University of St. Thomas Law Journal

Volume 14
Issue 3 *Presidential Executive Power Under the Constitution: Uses, Abuses, and Prospects for the Future*

Article 6

2018

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Bluebook Citation

Vincent Martin Bonventre, *Religious Liberty: Fundamental Right or Nuisance*, 14 U. St. Thomas L.J. 650 (2018).

ARTICLE

RELIGIOUS LIBERTY: FUNDAMENTAL RIGHT OR NUISANCE

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I. INTRODUCTION

Is free exercise of religion a fundamental right or simply a nuisance? The fact of the matter is that it is both. Indeed, all of the fundamental rights, including the freedom of speech, freedom of association, freedom of the press, right to counsel, right to a jury trial, and privilege against compulsory self-incrimination, are nuisances in the sense that they require resources and interfere with the efficiency of government. These fundamental rights impede societal goals and require us to confront complications that we would often prefer to avoid. Moreover, the current climate of increasingly hostile and superficial public discourse has underscored the difficulties in resolving questions involving the protection of fundamental rights, including the collision of religious liberty and important competing values.

II. THE FIRST AMENDMENT

The First Amendment of the United States Constitution begins with, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[1] The significance of this provision is exceptionally clear.[2] It was not buried deep in the Constitution where it would be difficult to find. This dual protection of religious liberty is the very first provision in the Bill of Rights[3]—the very first guarantee enumerated in the very first amendment made to the Constitution.

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1. U.S. CONST. amend. I.
2. *See id.*
3. *See id.*

Thomas Jefferson and James Madison are widely credited with developing the foundation for First Amendment religious freedom.[4] Thomas Jefferson, while Governor of the State of Virginia, drafted the Bill for the Establishment of Religious Freedom in 1777.[5] Jefferson's bill was passed into law several years later largely through the efforts of James Madison who navigated it through the state legislature, turning Bill No. 82 into the Virginia Statute for Religious Freedom.[6] This statute expressed Jefferson's belief that there should be a separation of church and state to allow each man the freedom to choose his religious beliefs.[7] The Virginia Statute for Religious Freedoms stated that "no man shall be compelled to frequent or support any religious worship whatsoever, nor be enforced, restrained, molested or burdened, nor otherwise suffer on accounts of his religious opinions or beliefs."[8] Under this statute, Virginia no longer required the support of the Anglican Church, nor restricted the practice of other religions.[9] James Madison, in addition to drafting the Bill of Rights, Constitution, and many of the Federalist Papers, authored the Memorial and Remonstrance against Religious Assessments in 1785 to further support the concept of religious liberty set forth by Jefferson in the Virginia Statute for Religious Freedom.[10] This support is evident in the document's language: "[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him."[11] The "duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[12]

The work of the founders, especially Thomas Jefferson and James Madison, has helped save this country from much of the religious strife that most of mankind has confronted. Without their efforts in Virginia, our

4. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 162–164 (1878); Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947); *see also* Donald L. Drakeman, *Religion and the Republic: James Madison and the First Amendment*, 25 J. CHURCH & ST. 427, 427 (1983). *See generally* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND THE STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986).

5. *Virginia Statute for Religious Freedom*, THE JEFFERSON MONTICELLO, https://www.monticello.org/site/research-and-collections/virginia-statute-religious-freedom (last visited Apr. 9, 2018).

6. *Id.* Jefferson considered the Virginia Statute for Establishing Religious Freedom to be one of his proudest accomplishments and one of a list of only three for which he wanted to be remembered. His self-written epitaph, engraved on his tombstone at Monticello, Virginia, identifies him as the author of that statute, author of the Declaration of Independence, and the Father of the University of Virginia. DUMAS MALONE, THE SAGE OF MONTICELLO 499 (1981).

7. *Thomas Jefferson and the Virginia Statute for Religious Freedom*, VA. MUSEUM OF HIST. & CULTURE, http://www.vahistorical.org/collections-and-resources/virginia-history-explorer/thomas-jefferson (last visited Apr. 9, 2018).

8. *Id.*

9. *See id.*

10. James Madison, *Memorial and Remonstrance Against Religious Assessments*, U. CHI. PRESS (2000), http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html (last visited Apr. 9, 2018).

11. *Id.*

12. *Id.*

newly-formed country might well have perpetuated the cycle of religious tribalism and violence that has characterized much of the history of mankind.[13] They saved us from the continuous religious wars that had plagued the previous generations.[14]

This was not a feat that could be accomplished by only one of the founding fathers, regardless of how extraordinary he was. Thomas Jefferson was a scientist, an inventor, a philosopher, an architect, and a statesman, but he needed James Madison to ultimately maneuver Jefferson's bill through the political landscape of Virginia.[15] In fact, despite being governor, Thomas Jefferson could not get his bill passed. It became law, the Virginia Statute for Religious Freedom, only when James Madison was governor.[16]

Nevertheless, the statute was one of the accomplishments of which Jefferson was most proud. On his gravestone in Monticello, Virginia, his self-authored epitaph reads, "Here was buried, Thomas Jefferson, author of the Declaration of American Independence, of the Statute of Virginia for Religious Freedom, and Father of the University of Virginia."[17] Notably, he did not include being President on his gravestone, but apparently viewed his authorship of the Statute of Virginia for Religious Freedom to be more significant.[18] This was, for him, one of the crowning achievements of his life.[19]

Additionally, including the University of Virginia, of which he was the founder—and architect—truly reflects Thomas Jefferson's view of education as unencumbered by religious mandates or preferences. Instead, he believed it essential to free government that citizens be educated to pursue truth wherever it might take them—in religion as well as all other endeavors.[20] That was among the reasons for which he espoused a strict wall of separation between church and state. Indeed, having established the University of Virginia as a state institution—which it continues to be—Jefferson ensured that it would be separate from any particular religion.[21]

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13. *See, e.g.*, *Thirty Years' War*, HISTORY.COM, http://www.history.com/topics/thirty-years-war (last visited Apr. 9, 2018).

14. *See, e.g.*, *id.*

15. JOHN P. KAMINSKI, THOMAS JEFFERSON: PHILOSOPHER AND POLITICIAN 7 (2005); *Virginia Statute for Religious Freedom*, *supra* note 5.

16. *See id.*

17. *Jefferson's Gravestone*, THE JEFFERSON MONTICELLO, https://www.monticello.org/site/research-and-collections/jeffersons-gravestone (last visited Apr. 9, 2018).

18. *See id.*

19. *See id.*

20. *See Our Endless Pursuit*, U. OF VA., http://www.virginia.edu/overview (last visited Apr. 9, 2018).

21. *See id.*; *Virginia Statute for Religious Freedom*, *supra* note 5.

III. Supreme Court Development

The Free Exercise Clause of the First Amendment states that "Congress shall make no law . . . prohibiting the free exercise" of religion.[22] The language of the clause prevents us and, more importantly jurists, from applying it literally.[23] The literal application of the Free Exercise Clause would allow the most egregious and otherwise harmful behaviors to be treated as constitutionally protected religious practices.[24] For example, government would be prohibited from enacting legislation that prohibited human sacrifices, which have been part of many religious practices throughout human history.[25] Unless such religious practices, as well as others that pose serious dangers to public health and safety, are to be allowed, the Free Exercise Clause cannot be applied literally. Civilized society must be permitted to pass laws prohibiting some religious practices. And yet, such a non-literalist reading of the free exercise guarantee ought not to be extended to allow government interference with religious practices in the absence of some genuinely important justification.

A. Unsympathetic Beginnings

Unfortunately, as with many other fundamental constitutional guarantees, the history of free exercise of religion in the United States and at the Supreme Court is a history of difficulty in getting it right.[26] In early religious liberty litigation, despite the First Amendment expressly allowing "no law" prohibiting the free exercise of religion, the Supreme Court approved aggressive legal interference with the Church of Jesus Christ of Latter-Day Saints—commonly referred to as the Mormon Church.[27] In fact, the United States Supreme Court avoided First Amendment difficulties by determining that the Church of Latter-Day Saints was not truly a religion.[28]

The Supreme Court stated that "call[ing] [polygamy] a tenet of religion . . . offend[s] the common sense of mankind."[29] The polygamous practice of the Mormon Church was compared to religious traditions of human sacrifice and determined to be a "cultus" activity that has long "been an offence against society."[30] The Court claimed in *Reynolds v. United States*

22. U.S. Const. amend. I.

23. *See id.*

24. *See id.*

25. *See id.*; *see generally Human Sacrifice*, Encyclopedia Britannica, https://www.britannica.com/topic/human-sacrifice (last visited Apr. 9, 2018).

26. I have discussed this elsewhere. *See* Vincent Martin Bonventre, *The Fall of Free Exercise: From 'No Law' to Compelling Interests to Any Law Otherwise Valid*, Alb. L. Rev. 1399, 1403–1409 (2007); Vincent Martin Bonventre, *Religious Liberty as American History*, 17 Update on L.-Related Educ. 41, 43–44 (1993).

27. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 168 (1878).

28. *See id.* at 166; Davis v. Beason, 333 U.S. 333, 345 (1890).

29. *Davis*, 333 U.S. at 342.

30. *Reynolds*, 98 U.S. at 165.

that "[p]olygamy has always been odious." The Court went further and, in diluting the Constitution's guarantee that "no law" shall prohibit religious freedom, insisted that protecting religious polygamy under the First Amendment would "make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself."[31]

One might well ask whether protecting religious polygamy necessarily would have such drastic ramifications. And, more basic than that, whether the *constitutional* immunity *explicitly* provided to religious exercise by the First Amendment made religious freedom superior to legislation.

Following its decision in *Reynolds*, the Court in *Davis v. Beason* again ruled against the Mormons. Explaining that "[w]hile legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated,"[32] the Court upheld severe penalties for polygamy and even for professing a belief in polygamy.[33] Between its decisions in *Reynolds*, *Davis*, and *The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*,[34] the Court approved the Mormons' felony convictions, loss of voting rights, and forfeiture of property, for practicing their sincerely held religious belief.

There were, to be sure, decisions interfering with the free exercise of religion that were less questionable. For example, the State of Massachusetts passed legislation mandating smallpox vaccinations for adults, and it disallowed exemptions based on religious beliefs.[35] The Supreme Court held that the legislation was "enacted in a reasonable and proper exercise of the police power" and was "maintained by high medical authority."[36] The need for the state to pass and uphold laws to protect citizens from contagious or infectious diseases was deemed significantly to outweigh religious-based objections.[37]

But then there is the case of *United States v. Schwimmer*, where the Supreme Court held that the religious practice of pacifism was not protected by constitutional free exercise.[38] In this ultimately overruled decision involving the pacifist religious beliefs of Quakers, the Court infamously ruled that individuals who immigrated to this country were not entitled to be naturalized as citizens if they would not take up arms.[39] The Court characterized pacifists as "offenders [of] the principles of the Constitution" who

31. *Id.*
32. *Davis*, 333 U.S. at 345.
33. *Id.* at 345, 348.
34. 136 U.S. 1 (1890).
35. Jacobson v. Massachusetts, 197 U.S. 11, 12 (1905).
36. *Id.* at 30, 35.
37. *See id.* at 28–29.
38. *See* United States v. Schwimmer, 279 U.S. 644 (1929).
39. *See id.* at 652–653.

were "incapable of the . . . devotion to the principles of our Constitution that [are] required of aliens seeking naturalization."[40]

A significant dissent by Justice Oliver Wendell Holmes, joined by Justice Louis Brandeis, provided some exception to the Court's collective ignominy.[41] Two of the truly eminent Justices in Supreme Court history combined their voices in a powerful dissent in *Schwimmer*.[42] Holmes, the named author of that opinion, declared that "there is [no] principle of the Constitution that [is] more imperative[ ] than . . . the principle of free thought."[43] Holmes continued with words that should have made the majority even more uncomfortable: "I had not supposed that [the Court] would expel [the Quakers] because they believe more than some of us do in the teachings of the Sermon on the Mount."[44]

B. A Preferred Freedom

Several years thereafter, in 1937, change was in the making at the Supreme Court.[45] This particular time in American constitutional history is often labeled after the "switch in time [that] saved nine"—the famous quote of Thomas Reed Powell that referred to the change in voting at the Court that is sometimes credited with defeating President Franklin D. Roosevelt's court-packing plan.[46] At the time, the Court was comprised of four stalwart conservatives (Justices Willis Van Devanter, Pierce Butler, George Sutherland, and James C. McReynolds), the three liberal "musketeers" (Justices Harlan F. Stone, Louis D. Brandeis, and Benjamin N. Cardozo), and two swing members (Chief Justice Charles Evan Hughes and Justice Owen J. Roberts). In the years preceding 1937, the Court repeatedly invalidated President Roosevelt's New Deal initiatives, as well as similar social welfare state laws, doing so for a variety of different reasons.[47]

Whether the laws provided for maximum hours, minimum wages, child labor restrictions, workplace safety, food health, regulations on

40. *Id.* at 652.

41. *Id.* at 653–655. As I often tell my students, regardless of the vote in a decision being seven to two, or even eight to one, if the dissent is by Justice Brandeis, Holmes, Cardozo, or another jurist of such extraordinary stature, it's almost a certainty that the dissent had the much better opinion and resolution for the case.

