

## Relevant Free Exercise History

The Free Exercise Clause of the First Amendment of the United States Constitution requires that “Congress shall make no law...prohibiting the free exercise [of religion].” It was not until the late nineteenth century that the Supreme Court decided to define the scope of the Free Exercise Clause. *Reynolds v. United States (1879)* held that while laws “cannot interfere with mere religious belief and opinions, they may with practices.”<sup>1</sup> To allow religious belief to serve as a justification of an overt criminal act would in effect “permit every citizen to become a law unto himself.”<sup>2</sup> The precedent set by *Reynolds* gave the government extremely broad authority to regulate and interfere with the religious behavior of any individual or group.<sup>3</sup>

Sixty years later in *Cantwell v. Connecticut (1940)*, the Supreme Court revised the rule governing the free exercise of religion established in *Reynolds*. In this case, Newton Cantwell and his two sons traveled to New Haven, Connecticut to evangelize and spread the religious beliefs of the Jehovah’s Witnesses. After a dispute with local Catholics, the Cantwells were arrested and convicted for inciting a breach of peace and for distributing materials on public property without a license.<sup>4</sup>

Ruling in favor of the Cantwells, the Court held that the First Amendment “embraces two concepts, -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.”<sup>5</sup> However, New Haven’s statute requiring the Cantwell’s to obtain a license to solicit for religious purposes constituted a “forbidden burden upon the exercise of liberty protected by

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<sup>1</sup> *Reynolds v. United States*, 98 U.S. 145, 166 (1878)

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, 165-167.

<sup>4</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 300-303 (1940)

<sup>5</sup> *Ibid.*, 303-304

the Constitution.”<sup>6</sup> Thus, *Cantwell* had the effect of broadening the freedom of religious groups and individuals to be free from governmental prior restraint. From *Cantwell* also emerged the “Clear and Present Danger Test.” Before the government could prohibit religious activity, it had to show that the activity presented a “clear and present danger” or an “immediate threat” towards the ordered society. This new standard considerably narrowed the latitude given to the government in *Reynolds* to restrict religious behavior. Under *Cantwell* such behavior could no longer be inhibited simply because it presented *some* danger to society.<sup>7</sup>

The “Clear and Present Danger Test” prevailed for almost twenty-five years until it was replaced by the “Sherbert Test” in 1963. Adeil Sherbert, a member of the Seventh-day Adventist Church, was fired from her job after refusing to work on Saturday, the Sabbath Day of her church. The South Carolina Employment Security Commission denied Sherbert unemployment compensation, finding unacceptable her religious justification for refusing to work on Saturday. Consequently, Sherbert sued claiming that her free exercise rights had been unduly burdened.<sup>8</sup>

Writing for the majority in *Sherbert v. Verner* (1963), Justice William Brennan ruled that the denial of Sherbert’s unemployment compensation represented a substantial burden upon her that was unconstitutional. According to Brennan, “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.”<sup>9</sup> A new test was created for deciding free exercise cases. Brennan’s “Sherbert Test” sought to balance government interests against religious behavior. Under this test, the government must demonstrate that it has a “compelling state interest” that justifies burdening the religious behavior in question. Brennan concluded that

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<sup>6</sup> Ibid, 307.

<sup>7</sup> Ibid, 308-310

<sup>8</sup> *Sherbert v. Verner*, 374 U.S. 398, 399-402 (1963)

<sup>9</sup> Ibid, 405.

“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 interest, give occasion for permissible limitation.”<sup>10</sup>

The “Sherbert Test” was championed by many scholars and religious leaders for broadening the scope of free exercise rights. This test controlled free exercise cases until the 1990 decision of *Employment Division of Oregon v. Smith* which now controls most free exercise cases. *Smith* concerned the denial of unemployment benefits to two Native Americans who were fired from a drug rehabilitation organization for using the illegal drug peyote in a religious ceremony. Writing for the majority, Justice Antonin Scalia ruled that government would no longer be required to demonstrate a “compelling state interest” to justify burdening the free exercise rights of its citizens.<sup>11</sup> According to Scalia, “if prohibiting the exercise of religion...is...merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”<sup>12</sup> Scalia reasoned that Oregon’s law prohibiting certain drugs, peyote among them, was a “law of general applicability”; it applied to everybody, not just members of the Native American Church. Consequently, the Free Exercise Clause of the First Amendment could no longer be used as a defense against such laws of general applicability. One cannot claim that his right to practice religion should take precedent over a law that was not designed to burden religious behavior.<sup>13</sup>

For three decades, the Supreme Court had used the “compelling interest test” established in *Sherbert v. Verner* to decide free exercise cases. After the *Smith* decision was handed down,

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<sup>10</sup> Ibid, 406.

<sup>11</sup> *Employment Division v. Smith*, 494 U.S. 872, 872-876 (1990).

