

**DEBATE:**  
**SHOULD CONGRESS PASS LEGISLATION**  
**OVERRULING THE SUPREME COURT'S**  
**DECISION IN THE "PEYOTE CASE," WHICH**  
**LIMITS THE SCOPE OF FREE EXERCISE**  
**OF RELIGION?**

**RELIGIOUS EXERCISE: HOW FREE?**

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Perhaps no provision of the Bill of Rights has generated more controversy in recent years than that portion of the First Amendment that states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."<sup>1</sup> Although the Establishment Clause has received the most attention in the past, a recent Supreme Court case has brought the Free Exercise Clause to the foreground. The Court decided *Employment Division, Department of Human Resources v. Smith*<sup>2</sup> on April 17, 1990, and immediately provoked a barrage of opposition, particularly from religious groups who claimed that this decision marked a fundamental change in the Court's approach to the burdens that government could place upon the free exercise of religion.

The case involved two drug rehabilitation counselors who were members of the Native American Church. They had been fired from their jobs with a private company in Oregon because they had used peyote, a hallucinogenic drug prohibited by state law,<sup>3</sup> as part of a religious exercise of the Church.<sup>4</sup> After being fired, the two counselors applied to Oregon's Department of Human Resources for unemployment compensation.<sup>5</sup> The Department of Human Resources, however, denied them benefits "because they had been discharged for work-related miscon-

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\* Ronald Reagan Fellow, The Heritage Foundation; former Attorney General of the United States. Mr. Meese's comments introduced the debate.

1. U.S. CONST. amend. I. The first part of this quotation is known as the Establishment Clause; the second is the Free Exercise Clause.

2. 110 S. Ct. 1595 (1990).

3. See OR. REV. STAT. § 475.992(4) (1987).

4. See *Smith*, 110 S. Ct. at 1597.

5. See *id.* at 1598.

duct."<sup>6</sup> The counselors sought judicial review in the Oregon state courts, and the Oregon Court of Appeals reversed the administrative board's decision, holding that "the denial of benefits violated respondents' free exercise rights under the First Amendment."<sup>7</sup> On appeal, the Oregon Supreme Court upheld payment of unemployment benefits.<sup>8</sup>

The United States Supreme Court granted certiorari,<sup>9</sup> but determined that more information was needed to decide whether the Constitution protected this particular religious practice.<sup>10</sup> On remand, the Oregon Supreme Court affirmed its prior holding, finding that because the Oregon statute "ma[de] no exception for sacramental use," the Free Exercise Clause rendered the law unconstitutional.<sup>11</sup> The Supreme Court again granted certiorari.<sup>12</sup>

With the issue more clearly before it, the Supreme Court split three ways. Justice Antonin Scalia, writing for the majority,<sup>13</sup> concluded that the Court had "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>14</sup> In support of this conclusion, Justice Scalia relied upon the case of *Reynolds v. United States*,<sup>15</sup> which held that the Constitution did not protect an individual against criminal laws prohibiting polygamy, even though his religion required such a practice.<sup>16</sup> In *Reynolds*, the Court had reasoned that "[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."<sup>17</sup> The *Smith* Court traced the development of this concept through a series of cases, concluding with a recent decision, *United States v. Lee*,<sup>18</sup> which required an Amish employer to collect and pay Social

6. *Id.*

7. *Id.*

8. *See id.*

9. *Employment Div., Dept. of Human Resources v. Smith*, 480 U.S. 916 (1987).

10. *See Smith*, 110 S. Ct. at 1598.

11. *Id.*

12. *Employment Div., Dept. of Human Resources v. Smith*, 489 U.S. 1077 (1989).

13. In addition to Justice Scalia, the majority included Chief Justice Rehnquist and Justices White, Stevens, and Kennedy.

14. *Smith*, 110 S.Ct. at 1600.

15. 98 U.S. 145 (1879).

16. *See Smith*, 110 S. Ct. at 1600.

17. *Reynolds*, 98 U.S. at 166-67.

18. 455 U.S. 252 (1982).