42. *Id.*

43. *Id.* at 654–655.

44. *Schwimmer*, 279 U.S. at 655. Shortly thereafter, in *United States v. Macintosh*, 283 U.S. 605 (1931), the Court repeated itself, this time upholding the denial of naturalization to a pacifist chaplain at Yale University. But this time, the Court's majority was a bare five votes. Holmes and Brandeis were now joined in dissent by Justices Charles Evans Hughes and Harlan Stone. Ultimately, seventeen years after *Schwimmer*, the dissent became the majority and the Court explicitly overruled *Schwimmer* and *Macintosh* in *Girouard v. United States*, 328 U.S. 61 (1946).

45. A. Frank Reel, *When a Switch in Time Saved Nine*, N.Y. TIMES (Nov. 10, 1985), http://www.nytimes.com/1985/11/10/opinion/l-when-a-switch-in-time-saved-nine-143165.html.

46. *Id.*

47. *See id.*; Daniel E. Ho & Kevin Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69, 70 (2010).

pharmaceuticals, or Social Security, the Supreme Court invalidated the legislation.[48] And it did so for a host of different reasons to justify the majority's holdings in support of its extremely pro-business philosophy.[49] But in 1937, the Court took a turn and the decisions changed. They did so because the "swing" justices, ostensibly—whether or not actually—fearful of Roosevelt's proposed court-packing, started voting with the liberal "musketeers" instead of the conservative stalwarts.[50] Suddenly, many of the revived social welfare laws of the New Deal, as well as of the states, were upheld by the Court.[51]

Hence, the "switch in time"—i.e., Hughes' and Roberts' voting with the other side—is viewed as having "saved nine."[52] Eventually the conservative stalwarts began to retire from the Court, giving Roosevelt the opportunity to replace them,[53] and the much differently composed Court, not surprisingly, began to behave much differently.[54]

The Court's behavior and, indeed, its overall jurisprudence changed dramatically. In large measure owing to justices such as Benjamin Cardozo, the Court established religious liberty as among the "Honor Roll of Superior Rights" deserving of special constitutional protection.[55] In *Palko v. Connecticut*, Cardozo authored the Court's opinion in a case involving a question of federal constitutional double jeopardy protection applying to the states through the Fourteenth Amendment.[56] In addressing that specific issue, however, Cardozo—in his typically eloquent and masterful fashion—articulated the seminal jurisprudence of constitutional rights that remains the foundation of fundamental rights and liberties in America today.[57]

In *Palko*, Cardozo recognized that there are certain rights that are essential to a free society.[58] Such a society could not exist without rights such as free speech, freedom of the press, and the right to counsel in a criminal prosecution.[59] Without these protections—fundamental rights—there can

48. *See* William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN MAG. (May 2005), www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/.

49. *See id.*

50. *See* Ho & Quinn, *supra* note 47, at 70; Reel, *supra* note 45.

51. *See* Ho & Quinn, *supra* note 47, at 70; Reel, *supra* note 45.

52. *See* Ho & Quinn, *supra* note 47, at 70; Reel, *supra* note 45.

53. S*ee* Reel, *supra* note 45; HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM & THE COURT: CIVIL RIGHTS & LIBERTIES IN THE UNITED STATES 512 (8th ed. 2003).

54. *See* ABRAHAM & PERRY, *supra* note 53, at 14.

55. *See id.* at 62–66 (discussing Cardozo's seminal opinion in Palko v. Connecticut, 302 U.S. 319 (1937)).

56. *See Palko*, 302 U.S. at 321.

57. *See* ABRAHAM & PERRY, *supra* note 53, at 96, 108; *see also* Howard J. Vogel, *The "Ordered Liberty" of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court*, 70 ALB. L. REV. 1473, 1483–1501 (2007).

58. *See Palko*, 302 U.S. at 324–325.

59. *Id.*

be no free and fair society.[60] Among these fundamental rights, Cardozo included religious freedom. Along with those indispensable others, "the free exercise of religion [is] implicit in the concept of ordered liberty"[61]—"neither liberty nor justice would exist if [such fundamental rights] were sacrificed."[62]

In the years shortly thereafter, the Court enforced free exercise in a series of decisions dealing with proselytizing and solicitation by Jehovah's Witnesses. It did so by prohibiting the application of various licensing, taxing, and bookselling laws to religious activities.[63] But the foremost landmark of the period, one of the most magnificently composed decisions in Court history, arose in the context of state laws mandating that public school children salute the American flag.

In *West Virginia State Board of Education v. Barnette*,[64] the state law requiring children to recite the pledge of allegiance and salute the flag treated failure to do so as "insubordination," resulting in the expulsion of the child and prosecution of the parents.[65] The religious beliefs of the Jehovah's Witnesses, including a literal belief in certain verses of Exodus, precluded them from obeying the West Virginia law.[66] Accordingly, the children refused to perform the requisite pledge and salute, they were expelled, and their parents were prosecuted.[67]

The Supreme Court, three years earlier, had upheld a similar state law against similar religious objections.[68] This time, however, the religious objections prevailed. In what might well have been providential, the task to author the Court's opinion fell upon Justice Robert H. Jackson. Perhaps the most beautiful stylist in Supreme Court history,[69] Jackson penned what is

60. *Id.*

61. *Id.*

62. *Id.* at 326.

63. *See* Martin v. City of Struthers, 319 U.S. 141 (1943) (ordinance prohibiting door-to-door distribution of literature); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (tax for soliciting orders for articles); Jones v. City of Opelika, 319 U.S. 103 (1943) (license tax on bookselling). Curiously, the early history of free exercise jurisprudence can be felicitously summed up as the Mormons losing their cases and the Jehovah's Witnesses winning theirs—compare *Reynolds*, *Davis*, and *The Late Corp. of the Church of Jesus Christ of Latter-Day Saints* with *Martin*, *Murdock*, and *Jones*, and, of course, with the decision in the landmark case to be discussed presently. The contrasting outcomes no doubt resulted, at least in part, due to the different eras in which the cases arose—the Jehovah's Witness cases being decided after the 1937 change in the Court's overall jurisprudence and, particularly, it's much more protective treatment of fundamental liberties.

64. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943).

65. *Id.*

66. *Id.* at 629.

67. *Id.* at 630.

68. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

69. *See e.g.*, Bryan A. Garner, *Celebrating the Powerful Eloquence of Justice Robert Jackson*, A.B.A. J. (Oct. 2016), http://www.abajournal.com/magazine/article/powerful_eloquence_justice_robert_jackson. As the holder of the Justice Jackson chair at Albany Law School—where Jackson received his single year of formal legal education—I am admittedly partial. But I have been stirred by Justice Jackson's prose, as well as by that of Benjamin Cardozo, since my days at

surely one of the most beautiful paeans to First Amendment freedom or, indeed—to paraphrase Cardozo in *Palko*—to the scheme of liberty implicit in American free government.

In response to arguments that the Court ought to defer to the legislative enactments of the people's elected representatives, Jackson reminded us of the meaning of higher law:[70]

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[71]

And while most actions taken by government are within its valid authority as long as based on some reasonable purpose, much more than that is required to justify interference with fundamental liberties. As Jackson put it:

> [F]reedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.[72]

Jackson then explained why the Court should not and would not permit intrusion on these paramount liberties except in those rare circumstances where the government's justification was so compelling. He did so in some of the most oft-quoted and most stirring words in the United States Reports:

> 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.[73]

Concluding for the Court, Jackson announced its decision in no uncertain terms. "[C]ompelling the flag salute and pledge transcends constitu-

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the University of Virginia in Supreme Court seminars taught by Henry J. Abraham who would recite from memory so many of the powerful and poignant passages from Jackson's opinions. *See generally* Robert H. Jackson Center, *Henry Abraham (2003) Interview*, YOUTUBE (Jul. 18, 2016), https://www.youtube.com/watch?v=3NKejQ3_mvU. Though he only attended Albany Law School for one academic year, 1911–1912, he recognized the law school as his alma mater, and it recognized him as its graduate, on his return for commencement nearly thirty years later. *See* Commencement Address of United States Attorney-General Jackson, N.Y.L.J., June 10, 1941, at 1.

70. That term, as used here, is from a classic work. *See* EDWARD S. CORWIN, THE HIGHER LAW BACKGROUND ON AMERICAN CONSTITUTIONAL LAW (1955).

71. *Barnette*, 319 U.S. at 638 (1943).

72. *Id.* at 639.

73. *Id.* at 642.

tional limitations," he wrote, for it "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."[74]

Twenty years hence, the Supreme Court confronted another religious objection, from another religious minority, resulting in another religious liberty landmark. This time, the case involved Saturday Sabbatarians, the Seventh Day Adventists, who were bound not to work on their religious day of rest.[75] In *Sherbert v. Verner*, an employee's refusal to work on her Saturday Sabbath was treated by the state as "without good cause."[76] Consequently, the employee not only lost her job, but she was also determined to be ineligible for unemployment benefits.[77]

That determination, however, was overruled by the Supreme Court which held that a state "may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest."[78] The Court explained that "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[79] Government may not force an individual 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."[80] Substantial infringements on free exercise of religion, even unintended "incidental burden[s] on free exercise,"[81] may be justified only by "some compelling state interest."[82] The Court, speaking through Justice William Brennan, was unequivocal about the Court's ruling and rationale:

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." No such abuse or danger has been advanced in the present case.[83]

Nearly a decade later, even as the Court grew increasingly conservative in many areas of the law, with a new Chief Justice and several other

74. *Id.* In yet another memorable passage, Jackson warned about seeking national unity through forced patriotic uniformity: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *Id.* at 641.

75. Sherbert v. Verner, 374 U.S. 398, 399 (1963).

76. *Id.* at 401.

77. *Id.*

78. *Id.* at 410.

79. *Id.* at 406.

80. *Id.* at 404.

81. *Sherbert*, 374 U.S. at 403.

82. *Id.* at 406.

83. *Id.* at 406–407 (citation omitted).

appointees of President Richard Nixon,[84] it rendered a decision that equaled, if not exceeded, the earlier landmarks safeguarding religious liberty. In *Wisconsin v. Yoder*,[85] Amish parents sought an exemption from the state law that mandated school-attendance for children until the age of sixteen.[86] The parents objected on religious grounds, fearing the worldly influence from the compulsory education beyond the basics of reading, writing, and arithmetic taught in elementary school.[87] When the parents failed to enroll their under-sixteen children in school, the parents were charged and convicted of violating the state law.[88]

Despite the "general applicability" of the law, as well as the concededly "strong interest" underlying it, the Supreme Court ruled that the Amish were entitled to an exemption.[89] Rejecting the state's argument to the contrary, the Court, speaking through Chief Justice Warren Burger, recounted what those earlier landmarks had settled:

> Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.[90]

Then, distilling the standard to be applied whenever government interfered with religious liberty, the Chief Justice was emphatic:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.[91]

To be sure, the right to free exercise of religion is not absolute and has never been considered as such by the Court. Even in the era of robust protection of religious liberty and the stringent standards established to justify any abridgement, the Court recognized justifiable limits on that fundamental freedom. In another opinion authored by Chief Justice Warren Burger,

84. *See* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 205 (3d ed. 1993); *see generally* Russell W. Galloway, Jr., *The Burger Court (1969–1986)*, 27 SANTA CLARA L. REV. 31 (1987).

85. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

86. *Id.* at 207.

87. *See id*. at 208–211.

88. *See id.* at 207–208.

89. *Id.* at 236.

90. *Id.* at 220.

91. *Yoder*, 406 U.S. at 215.

the Court identified one of those limits when it addressed the racially discriminatory religious practices of Bob Jones University.[92]

The officials of that university, who "genuinely believe[d] that the Bible forbids interracial dating and marriage," governed their institution in accord with this "fundamentalist" interpretation and, to effectuate their religious belief, historically refused to admit African American students.[93] Following a decision of the Fourth Circuit Court of Appeals prohibiting racial exclusion in private schools, however, Bob Jones University opened its doors to Black applicants—but only to unmarried ones.[94] Moreover, applicants who were either engaged in or supportive of interracial marriage or dating were denied admission or, if already enrolled, were expelled.[95] Similarly, the university maintained racial segregation policies on participation in student organizations.[96]

Under the administration of President Richard Nixon, the Internal Revenue Service began to challenge the tax exempt status of any private school that practiced racial discrimination in admissions.[97] When the IRS, in accord with its policy against racial discrimination, revoked Bob Jones's tax-exempt status in 1976,[98] the university filed suit claiming a violation of their Free Exercise of Religion under the First Amendment.[99]

Under the administration of President Jimmy Carter, the IRS policy was vigorously enforced.[100] When Carter lost the election in 1980, however, the administration of President Ronald Reagan sought to repeal the relevant regulation.[101] Indeed, although some Carter holdovers in the Justice Department disagreed, the Reagan administration submitted an amicus brief to the Supreme Court in opposition of the IRS regulation.[102]

Writing for the Court, Chief Justice Burger made clear that denying "charitable" status and, therefore, tax benefits to an educational institution should be done "only where there can be no doubt that the activity involved is contrary to a fundamental public policy."[103] But, he continued that "there can no longer be any doubt that racial discrimination in education violates

92. *See* Bob Jones University v. United States, 461 U.S. 574 (1983).

