial penalty that the State inflicts on no other major. Plainly they are not.

Equally unpersuasive is the Court's argument that the State may discriminate against theology majors in distributing public benefits because the Establishment Clause and its state counterparts are themselves discriminatory. The Court's premise is true at some level of abstraction – the Establishment Clause discriminates against religion by singling it out as the one thing a State may not establish. All this proves is that a State has a compelling interest in not committing

II

The Court identifies two features thought to render its discrimination less offensive. The first is the lightness of Davey's burden. The Court offers no authority for approving facial discrimination against religion simply because its material consequences are not severe. The indignity of being singled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial.

Even if there were some threshold quantum-of-harm requirement, surely Davey has satisfied it. The State exacts a financial penalty of almost $3,000 for religious exercise. The Court's only response is that "Promise Scholars may still use their scholarship to pursue a secular degree at a different institution from where they are studying devotional theology." But part of what makes a Promise Scholarship attractive is that the recipient can apply it to his *preferred* course of study at his *preferred* accredited institution. The Court distinguishes our precedents only by swapping the benefit to which Davey was actually entitled with another, less valuable one. On such reasoning, any facially discriminatory benefits program can be redeemed simply by redefining what it guarantees.

The other reason the Court thinks this particular facial discrimination less offensive is that the scholarship program was not motivated by animus toward religion. The Court does not explain why the legislature's motive matters, and I fail to see why it should.

It may be that Washington's original purpose in excluding the clergy from public benefits was benign, and the same might be true of its purpose in maintaining the exclusion today. But those singled out for disfavor can be forgiven for suspecting more invidious forces at work. Let there be no doubt: This case is about discrimination against a religious minority. The State's policy poses no obstacle to practitioners of only a tepid, civic version of faith. Those the statutory exclusion actually affects – those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry – are a far narrower set. One need not delve too far into modern popular culture to perceive a trendy disdain for deep religious conviction. In an era when the Court is so quick to come to the aid of other disfavored groups, see, *e.g.*, *Romer* v. *Evans*, its indifference in this case, which involves a form of discrimination to which the Constitution actually speaks, is exceptional.

Today's holding is limited to training the clergy, but its logic is readily extendible, and there are plenty of directions to go. What next? Will we deny priests and nuns their prescription-drug benefits? When the public's freedom of conscience is invoked to justify denial of equal treatment, benevolent motives shade into indifference and ultimately into repression. Having accepted the justification in this case, the Court is less well equipped to fend it off in the future.

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actual Establishment Clause violations. We have never inferred from this principle that a State has a constitutionally sufficient interest in discriminating against religion in whatever other context it pleases, so long as it claims some connection to establishment concerns.

Statutory relief from the *Smith* ruling: The position taken by the majority of the Supreme Court in *Smith* was criticized by many. In order to overturn the effect of the decision, Congress enacted statutory protection for religious freedom.

Religious Freedom Restoration Act of 1993 (RFRA)

SEC. 1. SHORT TITLE.

This Act may be cited as the 'Religious Freedom Restoration Act of 1993'.

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) Findings: The Congress finds that--

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

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

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

(4) in Employment Division v. Smith, 494 U.S. 872 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

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

(b) Purposes: The purposes of this Act are--

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

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

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) In General: 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).

(b) Exception: 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.

(c) Judicial Relief: A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under

this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

. . . .

SEC. 5. DEFINITIONS.

As used in this Act --

(1) the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term 'exercise of religion' means the exercise of religion under the First Amendment to the Constitution.

SEC. 6. APPLICABILITY.

(a) In General.--This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act .

(b) Rule of Construction.--Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act .

(c) Religious Belief Unaffected.--Nothing in this Act shall be construed to authorize any government to burden any religious belief.

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the 'Establishment Clause'). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term 'granting', used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Note: In 1997, the Supreme Court considered the constitutionality of RFRA as applied to the states. In *City of Boerne v. Flores*, the Court struck the statute down as beyond the power of Congress under Section 5 of the Fourteenth Amendment. RFRA continues to apply to the actions of the federal government.

CITY OF BOERNE v. FLORES

521 U.S. 507 (1997)

JUSTICE KENNEDY delivered the opinion of the Court. JUSTICE SCALIA joins all but Part III-A-1 of this opinion.