Security taxes on behalf of himself and his employees, even though his religious faith prohibited participation in governmental support programs.<sup>19</sup>

The Court's willingness in *Smith* to allow the government to restrict an individual's free exercise of his religious beliefs without requiring the government to demonstrate a compelling state interest generated the most controversy. The Court stated that

[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." 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" . . . contradicts both constitutional tradition and common sense.<sup>20</sup>

Justice Sandra Day O'Connor wrote a separate opinion. She agreed with the majority result, but took a very different position on the principle of law involved. Justice O'Connor started from the premise that "a law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person's free exercise of his religion."<sup>21</sup> She then stated that the Court has

respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the Government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.<sup>22</sup>

She explained this position further:

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."<sup>23</sup>

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19. See *id.* at 258-61.

20. *Smith*, 110 S. Ct. at 1603 (citations omitted) (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988)).

21. *Id.* at 1608 (O'Connor, J., concurring).

22. *Id.* (O'Connor, J., concurring).

23. *Id.* at 1609 (O'Connor, J., concurring) (citation omitted) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

The test described in Justice O'Connor's opinion places a heavy responsibility upon a government agency to justify any infringement of religious freedom.

Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest . . . ." <sup>24</sup>

Despite this exacting requirement, Justice O'Connor concluded that Oregon had satisfied the test and that it "has a compelling interest in regulating peyote use by its citizens and that accommodating respondents' religiously motivated conduct 'will unduly interfere with fulfillment of the governmental interest.'" <sup>25</sup>

Justice Harry Blackmun dissented. <sup>26</sup> Justice Blackmun followed a third approach, in which he contended that the discharged counselors should not have been denied unemployment benefits because their conduct was in pursuit of the exercise of their religion. <sup>27</sup> In explaining his opinion, Justice Blackmun reiterated Justice O'Connor's position that the compelling-interest test was required but disagreed that Oregon had satisfied that test. He added that the Court

over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means. <sup>28</sup>

Justice Blackmun's opinion then discussed the merits of the Native American Church's use of peyote for religious purposes, such as the lack of evidence of harm arising from such a practice, <sup>29</sup> the "considerable evidence that the spiritual and social support provided by the Church" has benefited the Native

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24. *Id.* at 1611 (O'Connor, J., concurring) (quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982)).

25. *Id.* at 1615 (O'Connor, J., concurring) (quoting *Lee*, 455 U.S. at 259).

26. Justices Brennan and Marshall joined the dissent.

27. *See id.* at 1618-20 (Blackmun, J., dissenting).

28. *Id.* at 1615 (Blackmun, J., dissenting).

29. *See id.* at 1618-19 (Blackmun, J., dissenting).

American population,<sup>30</sup> and the fact that many states “have maintained an exemption for religious peyote use for many years.”<sup>31</sup> The opinion concluded that “Oregon’s interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents’ right to the free exercise of their religion.”<sup>32</sup> Thus, because “the state could not constitutionally enforce its criminal prohibition” against the individuals involved, it was likewise prohibited from denying unemployment benefits.<sup>33</sup>

The ensuing protest against the majority decision gave rise to calls for Congressional legislation to reverse the Supreme Court’s ruling.<sup>34</sup> Those legislative initiatives set the stage for the debate in the following two articles. First, should Congress, by statute, enact the “compelling governmental interest” test for evaluating state or federal statutes that concern the free exercise of religion? Second, if such a statute is desirable as a policy matter, does Congress have the constitutional ability to enact such a law, thereby overriding a Supreme Court ruling that was based on constitutional grounds?<sup>35</sup>

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30. *Id.* at 1619 (Blackmun, J., dissenting).

31. *Id.* at 1620 (Blackmun, J., dissenting).

32. *Id.* at 1622 (Blackmun, J., dissenting).

33. *Id.* at 1622-23 (Blackmun, J., dissenting).

34. A bill to carry out that purpose was named the Religious Freedom Restoration Act. *See* H.R. 5377, 101st Cong., 2d Sess. (1990) (introduced by Congressman Stephen Solarz).

35. Many scholars have pointed out the basic clash between the Free Exercise Clause and the Establishment Clause. *See, e.g.,* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 17.1, at 1031 (3rd ed. 1986) (“There is a natural antagonism between a command not to establish religion and a command not to inhibit its practice.”). The debate concerning the Free Exercise Clause necessarily raises the issue of the constitutionality of a Congressional act to promote the free exercise of religion.