93. *Id.* at 580.

94. *Id.* (citing McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), *aff'd*, 427 U.S. 160 (1976)).

95. *Id.*

96. *Id.*

97. *See id.* at 581.

98. *Bob Jones University*, 461 U.S. at 581.

99. *Id.* at 582.

100. *See* Olati Johnson, *The Story of* Bob Jones University v. United States*: Race, Religion, and Congress' Extraordinary Acquiescence* 14 (Columbia Law Sch. Pub. L. & Legal Theory Working Papers, Paper No. 9184).

101. *Id.* at 15–16.

102. *Id.* at 15, 17.

103. *Bob Jones University*, 461 U.S. at 592.

deeply and widely accepted views of elementary justice."[104] Then, summarizing the Court's religious freedom case law, he explained that

> the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief. However, "[n]ot 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."[105]

Chief Justice Burger proceeded to apply that free exercise jurisprudence to the particular case and to conclude that denying tax benefits to the religious school was appropriate:

> The governmental interest at stake here is compelling. . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, 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 [Bob Jones University] cannot be accommodated with that compelling governmental interest; and no "less restrictive means" are available to achieve the governmental interest.[106]

The *Bob Jones University* decision solidified the Supreme Court's jurisprudence of religious liberty. That freedom held a preferred position as a fundamental constitutional right "implicit in the scheme of ordered liberty," as Cardozo characterized it a half-century earlier.[107] And as such, similarly to the freedoms of speech and press and peaceable assembly, may not be abridged unless there is no alternative way to achieve a "compelling," "overriding" interest.[108]

C. No Longer Preferred

Just a few years hence, Justice Antonin Scalia, writing for a majority of his colleagues, denied that the Court had ever really adopted such jurisprudence.[109] Constitutional and religious scholars of all political and ideo-

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104. *Id.*

105. *Id.* at 603 (citations omitted) (quoting United States v. Lee, 455 U.S. 252, 257–258 (1982)).

106. *Id.* at 604 (footnote omitted) (citations omitted).

107. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

108. *See Bob Jones University*, 461 U.S. at 604. During this same period, the Court similarly found other government interests to outweigh claimed infringements on free exercise claims. *See e.g.*, Bowen v. Roy, 476 U.S. 693 (1986) (ruling that the government's internal use of social security numbers outweighs religious objections to such numbers being assigned); Goldman v. Weinberger, 475 U.S. 503 (1986) (deferring to military need for discipline in dress uniformity to defeat request to wear religious headgear).

109. Emp't Div. v. Smith (Smith II), 494 U.S. 872 (1990).

logical stripes found that opinion to be shocking[110] and, at the least, disingenuous.[111] In it, the majority recharacterized the freedom to exercise religion in a way that "dramatically depart[ed] from well-settled First Amendment jurisprudence, appear[ed] unnecessary to resolve the question presented, and [was] incompatible with our Nation's fundamental commitment to individual religious liberty."[112]

The underlying facts involved members of a Native American church whose rituals included the centuries-old sacramental use of peyote.[113] When those church members were fired from their jobs and denied unemployment benefits because they had violated the state's criminal drug law, they claimed entitlement to a Free Exercise exemption for their concededly sincere religious practice.[114] But notwithstanding previous landmarks which seemed clearly to mandate an exemption, the Court this time, in *Employment Division v. Smith*, declaring exactly the opposite of what those landmarks had held, denied the exemption:

> [I]f prohibiting the exercise of religion . . . is not the object of the [law], but merely the incidental effect of a *generally applicable* and *otherwise valid* provision, the First Amendment has not been offended.[115]

Justice Sandra Day O'Connor agreeing with the ultimate result in the case, but condemning the majority's newly eviscerated protection of religious liberty, catalogued a long line of decisions that demonstrated what the Supreme Court's jurisprudence actually had been. That long line of decisions protected Free Exercise

> 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. *See Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987); *United States v. Lee,* 455 U.S. 252, 257–258 (1982); *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 718 (1981); *McDaniel v. Paty*, 435 U.S. 618, 626–629 (1978) (plurality opinion); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Gillette v. United States*, 401 U.S. 437, 462 (1971); *Sherbert v. Verner*, 374

110. *See e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1120 (1990) (finding that the majority's "purported . . . use of precedent is troubling, bordering on the shocking"); *see also* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 BYU L. REV. 275; Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990).

111. *See, e.g.*, Vincent Martin Bonventre, Symposium, *A Second-Class Constitutional Right? Free Exercise and the Current State of Religious Freedom in the United States*, 70 ALB. L. REV. 1399 (2007).

112. *Smith II*, 494 U.S. at 891 (O'Connor, J., concurring).

113. *See* Emp't Div. v. Smith (Smith I), 485 U.S. 660, 667 n.11 (1988).

114. *See Smith II*, 494 U.S. at 874–875 (1990).

115. *Id.* at 878 (emphasis added).

> U.S. 398, 403 (1963); *see also Bowen v. Roy*, 476 U.S. 693, 732 (opinion concurring in part and dissenting in part); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943). The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests "of the highest order," *Yoder*, 406 U.S. at 215.[116]

Despite O'Connor's catalogue of decisions impeaching the majority's characterization of the Court's Free Exercise case law, Scalia insisted that "[o]ur decisions reveal 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."[117] And in support of that indisputably inaccurate proposition, Scalia relied upon and quoted from an overruled 1940 decision, *Minersville School District Board of Education v. Gobitis*.[118] That decision, upholding a mandatory flag salute and Pledge of Allegiance for school children despite religious objections, was of course repudiated by the Court three years later in Justice Jackson's magnificent opinion in *West Virginia State Board of Education v. Barnette*.[119]

Among other decisions Scalia relied upon, in addition to the overruled *Gobitis*, were the 1879 decision upholding anti-polygamy laws against Mormons,[120] the 1944 decision upholding child labor laws against Jehovah Witnesses,[121] and the more contemporary decisions upholding military conscription against conscientious objectors[122] and social security taxes against the Amish.[123] But, in fact, what was made pellucidly clear in that latter 1982 case relied upon by Scalia is precisely the opposite of what Scalia was insisting. In that case, *United States v. Lee*, the Court was explicit and unequivocal about the sum and substance of its prior decisions applying the Free Exercise guarantee. "The state may justify a limitation on religious liberty by showing that it is *essential* to accomplish an *overriding* governmental interest"[124]—not simply by any "generally applicable" and "otherwise valid" law.[125]

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116. *Id.* at 894–895 (O'Connor, J., concurring). The three dissenting Justices—William Brennan, Thurgood Marshall, and Harry Blackmun—joined that part of O'Connor's concurring opinion. *Id.* at 891.

117. *Id.* at 878.

118. *Id.* at 879 (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–595 (1940)).

119. *See supra* notes 64–74 and accompanying text.

120. Reynolds v. United States, 98 U.S. 145 (1878).

121. Prince v. Massachusetts, 321 U.S. 158 (1944).

122. Gillette v. United States, 401 U.S. 437 (1971).

123. United States v. Lee, 455 U.S. 252 (1982).

124. *Id.* at 257 (emphasis added).

125. Emp't Div. v. Smith (Smith II), 494 U.S. 872, 878 (1990). Scalia dismissed the Free Exercise protections enforced in many of the landmark decisions by insisting that those cases involved other fundamental rights. So *Wisconsin v. Yoder*, 406 U. S. 205 (1972) (compulsory

And yet, as a result of *Smith*, Scalia's formulation has effectively removed free exercise of religion from its previously preferred place where it was immunized from abridgement except for the most compelling government reasons. Indeed, Justice Jackson's pronouncement for the Court in *Barnette*, that the "freedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction only to prevent grave and immediate danger,"[126] is no longer true for religious liberty. Instead of that "compelling interest" protection for free exercise which, according to the majority in *Smith*, "contradicts both constitutional tradition and common sense"[127] and even "court[s] anarchy,"[128] any hospitality toward that freedom should be left to the democratic process.

Indeed, lest there be any doubt that the *Smith* majority anticipated and intended that to be the very consequence of its ruling, Scalia stated it plainly in concluding his opinion for the Court:

> 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.[129]

D. The Aftermath of Employment Division v. Smith

Condemnation of the Supreme Court's decision in *Smith* was immediate and widespread. Specifically, Scalia's recharacterization of the Court's free exercise landmarks and jurisprudence was met with the harshest criticism.[130] The most eminent constitutional and religious liberty scholars reacted with both shock and disbelief.[131] Indeed, scholarly reflections on the decision many years later continued to evince dismay and outright hostility.[132] Representative of those views were the observations of one such scholar expressed seventeen years after the decision was rendered:

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school attendance) was really about parental rights and *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (compulsory flag salute) was solely about free speech. *See Smith II*, 494 U.S. at 881–882. Scalia dismissed the Saturday Sabbatarian cases of *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Rev. Bd.*, 450 U.S. 707 (1981) as simply aberrational decisions confined to denials of unemployment benefits. *See Smith II*, 494 U.S. at 883–884.

126. *Barnette*, 319 U.S. at 639.

127. *Smith II*, 494 U.S. at 885.

128. *Id*. at 888.

129. *Id*. at 890.

130. Much of that criticism mirrored the concurring and dissenting opinions: *Smith II*, 494 U.S. at 892 (O'Connor, J., concurring) (the majority "disregard[ed] our consistent application of free exercise doctrine"); *id*. at 907–908 (Blackmun, J., dissenting) ("Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence.").

131. *See e.g.*, Laycock, *supra* note 110; McConnell, *Free Exercise Revisionism and the Smith Decision*, *supra* note 110.

132. Scalia's assertions and newly refashioned rule in *Oregon v. Smith* were condemned by constitutional and religious scholars of all political and ideological stripes. *See, e.g.*, Symposium, *A Second Class Constitutional Right? Free Exercise and the Current State of Religious Freedom in the United States*, 70 ALB. L. REV. 1399 (2007). *See also* Steven D. Smith, *Religious Freedom*

> Although Justice Scalia's majority opinion in that case did not acknowledge that it was discarding a free exercise approach that had been in place for many years, the opinion in fact turned existing free exercise law on its head. . . . It is difficult to believe that the Framers of the federal Constitution, who valued religious liberty so highly, would have relegated it to so peripheral a status and put it so much at the mercy of majoritarian beliefs and insensitivities as *Employment Division v. Smith* assumes.[133]

Another religious liberty scholar was even more blunt about what the Court had done with the (formerly?) fundamental First Amendment guarantee:

> [T]his right was essentially written out of the Constitution by the Supreme Court in [*Employment Division v. Smith*]. To put it plainly, I believe that the decision in that case effectively repealed the Free Exercise Clause of the First Amendment to the US Constitution rendering it, *at best*, a second class right.[134]

Similarly, the other two branches of the federal government disagreed vehemently with the Supreme Court majority's re-rendering of the free exercise right. The House of Representatives unanimously passed a bill sponsored by then Representative Charles Schumer to overrule *Oregon v. Smith* and to reinstate the "compelling interest" test as spelled out in *Wisconsin v. Yoder* and *Sherbert v. Verner*.[135] The Senate, where the bill was sponsored by Senator Edward Kennedy,[136] passed the bill by a vote of 97 to 3.[137] President Bill Clinton then signed the bill into law.[138]

The legislation, titled the Religious Freedom Restoration Act ("RFRA"),[139] in veritable denunciation of Scalia's majority opinion in *Smith*, declared that:

> The Congress finds that . . . in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exer-

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and Its Enemies, or Why the Smith *Decision May Be a Greater Loss Now than It Was Then*, 32 CORDOZO L. REV. 2033 (2011); Symposium, *Restoring Religious Freedom in the States*, 32 U.C. DAVIS L. REV. 513 (1999).

133. Gary J. Simson, *Reflections on Free Exercise: Revisiting* Rourke v. Department of Correctional Services, 70 ALB. L. REV. 1425, 1426–1427, 1433 (2007).

134. Timothy A. Byrnes, *The Politics of a Second Class Right: Free Exercise in Contemporary America*, 70 ALB. L. REV. 1441, 1441 (2007) (emphasis added).

135. *See* Religious Freedom Restoration Act of 1993, H.R. 1308, 103rd Cong. (1993), https://www.congress.gov/bill/103rd-congress/house-bill/1308/actions.

136. *See* Religious Freedom Restoration Act of 1993, S. 578, 103rd Cong. (1993), https://www.congress.gov/bill/103rd-congress/senate-bill/578.

137. H.R. 1308, https://www.congress.gov/bill/103rd-congress/house-bill/1308/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D.

138. H.R. 1308, https://www.congress.gov/bill/103rd-congress/house-bill/1308/all-actions?q=%7B%22action-by%22%3A%22Executive+Branch%22%7D.

139. Religious Freedom Restoration Act, Pub. L. No. 103–141 (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4 (1993)).

> cise imposed by laws neutral toward religion; and [ ] *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.[140]
>
> [Therefore,] 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* . . . .[141]
>
> . . . .
>
> [The g]overnment 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.[142]

In repudiating *Smith*, the purpose of RFRA was not only to restore religious liberty protection to that which had been provided in *Sherbert* and *Yoder*. More broadly, it was to return free exercise of religion to the preferred status it previously enjoyed with other fundamental rights. Like other First Amendment rights and other vital freedoms, religious liberty was once again to enjoy the protection of the "compelling interest" standard. Under RFRA, burdens on the freedom to practice one's religion would once again be subjected to enhanced or "strict" scrutiny and, thus, be permitted only when necessary to accomplish some exceedingly important government interest.

