Chapter 5:
Belief versus Action in the Free Exercise of Religion

By Kashif J. Powell, Graduate Fellow

In the years immediately following the signing of the Declaration of Independence, many colonists suffered from religious persecution and intolerance at the hands of established religion. In the colony of Virginia, Baptists, Presbyterians, Catholics, and Quakers were whipped, fined, and imprisoned, in an effort to coerce support for the Anglican Church. However, James Madison, Thomas Jefferson, and George Mason, asserting that "religious belief was a natural right entrusted to the conscience of the individual,"[1] became Virginia's vanguard for securing religious liberties for all its citizens. Success came in 1786 when the state's legislature passed the *Virginia Statue for Establishing Religious Freedom.* The document declared "that no man shall be compelled to frequent or support any religious worship, place, or ministry…nor shall otherwise suffer on account of his religious opinions or beliefs."[2]

However, this notion of religious freedom would not remain stagnant. Since the Supreme Court's first session in February of 1790,[3] the standards by which religious freedom has been guaranteed has undergone continual revision. This chapter focuses on the judicial evolution of the First Amendment's Free Exercise clause, paying particular attention to the individual's expression of religious belief. Further, the chapter will examine the Supreme Court's landmark decision near the end of the last century, *Employment Division v. Smith.*[4] Finally, the chapter will conclude by offering solutions to problems resulting from the current state of the law.

The Evolution of the Right to Free Exercise of Religion

More than one hundred years after it inception, the *Virginia Statue* would serve as the foundation for the case law surrounding the Free Exercise clause and religious beliefs. In *Reynolds v. United States*[5] the Court re-shaped the contours of the Free Exercise clause when it heard a case involving George Reynolds, a Mormon with several wives, and his conflict with federal legislation that made bigamy a crime in any state or federal territory. Writing for the majority, Chief Justice Waite upheld the constitutionality of the federal statue, despite its conflict with Mormon teachings. The Chief Justice affirmed the principles of the *Virginia Statue* by asserting that no one should suffer on the account of his or her religious beliefs; however, the Court held that the province of *belief is different from that of action*. In the words of Chief Justice Waite, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinion, they may with practices."[6]

With this decision, the Court effectively created a distinction between religious practice and belief, holding that individuals have the freedom to believe what they choose, but belief cannot be practiced in ways that violate constitutional rights or state and federal statutes. *Reynolds v. United States* (1878) influenced the decisions made by the Charles E. Hughes Court

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[1] Louis Fisher, American Constitutional Law (Durham: Carolina Academic Press, 2001) 616.
[2] Fisher 616.
[3] Supreme Court of the United States. 18 Jun 2008. Supreme Court of the United States. 18 Jun 2008. <http://www.supremecourtus.gov/about/briefoverview.pdf>
[4] 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876
[5] 98 U.S. (8 Otto) 145, 25 L.Ed. 244 (1878)
[6] Craig R. Ducat. Constitutional Interpretation: Rights of the Individual (Belmont: Wadsworth, 2000) 1167.

of the 1930's and 1940's. In *Hamilton v. Regents of the University of California* [7] the Supreme Court, in a 9-0 decision, sustained the constitutionality of California's law mandating all students attending state universities to take a course on military science and tactics. This ruling was in stark contrast to the Methodist Church's resolution that forbade its followers to engage in any military training.

This practice-belief dichotomy is also reflected in the Court's 1940 decision, *Cantwell v. Connecticut.* [8] This opinion played a pivotal role in the jurisprudence of religious belief by relying on the incorporation doctrine, which applied the clauses of the First Amendment to the states. In the case, three Jehovah Witnesses were arrested for soliciting and playing a phonograph record with a religious message and convicted on the grounds that their actions violated Connecticut's statues that required solicitors to obtain a certificate from the state's Secretary; they were also convicted for breaching the peace. In writing the Court's unanimous decision to overturn the convictions, Justice Roberts argued that the First Amendment's freedom to believe is absolute, but the freedom to act can be regulated for the common good of society. However, Justice Roberts also argued that Connecticut's statue deprived the Cantwells "of their liberty without due process of the law" as guaranteed by the Fourteenth Amendment. The Court's opinion created the precedent that incorporates the liberties of the First Amendment and applies them to the states thereby abating a state's power to regulate religious practices. [9]