<sup>12</sup> Ibid, 876. *Scalia cited the precedent of Minersville School District v. Gobitis (1940)* (which had been overturned by *West Virginia Board of Education v. Barnette, 1943*) and wrote: “Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”

<sup>13</sup> Ibid, 895-896.

the burden was no longer on the government to demonstrate an important reason or “compelling interest” to interfere with religious freedom. Many church-state scholars were outraged by Scalia’s opinion. Concurring in the result of *Smith* but dissenting from the methodology of the Supreme Court, Justice Sandra Day O’Connor declared that the holding in *Smith*

dramatically departs from well-settled First Amendment jurisprudence...and is incompatible with our Nation’s fundamental commitment to individual religious liberty....Given the range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment never requires the State to grant a limited exemption for religiously motivated conduct....As the language of the Clause itself makes clear, an individual’s free exercise of religion is a preferred constitutional activity. A law that makes criminal such an activity therefore triggers constitutional concern – and heightened judicial scrutiny – even if it does not target the particular religious conduct at issue.<sup>14</sup>

### **The State’s Argument**

The argument of the state would undoubtedly be based heavily upon Antonin Scalia’s majority opinion in *Employment Division of Oregon v. Smith*. Citing *Reynolds v. United*, the district attorney would first state the universally accepted principle that while religious belief is absolute, religious behavior is not. Laws may have the effect of inhibiting the religious practices of its citizens. As Scalia noted in *Smith*, the Supreme Court has “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.”<sup>15</sup> Consequently, free exercise rights do not relieve a person from the obligation to adhere to a “valid and neutral law of general applicability.”

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<sup>14</sup> Ibid, 891, 899-902. Three years later in *Church of Lukumi Babalu Aye v. City of Hialeah* (1993) the Court disappointed religious liberty advocates and adhered to the “neutral law of general applicability” test established in *Smith*. The Court ruled that the *Smith* test had not been met since the City of Hialeah’s ordinance against animal sacrifice clearly targeted members of the Santeria religion. Thus, the Court affirmed the *Smith* decision which stated that only if a law targeted religion specifically and hindered or prohibited religious activity would that law be subject to the compelling state interest test. However, Congress responded to the *Smith* decision by passing the Religious Freedom Restoration Act (RFRA) on November 16, 1993. RFRA was designed to prevent the government (federal and state) from substantially burdening a person’s free exercise rights unless the burdened furthered a compelling interest and was the least restrictive means of furthering that interest. Thus, RFRA essentially reinstated the pre-*Smith* “Sherbert Test” which reigned from 1963-1990. However, the Supreme Court struck down RFRA as an unconstitutional use of Congress’s enforcement of powers in 1997.

<sup>15</sup> *Oregon v. Smith*, 879.

The district attorney would argue that the law in question prohibiting an individual from “disturbing the peace” in a public place was indeed a “valid and neutral law of general applicability.” No particular religion was targeted with the law’s enactment. It applies equally to all citizens including the religious and irreligious. Any person, even the accused, can believe whatever religious doctrine he so chooses – denial of the Trinity included. However, this man or any person does not have the right to engage in criminal conduct (i.e. disturb the peace).

As Scalia held in *Smith*, exemptions to laws of general applicability are not required constitutionally. And in this case, the district attorney is not required to carve out an exemption for the man.<sup>16</sup> According to Scalia, “to make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is “compelling” – permitting him by virtue of his beliefs ‘to become a law unto himself’ contradicts both constitutional tradition and common sense.”<sup>17</sup> The district attorney would not employ the “Sherbert Test”<sup>18</sup> (compelling state interest test) to require that the man receive an exemption from this law simply due to his desire to spread his religious message which many in the town found to be offensive. Quoting Scalia from *Smith*, the district attorney would note that the Court “cannot afford the luxury of deeming presumptively invalid as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.”<sup>19</sup>

### **The Claimant’s Argument**

The claimant (man) would argue that the “Sherbert Test” should be applied in this case. Under this test, the district attorney would have to prove that there is a “compelling state

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<sup>16</sup> Ibid, 897. For instance, if individuals were allowed to challenge the tax system because taxes are spent in a manner that violates their religious beliefs, chaos would ensue and our tax system could no longer function.

<sup>17</sup> Ibid, 885.

<sup>18</sup> As previously discussed, under the “Sherbert Test” governmental practices that substantially burden a religious practice must be justified by a compelling governmental interest. The Supreme Court has never invalidated any governmental action on the basis of the “Sherbert Test” except the denial of unemployment compensation. Even if the “Sherbert Test” were applied in this case, history shows that the Court would likely not rule in favor of the man.

<sup>19</sup> Ibid, 888.

interest” that justifies the burdening of the man’s religious behavior. He would argue that the government’s interest in keeping the peace in public places does not outweigh his free exercise right to express his sincerely held religious beliefs in public.