Indeed, contrary to Scalia's insistence in *Smith* that such a standard contravened constitutional tradition and common sense, and that it courted anarchy,[143] such enhanced or strict scrutiny has in fact been the standard long applied by the Supreme Court to protect fundamental rights generally.[144] Where government has interfered with one of those most basic civil rights or liberties—whether it be free speech,[145] freedom of association,[146]

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140. 42 U.S.C. §§ 2000bb(a)(4)–(5) (emphasis added).

141. *Id.* at § 2000bb(b)(1) (emphasis added).

142. *Id.* at § 2000bb–1(b) (emphasis added).

143. Emp't Div. v. Smith, 494 U.S. 872, 885, 888 (1990).

144. The compelling interest or strict scrutiny test, however phrased, has been the standard generally applied by the Supreme Court to government intrusions on fundamental rights at least since the era that produced Justice Benjamin Cardozo's foundational opinion in *Palko v. Connecticut*, 302 U.S. 319 (1937) (establishing the doctrine of fundamental rights as those "implicit in the scheme of ordered liberty") and, the very next year, Justice Harlan Stone's famed footnote four in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting the need for "more exacting judicial scrutiny" to protect political rights). *See generally* ABRAHAM & PERRY, *supra* note 53, at 14–32.

145. *See, e.g.*, Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994); Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991).

146. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780 (1983); NAACP v. Alabama, 357 U.S. 449 (1958).

the right to vote,[147] racial equal treatment,[148] or others deemed essential to the American scheme of liberty[149]—that interference has been ruled constitutionally invalid, unless government could satisfy the heightened scrutiny of the compelling interest test.

Sixteen years after the decision in *Smith*—and the very next year after he was appointed to the Court[150]—Chief Justice John Roberts, writing for his unanimous colleagues, applied RFRA on behalf of religious objectors and seemed clearly to share the sentiments underlying that legislation.[151] In rebutting the government's argument, that the good reasons Congress had for enacting the Controlled Substances Act justified denying the religious exemption sought in this case, Roberts explained what he viewed as the overriding purposes of RFRA:

> The Government repeatedly invokes Congress' findings and purposes underlying the Controlled Substances Act, but Congress had a reason for enacting RFRA, too. Congress *recognized* that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise," and legislated "the *compelling interest test*" as the means for the courts to "*strik[e] sensible balances* between religious liberty and competing prior governmental interests." 42 U.S.C. §§2000bb(a)(2), (5).[152]

In addition to his evident concurrence with the reasoning underlying RFRA, Roberts rejected the government's characterization of several pre-*Smith* decisions,[153] which was similar to how Scalia had characterized them in that case.[154] Those decisions, as Roberts explained, did not stand for the proposition that a generally applicable valid law necessarily defeated a free exercise claim for an exemption. Rather, as Roberts unequivocally stated:

> Those cases did not embrace the notion that a general interest in uniformity justified a substantial burden on religious exercise; they instead scrutinized the asserted need and explained why the denied exemptions could not be accommodated. In United States v. Lee [citation omitted], for example, the Court rejected a claimed exception to the obligation to pay Social Security taxes,

147. *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).

148. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

149. *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102 (1996) (parental rights); Shapiro v. Thompson, 394 U.S. 16 (1968) (right to interstate travel); Loving v. Virginia, 388 U.S. 1 (1967) (right to marry); Skinner v. Oklahoma, 316 U. S. 535 (1942) (procreation).

150. John G. Roberts, Jr., nominated to be Chief Justice of the United States by President George W. Bush, was confirmed by the Senate on September 29, 2005. *See Current Members*, SUP. CT. U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Apr. 9, 2018).

151. Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006).

152. *Id.* at 439 (emphasis added).

153. *Id.* at 435.

154. Emp't Div. v. Smith (Smith II), 494 U.S. 872, 879–880.

> noting that "mandatory participation is indispensable to the fiscal vitality of the social security system" and 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." [Citations omitted] See also Hernandez v. Commissioner [citations omitted] (same). In Braunfeld v. Brown, 366 U.S. 599 (1961) (plurality opinion), the Court denied a claimed exception to Sunday closing laws, in part because allowing such exceptions "might well provide [the claimants] with an economic advantage over their competitors who must remain closed on that day." The whole point of a "uniform day of rest for all workers" would have been defeated by exceptions. See Sherbert [citations omitted] (discussing Braunfeld). These cases show that the Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.[155]

But *O Centro* involved the application of RFRA to federal legislation. Several years earlier, and only a few years after the enactment of RFRA, the Court invalidated the application of that statute to state and local laws.[156] According to the Court in *City of Boerne v. Flores*, Congress had exceeded its authority in attempting to impose, upon the states and their subdivisions, greater protection than the First Amendment provided for religious freedom.[157]

In that case, a church had sought to utilize RFRA's protection to obtain a religious exemption to a local zoning ordinance.[158] But the Court ruled that Congress's attempt to impose the compelling interest standard to protect free exercise, in contradiction to the rejection of that standard in *Smith*, was beyond the power given to Congress in the Fourteenth Amendment to enforce constitutional rights *against the states*.[159] Under that Amendment's grant of power, Congress could enforce *Smith*'s limited free exercise protection against state and local laws, but nothing more.[160]

Hence, the *statutory* "compelling interest" protection of RFRA does not apply to burdens imposed on religious liberty by state or local governments. Instead, the "otherwise valid" constitutional standard of *Smith* is the applicable test for determining the legality of those governments' interfer-

155. *O Centro*, 546 U.S. at 435.

156. *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997).

157. *See id.* at 519, 534–536.

158. *See id.* at 512.

159. *See id.* at 534–536. Chief Justice Roberts stated it plainly in *O Centro*: "As originally enacted, RFRA applied to States as well as the Federal Government. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), we held the application to States to be beyond Congress' legislative authority under [Sec.] 5 of the 14th Amendment." *O Centro*, 546 U.S. at 424 n.1.

160. *See City of Boerne*, 521 U.S. at 519, 534–536.

ing with the First Amendment right of free exercise.[161] Moreover, regarding interferences with religious liberty by the federal government, *Smith* is the standard for free exercise of religion under the Constitution. The protection previously afforded against federal intrusion, by landmarks such as *Sherbert* and *Yoder*, are now available only statutorily under RFRA.

E. The Constitution, the Statute, and the States

The First Amendment's guarantee of Free Exercise of Religion protects religious liberty against both federal and state actions.[162] But since *Smith*, that guarantee only protects against laws that are *not* "otherwise valid."[163] If a law is invalid for some other reason—e.g., it is invalid because it violates some other constitutional right—then free exercise is protected, albeit incidentally so.[164] This would similarly include laws that were not "neutral" and "generally applicable"—i.e., laws that actually targeted religion or particular religions.[165] But such laws that discriminated on the

161. *See id*. at 536. Congress responded to *City of Boerne* by enacting the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), a "compelling government interest" statute like RFRA but with a much narrower scope and based on the Spending and Commerce powers. *See* 42 U.S.C. § 2000cc. As explained by the Court in *Cutter v. Wilkinson*, 544 U.S. 709, 715–716 (2005): "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 . . . land-use regulation [and] institutionalized persons . . . in a program or activity that receives Federal financial assistance [or affects] commerce with foreign nations, among the several States, or with Indian tribes."

162. The First Amendment's free exercise guarantee was deemed one of the fundamental rights made assertable against the states through the Fourteenth Amendment in Justice Cardozo's opinion for the Court in *Palko v. Connecticut*, 302 U.S. 319, 324–325 (1937), see *supra* notes 64–74 and accompanying text. Its application to the states was then treated as settled in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

163. *See* Emp't Div. v. Smith (Smith II), 494 U.S. 872, 878–879 (1990).

164. *Id*. at 881–882. Scalia referred to these cases where free exercise was incidentally protected only because some other right was actually violated as "hybrid situation[s]." In his opinion for the Court, he explained this novel proposition as follows: "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*, 310 U.S. at 304–307 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick*, 321 U.S. 573 (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), to direct the education of their children, see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school attendance laws as applied to Amish parents who refused on religious grounds to send their children to school)." *Smith II*, 494 U.S. at 881.

165. *Id*. at 879–880. Among other cases cited for this proposition, Justice Scalia relied upon *Prince v. Massachusetts*, 321 U.S. 158 (1944), where the Court had denied a claim for a religious exemption from child labor laws stating, as quoted by Scalia, there was "no constitutional infirmity in 'excluding [these children] from doing there what no other children may do.'" Prince, 321 U.S. at 171 (*quoted in Smith II*, 494 U.S. at 880).

basis of religion would be invalid in any event as equal protection violations.[166]

So it is not clear from *Smith* what little protection remains, if any, that the constitutional guarantee of free exercise of religion actually provides in and of itself.[167] But whatever that might be, it applies to both federal and state government actions.

By contrast with constitutional free exercise, the statutory protection under RFRA[168] is strong. Legislatively reviving the compelling interest standard of *Sherbert* and *Yoder* that significantly restricted burdens on religious liberty, Congress intended RFRA to restore free exercise to the protected status it formerly had and which other fundamental rights enjoy. But unlike the constitutional protection enjoyed by other fundamental rights,[169] that statutory protection for religious liberty extends only against federal interference. The Court in *City of Boerne* blocked the application of RFRA to any state and local actions.[170] Henceforth, *Smith*'s minimalist (re)construing of constitutional free exercise is the outer limit of Congress's enforcement power under the Fourteenth Amendment.[171]

Of course, individual states themselves may choose to protect constitutional rights under their own law beyond those standards set by the Su-

166. The full quote from *Prince* makes this clear: "However Jehovah's Witnesses may conceive them, the public highways have not become their religious property merely by their assertion. And there is *no denial of equal protection in excluding their children* from doing there what no other children may do." 321 U.S. at 170–171 (emphasis added). Indeed, it is settled doctrine that constitutional equal protection prohibits government action that discriminates on the basis of religion. *See, e.g.*, United States v. Armstrong, 517 U.S. 456 (1996) (equal protection prohibits "an unjustifiable standard such as race, *religion*, or other arbitrary classification) (emphasis added) (citation omitted); Plyler v. Doe, 457 U.S. 202, 216–217 (1982) ([I]n accord with "*elemental constitutional premises* . . . we have treated as *presumptively invidious those classifications* that disadvantage a 'suspect class,' or that impinge upon the exercise of a '*fundamental right*.') (emphasis added) (footnotes omitted); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("[A] classification [that] trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, *religion*, or alienage" will not be presumed to be constitutional.) (emphasis added).

167. This is no idiosyncratic observation. *See, e.g.*, Gary J. Simson, *Reflections on Free Exercise: Revisiting* Rourke v. Department of Correctional Services, 70 ALB. L. REV. 1425, 1430 (2007) (*Smith II* "relegated [free exercise] to so peripheral a status"); Timothy A. Byrnes, *The Politics of a Second Class Right: Free Exercise in Contemporary America*, 70 ALB. L. REV. 1441 (2007) ("this right was essentially written out of the Constitution by the Supreme Court"); Laycock, *supra* note 110, at 1–4 ("[T]he Court's account of its precedents in *Smith* [*II*] is transparently dishonest . . . . [T]he Free Exercise Clause itself now has little independent substantive content.").

168. As well as its expansion under RLUIPA. *See supra* note 161 and accompanying text.

169. *See generally* ABRAHAM & PERRY, *supra* note 53, at 14–32.

170. *See* City of Boerne v. Flores, 521 U.S. 507, 519, 534–536.

171. *Id.* The Court did subsequently uphold the narrow application of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5 ("RLUIPA") to state and local land use regulations and prisons where there was either federal subsidization or impact on interstate commerce, as within Congress's spending and commerce powers. *See* Cutter v. Wilkinson, 544 U.S. 709, 715–716 (2005).

preme Court under the federal Constitution.[172] Free exercise of religion is among those rights where states have often done so. Indeed, very shortly after the Supreme Court had made that First Amendment right applicable to the states through the Fourteenth Amendment,[173] New York's highest court, the Court of Appeals, made clear it would not be bound by less protective federal standards.[174] Speaking through Chief Judge Irving Lehman, the state high court explained:

> Parenthetically we may point out that in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States.[175]

More recently, some state courts have chosen to reject *Smith* and to provide greater protection for religious liberty as a matter of independent state constitutional law.[176] Others have decided to do the opposite and have adopted *Smith*'s "otherwise valid" standard as their own law.[177] The result is that the freedom to exercise religion is different in different parts of the country. Despite free exercise being a fundamental right guaranteed by the First Amendment of the Constitution—and made applicable to the states through the Fourteenth Amendment—there is no uniform, nationwide protection but, instead, it depends upon location. In some states that right is protected as are other fundamental rights with the compelling interest test; in other states it is protected with the bare minimum standard of *Smith*.

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172. This is a basic truism of federalism recognized by the Court, by state courts, and by constitutional scholars countless times. *See, e.g.*, California v. Greenwood, 486 U.S. 35, 43 (1988) ("Individual States may surely construe their own constitutions as imposing more stringent constraints."); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (reaffirming "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"); William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 62 ST. JOHN'S L. REV. 399 (1987).

173. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Palko v. Connecticut, 302 U.S. 319, 324–325 (1937).

174. People v. Barber, 46 N.E.2d 329 (N.Y. 1943) (rejecting the Supreme Court's denial of a religious exemption for Jehovah's Witnesses from laws restricting door-to-door solicitation in *Jones v. City of Opelika*, 316 U.S. 584 (1942)).

175. *Barber*, 46 N.E.2d at 331.

176. *See, e.g.*, State v. Hershberger, 462 N.W.2d 393 (Minn. 1990) (adhering to the compelling interest standard under the state constitution).

177. *See, e.g.*, Gingerich v. Commonwealth, 382 S.W.3d 835 (Ky. 2012) (holding that the state constitution provides the same protection as the First Amendment).

1. The Constitution

As a consequence of its ruling in *Smith*, that any "otherwise valid law" defeats a claim that constitutional free exercise of religion has been burdened, the Supreme Court has protected that fundamental right—if at all—only when the government action is otherwise *in*valid. So if a government action violates constitutional freedom of speech, and that speech happens to be religious, then religious liberty is protected as a by-product.[178] Or if a government action is not "neutral" or "generally applicable" within the meaning of *Smith*—i.e., it actually targets a particular religion or religion generally—then that action is invalid because it invidiously discriminates on the basis of religion.[179] But government actions that happen to interfere with religious free exercise are no longer *constitutionally* invalid solely for that reason.[180]

A brief review of the Court's post-*Smith* decisions, where religious freedom *was* constitutionally protected, makes these points clear. There are those cases where the Court sided with the religious complainants, but only because the government action was deemed to violate free speech rights.

Lamb's Chapel v. Center Moriches Union Free School District,[181] decided three years after *Smith*, involved a local school district that permitted the use of its facilities after hours by various community groups, except for religious purposes.[182] The Court held that the denial of a church group's application to use the facilities to show a religious film series was an unconstitutional viewpoint-based abridgement of free speech.[183]

Similarly, several years later in *Good News Club v. Milford Central School*,[184] the Court found another free speech violation where a Bible group was denied the after-hours use of school facilities.[185] Because the denial was specifically based on the religious nature of the discussions in-

178. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (invalidating the restriction on after-school use of facilities for discussion on non-religious subjects); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (invalidating the refusal of the state university to fund a student organization's publication because of its religious viewpoint); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (invalidating a school district's refusal to permit groups with a religious viewpoint to use its facilities).

179. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012 (2017) (invalidating the denial of state benefits to a church that were available to all other organizations); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (invalidating a law that prohibited the animal slaughtering of only a particular disfavored religion).

180. Such interference with religious liberty may be illegal as a *statutory* matter under RFRA, but not as a violation of the First or Fourteenth Amendments. See discussion of RFRA at *supra* notes 135–161 and *infra* 215–240 and accompanying text.

181. 508 U.S. 384 (1993).

182. *Id.* at 386.

183. *Id.* at 393–394.

184. 533 U.S. 98 (2001).

185. *Id.* at 103–104.

tended by the group, the Court deemed the case indistinguishable from the viewpoint-based discrimination in *Lamb's Chapel*.[186]

In a somewhat different context, but with the same result, a state university—the University of Virginia, founded by Thomas Jefferson[187]—sought to keep Jefferson's "wall of separation between church and state"[188] high and impregnable.[189] It therefore refused to provide student activity funds to subsidize a student group's religious publication. But in *Rosenberger v. Rector and Visitors of University of Virginia*, the Court held that the denial of support for the students' publication was a "denial of their right of free speech"[190]—again, much like the viewpoint-based discrimination in *Lamb's Chapel*.[191] And in another common thread tying all three cases together, *Smith* and the diminished right of free exercise that it defined were entirely absent from the Court's decisions.[192]

In two other decisions where the Court sided with religious claimants, *Smith* did figure prominently—at least ostensibly so. Notably, the Court's reasoning in those cases was actually a rejection of invidious discrimination, not the protection of free exercise as a self-standing fundamental liberty.[193]

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186. *Id.* at 107.

187. *See* MALONE, *supra* note 6, at 251–282 (1981).

188. *See* DUMAS MALONE, JEFFERSON THE PRESIDENT: FIRST TERM 1801–1805, at 108–109 (1970) (discussing Jefferson's 1802 Letter to the Danbury Baptists). The Supreme Court has often relied on Jefferson's letter to determine the meaning of the First Amendment's religion clauses. *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 164 (1878) (referring to Jefferson's letter as an "authoritative declaration of the scope and effect of the [First] amendment").

189. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995).

190. *Id.* at 837.

191. *Id.* at 832.

192. The opinions for the Court in these three cases—authored by Justice Byron White in *Lamb's Chapel*, by Justice Anthony Kennedy in *Rosenberger*, and by Justice Clarence Thomas in *Good News*—never even mentioned *Smith* as support for the decisions.

193. Others have also noted the Court's modern approach to free exercise as being the equivalent of equal protection analysis. *See, e.g.*, Susan Gelman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 680–682 (2008); Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275, 338, 344 (2006). Some have been urging such an approach to religious liberty. *See, e.g.*, Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication,* 61 NOTRE DAME L. REV. 311, 313–314 (1986). In a more recent case, the Court did reject a religious speech claim made under *Rosenberger*, *Good News Club*, *Lamb's Chapel*, and earlier analogous precedents—but this case did *not* involve the religious discrimination involved in those cases. In *Christian Legal Soc. Chapter of the University of California v. Martinez*, 561 U.S. 661 (2010), a state law school denied an exemption from its policy, requiring open membership in all student organizations, to a religious group that wished to exclude gays and lesbians. *Id.* at 672–673. Justice Ginsburg, writing for the five to four majority, reasoned that—unlike the regulations at issue in those other cases—the membership requirement here was reasonable, viewpoint neutral, applicable to all student groups, and thus constitutional despite the incidental burden on the religious group. *Id.* at 694–696. Notably, the four dissenters who sided with the student group—Chief Justice Roberts and Justices Scalia, Thomas, and Alito—are the same Justices who dissented in other major gay rights cases. *See, e.g.*, United States v. Windsor, 133 S.Ct. 2675

In the first of those cases, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[194] the Court held that the local ordinance in question violated constitutionally guaranteed free exercise as outlined in *Smith*, because the law was not a "neutral" law of "general applicability."[195] The facts showed that the ordinance in question, which prohibited a narrowly drawn category of animal slaughtering, deliberately targeted the practices of an unpopular religious group for no reason other than "animosity" toward that particular group.[196] The Court, speaking through Justice Anthony Kennedy, employed "an equal protection mode of analysis"[197] and invalidated the ordinance because of its intentionally discriminatory treatment of a religion.[198] In fact, the Court left no doubt that the free exercise violation it found was discrimination, not merely some burden on religious practice. The Court's opinion is replete with explicit reference to discrimination, as well as to precedents where the evil the Court says it had condemned was unequal treatment.[199]

In the other post-*Smith* victory for constitutional free exercise, the Court was even more emphatic that the impermissible evil was discriminatory treatment of religion, not mere interference with it.[200] In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, a state law excluded religious organizations from an otherwise generally available program that provided grants to help improve child playgrounds.[201] Explaining that this exclusion violated constitutional religious liberty, the Court left no doubt about the basis for its ruling. Speaking through Chief Justice John Roberts, the Court began quite plainly: "The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious sta-

(2013) (invalidating discrimination against same-sex married couples in the Defense of Marriage Act); Obergefell v. Hodges, 135 S.Ct. 2584 (2015) (recognizing a right to marry for same-sex couples).

194. 508 U.S. 520 (1993).

195. *Id.* at 531–532, 546–547.

196. *Id.* at 542.

197. *Id.* at 540 (quoting Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

198. *Id*. at 537–538.

199. *See id.* at 532–538 (referring repeatedly to the evil of discrimination, to its unconstitutionality, and to numerous cases in which unequal treatment on the basis of religion was the evil disallowed in the Court's rulings—not merely that free exercise happened to be burdened). In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999)—especially noteworthy because the court's opinion was authored by then Judge Samuel Alito—the circuit court relied on *Lukumi Babalu* to invalidate the discriminatory treatment of religious objectors to the police department's grooming policy; they were denied exemptions even though others were granted exemptions for secular reasons.

200. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012 (2017).

201. *Id.* at 2017.

tus.'"[202] The Court proceeded to discuss prior decisions in which it had forbidden discriminatory—not just burdensome—treatment of religion.[203]

Strikingly, the Court quoted quite favorably from *Sherbert* and *Yoder* early in its analysis, despite the fact that those precedents had been disparaged, if not repudiated, in Scalia's majority opinion in *Smith*.[204] Just as notably, the Court did not even refer to *Smith* until several paragraphs later. Then, when the Court did, it did so only to highlight that decision's prohibition on religious discrimination.[205] Adding to what was especially notable, as well as particularly curious and revealing, was the evident embrace of *Sherbert*'s condemnation of even "indirect" burdens on free exercise.[206] Quoting approvingly from *Sherbert*, Chief Justice Roberts' majority opinion in *Trinity Lutheran* noted:

> As the Court put it more than 50 years ago, "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert*, 374 U.S. at 404. . . . The "imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights." *Sherbert*, 374 U.S. at 405.[207]

The Court concluded by recalling that such conditions that penalize free exercise "must be subjected to the 'most rigorous' scrutiny.[208] In turn, that means that "only a state interest 'of the highest order' can justify the [state's] discriminatory policy."[209] Finally, the Court readily applied that "compelling" interest test[210] to determine that the denial of benefits to a religious entity that was "otherwise qualified" violated the Constitution's protection of free exercise.[211]

There was certainly no disdain for the compelling interest test applied to religious liberty as there was in *Smith*.[212] Scalia's opinion for the Court in that case had argued that

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202. *Id.* at 2019 (quoting *Lukumi Babalu*, 508 U.S. at 533, 542).

203. *Id*. Including, most prominently, *McDaniel v. Paty*, 435 U.S. 618 (1978), where a state law disqualified religious ministers from running for political office.

204. *Contrast id.* at 2019–2020, 2022, *with* Emp't Div. v. Smith (Smith II*)*, 494 U.S. 872, 883 (1990) ("We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. . . . In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all."), *and Smith II* at 881 (*Yoder* protected religious liberty only because that case involved "the right of parents to direct the education of their children") (citation omitted).

205. *Trinity Lutheran*, 137 S.Ct. at 2020–2021.

206. *Id.* at 2022.

207. *Id.*

208. *Id.* at 2024 (citation omitted).

209. *Id.* (citation omitted).

210. *Id.* The Court had just variously referred to this in terms of "the most rigorous scrutiny" and "only a state interest of the highest order." *See id.* at 2014.

211. *Trinity Lutheran*, 137 S.Ct. at 2025.

212. Emp't Div. v. Smith (Smith II), 494 U.S. 872, 885–886 (1990).

> 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. . . .[213]

But in *Trinity Lutheran*, the Court did apply the rigor of the compelling interest test to a free exercise claim, much as it would have in a case involving racial discrimination or interference with free speech. The Court did not seem to have any hesitation or difficulty in doing so.[214] Nor has the Court had much difficulty applying that test in cases where RFRA—rather than the limited *Smith* version of religious freedom—supplied the protection for free exercise.

2. The Statute

Following its ruling in *City of Boerne*, that Congress had exceeded its constitutional authority in enacting Religious Freedom Restoration Act (RFRA),[215] the Supreme Court made clear that it had only been referring to RFRA's attempted application to the states.[216] Nine years after *City of Boerne*, in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, the Court additionally made clear that RFRA did, however, validly apply to federal burdens on free exercise.[217]

Ironically, the Court in *O Centro* was confronted with a question very similar to that which it had faced in *Smith*. In both cases, a generally applicable drug law imposed an incidental burden on a sincere religious use of a prohibited substance.[218] But the *O Centro* case involved the statutory protection of free exercise under RFRA, not the much diminished constitutional protection of *Smith*—which RFRA was intended to undo.[219] And in applying the compelling interest test that was reinstituted in RFRA, the

213. *Id.* (citations omitted).

214. Even the two dissenting Justices, whose concerns involved the separation of church and state, did not raise any concerns about the compelling interest test or even mention it. *See Trinity Lutheran*, 137 S.Ct. at 2027 (Sotomayor, J., dissenting) (joined by Ginsburg, J.).

215. *See* City of Boerne v. Flores, 521 U.S. 507, 519, 534–536.

216. *See* Cutter v. Wilkinson, 544 U.S. 709, 715 (2005) ("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."). In *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006), the Court repeated that, *id.* at 424 n.1, and then proceeded to apply RFRA to a federal law.

217. *See O Centro*, 546 U.S. at 439 (applying RFRA to the federal Controlled Substances Act).

218. *See id.* at 425; Emp't Div. v. Smith (Smith II), 494 U.S. 872, 874 (1990).

219. *See O Centro*, 546 U.S. at 424 (RFRA "adopts a statutory rule comparable to the constitutional rule rejected in *Smith*.").