The dichotomy between action and belief remained the standard of evaluation for the First Amendment for twenty years. However, under the direction of Chief Justice Earl Warren, the Supreme Court moved away from the stare decisis of the practice-belief paradigm in *Sherbert v. Verner.*[10] Here, Sherbert, a Seventh Day Adventist, was dismissed from employment for refusing to work on Saturday, her faith's Sabbath Day. She was subsequently denied unemployment compensation benefits by the South Carolina Employment Security Commission. The agency found Sherbert ineligible to receive benefits because she was deemed available and able to work but denied, "without good cause," suitable working hours. The Supreme Court, in reversing the state's decision to uphold the denial of benefits, argued that the state's declared interest[11] was insufficiently compelling to take precedence over Sherbert's First Amendment religious rights. Justice William Brennan highlighted the tenets of this new line of reasoning in the majority opinion when he asserted that by the standards of the new *Sherbert Test*, courts must "consider whether some compelling state interest...justifies the substantial infringement [or restriction] of appellants' First Amendment right."[12]

The standards of the *Sherbert Test* were applied in the 1972 case involving a Wisconsin Amish Church that believed children should only attend school until the age of thirteen, while the

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[7] 293 U.S. 245, 55 S.Ct. 197 (1934)
[8] 310 U.S. 296, 60 S.Ct 900 (1940)
[9] Ducat 1168
[10] *347 U.S. 398, 83 S.Ct. 1790 (1963).*
[11] The state's declared interest in the *Sherbert* case was "a possibly that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work may dilute the employment compensation fund and also hinder the scheduling by employers of necessary Saturday work." *347 U.S. 398, 83 S.Ct. 1790 (1963).*
[12] Craig R. Smith and David M Hunsaker, The Four Freedoms of the First Amendment (Long Grove: Waveland Press, Inc., 2004) 50.

state's law required attendance until the age of sixteen. The Supreme Court in *Wisconsin v. Yoder*[13] held that the state's interest in enforcing obligatory attendance of students under the age of sixteen was not satisfactorily compelling. Accordingly, the state lacked the power to override the Amish Church's two-hundred year old practice of training their children to be active members of their "separated agrarian" Amish community. The *Sherbert* and *Yoder* decisions persuaded the Court to apply the "religious-exception doctrine," done so by examining two questions: "Has the government significantly burdened a sincerely motivated religious practice? If so, is the burden justified by a compelling state interest?"

Soon the standards of the *Sherbert Test* were found to be so subjective that states were having difficulty interpreting them. Therefore, the Supreme Court set out to define more objective standards to regulate the exercise of religious belief. The opportunity was presented in a case involving legislation enacted by Rhode Island and Pennsylvania that gave aid to church-affiliated elementary and secondary schools for "secular educational services." In *Lemon v. Kurtzman,*[14] Alton J. Lemon, a citizen of Pennsylvania and parent of a child attending public school, brought suit against David H. Kurtzman, Pennsylvania's Superintendent of Public Instruction, for providing state funds for religiously based curricula. The Court decided that the wall between church and state was falling and consequently created the *Lemon Test*. Chief Justice Warren Burger declared that in order for government legislation to pass the test, it must first have a secular legislative purpose, second neither advance nor inhibit religion, and finally government legislation must not foster excessive government entanglement with religion.[15]

However, the applicability of the *Lemon* test was challenged by subsequent rulings of the Supreme Court. On some church-state issues, *Lemon's* three-prong test was ignored and replaced with historical precedence.[16] In other cases, the first and third tenets were criticized for being too easily manipulated and inapplicable.[17] Therefore, the *Sherbert Test* overpowered the *Lemon Test* throughout the 1970's to protect the rights of United States citizens.