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

II

Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). RFRA prohibits "government" from "substantially burdening" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

III

A

Congress relied on its Fourteenth Amendment enforcement power in enacting the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the States. The parties disagree over whether RFRA is a proper exercise of Congress' § 5 power "to enforce" by "appropriate legislation" the constitutional guarantee that no State shall deprive any person of "life, liberty, or property, without due process of law" nor deny any person "equal protection of the laws."

All must acknowledge that § 5 is "a positive grant of legislative power" to Congress. Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into "legislative spheres previously reserved to the States."

It is also true, however, that "as broad as the congressional enforcement power is, it is not unlimited." Congress' power extends only to "enforcing" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial." Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.

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

If Congress could define its own powers by altering the Fourteenth Amendment's

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

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

B

Respondent contends that RFRA is a proper exercise of Congress' remedial or preventive power. The Act, it is said, is a reasonable means of protecting the free exercise of religion as defined by *Smith*. It prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices. To avoid the difficulty of proving such violations, it is said, Congress can simply invalidate any law which imposes a substantial burden on a religious practice unless it is justified by a compelling interest and is the least restrictive means of accomplishing that interest.

The appropriateness of remedial measures must be considered in light of the evil presented. RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. The absence of more recent episodes stems from the fact that, as one witness testified, "deliberate persecution is not the usual problem in this country." Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion. This lack of support in the legislative record, however, is not RFRA's most serious shortcoming.

Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.

RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. RFRA has no termination date or mechanism.

The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test

known to constitutional law. Laws valid under *Smith* would fall under RFRA. We make these observations not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA.

The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs. In addition, the Act imposes in every case a least restrictive means requirement--a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify--which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations.

Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch. RFRA was designed to control cases and controversies, but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.

JUSTICE STEVENS, concurring.

In my opinion, RFRA is a "law respecting an establishment of religion" that violates the First Amendment. If the historic landmark in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.

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

I write to respond briefly to the claim of JUSTICE O'CONNOR's dissent that historical materials support a result contrary to the one reached in *Smith*. The 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.

JUSTICE O'CONNOR, with whom JUSTICE BREYER joins except as to a portion of Part I, dissenting.

I dissent from the Court's disposition of this case. I agree with the Court that the issue before us is whether RFRA is a proper exercise of Congress' power to enforce § 5 of the Fourteenth Amendment. But as a yardstick for measuring the constitutionality of RFRA, the Court uses its holding in *Smith*, the decision that prompted Congress to enact RFRA. I remain of the view that *Smith* was wrongly decided, and I would use this case to reexamine the Court's holding there. Therefore, I would direct the parties to brief the question whether *Smith* represents the correct understanding of the Free Exercise Clause and set the case for reargument. If the Court were to correct the misinterpretation of the Free Exercise Clause set forth in *Smith*, we would then be in a position to review RFRA in light of a proper interpretation of the Free Exercise Clause.

I

The Court's analysis of whether RFRA is a constitutional exercise of Congress' § 5 power is premised on the assumption that *Smith* correctly interprets the Free Exercise Clause. This is an assumption that I do not accept. I continue to believe that *Smith* adopted an improper standard for deciding free exercise claims. Contrary to the Court's holding in that case, the Free Exercise Clause is not simply an antidiscrimination principle that protects only against those laws that single out religious practice for unfavorable treatment. Rather, the Clause is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law. Before *Smith*, our free exercise cases were generally in keeping with this idea: where a law substantially burdened religiously motivated conduct--regardless whether it was specifically targeted at religion or applied generally--we required government to justify that law with a compelling state interest and to use means narrowly tailored to achieve that interest.

II

I shall not restate what has been said in other opinions, which have demonstrated that *Smith* is gravely at odds with our earlier free exercise precedents. Rather, I examine here the early American tradition of religious free exercise to gain insight into the original understanding of the Free Exercise Clause--an inquiry the Court in *Smith* did not undertake.

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

Neither the First Congress nor the ratifying state legislatures debated the question of religious freedom in much detail, nor did they directly consider the scope of the First Amendment's free exercise protection. But a variety of sources supplement the legislative history and shed light on the original understanding of the Free Exercise Clause. These materials suggest that--contrary to *Smith*--the Framers did not intend simply to prevent the Government from adopting laws that discriminated against religion. The historical record indicates that they believed that the Constitution affirmatively protects religious free exercise

and that it limits the government's ability to intrude on religious practice.

