



## READING PACKET FOR DECEMBER 9<sup>TH</sup>, 2023 | RELIGIOUS LIBERTY: CURRENT EVENTS

### CORE READING 1: *Reynolds v. United States* | January 6, 1879

SOURCE: <https://teachingamericanhistory.org/document/reynolds-v-united-states/>

*The Morrill Anti-Bigamy Act (1862) intended to end the practice of polygamy in the Utah territory by members of the Church of Jesus Christ of the Latter-Day Saints (the Mormons). It also limited church property ownership in any U.S. territory. George Reynolds, a prominent Mormon, allowed his second marriage to become a court case to test the authority of the U.S. Congress to ban a religious practice in the territories. Reynolds argued that his membership in the Mormon Church gave him the constitutional right of free religious exercise to marry a second wife. The Supreme Court disagreed, unanimously affirming a district court ruling that Reynolds had violated a federal anti-bigamy law governing the Territory of Utah. (Utah did not become a state until 1896.) In rejecting Reynolds' claim, the Court followed the traditional common law doctrines of state courts as well as federal practices in the territories and Washington, D.C. These doctrines, some of which continue today, include the confidentiality of confessions and the exemption of churches from taxation. In addition, the common law recognized traditional moral and legal practices, such as monogamy. State and federal laws and court decisions have rejected or modified common law, as the cases in this volume will illustrate. The court's decision in the Reynolds case was unanimous. The case illustrates the doctrine that a claim to religious freedom may not be used to overturn otherwise legitimate laws: There is a limit to individual free exercise as there is to any asserted right.*

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

. . . As to the defense of religious belief or duty.

On the trial, [Reynolds] proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that church “that it was the duty of male members of said church, circumstances permitting, to practice polygamy ”

Upon this proof he asked the court to instruct the jury that if they found from the evidence that he “was married as charged—if he was married—in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be ‘not guilty’” . . .

. . . [T]he question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

Congress cannot pass a law for the government of the territories which shall prohibit the free exercise of religion. The First Amendment to the Constitution expressly forbids such legislation. Religious freedom



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is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

The word “religion” is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

Before the adoption of the Constitution, attempts were made in some of the colonies and states to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the states, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that state having under consideration “a bill establishing provision for teachers of the Christian religion,” postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested “to signify their opinion respecting the adoption of such a bill at the next session of assembly.”

This brought out a determined opposition. Amongst others, Mr. Madison prepared a “Memorial and Remonstrance,” which was widely circulated and signed, and in which he demonstrated “that religion, or the duty we owe the Creator,” was not within the cognizance of civil government. At the next session the proposed bill was not only defeated, but another, “for establishing religious freedom,” drafted by Mr. Jefferson, was passed. In the preamble of this act religious freedom is defined; and after a recital “that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,” it is declared “that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.” In these two sentences is found the true distinction between what properly belongs to the church and what to the state.

. . . [A]t the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to say: “Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof,’ thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation in behalf of the rights of



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conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.” Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I, it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons.

By the statute of James I, the offence, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that “all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience,” the legislature of that state substantially enacted the statute of James I, death penalty included, because, as recited in the preamble, “it hath been doubted whether bigamy or polygamy be punishable by the laws of this commonwealth.” From that day to this we think it may safely be said there never has been a time in any state of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor, Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in



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connection with monogamy [T]here cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances . . .



## CORE READING 2: *Sherbert v. Verner* | June 17, 1963

SOURCE: <https://teachingamericanhistory.org/document/sherbert-v-verner/>

*Sherbert v. Verner is a free exercise case involving employment rights. The decision ordered accommodation of the religious practices of Seventh-day Adventist workers, so that they may collect state unemployment insurance. By insisting that Adell Sherbert be given state unemployment benefits, despite her refusal to work on her Saturday Sabbath and subsequent firing, the Court expanded what it did earlier in West Virginia v. Barnette, recognizing free exercise rights against government. The claim of religious free exercise may also be asserted by a for-profit corporation, as in the contraceptive mandate at issue in Burwell v. Hobby Lobby, and in Masterpiece Cakeshop v. Colorado Civil Rights Commission.*