In the 1980's, another paradigmatic shift began to take shape. The change was set in motion by then Associate Justice William Rehnquist in *Thomas v. Indiana Employment Security Review Board,*[18] where a Jehovah's Witness worked at a machinery company that manufactured turrets for military weapons. Thomas' religion discouraged participation in the production of weaponry, which led him to quit his job on the basis of his religious beliefs. After leaving the company, Thomas filed for unemployment benefits, which were granted. However, Indiana's Supreme Court revoked the benefits on the grounds that the choice to quit was personal and philosophical, not religious. Yet, in an 8-1 decision the Justices overturned Indiana's ruling with Justice Rehnquist writing what would become an important dissent in the matter of religious freedoms.[19] In his dissent, Rehnquist urged the Court to

[13] 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed2d 15 (1972)
[14] 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)
[15] 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)
[16] See *Marsh v. Chambers*, 463 U.S. 783 (1983)
[17] See *Wallace v. Jaffree*, 472 U.S. 38 (1985) and *Aguilar v. Felton*, 473 U.S. 402, 422 (1983)
[18] 450 U.S. 707, 101 S.Ct. 1425, 67 Ed.2d 624 (1981)
[19] Justice Rehnquist's dissent would eventually become the majority opinion in the Employment Division of Oregon v. Smith 6-3 decision.

reconsider the *Sherbert Test*, arguing that this new line of thinking created unnecessary problems. The foremost problem was the clash between the First Amendment's two religious clauses. Rehnquist's solution was a more restrained reading of the both clauses.[20]

The Court seemingly took note of Rehnquist's objection as it began to view cases through the lens of strict construction, becoming more willing to label a state's interests as both compelling and secularly driven. One such ruling that exemplifies this shift is *Goldman v. Weinberger,* [21] in which a suit was brought against the Secretary of Defense for the Air Force's regulation [22] that restricted the wearing of religious paraphernalia,[23] thereby infringing on First Amendment rights. In the majority opinion, authored by Justice Rehnquist, the Court disagreed and stated that the regulation was designed to "foster instinctive obedience, unity, commitment, and esprit de corps." The Court concluded that the Air Force's interest to "encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions" was sufficiently compelling to violate the Free Exercise Clause of the First Amendment. However, through the power of checks and balances, in 1987, the legislative branch enacted a bill[24] into law that effectively reversed the Court's decision and allowed religious apparel to be worn, contingent upon the assumption that the apparel did not interfere with the performance of military duties.[25]

The *Smith* Decision and the Current State of the Law

Despite Congress' legislative reform of the Court's 1986 decision, a trend of increasing states' power at the expense of individual freedom had commenced. This trend influenced one of the most important contemporary decisions the Court has made on the freedom to exercise one's religious beliefs. In 1990, the Supreme Court heard the case of *Employment Division, Department of Human Resources of Oregon v. Smith.*[26] Alfred Smith and Galen Black were fired from their jobs after tests revealed that they had ingested peyote[27] during a religious ceremony at their Native American church. As a result, Smith and Black were ineligible to receive unemployment compensation from the Oregon Department of Human Resources. The intermediate appellate state court ruled the agency violated the First Amendment and the Oregon Supreme Court affirmed. The U.S. Supreme Court in a 6-3 decision reversed the ruling and upheld the constitutionality of the agency's choice to withhold unemployment benefits from Smith and Black.