Court was unanimous in ruling for the religious objectors—precisely the opposite of the result reached in *Smith*.[220]

> As Chief Justice Roberts explained, in enacting RFRA
>
> Congress . . . legislated "the compelling interest test" as the means for the courts to "strik[e] sensible balances between religious liberty and competing prior governmental interests." . . . Applying that test, we conclude . . . the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the [religious group's] sacramental use of [the prohibited drug].[221]

Similarly, in *Burwell v. Hobby Lobby Stores, Inc.*,[222] the Court applied the compelling interest test and ruled in favor of the religious objectors.[223] Under the Patient Protection and Affordable Care Act of 2010 (ACA)[224] and regulations promulgated thereunder,[225] covered employers were required to offer their employees health insurance that included contraceptive coverage. The owners of several family owned businesses complained that obeying that contraceptive mandate would violate their sincere religious beliefs.[226] The Court held that, under RFRA, the religious objectors were entitled to exemptions.[227]

Applying RFRA, the majority assumed *arguendo* that the government had a compelling interest in requiring contraceptive coverage.[228] But that still left the question of whether it was *necessary* to impose that requirement on religious objectors—i.e., whether imposing that requirement was the "least restrictive means" of achieving the government's interest.[229] And the majority readily found such a less restrictive means in the very regulations implementing ACA.[230] Those regulations already afforded exemptions to accommodate some religious objectors and, beyond that, the regulations

220. *Contrast id.* at 439, *with Smith II*, 494 U.S. at 890.

221. *O Centro*, 546 U.S. at 439. Notably, there was not a peep about the compelling interest test's application to protect free exercise being contrary to tradition or to common sense or that it was courting anarchy—not even from Justice Scalia who had insisted just that in *Smith II*, 494 U.S. at 885, 886, or from Justice Kennedy who had joined him. None of the other members of the majority in that previous case were still on the Court for *O Centro*.

222. 134 S.Ct. 2751 (2014).

223. *Id.* at 2759.

224. Pub. L. No. 111–148, 124 Stat. 119.

225. *See* 42 U.S.C. § 300gg–13(a)(4) (authorizing the Department of Health and Human Services to promulgate regulations to fulfill the legislative purposes of the Act).

226. Hobby Lobby Stores, Inc. v. Sebelius, 134 S.Ct. 2751, 2759, 2764–2766 (2014).

227. *Id.* at 2759, 2785. To be precise, the majority relied upon RFRA as "amend[ed]" by its "sister statute" RLUIPA. *Id.* at 2772, 2781.

228. *Id.* at 2780,

229. *Id.* (referring to 42 U.S.C. § 2000bb–1(b)(2). Notably, there was no disagreement among the Justices that the compelling interest test, including the "least restrictive means" analysis, applied in this case. Instead, the dissenters argued that for-profit corporations were not entitled to the protections of RFRA, *id*. at 2793–2797 (Ginsburg, J., dissenting) and that the exemptions sought would undermine the government's ability to achieve its compelling interest. *Id*. at 2799–2804.

230. *Id.* at 2781–2783.

required the insurers to provide the contraceptive coverage themselves for employees who wanted it.[231] Hence, the majority concluded that there was no reason to deny the same exemption to the religious objectors in this case, since contraceptive coverage could be provided in the very same way to the otherwise affected employees.[232]

The very next year, the Court again applied the *statutorily* mandated compelling interest test[233] and again ruled for the religious objector.[234] In *Holt v. Hobbs*, a devout Muslim, incarcerated in an Arkansas prison, objected on sincere religious grounds to shaving in accord with the state's corrections' grooming policy.[235] He was denied his request to maintain his beard to one half-inch.[236]

The state claimed that its strict policy was necessary to promote prison safety and security and, specifically, to prevent prisoners from hiding contraband.[237] The Court, speaking through Justice Samuel Alito, responded

231. *Id.* at 2763, 2782. As the majority explained: "HHS has effectively exempted certain religious nonprofit organizations [that] . . . oppose[ ] providing coverage for some or all of any contraceptive services required to be covered . . . on account of religious objections." . . . [T]he issuer must then exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. Although this procedure requires the issuer to bear the cost of these services, HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services." *Id*. at 2763 (citations omitted).

232. *Hobby Lobby*, 134 S.Ct. at 2782 (concluding that such an implementation of ACA would "not impinge on the plaintiffs' religious belief . . . and it serves HHS's stated interests equally well"). Notably, the majority's approach under RFRA was the same the Court had mandated as a *constitutional* protection in *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (only "interests of the highest order and those not otherwise served" defeat free exercise claims), which was later repudiated as unworkable in *Employment Division v. Smith (Smith II)*, 494 U.S. 872, 883–884 (1990). *See id.* at 2760 (stating that *Smith II* "largely repudiated th[at] method of analyzing free-exercise claims"). Notably also—and rather curiously—Justice Scalia, who authored the majority in *Smith*, to do away with that approach, had no such concerns in *Hobby Lobby*. Rather, it was the more liberal, Democratic appointees on the Court who expressed such concerns in a dissent by Justice Ruth Bader Ginsburg. *Id.* at 2805–2806 (Ginsburg, J., dissenting). Curiously also—and under the category of how things change depending on what other interests are at stake—the ACLU which had supported the compelling interest/strict scrutiny test in *Smith II* (and then condemned the decision against a religious exemption in that case and urged passage of RFRA to overrule it), turned against the application of that test and RFRA in *Hobby Lobby*. *Contrast The ACLU and Freedom of Religion and Belief*, ACLU, https://www.aclu.org/other/aclu-and-freedom-religion-and-belief (last accessed Apr. 21, 2018) (favoring strict scrutiny and a religious exemption for the Native Americans to use peyote in *Smith*, as well as urging passage of RFRA), *with* Leah Rutman, *The Hobby Lobby Decision: Imposing Religious Beliefs on Employees*, ACLU (Aug. 11, 2014), https://www.aclu-wa.org/blog/hobby-lobby-decision-imposing-religious-beliefs-employees (opposing the application of RFRA to provide a religious exemption from the contraception mandate in *Hobby Lobby*).

233. To be precise, the Court applied RLUIPA which the Court has described as an "amendment" and "sister act" of RFRA. *Hobby Lobby*, 134 S.Ct. at 2772, 2781. *See also supra* note 161.

234. Holt v. Hobbs, 135 S.Ct. 853, 859, 864–865 (2015) (citing and applying the same analysis as in *Hobby Lobby*).

235. *See id.* at 859.

236. *See id.* at 861.

237. *See id.* at 863.

that, while the restriction of contraband in prison facilities is a compelling interest, "the argument that this interest would be seriously compromised by allowing an inmate to grow a half-inch beard is hard to take seriously."[238] Moreover, the Court could not take seriously that this or other justifications of prison security passed the least restrictive means analysis noting, among other things, that numerous other prisons successfully use other methods in order to accommodate the same religious requests.[239]

This time, the Court's application of the statutory compelling interest test was unanimous.[240]

3. The States

As a result of the Supreme Court's current jurisprudence, states have wide latitude in whether or not to protect free exercise of religion. Under the Court's decision in *Smith*, states may disregard any burden imposed on the *constitutional* guarantee of religious freedom, as long as their laws are "otherwise valid."[241] So unless a state law or action is invalid *for some other reason*—e.g., it violates freedom of speech[242] or invidiously discriminates on the basis of religion[243]—the interference with free exercise is constitutionally irrelevant.

Additionally, under the Court's decision in *City of Boerne*, the attempted restoration of the compelling interest test in RFRA to safeguard free exercise of religion does not apply to the states at all.[244] And even with the corrective enactment of RLUIPA, that stringent *statutory* protection of free exercise is applicable to the states in only two narrow categories—i.e., the use of land and the treatment of prisoners.[245] Otherwise, *Smith*'s narrow reading of First Amendment religious freedom applies.

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238. *See id.*

239. *See id.* at 864–867 (citing and applying the same analysis as in *Hobby Lobby*).

240. There were two separate concurring opinions, but they did not take issue with the Court's analysis. *Holt*, 135 S.Ct. at 867 (Ginsburg, J., concurring); *id.* (Sotomayor, J., concurring). The next year, in a follow-up contraceptive mandate case, *Zubik v. Burwell*, 136 S.Ct. 1557 (2016), several nonprofit organizations claimed entitlement under RFRA to a religious exemption from even submitting the required notice to the insurer or to the federal government that they chose not to provide contraceptive coverage. In a unanimous *per curiam* decision, the Court relied on the supplemental briefs of both sides to the controversy which acknowledged that there were feasible options for accommodating the competing interests. Accordingly, the Court remanded the several cases involved back to the circuit courts to afford the parties "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'" *Id.* at 1560 (quoting from the government's supplemental brief).

241. *See supra* notes 109–134 and accompanying text.

242. *See supra* notes 181–192 and accompanying text.

243. *See supra* notes 193–214 and accompanying text. Such discriminatory laws are not "neutral" and "generally applicable" within the meaning of those terms as used in *Smith*. *See* discussion of *Lukumi Babalu*, *supra* notes 194–199 and accompanying text.

244. *See supra* notes 156–161 and accompanying text.

245. *See supra* notes 161, 233–240 and accompanying text.

Not surprisingly, with federal constitutional and statutory law imposing very few limits on the states' interference with free exercise, the treatment of religious liberty nationwide is in disarray. This fundamental First Amendment right, previously treated as a "preferred freedom" that is essential to the American "scheme of ordered liberty,"[246] is now treated differently—rigorously protected or hardly at all—depending upon the different states' different decisions.

Other fundamental rights—whether free speech, free press, freedom of assembly, parental rights, or others—are all safeguarded under federal constitutional law to the highest extent. Interference with any of those rights triggers strict scrutiny, requiring the state to justify its law or action as being needed to achieve some compelling government interest.[247] But not so for free exercise of religion.

Other than the two narrow areas statutorily protected by RLUIPA, a state is free under federal law to burden free exercise of religion as long as whatever it is doing is not *otherwise invalid*. The result is that while some states have chosen to continue protecting religious liberty as a fundamental right, others have chosen to treat it as little more than a nuisance.

In *Smith*, Justice Scalia condemned the compelling interest test for free exercise as "courting anarchy."[248] In fact, the Court's decision to eliminate that protection for free exercise has resulted in a kind of "anarchy" that would not be permissible for any other fundamental constitutional right. A few illustrations will make the point.

In *State v. Hershberger*,[249] decided the same year as *Smith*, Minnesota's high court rejected the Supreme Court's decision and, as a matter of its own state constitutional law, adhered to the more protective standards that the Supreme Court had just abandoned.[250] In that case, members of the

246. *See supra* notes 55–108 and accompanying text.

247. *See supra* notes 144–149 and accompanying text. As Justice Jackson wrote for the Court long ago in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943), "[F]reedoms 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." Well, since *Smith II*, that remains true today except for freedom of worship.

248. Emp't Div. v. Smith (Smith II), 494 U.S. 872, 888 (1990).

249. 462 N.W.2d 393 (1990), *on remand from* 485 U.S. 901 (1990).

250. *Id.* at 398. Of course it is a truism that under our federal system of government a state and its courts may afford greater protection, under the state's own law, for rights and liberties than that which is mandated by the Supreme Court, as a matter of federal law. Indeed, a state and its courts may decide to protect rights and liberties however they choose as long as they do not actually *violate* federal law—e.g., infringe upon a federal constitutional right or liberty—in doing so. *See* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982) (avoiding the federal issue because "a state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee") (citations omitted); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (affirming the state court's decision on the ground that Supreme Court rulings do not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive

Old Order Amish objected on sincere religious grounds to the state requirement that they display a fluorescent orange-red triangular sign on their slow moving vehicles.[251] In its initial decision prior to *Smith*, the state's high court applied the federal constitutional standards then in effect and, accordingly, ordered the state to allow the Amish to use a less restrictive alternative that would still achieve the state's safety purposes.[252]

When the Supreme Court vacated that decision in light of the diluted standard just adopted in *Smith*, the state court chose to adhere to its prior decision on the basis of its own constitutional guarantee of religious liberty.[253] Applying the same heightened scrutiny that would be triggered by infringements on other fundamental rights, Minnesota's Supreme Court explained that to "infringe upon religious freedoms which this state has traditionally revered, the state must demonstrate that public safety cannot be achieved through reasonable alternative means."[254] Because the state had failed to show that the "use of white reflective tape and a lighted red lantern" was inadequate to serve its highway safety interests, the state's high court ruled for the religious objectors.[255]

Several years later, in *State v. Miller*,[256] a case involving the same religious objections, the Wisconsin Supreme Court also rejected *Smith*, and ruled that "guarantees of our state constitution will best be furthered through continued use of the compelling interest/least restrictive alternative analysis of free conscience claims."[257] Applying that analysis, the state's high court mandated the accommodation for the religious objectors just as the Minnesota court had in *Hershberger*.[258]

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than those conferred by the Federal Constitution"). *See generally* William J. Brennan, *supra* note 172; Vincent Martin Bonventre, *Changing Roles: The Supreme Court and the State High Courts in Safeguarding Rights*, 70 ALB. L. REV. 841, 842 (2007); Vincent Martin Bonventre, *Beyond the Reemergence—'Inverse Incorporation' and Other Prospects for State Constitutional Law*, 53 ALB. L. REV. 403 (1989). See also *supra* notes 172–176 and accompanying text.