This argument would rely heavily on former Justice Sandra Day O’Connor’s concurrence in *Oregon v. Smith* (1990) and her dissent in *City of Boerne v. Flores* (1997). Any law that inhibits an individual’s exercise of religion, even if the law is generally applicable, at the very least implicates First Amendment concerns. According to O’Connor, since the First Amendment does not distinguish between religious belief and conduct, both must be presumptively protected by the Free Exercise Clause. However, the law at question, while generally applicable, does not offer this presumptive protection. O’Connor writes: “If the First Amendment is to have any vitality, it ought not to be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.”<sup>20</sup> Consequently, the claimant’s religious conduct should be exempted from this very real law provided that protecting the conduct outweighs any “compelling interest” by the state to prevent the conduct.

O’Connor sums up the claimant’s argument in her concurrence in *Smith*:

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.”

The district attorney takes the idea of “keeping the peace” too far. It does not require that the religious beliefs of the claimant or any person be suppressed in the public square. Religious liberty is one of the most precious freedoms granted to Americans under the Constitution.

Given the vast array of conduct that a state might legitimately criminalize, it should not be assumed that merely because a law is neutral on its face and generally applicable that the First

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<sup>20</sup> Smith, 893-895.

Amendment never demands the state to grant an exemption for religious conduct.<sup>21</sup> As Justice David Souter opined in *Lukumi*, “neutral, generally applicable laws, drafted as they are from the perspective of the nonadherent, have the unavoidable potential of putting the believer to a choice between God and government.”<sup>22</sup> The claimant has unfortunately been put in this same situation.

According to Scalia in *Smith*, which the district attorney cites repeatedly, the only decisions in which the Supreme Court has 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.”<sup>23</sup> Clearly, this case involves a free speech claim in addition to the claimant’s free exercise claim. The claimant’s freedom to speech has been inhibited by this law aimed at keeping the peace. Thus, as a hybrid case involving both free exercise and free speech issues, this claim does not demand the application of the *Smith* test. Relying on the precedents cited by Scalia in *Smith*, it is more appropriate to apply the “Sherbert Test” in this instance. And as has already been discussed above, the state does not meet the compelling interest standard to justify the prohibition of the claimant’s religious speech.

### **Predicting The Outcome**

Without a doubt, predicting the outcome of a Supreme Court decision is a difficult task. However, under the fact pattern provided, the outcome will at best be 6-3 in favor of the state and at worst 7-2. Voting with the majority will be Antonin Scalia, author of the *Smith* decision which established the “law of general applicability” test. Though not yet a member of the Supreme Court when *Oregon v. Smith* was decided, Clarence Thomas made clear that he concurred with Scalia’s analysis of *Smith* when he joined Anthony Kennedy’s majority opinion

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<sup>21</sup> *Smith*, 900.

<sup>22</sup> *Lukumi*, 577.

<sup>23</sup> *Smith*, 881.

in *Church of Lukumi Babalu Aye v. City of Hialeah*.. Likewise, Kennedy too adopts the analysis of *Smith* in his *Lukumi* majority opinion.<sup>24</sup> All three would side with the district attorney.

Liberal Justice John Paul Stevens also seems ready to join the majority in this decision. Offering no concurrence, Stevens cast his vote with the majority in both *Smith* and *Lukumi*. By joining Part II-B of the *Lukumi* opinion, Stevens clearly accepts the *Smith* test as appropriate in determining the extent of free exercise rights. New Supreme Court Justices Samuel Alito and John Roberts, both regarded as very conservative like Scalia, will side with the majority in favor of the state. Alito spoke favorably of the *Smith* decision in *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004) while serving on the United States Court of Appeals for the Third Circuit.<sup>25</sup>

Those Supreme Court Justices who will dissent and side with the claimant include David Souter and Stephen Breyer. Concurring in the judgment of *Lukumi*, Souter explained that he had doubts about “whether the *Smith* rule merits adherence” and called on the Court to “reexamine the rule *Smith* declared.”<sup>26</sup> Souter’s dissent in *City of Boerne v. Flores* (1997) further details his opposition to the rule established in *Smith*. In Breyer’s dissent to *Boerne*, he noted his agreement with former Justice Sandra Day O’Connor’s *Boerne* dissent which stated that *Smith* adopted an improper standard for deciding free exercise claims. Finally, it is unclear how liberal Justice Ruth Bader Ginsburg would rule. Even without knowing how Ginsburg would vote, the state would prevail on this claim by a large margin of at least 6-3 with Ginsburg dissenting or 7-2 (with Ginsburg voting with the majority).

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<sup>24</sup> Both Kennedy and Thomas adopt Scalia’s “law of general applicability” test in Part II-B of the *Lukumi* decision. By casting his vote for the majority in *Smith* and without making any clarifications, Kennedy seemed to embrace Scalia’s argument back in 1990 as well.

<sup>25</sup> In *Blackhawk*, Alito favorably characterized the Supreme Court’s ruling in *Smith* as “opening a new chapter in the interpretation of the Free Exercise Clause.”

<sup>26</sup> *Church of Lukumi Babalu Aye v. City of Hialeah*, 559.