The case's significance, however, is derived from the varied opinions offered by the Court. The majority's application of the law finds its root not in the *Sherbert* "compelling state interest" line of reasoning, but rather in its predecessor, the *Reynolds-Cantwell* "practice-belief" line of reasoning. Justice Scalia, speaking for the majority [28] attacked the subjective

[20] Ducat 1168
[21] 475 U.S. 503 (1986)
[22] Regulation AFR 35-10
[23] In this case, the religious apparel was a yarmulke.
[24] 101 stat. 1086-87, §508
[25] The quotations in this paragraph come from Fisher 631-633
[26] 494, U.S. 872110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)
[27] A hallucinogenic drug outlawed in the state of Oregon.
[28] Justices in the majority were Rehnquist, Stevens, White, Kennedy, and Scalia

nature of the *Sherbet Test* and argued that requiring the government to show a compelling interest allows an individual "to become a law unto himself," and would only serve to create a "constitutional anomaly."[29] Reverting back to the *Reynolds-Cantwell* paradigm functionally turned the tables, requiring the individual to fit within the government's stated interests, as opposed to the government conforming to the individual's stated religious beliefs.

As a foil to this line of reasoning, Justice O'Conner wrote an opinion of concurrence in which she argued that the *Sherbert* standard should have been employed to reach the Court's decision. O'Conner held that *Sherbert's* compelling interest standard was sufficient to overturn Oregon's ruling, as it impeded the government's interest the curb drug usage and the trafficking of narcotics. However, this reasoning was a point of contention for the case's dissenters.[30] In his dissent, Justice Blackmun asserted that the real government interest was not drug trafficking, but improper peyote use. Because Oregon ruled in favor of the sacramental use of peyote, there was no conflict with the government's asserted interest. However, one point on which all three dissenters and O'Conner agreed was that by reverting to the *Reynolds-Cantwell* paradigm, the Court profoundly jeopardized the First Amendment rights of followers of "faiths not widely practiced." Both Justice O'Conner and Blackmun, in the concurrence and dissent respectively, argued that Madison, Mason, and Jefferson's original intent of the Free Exercise clause was to protect, not jeopardize, minority religions.[31]

Some of the damage caused by the *Smith* decision was repaired on June 24, 1991 when the Oregon state legislature joined twelve other states in protecting the sacramental use of peyote by the Native American church.[32] The push for greater religious freedoms than those offered in the *Smith* decision reached the national level in 1993 when Congress passed the Religious Freedom Restoration Act (RFRA). Believing that *Smith* threatened a number of religious acts such as the use of ceremonial wine, the practice of kosher slaughter, and the Hmong objection to autopsies, the RFRA mandated that governments burdening an individual's religious practice may only do so by demonstrating a compelling state interest and using the least restrictive means to further that interest.[33] Congress had successfully restored the *Sherbert* and *Yoder* compelling interest test.

Another victory for advocates of religious freedom came in the Court's decision of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[34] One minority religion threatened by the Court's 1990 decision was Santeria, a religion which sacrifices chickens, pigeons, doves, ducks, guinea pigs, goats, turtles, and sheep as one of its central forms of devotion. As most of the Santeria's followers are Cuban refugees, one of the largest ministries, the Church of the Lukumi Babalu Aye, resides in south Florida. After announcing the construction of a worship house in the city of Hialeah, city officials passed three ordinances restricting "religious

[29] Ducat 1180-1186
[30] Justices in the dissent were Blackmun, Brennan, and Marshall
[31] Smith and Hunsaker 59
[32] The following states had RFRAs as of Aug. 25, 2002: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Oklahoma, Rhode Island, South Carolina and Texas. The First Amendment Center. 16 Jun 2008. Vanderbilt University. 16 Jun 2008. < http://www.firstamendmentcenter.org/rel_liberty/free_exercise/index.aspx >
[33] Fisher 640
[34] 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed2d. 472

practices that appeared contrary to public morals, peace, and safety" including the "cruel killing of animals" for religious purposes.[35] The Church filed suit, and after an appellate court ruled in favor of the city, the Supreme Court heard the case. In a 9-0 decision, the Court held that the city's ordinances were unconstitutional, giving hope to religious freedom advocates across the country.