251. State v. Hershberger, 444 N.W.2d 282, 284 (Minn. 1989), *vacated* (1990) 495 U.S. 901 (1990), *remanded to* 462 N.W.2d 393 (Minn. 1990).

252. *Id.* at 289.

253. *Hershberger*, 462 N.W.2d at 399 (1990), *on remand from* 495 U.S. 901 (1990).

254. *Id.*

255. *Id.* In another case where a state court's pre-*Smith* decision was vacated by the Supreme Court, *First Covenant Church of Seattle v. City of Seattle*, 787 P.2d 1352 (Wash. 1990), *cert. granted, vacated*, 499 U.S. 901 (1991), *remanded to* 840 P.2d 174 (Wash. 1992), the Washington Supreme Court similarly adhered to its initial decision as a matter of its own state constitutional guarantee of freedom of conscience. First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 185–186 (1992). Although the state court found that applying *Smith II* would not necessarily lead to a different result, it chose instead to decide the case under the compelling interest test from its own case law and, in doing so, it held that applying the local landmarks preservation law in disregard of the church's religious needs "is not necessary to prevent a grave danger to the public health, peace, or welfare." *Id*. at 188.

256. 549 N.W.2d 235 (Wis. 1996).

257. *Id.* at 241.

258. *Id.* at 242.

Under *Smith*, however, an "otherwise valid" traffic law would defeat sincere religious objections. And when state courts decline to adopt a more protective standard under their own law and, instead, choose simply to march lockstep with that Supreme Court decision, free exercise claims are dismissed. That is exactly what happened in *Gingerich v. Commonwealth*.[259]

Despite a readily available alternative that would have served the state's interests and avoided burdening religious liberty—as the courts in *Hershberger* and *Miller* had found—Kentucky's Supreme Court simply decided that it "will follow federal precedent" and forego any independently protective state standard.[260] That state's high court thus abandoned the compelling interest test, just as the Supreme Court had done, and it held that the traffic law would be "presumed constitutional unless there is no *rational* basis for it."[261] So mere rationality would henceforth defeat genuine claims of free exercise in that state.

It would seem that a fundamental right—if that's what free exercise of religion is—would at least require that government make some effort to accommodate its exercise. A fortiori when an accommodation to protect that right is so obvious and available. But the Kentucky court in *Gingerich*, like the Supreme Court in *Smith*, chose to treat religious liberty more like a nuisance to be casually disregarded than a right to be taken seriously. As the dissenter in *Gingerich* recognized, "[e]mploying a rational basis standard renders inconsequential Kentucky's free exercise guarantee in that virtually any asserted governmental interest could justify laws of general applicability that have the effect of substantially burdening individuals' religious liberty."[262]

This same disparate treatment of religious liberty has arisen in numerous other contexts since *Smith*. Not surprisingly, employment is among them. In *Humphrey v. Lane*,[263] a state correctional employee who wore his hair long as a sincere practitioner of Native American Spirituality was ordered to cut his hair in accordance with the official grooming policy or he would be fired.[264] The trial court, applying the compelling interest test, granted the employee injunctive relief; but the intermediate appellate court applied *Smith*, rejected the free exercise claim, and reversed.[265]

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259. 382 S.W.3d 835, 844 (Ky. 2012).

260. *Id.* at 844.

261. *Id.* (emphasis added).

262. *Id.* at 847 (Scott, J., dissenting).

263. 728 N.E.2d 1039 (Ohio 2000).

264. *Id.* at 1041. The prefatory statement of the case in an Ohio Supreme Court opinion is an official "Syllabus by the Court," *Id.* at 1040.

265. *Id.* at 1042–1043.

The Ohio Supreme Court, however, rejected *Smith* as the standard for the state's own religious freedom guarantee. Instead, the state's high court declared:

> We adhere to the standard long held in Ohio regarding free exercise claims—that the state enactment must serve a compelling state interest and must be the least restrictive means of furthering that interest. That protection applies to direct and indirect encroachments upon religious freedom.[266]

Applying that heightened scrutiny as a matter of independent state constitutional law, the court acknowledged a strong interest in uniformity and professionalism among the prison guards, but it insisted upon the "simple accommodation of allowing [the employee] to wear his hair pinned under his uniform cap" which would satisfy the need for guards to present a "professional and dignified image."[267]

Another state court adopted the much less protective approach to free exercise. In *Hagy v. Commissioner*,[268] an employee objected, on religious grounds, to newly assigned duties involving advertisements that "promoted witchcraft, satanic worship, drugs, homosexuality, and violence."[269] When the employer refused to accommodate his religious objections, the employee quit and the state's labor department approved his application for unemployment benefits on the ground that his religious objections were a "good work-related cause to quit."[270] That determination in his favor, however, was overruled and, ultimately, the state's intermediate appellate court ruled against him as well.[271]

The Tennessee court, favorably citing *Smith*, announced its own similar rule: "the enforcement of a 'facially neutral and uniformly applicable' law which incidentally burdens a religious practice is valid."[272] Finding that the state's unemployment compensation law fit that description, the court concluded that there was "*no merit* in plaintiff's argument regarding constitutional violations."[273] None? Not even a close or difficult balance between a fundamental constitution right and mere legislation? Well no—not if that right is treated as a mere nuisance, which current First Amendment jurisprudence permits.[274]

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266. *Id.* at 1045.

267. *Id.* at 1046.

268. No. E2003-01685-COA-R3-CV, 2004 WL 1170031 (Tenn. Ct. App., May 26, 2004). The opinion notes that "Application for Permission to Appeal Denied by Supreme Court, Nov. 29, 2004." *Id.*

269. *Id.* at 1.

270. *Id.*

271. *Id.* at 4.

272. *Id.*

273. *Id.* (emphasis added).

274. Tennessee subsequently adopted its own version of the federal RFRA. The state's Preservation of Religious Freedom Act was signed into law in 2009. Tenn. Code Ann. § 4–1–407(b). Like the federal law, it reinstates the compelling interest test for burdens on free exercise and

While religious freedom may readily be accommodated in some contexts—which, however, does not necessarily mean that the accommodation will be ordered—there are some contexts in which the competing interest makes an accommodation or exemption much more complicated. Housing discrimination is one such context. With *Smith* mandating very little federal constitutional protection for free exercise, state courts have resolved the resulting issues quite differently.

In *State v. French*,[275] the Minnesota Supreme Court—several months prior to its final *Hershberger* decision[276]—granted an exemption from the state's Human Rights Act to a landlord who refused to rent to an unmarried opposite-sex couple.[277] The law prohibited discrimination based on marital status, but the landlord had sincere religious objections to an adult couple living together in a sexual relationship outside of marriage.[278] Applying the state's independent constitutional protection of religious freedom, Minnesota's high court required the government to demonstrate a sufficiently compelling interest to outweigh the landlord's right to exercise his religion.[279]

The state argued that it had an overriding interest in "eliminating pernicious discrimination."[280] But finding nothing particularly "pernicious" about "refusing to treat unmarried, cohabiting couples as if they were legally married," the court ruled that the state had failed to demonstrate an interest sufficient to defeat the religious rights of the landlord.[281]

The Alaska Supreme Court, confronting a similar religious objection and applying a similar standard under its own constitution, nevertheless reached the opposite result.[282] In *Swanner v. Anchorage Equal Rights Commission*, the landlord had refused on religious grounds to rent to several unmarried opposite-sex couples.[283] The landlord's religious beliefs were that "even a non-sexual living arrangement by roommates of the opposite sex is immoral and sinful."[284] The state's high court agreed with the administrative determination that the landlord's refusal to rent violated state and

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effectively overrules decisions of its own courts such as in *Hagy*. At the time of this writing, twenty-one states have adopted similar legislation rejecting *Smith*'s dilution of free exercise protection. *See* National Conference of State Legislatures, *State Religious Freedom Restoration Acts*, NCSL (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx#RFRA.

275. 460 N.W.2d 2 (Minn. 1990).

276. *See supra* notes 249–255 and accompanying text.

277. *French*, 460 N.W.2d at 11.

278. *Id.* at 3–4.

279. *Id.* at 10. The court viewed the Minnesota constitution as providing "far more protection of religious freedom" than the United States Constitution. *Id.* at 9.

280. *Id.*

281. *Id.* at 11.

282. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994).

283. *Id.* at 276–277.

284. *Id.* at 277.

local laws prohibiting marital status discrimination, and it also agreed that enforcement of those laws against him did *not* violate his religious freedom.[285]

Adhering to the heightened scrutiny of *Sherbert* and *Yoder* as a matter of state constitutional law,[286] the Alaska court outlined the test as whether a government "interest of the highest order" would "suffer if a [religious] exemption is granted."[287] Applying that test, the court found that the interest in eliminating housing discrimination "that degrades individuals, affronts human dignity, and limits one's opportunities" would necessarily "suffer" if exemptions were permitted.[288]

That different courts might reach different results in cases involving competing interests that are both strong is not a surprise. Nor is it a surprise that such a case becomes much easier to resolve when one of the competing interests is treated like a nuisance and downgraded. That is what the California Supreme Court did with religious liberty in *Smith v. Fair Employment & Housing Commission*.[289] In that case, California's high court raised the possibility that free exercise would be more protected under the state's constitutional law than under the Supreme Court's interpretation of the federal Constitution.[290] But as the dissenting opinion complained, the state court's treatment of religious freedom was, instead, "virtually indistinguishable from the rationale and holding of *Smith*."[291]

Similar to the Minnesota and Alaska cases, this California case involved a landlord who refused on religious grounds to rent to unmarried couples because she believed "it is a sin for her to rent her units to people who will engage in nonmarital sex."[292] Upholding the administrative determination that the landlord's religious objections did not excuse her violation of the state's prohibition against marital status discrimination in housing, the court analyzed the case under both *Smith* and the compelling interest test that decision had abandoned. Under the former, the California court simply recited that the law was "generally applicable and neutral towards religion" and, therefore, that the landlord was bound to comply with it.[293]

285. *Id.* at 278, 285.
286. *Id.* at 281–282.
287. *Id.* at 282.
288. *Swanner*, 874 P.2d at 283.
289. 913 P.2d 909 (Cal. 1996)
290. *Id.* at 930–931.
291. *Id.* at 966 (Baxter, J., dissenting).
292. *Id.* at 913.
293. *Id.* at 919.

Then, ostensibly applying the compelling interest test,[294] the court dismissed the free exercise claim by denying that the law imposed any substantial burden on the religiously objecting landlord. The court summarized its analysis this way:

> [The landlord's] religion does not require her to rent apartments, nor is investment in rental units the only available income-producing use of her capital. Thus, she can avoid the burden on her religious exercise without violating her beliefs or threatening her livelihood. The asserted burden is the result not of a law directed against religious exercise, but of a religion-neutral law that happens to operate in a way that makes Smith's religious exercise more expensive.[295]

It is, apparently, not the duty of government to avoid burdens on free exercise of religion. Rather, according to the California court in this case, that duty falls upon the religious practitioner—even if that means having to give up one's chosen livelihood. No accommodations or exemptions need be afforded to insure that religious liberty be safeguarded. As long as religion itself is not the target of discriminatory treatment, free exercise may simply be disregarded as a nuisance.

Finally, the decision of New York's highest court in *Catholic Charities v. Serio* deserves some attention.[296] If free exercise of religion jurisprudence after *Smith* is a hodgepodge of incoherence, inconsistency, and contradictions across the states—with varying tests and interpretations and protections (or lack thereof) for what is supposed to be a fundamental right under the United States Constitution—the New York decision is a microcosm of it all. The court's denial of a religious exemption from the state's contraceptive insurance mandate[297]—agree with it or not—is one of the few understandable aspects of the decision. What free exercise law actually

294. The court did so believing at the time—prior to the Supreme Court's decision in *City of Boerne*—that the federal RFRA and, thus, the heightened scrutiny under *Sherbert* and *Yoder* applied to state cases. *Id.* at 922–923.

295. *Smith v. Fair Emp't*, 913 P.26 at 928–929 (citations omitted). Albeit using a different rationale, the Florida Supreme Court in *Warner v. City of Boca Raton*, 887 So.2d 1023 (Fla. 2004), also diluted the compelling interest test it was ostensibly applying. Interpreting the state's own RFRA—which, like the federal counterpart, reinstated the heightened scrutiny of *Sherbert* and *Yoder*—the court held that a "substantial burden" on free exercise only covers "conduct that his religion forbids or . . . conduct that his religion requires," but not "religiously motivated conduct." *Id.* at 1033. Apparently, conduct based on *mere* religious beliefs does not count, only religiously *obligated* or *prohibited* conduct.

296. 859 N.E.2d 459 (N.Y. 2006). Disclosure: I consulted with the attorney for Catholic Charities in this case. Although I am not a religious believer and do support the contraceptive mandate, I support religious liberty and the requested religious exemptions even more fervently. Moreover, though I do believe that a court could reasonably decide that granting the exemptions would undermine the important purposes of the law, I think the court's analysis and the rule it adopted for dealing with burdens on religious freedom is—to be blunt—dreadfully unprotective of that fundamental right.