The principle of religious "free exercise" and the notion that religious liberty deserved legal protection were by no means new concepts in 1791, when the Bill of Rights was ratified. The term "free exercise" appeared in an American legal document as early as 1648, when Lord Baltimore extracted from the new Protestant governor of Maryland and his councilors a promise not to disturb Christians, particularly Roman Catholics, in the "free exercise" of their religion. Soon after, in 1649, the Maryland Assembly enacted the first free exercise clause by passing the Act Concerning Religion. Rhode Island's Charter of 1663 used the analogous term "liberty of conscience." Various agreements between prospective settlers and the proprietors of Carolina, New York, and New Jersey similarly guaranteed religious freedom. These documents suggest that, early in our country's history, several colonies acknowledged that freedom to pursue one's chosen religious beliefs was an essential liberty. Moreover, these colonies appeared to recognize that government should interfere in religious matters only when necessary. In other words, when religious beliefs conflicted with civil law, religion prevailed unless important state interests militated otherwise. Such notions parallel the ideas expressed in our pre-*Smith* cases--that government may not hinder believers from freely exercising their religion, unless necessary to further a significant state interest.

The principles expounded in these early charters re-emerged over a century later in state constitutions that were adopted in the flurry of constitution-drafting that followed the American Revolution. By 1789, every State but Connecticut had incorporated some version of a free exercise clause into its constitution. These state provisions, which were typically longer and more detailed than the federal Free Exercise Clause, are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty. The precise language of these state precursors to the Free Exercise Clause varied, but most guaranteed free exercise of religion or liberty of conscience, limited by particular, defined state interests.

The practice of the colonies and early States bears out the conclusion that, at the time the Bill of Rights was ratified, it was accepted that government should, when possible, accommodate religious practice. Unsurprisingly, of course, religious conscience and civil law rarely conflicted. Most 17th and 18th century Americans belonged to denominations of Protestant Christianity whose religious practices were generally harmonious with colonial law. Moreover, governments then were far smaller and less intrusive than they are today, which made conflict between civil law and religion unusual.

Nevertheless, tension between religious conscience and generally applicable laws, though rare, was not unknown in pre-Constitutional America. Most commonly, such conflicts arose from oath requirements, military conscription, and religious assessments. The ways in which these conflicts were resolved suggest that Americans in the colonies and early States thought that, if an individual's religious scruples prevented him from complying with a generally applicable law, the government should, if possible, excuse the person from the law's coverage. It is reasonable to presume that the drafters and ratifiers of the First Amendment assumed courts would apply the Free Exercise Clause similarly.

III

The Religion Clauses of the Constitution represent a profound commitment to religious

liberty. Our Nation's Founders conceived of a Republic receptive to voluntary religious expression, not of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law. Certainly, it is in no way anomalous to accord heightened protection to a right identified in the text of the First Amendment. Although it may provide a bright line, the rule the Court declared in *Smith* does not faithfully serve the purpose of the Constitution. Accordingly, I believe that it is essential for the Court to reconsider its holding in *Smith*--and to do so in this very case. I would therefore direct the parties to brief this issue and set the case for reargument.

JUSTICE SOUTER, dissenting.

To decide whether the Fourteenth Amendment gives Congress sufficient power to enact the Religious Freedom Restoration Act, the Court measures the legislation against the free-exercise standard of *Smith*. I have serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence. But without briefing and argument on the merits of that rule, I am not now prepared to join JUSTICE O'CONNOR in rejecting it or the majority in assuming it to be correct. In order to provide full adversarial consideration, this case should be set down for reargument permitting plenary reexamination of the issue.

JUSTICE BREYER, dissenting.

I agree with JUSTICE O'CONNOR that the Court should direct the parties to brief the question whether *Smith* was correctly decided, and set this case for reargument. I do not, however, find it necessary to consider the question whether, assuming *Smith* is correct, § 5 of the Fourteenth Amendment would authorize Congress to enact the legislation before us.

Congress Responds to City of Boerne v. Flores: After the Supreme Court decision in *City of Boerne*, Congress passed a new statute utilizing its Commerce and Spending Clause powers to restore some of the protections of religious freedom against state interference that were eliminated when the Court invalidated RFRA as applied to the states.

RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT of 2000 (RLUIPA)

42 U.S.C. § 2000cc. Protection of land use as religious exercise

(a) Substantial burdens.

(1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application. This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal

financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) 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.

(b) Discrimination and exclusion.