However in 1997, despite the strides made by supporters and politicians in favor of First Amendment religious rights, the Supreme Court in *Boerne v. Flores*[36] ruled that Congress had over-stepped the boundaries of the Fourteenth Amendment's fifth section. The case involved the city of Boerne, TX and its refusal to grant a building permit to Catholic Archbishop P.F. Flores to enlarge his church. Under the RFRA, Flores brought suit against the city and the 5th Circuit court upheld the constitutionality of the RFRA. In a 6-2 decision the Supreme Court held that Congress may enact legislation to prevent religious abuses, but cannot regulate the manner in which states enforce the legislation. Asserting that the RFRA encroaches on states' freedoms, the Court struck down the RFRA and reaffirmed the 1990 *Smith* decision.

Soon after on June 9, 1998, a "Son of the RFRA" or the Religious Land Use and Institutionalized Persons Act (RLUIPA) was introduced. After revisions, the bill cleared both chambers, offering two kinds of protections. First, it offered religious groups protection in land-use disputes such as in *Boerne v. Flores* (1997). Second, it created greater accommodations for prisoners to practice their faith. The bill, signed into law by President Clinton on September 22, 2000, is applicable to all agencies that receive federal money.[37] Despite this legislation, today's jurisprudence in regard to religious freedoms continues to rest on the *Smith* decision.

Solutions and Conclusions: Reversing the *Smith* Decision

As legislation such as the RFRA and the RLUIPA suggest, the greatest question facing today's Supreme Court is whether to allow the *Smith* decision to stand; however, the *Smith* standards are difficult to apply. Since RFRA has been limited by the Supreme Court, it has limited the power of Congress and religious groups to interpret and define the Constitution's guarantee of religious freedom. If no action is taken, then the *Smith* decision and its *Reynolds-Cantwell* paradigm will continue to erode minority religious freedoms and augment government infringement.[38] *Elk Grove Unified School District v. Newdow*[39] demonstrates this dilemma. A father filed suit against a school district for forcing his daughter to listen to Pledge of Allegiance.[40] While the Court held that Newdow lacked standing to file suit and therefore could not rule on any constitutional question, Justices O'Conner, Thomas, and Rehnquist wrote opinions arguing that the phrase "under God" in the Pledge of Allegiance is traditional and historic, and therefore, it was not a violation of the student's rights to force her to listen

[35] Ducat 1187
[36] 521 U.S. 507 (1997)
[37] Fisher 641
[38] Fisher 641
[39] 542 U.S. 1 (2004)
[40] The Elk Grove School District's Pledge of Allegiance was teacher-lead, but students were not mandated to participate. However, all students were present to hear the words "under God" spoken.

to those words. If this were in fact the opinion of the Court, states would have the power to determine how students exercise their belief or disbelief in God.

However, if *Smith* is overturned, the Court would likely return to *Sherbert's* compelling interest test, which also has its problems. Justice Rehnquist highlighted *Sherbert's* problem in his 1981 dissent where he urged the court to protect against the collision of the First Amendment's religious clauses.[41] One of Rehnquist's three causes of the collision was the growth of social welfare legislation of the Great Depression and Civil Rights Eras. This legislation, in the Justice's words, "touches the individual at so many points in his life" that it increases the conflict between the Free Exercise and Establishment clauses. A contemporary example of this conflict came in January of 2001 with the introduction of President George W. Bush's Faith-Based and Community Initiative Programs (FBCI). The Initiative allows for religiously based organizations to receive federal funds for secularly driven programs such as drug and alcohol rehabilitation. The state's interest of rehabilitating its citizens barricades into the wall between church and state and consequently rights to free exercise.

This conflict has also emerged in recent case law. In *Locke v. Davey,*[42] Joshua Davey filed suit against the state of Washington when he was forced to forfeit a state-sponsored scholarship because of his decision to major in theology. Davey filed suit on the grounds that the state, in offering scholarships to all other majors except theology, was not being neutral toward religion and infringed upon his religious beliefs. Seven of the Supreme Court Justices disagreed, arguing that states have a "historic and substantial interest" to exclude religious involvement from federal funding. The state of Washington attempted to separate church and state, but in doing so, it could be interpreted that the state infringed upon free exercise rights; many of its citizens could not freely express their religion due to the lure of state funding. This ruling also implicates the ongoing debate over indirect federal funding, for example, school vouchers. In short, resting on the subjectivity of the *Sherbert Test* is problematic.