297. *Id.* at 461, 468.

is in New York after this case is, at best, perplexing. On the one hand, the New York court claimed that, as a matter of independent state constitutional law, it was rejecting the "inflexible rule" of *Smith* that neutral and generally applicable laws defeat free exercise claims.[298] But within a few paragraphs, the court largely backtracked. The court announced that "the principle stated by the United States Supreme Court in *Smith*—that *citizens are not excused* by the Free Exercise Clause from complying with generally applicable and neutral laws, even ones offensive to their religious tenets—*should be the usual, though not the invariable, rule*.[299]

Reviewing its previous decisions, the court failed to acknowledge its early landmark, *People v. Barber*,[300] where the court applied the state constitution to carve out a religious exemption from an otherwise valid generally applicable law, even though the Supreme Court had just declined to do so.[301] Instead, the court characterized the cited precedents as creating some as yet undefined balancing test between the competing religious and government interests.[302] It then proceeded to formulate a balancing test that *relieved the government of any requirement to justify* the burden placed on religious liberty.[303] The rule fashioned by the court was that the *religious objector* "bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom."[304]

Lest there be any doubt that it was placing the burden on the party whose fundamental right was being interfered with, rather than the government which was interfering with that right, the court repeated itself. It insisted that "[t]he burden of showing that an interference with religious practice is unreasonable, and therefore requires an exemption from the statute, must be on the person claiming the exemption."[305] Although the burden of justification is on the government, under the strict scrutiny test, whenever it interferes with other fundamental rights[306]—and for free exercise as well under RFRA and other states' constitutional law[307]—the New York Court of Appeals simply referred to "legislative prerogative" and "efficient government" as the supposed reasons to treat religious liberty differently.[308]

Then, to add some mystery and apparent second-thoughts to its adopted rule, the court identified some burdens on religious liberty that,

298. *Id.* at 466.
299. *Id*. at 467 (emphasis added).
300. 46 N.E.2d 329 (N.Y. 1943).
301. *See supra* notes 174–175 and accompanying text.
302. Catholic Charities v. Serio, 859 N.E.2d 459, 466 (N.Y. 2006).
303. *Id.* (holding that "substantial deference is due the Legislature.")
304. *Id.*
305. *Id*. at 467.
306. *See supra* notes 144, 247 and accompanying text.
307. *See supra* notes 217–240, 249–259 and accompanying text.
308. *Catholic Charities*, 859 N.E.2d at 467.

regardless of what it had just outlined, it would not tolerate. These included "a requirement that all witnesses must testify" without an exemption for priest-penitent confidences, "a general prohibition of alcohol consumption" without an exemption for Christian communion, and a "uniform regulation of meat preparation" without an exemption for kosher slaughtering.[309] The court declared "these hypothetical laws to be well beyond the bounds of constitutional acceptability."[310]

Does that mean that the application of such laws to the religious practice would be *per se* invalid? And that the religious objector would not bear the burden of demonstrating unreasonableness to obtain an exemption? Even though none of those neutral and generally applicable laws would themselves be unreasonable?[311]

So is the real test a matter of how important the burdened belief or practice is to the religion?[312] Does that test then entail courts engaged in examining a religion and assessing how important that belief or practice is? And does that in turn also entail courts deciding that some religious beliefs and practices are not that important?[313]

Beyond that, with those enumerated and similar exceptions in mind, what exactly is the free exercise jurisprudence that New York's high court adopted in *Catholic Charities*? To what extent is that right protected? As a fundamental liberty? Or as a nuisance usually to be dismissed as not quite so important, as it was in that case?

As the cases discussed show, that is precisely the disparity with which the constitutional guarantee of religious freedom is being treated across the country since the Supreme Court's decision in *Smith* permitted that to be so.

IV. Conclusion: Fundamental Right or Nuisance

The Supreme Court majority in *Smith*, speaking through Justice Scalia, repudiated the compelling interest test for free exercise of religion as "con-

309. *Id.* (quoting Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1418–1419 (1990)).

310. *Id.*

311. In all candor, the recitation of these hypotheticals as "well beyond the bounds of constitutional acceptability" seems so at odds with the thrust of the court's opinion that it seems an addition by or at the urging of someone other than the primary author of the opinion. A unanimous opinion—as this was—is oftentimes more compromise than conviction, and often the product of additions and deletions at the behest of others who have joined it. *See* Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the New York Court of Appeals*, 67 Temple L. Rev. 1163, 1167 nn.18–19 (1994).

312. What does the court's rule mean for an *abortion* coverage mandate? That question is now in litigation. *See* Roman Catholic Diocese v. Vullo, No. 7536–17, (N.Y. Sup. Ct. filed Dec. 5, 2017).

313. Of critical note is that any such "intrusive inquiry into religious belief" would likely run afoul of both the non-establishment and free exercise guarantees of the First Amendment. Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 339 (1987). *See also* Thomas v. Review Bd., 450 U.S. 707, 716 (1981).

tradict[ing] common sense" and as "courting anarchy."[314] But, in fact, the consequences wrought by that decision are what makes little sense and what has created a veritable anarchy. A fundamental, First Amendment, constitutional right was stripped of the protection of heightened judicial scrutiny[315] which safeguards every other First Amendment right and, indeed, every other fundamental liberty.[316]

As a result of *Smith*, free exercise of religion has been afforded varying levels of protection, from a great deal to nearly none at all, depending upon the varying decisions of the various states.[317] Except where a violation of some other fundamental right incidentally interferes with free exercise,[318] or where a religion is the intended victim of invidious discrimination,[319] the states have been left with virtually free reign to treat religious liberty as a fundamental right or as little more than a mere nuisance.

Hence, some state supreme courts have rejected *Smith* and retained the compelling interest protection spelled out in *Sherbert* and *Yoder* as a matter of their own constitutional law.[320] Others have chosen to march lockstep with the Supreme Court and have simply adopted the *federal* constitutional decision in *Smith* as their own *state* constitutional rule.[321] Then there are those state courts which have claimed to be applying the compelling interest test but, in fact, applied a much diluted version of it and denied that there had been a cognizable burden on free exercise—either under the state's constitution[322] or under the state's RFRA.[323] And there is at least one state high court that 1) explicitly rejected *Smith* as a matter of state constitutional law but, 2) in the same opinion, also rejected the compelling interest test and 3) announced that the *Smith* rule would usually apply and, 4) if that were not confusing enough, spelled out its own extremely unprotective rule, but 5) then identified exceptions that seemed to contradict or at least seriously undermine the rule just announced.[324]

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314. Emp't Div. v. Smith (Smith II), 494 U.S. 872, 885, 888 (1990).

315. *See supra* notes 109–134 and accompanying text.

316. *See supra* notes 144, 247 and accompanying text.

317. *See supra* notes 241–313 and accompanying text.

318. *See supra* notes 181–192 and accompanying text.

319. *See supra* notes 193–214 and accompanying text. There is also the *statutory* protection under RLUIPA that restricts state interference with religious liberty in land use and prison matters. *See supra* notes 233–240 and accompanying text.

320. *See, e.g.*, State v. Hershberger, 462 N.W.2d 393, 399 (Minn. 1990), *on remand from* 495 U.S. 901 (1990); *see also supra* notes 249–258 and accompanying text.

321. *See, e.g.*, Gingerich v. Commonwealth, 382 S.W.3d 835, 844 (Ky. 2012); *see also supra* notes 259–262 and accompanying text.

322. *See, e.g.*, Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909 (Cal. 1996); *see also supra* notes 289–295 and accompanying text.

323. *See, e.g.*, Warner v. City of Boca Raton, 887 So.2d 1023 (Fla. 2004); *see also supra* note 295.

324. *See* Catholic Charities v. Serio, 859 N.E.2d 459 (N.Y. 2006); *see also supra* notes 296–313 and accompanying text. Again, *see* disclosure at *supra* note 296.

Smith's supposed rescuing free exercise jurisprudence from "anarchy" in the name of "common sense" has thus generated enormous disarray and confusion and has left that First Amendment right at the mercy of a vast disparity of treatments. A case currently pending at the Supreme Court demonstrates much of what has been discussed in these pages and provides a fitting illustration with which to conclude.

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[325] the owners of a bakery in Colorado refused, on sincere religious grounds, to create a cake sought by a same-sex couple to celebrate their upcoming wedding.[326] The state found the bakery's refusal to be a violation of its law that prohibits sexual-orientation discrimination in places of business[327] and, on appeal, the state's intermediate court agreed.[328] The state's supreme court declined to review the case,[329] but the United States Supreme Court chose to do so.[330]

In its decision, the Colorado appellate court addressed the bakery owners' religious objections after first rejecting their free speech arguments.[331] The court held that, because Colorado's anti-discrimination statute was a "neutral law of general applicability, it defeated the free exercise claim as a matter of federal constitutional law under *Smith*.[332] The court then rejected the argument for greater protection under the state constitution and, instead, held that *Smith* was the standard for Colorado's law.[333] In accord with that decision, the Colorado court applied a "rational basis" test to summarily dismiss the religious objections as a matter of state constitutional law as well.[334]

At the United States Supreme Court, the bakery owners' brief relies largely on free speech, claiming that creating a cake for the same-sex couple would be expressive activity endorsing that couple's marriage.[335] In that brief, there are also two arguments ostensibly based on the "Free Exercise Clause." The first such argument is in fact about "discriminatory application" and "discriminatory reading" of the state law, allegedly resulting in

325. 137 S.Ct. 2290 (2017).

326. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276–277 (Colo. Ct. App. 2015), *cert. granted sub. nom.* Masterpiece Cakeshop v. Colo. Rights Comm'n, 137 S.Ct. 2290 (2017). On June 4, 2018, while publication of this article was pending the Supreme Court rendered its decision. *See infra* note 343.

327. *Id.*

328. *Id.* at 294.

329. Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016) (denying certiorari).

330. *Masterpiece Cakeshop*, 137 S. Ct. 2290. The decision was pending at the time of this writing.

331. *Masterpiece Cakeshop*, 370 P.3d at 288.

332. *Id.* at 292.

333. *Id.* at 292–294.

334. *Id.*

335. *See* Brief for Petitioners, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S.Ct. 2290 (2017) (No. 16–111), 2017 WL 3913762, at *16–37.

"discriminatory treatment" of the bakers.[336] It is entirely in the nature of an invidious discrimination claim.[337] The other ostensibly "Free Exercise Clause" argument, which discusses so-called "hybrid rights," is nothing more than a very brief restatement that the bakers' have a "strong free-speech interest" in their religion claim.[338] It is essentially their free speech argument under a different heading.

To underscore that latter point. The amicus brief filed by the United States[339] does not even make a free exercise of religion argument.[340] Instead, it rests its support for the bakers solely on free speech.[341] Whether the bakers should prevail in this case, or whether eliminating sexual-orientation discrimination in the market place is more important, it is extraordinarily significant that an undeniable burden imposed on First Amendment *freedom of religion, in and of itself*—i.e., as opposed to the bakers' free speech or the alleged deliberate discrimination against them—has become such a comparably insignificant aspect of this litigation. That fundamental right is being treated as little more than a nuisance unless tied to some other constitutional concern.[342]

But that is the current state of free exercise under the Constitution and the legacy of *Smith*.[343]

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336. *Id.* at *38–46.

337. For a related discussion, see *supra* notes 193–214 and accompanying text.

338. *Id.* at *46–48.

339. Brief for the United States as Amicus Curiae Supporting Petitioners, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S.Ct. 2290 (2017) (No. 16–111), 2017 WL 4004530 (filed by the Department of Justice under the administration of President Donald Trump).

340. *Id.* at *33 n.6.

341. The sole argument is based on "The First Amendment Free Speech Clause." *Id.* at *9.

342. Disclosure: Despite my fervent support for religious liberty, I strongly favor the elimination of sexual-orientation discrimination and believe that the Supreme Court should view eliminating that evil as an interest of the very highest order, just as it did with regard to racial discrimination in *Bob Jones University v. United States*, 461 U.S. 574 (1983). *See supra* notes 92–108 and accompanying text. So I would not favor granting an exemption to the bakers.

343. On June 4, 2018, while publication of this article was pending, the Supreme Court ruled in favor of the baker in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). The 7-2 decision, authored by Justice Anthony Kennedy, narrowly held that Colorado's Civil Rights Commission was hostile to the baker's religious beliefs and thus did not give him a fair and neutral hearing. The Court avoided the underlying issue of whether a religious objector would be entitled to an exemption from an otherwise valid, generally applicable anti-discrimination law. Instead, the Court relied on its precedents, such as *Church of the Lukumi Babalu Ave. Inc. v. City of Hialeah* which ruled in favor of religious objectors solely on the ground that the legislation was the product of hostility toward a particular religion. *See* discussion *supra* note 179. In short, the Court found that the Colorado determination that the baker was not entitled to an exemption was not "otherwise valid," because it unlawfully assessed the baker's religious belief as illegitimate and subjected it to ridicule. In the Supreme Court's own words, the Colorado commission "disparage[d]" the baker's religious faith "by describing it as despicable, and also characterizing it as merely rhetorical—something insubstantial and even insincere." *Masterpiece Cakeshop*, 138 S. Ct. at 1729. *Oregon v. Smith* as the current standard for protecting—or not—religious liberty was left untouched. *See The Cakeshop case: What the Court Did NOT Decide*, http://www.newyorkcourtwatcher.com/2018/06/the-cakeshop-case-what-court-did-not.html.