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits. No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

§ 2000cc-1. Protection of religious exercise of institutionalized persons

(a) General rule. No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application. This section applies in any case in which--

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

§ 2000cc-2. Judicial relief

(a) Cause of action. A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) Burden of persuasion. If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2 [42 U.S.C. § 2000cc], the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit. Adjudication of a claim of a violation of section 2 [42 U.S.C. § 2000cc] in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) [Omitted]

(e) Prisoners. Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this Act. The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation. If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

§ 2000cc-3. Rules of construction

(a) Religious belief unaffected. Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated. Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected. Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected. Nothing in this Act shall–

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) Governmental discretion in alleviating burdens on religious exercise. A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law. With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) Broad construction. This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) No preemption or repeal. Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

(i) Severability. If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

§ 2000cc-4. Establishment Clause unaffected

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment to the Constitution prohibiting laws respecting an establishment of religion. Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

§ 2000cc-5. Definitions

In this Act:

(1) Claimant. The term "claimant" means a person raising a claim or defense under this Act.

(2) Demonstrates. The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause. The term "Free Exercise Clause" means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government. The term "government"--

(A) means--

(i) a State, county, municipality, or other governmental entity created under the authority of a State; (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and (iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5 [42 USCS §§ 2000cc-2(b) and 2000cc-3], includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation. The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity. The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964.

(7) Religious exercise.

(A) In general. The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule. The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

CUTTER v. WILKINSON

544 U.S. 709 (2005)

GINSBURG, J., delivered the opinion for a unanimous Court.

Petitioners are current and former inmates of institutions operated by the Ohio Department of Rehabilitation and Correction and assert that they are adherents of "nonmainstream" religions: the Satanist, Wicca, and Asatru religions, and the Church of Jesus Christ Christian. They complain that prison officials, in violation of RLUIPA, have failed to accommodate their religious exercise "in a variety of ways, including denying them access to religious literature, denying them the same opportunities for group worship that are granted to adherents of mainstream religions, forbidding them to adhere to the dress and appearance mandates of their religions, withholding religious ceremonial items that are substantially identical to those that the adherents of mainstream religions are permitted, and failing to

provide a chaplain trained in their faith." In response to petitioners' complaints, respondent prison officials have mounted a facial challenge to the institutionalized-persons provision of RLUIPA; respondents contend that the Act improperly advances religion in violation of the Establishment Clause.

"This Court has long recognized that the government may accommodate religious practices without violating the Establishment Clause." Just last Term, in *Locke* v. *Davey*, the Court reaffirmed that "there is room for play in the joints between" the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause. "At some point, accommodation may devolve into 'an unlawful fostering of religion.'" But § 3 of RLUIPA, we hold, does not, on its face, exceed the limits of permissible government accommodation.

I

RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens. Ten years before RLUIPA's enactment, the Court held, in *Employment Div.* v. *Smith*, that the Free Exercise Clause does not inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct. Responding to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA). RFRA "prohibits 'government' from 'substantially burdening' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" RFRA "applied to all Federal and State law," but notably lacked a Commerce Clause underpinning or a Spending Clause limitation to recipients of federal funds. In *City of Boerne*, this Court invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment.

Congress again responded, this time by enacting RLUIPA. Less sweeping than RFRA, and invoking federal authority under the Spending and Commerce Clauses, RLUIPA targets two areas: Section 2 of the Act concerns land-use regulation; § 3 relates to religious exercise by institutionalized persons. Section 3, at issue here, provides that "no [state or local] government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government shows that the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." The Act defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Section 3 applies when "the substantial burden [on religious exercise] is imposed in a program or activity that receives Federal financial assistance," or "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." "A person may assert a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."

Before enacting § 3, Congress documented that "frivolous or arbitrary" barriers impeded

institutionalized persons' religious exercise.[1] To secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA the "compelling governmental interest"/"least restrictive means" standard. Lawmakers anticipated, however, that courts entertaining complaints under § 3 would accord "due deference to the experience and expertise of prison and jail administrators."

We granted certiorari to resolve the question whether RLUIPA's institutionalized-persons provision is consistent with the Establishment Clause.[2]

II

A

Our decisions recognize that "there is room for play in the joints" between the Religion Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause. We hold that § 3 of RLUIPA fits within the corridor between the Religion Clauses: On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.