Neither the *Reynolds-Cantwell* nor the *Sherbert Test* fully protects the rights of both the individual and the state. The solution then, is to find the equilibrium between the two tests; that equilibrium is the judicial notion of strict scrutiny. By applying the principles of strict scrutiny to cases involving the free exercise of religion, the Court can strike a balance between the state and individual rights.[43] Strict scrutiny is one of the most stringent levels of analysis for judicial review in which courts use to determine the constitutionality of federal, state, and local policies. Strict scrutiny is used in cases "where there is a real and appreciable impact on, or a significant interference with the exercise of a fundamental right,"[44] making strict scrutiny a perfect candidate.

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[41] In *Thomas v. Indiana Employment Security Review Board* Rehnquist explained that Sherbert's test caused the clauses the collide for three reasons: 1) "the growth of social welfare legislation", 2) "the decision by the Court the 1st Amendment was "incorporated" by the 14th", and 3) "the overly expansive interpretation of both [the Establishment and Free Exercise] clauses.

[42] 504 U.S. 712 (2004)

[43] It is important to note that strict scrutiny does not address issues of subjectivity address first by Burger Court. I believe that it is difficult, if not impossible, to find an objective standard by which to interpret the Constitution.

[44] Law Library: American Law and Legal Information. 14 Jun 2008. Net Industries LLC. 16 June 2008. <http://law.jrank.org/pages/10552/Strict-Scrutiny.html >

Strict scrutiny is three-fold; the first tenet requires that the government have a compelling interest. Just as in the *Sherbert Test*, this criterion gives states the power to make laws to protect its interests, while simultaneously protecting minority religions from First Amendment infringement. The second tenet places the "burden of proof" on government bodies to ensure that laws are constitutionally grounded. This tenet requires that laws are "narrowly tailored" to achieve the stated goal or interest. This second aspect of strict scrutiny attempts to address the collision between the Establishment and Free Exercise clauses by addressing issues of inclusivity and exclusivity. For instance, using strict scrutiny Bush's FBCI could be deemed unconstitutional because state involvement overly includes religious activity. The final tenet of strict scrutiny mandates that laws use the least restrictive means to achieve its interest, creating a more equal sharing of power between the individual and the state, with the scales tipping slightly toward government interest.

Strict scrutiny also carries significant implications for the *Smith* decision. If a case similar to *Employment Division v. Smith* is heard by the Supreme Court, then the *Smith* decision can be overturned and a new precedent set using strict scrutiny. Initially, the majority opinion argued that deciding in favor of Smith would overly restrict states' power, but strict scrutiny solves for this dilemma through its first measure of analysis. Moreover, in her concurrence Justice O'Conner asserted that the state's compelling interest was drug trafficking, while in the dissent, Justice Blackmun argued that the interest was peyote usage. In O'Conner's case, strict scrutiny would find that the restriction of peyote usage is not narrowly tailored to the interest of drug trafficking, making the employment agency's choice to withhold benefits unconstitutional. Furthermore, in the case of Blackmun, strict scrutiny would find grounds to overturn *Smith* through the means Oregon used to control peyote usage. Using strict scrutiny, the Court could uphold the constitutionality of the restriction of recreational peyote usage, by arguing that restricting sacramental peyote usage is not the least restrictive mean to achieve the state's interest. In sum, strict scrutiny could effectively overturn the *Smith* decision and initiate a new beginning for the interpretation of the First Amendment's religious freedoms.

Religion "can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of his conscience." In 1776, James Madison, Thomas Jefferson, and George Mason forged these words in the making of a document that resonates to this day. It contains the responsibilities and rights that transformed the notion of freedom from potentiality to actuality. Today, we have a responsibility to continue in the legacy of protecting and preserving the rights of this nation's citizens, chief among them is the right to freely believe.