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### **MR. JUSTICE BRENNAN delivered the opinion of the Court.**

Appellant, a member of the Seventh-day Adventist Church, was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith. When she was unable to obtain other employment because, from conscientious scruples, she would not take Saturday work, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. That law provides that, to be eligible for benefits, a claimant must be “able to work and . . . available for work;” and, further, that a claimant is ineligible for benefits “[i]f . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer.” The appellee Employment Security Commission, in administrative proceedings under the statute, found that appellant’s restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept “suitable work when offered . . . by the employment office or the employer. . . .” The State Supreme Court held specifically that appellant’s ineligibility infringed no constitutional liberties because such a construction of the statute places no restriction upon the appellant’s freedom of religion, nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience. We reverse the judgment of the South Carolina Supreme Court and remand for further proceedings not inconsistent with this opinion.

### **I**

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such. Government may neither compel affirmation of a repugnant belief; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities; nor employ the taxing power to inhibit the dissemination of particular religious views. On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain



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overt acts prompted by religious beliefs or principles, for “even when the action is in accord with one’s religious convictions, [it] is not totally free from legislative restrictions.” The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order.

Plainly enough, appellant’s conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant’s constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the state of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant’s religion may be justified by a “compelling state interest in the regulation of a subject within the state’s constitutional power to regulate...”

### II

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

Nor may the South Carolina court’s construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant’s “right,” but merely a “privilege.” It 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. . . .

Significantly, South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian’s religious liberty. When, in times of “national emergency,” the textile plants are authorized by the state commissioner of labor to operate on Sunday, “no employee shall be required to work on Sunday . . . who is conscientiously opposed to Sunday work, and if any employee should refuse to work on Sunday on account of conscientious . . . objections, he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner.” No



question of the disqualification of a Sunday worshipper for benefits is likely to arise, since we cannot suppose that an employer will discharge him in violation of this statute. The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects.

### III

We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable<sup>8</sup> state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."<sup>9</sup> No such abuse or danger has been advanced in the present case. The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund, but also hinder the scheduling by employers of necessary Saturday work. But that possibility is not apposite here, because no such objection appears to have been made before the South Carolina Supreme Court, and we are unwilling to assess the importance of an asserted state interest without the views of the state court. Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance. Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs,—a question as to which we intimate no view, since it is not before us—it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.

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



## IV

In holding as we do, plainly we are not fostering the “establishment” of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. Nor does the recognition of the appellant’s right to unemployment benefits under the state statute serve to abridge any other person’s religious liberties. Nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment. This is not a case in which an employee’s religious convictions serve to make him a nonproductive member of society. Finally, nothing we say today constrains the states to adopt any particular form or scheme of unemployment compensation. Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest. This holding but reaffirms a principle that we announced a decade and a half ago, namely that no state may “exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.”

In view of the result we have reached under the First and Fourteenth Amendments’ guarantee of free exercise of religion, we have no occasion to consider appellant’s claim that the denial of benefits also deprived her of the equal protection of the laws in violation of the Fourteenth Amendment. . . .

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

Today’s decision is disturbing both in its rejection of existing precedent and in its implications for the future. The significance of the decision can best be understood after an examination of the state law applied in this case. South Carolina’s Unemployment Compensation Law was enacted in 1936 in response to the grave social and economic problems that arose during the depression of that period. As stated in the statute itself:

Economic insecurity due to unemployment is a serious menace to health, morals and welfare of the people of this state; involuntary unemployment is therefore a subject of general interest and concern . . . ; the achievement of social security requires protection against this greatest hazard of our economic life; this can be provided by encouraging the employers *to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of*



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*unemployment*, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance.” (Emphasis added.)