Foremost, we find RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise. See *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U.S. 687 (1994). Furthermore, the Act on its face does not founder on shoals our prior decisions have identified: Properly applying RLUIPA, courts must take adequate account of the burdens

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[1] The hearings held by Congress revealed, for a typical example, that "[a] state prison in Ohio refused to provide Moslems with Hallal food, even though it provided Kosher food." Across the country, Jewish inmates complained that prison officials refused to provide sack lunches, which would enable inmates to break their fasts after nightfall. The "Michigan Department of Corrections prohibited the lighting of Chanukah candles at all state prisons" even though "smoking" and "votive candles" were permitted. A priest responsible for communications between Roman Catholic dioceses and corrections facilities in Oklahoma stated that there "was [a] nearly yearly battle over the Catholic use of Sacramental Wine for the celebration of the Mass," and that prisoners' religious possessions, "such as the Bible, the Koran, the Talmud or items needed by Native Americans[,] were frequently treated with contempt and were confiscated, damaged or discarded" by prison officials.

[2] Respondents argued below that RLUIPA exceeds Congress' legislative powers under the Spending and Commerce Clauses and violates the Tenth Amendment. The District Court rejected respondents' challenges under the Spending Clause and the Tenth Amendment, and declined to reach the Commerce Clause question. The Sixth Circuit, having determined that RLUIPA violates the Establishment Clause, did not rule on respondents' further arguments. Respondents renew those arguments in this Court. They also augment their federalism-based or residual-powers contentions by asserting that, in the space between the Free Exercise and Establishment Clauses, the States' choices are not subject to congressional oversight. Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.

a requested accommodation may impose on nonbeneficiaries, see *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985); and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths.

"The 'exercise of religion' often involves not only belief and profession but the performance of . . . physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine . . . ." Section 3 covers state-run institutions -- mental hospitals, prisons, and the like -- in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise. RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion.[3]

We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests. In *Caldor,* the Court struck down a Connecticut law that "armed Sabbath observers with an absolute and unqualified right not to work on whatever day they designated as their Sabbath." We held the law invalid under the Establishment Clause because it "unyieldingly weighted" the interests of Sabbatarians "over all other interests."

We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns. While the Act adopts a "compelling governmental interest" standard, "context matters" in the application of that standard. Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. They anticipated that courts would apply the Act's standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources."

Finally, RLUIPA does not differentiate among bona fide faiths. In *Kiryas Joel,* we held that the law violated the Establishment Clause in part because it "singled out a particular religious sect for special treatment." RLUIPA presents no such defect. It confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous

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[3] Respondents argue that RLUIPA goes beyond permissible reduction of impediments to free exercise. The Act, they project, advances religion by encouraging prisoners to "get religion," and thereby gain accommodations afforded under RLUIPA. While some accommodations of religious observance, notably the opportunity to assemble in worship services, might attract joiners seeking a break in their closely guarded day, we doubt that all accommodations would be perceived as "benefits." For example, congressional hearings on RLUIPA revealed that one state corrections system served as its kosher diet "a fruit, a vegetable, a granola bar, and a liquid nutritional supplement -- each and every meal." The argument, in any event, founders on the fact that Ohio already facilitates religious services for mainstream faiths. The State provides chaplains, allows inmates to possess religious items, and permits assembly for worship.

treatment.

B

The Sixth Circuit misread our precedents to require invalidation of RLUIPA as "impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights." Our decision in *Amos* counsels otherwise. Religious accommodations, we held, need not "come packaged with benefits to secular entities."

Were the Court of Appeals' view the correct reading of our decisions, all manner of religious accommodations would fall. Congressional permission for members of the military to wear religious apparel while in uniform would fail, as would accommodations Ohio itself makes. Ohio could not, as it now does, accommodate "traditionally recognized" religions: The State provides inmates with chaplains "but not with publicists or political consultants," and allows "prisoners to assemble for worship, but not for political rallies."

In upholding RLUIPA's institutionalized-persons provision, we emphasize that respondents "have raised a facial challenge to [the Act's] constitutionality, and have not contended that under the facts of any of [petitioners'] specific cases . . . [that] applying RLUIPA would produce unconstitutional results." The District Court, noting the underdeveloped state of the record, concluded: A finding "that it is *factually impossible* to provide the kind of accommodations that RLUIPA will require without significantly compromising prison security or the levels of service provided to other inmates" cannot be made at this juncture. We agree.

"For more than a decade, the federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners." The Congress that enacted RLUIPA was aware of the Bureau's experience. We see no reason to anticipate that abusive prisoner litigation will overburden the operations of state and local institutions.

Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order.