Thus, the purpose of the legislature was to tide people over, and to avoid social and economic chaos, during periods when work was unavailable. But, at the same time, there was clearly no intent to provide relief for those who, for purely personal reasons, were or became unavailable for work. In accordance with this design, the legislature provided, that “[a]n unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that . . . [h]e is able to work and is available for work “

The South Carolina Supreme Court has uniformly applied this law in conformity with its clearly expressed purpose. It has consistently held that one is not “available for work” if his unemployment has resulted not from the inability of industry to provide a job, but rather from personal circumstances, no matter how compelling. The reference to “involuntary unemployment” in the legislative statement of policy, whatever a sociologist, philosopher, or theologian might say, has been interpreted not to embrace such personal circumstances. In the present case, all that the state court has done is to apply these accepted principles. Since virtually all of the mills in the Spartanburg area were operating on a six-day week, the appellant was “unavailable for work,” and thus ineligible for benefits, when personal considerations prevented her from accepting employment on a full-time basis in the industry and locality in which she had worked. The fact that these personal considerations sprang from her religious convictions was wholly without relevance to the state court’s application of the law. Thus, in no proper sense can it be said that the state discriminated against the appellant on the basis of her religious beliefs or that she was denied benefits because she was a Seventh-day Adventist. She was denied benefits just as any other claimant would be denied benefits who was not “available for work” for personal reasons.

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

First, despite the Court’s protestations to the contrary, the decision necessarily overrules *Braunfeld v. Brown*, which held that it did not offend the “Free Exercise” Clause of the Constitution for a state to forbid a Sabbatarian to do business on Sunday. The secular purpose of the statute before us today is even clearer than that involved in *Braunfeld*. And just as in *Braunfeld*— where exceptions to the Sunday closing laws for Sabbatarians would have been inconsistent with the purpose to achieve a uniform day of rest and would have required case-by-case inquiry into religious beliefs—so here, an exception to the rules of eligibility based on religious convictions would necessitate judicial examination of those convictions and would be



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at odds with the limited purpose of the statute to smooth out the economy during periods of industrial instability. Finally, the indirect financial burden of the present law is far less than that involved in *Braunfeld*. Forcing a store owner to close his business on Sunday may well have the effect of depriving him of a satisfactory livelihood if his religious convictions require him to close on Saturday as well. Here we are dealing only with temporary benefits, amounting to a fraction of regular weekly wages and running for not more than 22 weeks. Clearly, any differences between this case and *Braunfeld* cut against the present appellant.

Second, the implications of the present decision are far more troublesome than its apparently narrow dimensions would indicate at first glance. The meaning of today's holding, as already noted, is that the state must furnish unemployment benefits to one who is unavailable for work if the unavailability stems from the exercise of religious convictions. The state, in other words, must single out for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated. It has been suggested that such singling out of religious conduct for special treatment may violate the constitutional limitations on state action. My own view, however, is that, at least under the circumstances of this case, it would be a permissible accommodation of religion for the state, if it chose to do so, to create an exception to its eligibility requirements for persons like the appellant. The constitutional obligation of "neutrality" is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the state justify some special provision for religion to prevent it from being submerged by an all-embracing secularism. The state violates its obligation of neutrality when, for example, it mandates a daily religious exercise in its public schools, with all the attendant pressures on the school children that such an exercise entails. But there is, I believe, enough flexibility in the Constitution to permit a legislative judgment accommodating an unemployment compensation law to the exercise of religious beliefs such as appellant's.

For very much the same reasons, however, I cannot subscribe to the conclusion that the state is constitutionally compelled to carve out an exception to its general rule of eligibility in the present case. Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between, and this view is amply supported by the course of constitutional litigation in this area. Such compulsion in the present case is particularly inappropriate in light of the indirect, remote, and insubstantial effect of the decision below on the exercise of appellant's religion and in light of the direct financial assistance to religion that today's decision requires.

For these reasons I respectfully dissent from the opinion and judgment of the Court.



**CORE READING 3: *Employment Division, Department of Human Resources of Oregon v. Smith* |  
April 17, 1990**

**SOURCE:** <https://teachingamericanhistory.org/document/employment-division-department-of-human-resources-of-oregon-v-smith/>

*The State of Oregon denied unemployment benefits to former employees Alfred Leo Smith (and Galen Black) because they were fired for using an illegal drug, peyote. Smith and Black argued that Oregon was denying them their First Amendment free exercise of religion right because their use of peyote was part of a traditional Native American Church rite. The rest of the facts of the case are Found in the Court opinion.*

*The Oregon Supreme Court ruled that the state's prohibition of peyote violated Smith and Black's First Amendment's Free Exercise Clause rights and thus the state could not deny them unemployment benefits. The U.S. Supreme Court reversed the Oregon Court's decision 6 to 3. In its ruling, the Court sought to impose some limits to the scope of free religious exercise without compromising the fundamental principle. The justices sought a judicial doctrine that would avoid approving illegal conduct (in this case illegal drug use) but still allow some free exercise exceptions to some laws (e.g., conscientious objection to military service).*

*In response to Oregon v. Smith, Congress overwhelmingly passed "The Religious Freedom Restoration Act" (RFRA). In summary, the Religious Freedom Restoration Act of 1993 prohibits any agency, department, or official of the United States or any state (the government) from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.*

*RFRA and its successors (one version was overturned by the Court as interference with its authority to interpret the first amendment) have played a role in its interpretations of religious freedom.*

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**Justice SCALIA delivered the opinion of the Court.**

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

**I**  
Oregon law prohibits the knowing or intentional possession of a "controlled substance" unless the substance has been prescribed by a medical practitioner....



## A

The Free Exercise Clause of the First Amendment, which has been made applicable to the states by incorporation into the Fourteenth Amendment, provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all “governmental regulation of religious beliefs as such.” The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

But the “exercise of religion” often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a state would be “prohibiting the free exercise [of religion]” if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of “statues that are to be used for worship purposes,” or to prohibit bowing down before a golden calf.

Respondents in the present case, however, seek to carry the meaning of “prohibiting the free exercise [of religion]” one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that “prohibiting the free exercise [of religion]” includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as “prohibiting the free exercise [of religion]” by those citizens who believe support of organized government to be sinful than it is to regard the same tax as “abridging the freedom . . . of the press” of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that, if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax, but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

Our decisions reveal that the latter reading is the correct one. We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence



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contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Educ. v. Gobitis*:

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

We first had occasion to assert that principle in *Reynolds v. United States*, where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. “Laws,” we said,

are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.

. . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a “valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” In *Prince v. Massachusetts* (1944), we held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in “excluding [these children] from doing there what no other children may do.” In *Braunfeld v. Brown*, we upheld Sunday closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In *Gillette v. United States* we sustained the military selective service system against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds.

Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual’s religion was *United States v. Lee*. There, an Amish employer, on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. We rejected the claim that an exemption was constitutionally required. There would be no way, we observed, to distinguish the Amish believer’s objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes. . . .

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. . . .

The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon’s drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one’s children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls.

## **B**

Respondents argue that, even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for areligious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner*. Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. Applying that test, we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant’s willingness to work under conditions forbidden by his religion. We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied....

Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. . . .

Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct. Although, as noted earlier, we have sometimes used the *Sherbert* test to analyze free exercise challenges to such laws, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, 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”—permitting him, by virtue of his beliefs, “to become a law unto himself,”—contradicts both constitutional tradition and common sense.



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

Nor is it possible to limit the impact of respondents’ proposal by requiring a “compelling state interest” only when the conduct prohibited is “central” to the individual’s religion. It is no more appropriate for judges to determine the “centrality” of religious beliefs before applying a “compelling interest” test in the free exercise field than it would be for them to determine the “importance” of ideas before applying the “compelling interest” test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer’s assertion that a particular act is “central” to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable “business of evaluating the relative merits of differing religious claims.” Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

If the “compelling interest” test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if “compelling interest” really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because “we are a cosmopolitan nation made up of people of almost every conceivable religious preference,” and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment’s protection of religious liberty does not require this.

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not



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

...

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

**Justice O'CONNOR, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join as to Parts I and II, concurring in the judgment.**

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

...

## **II**

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

## **A**

The Free Exercise Clause of the First Amendment commands that "Congress shall make no law . . . prohibiting the free exercise [of religion]". . . Because the First Amendment does not distinguish between



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religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must therefore be at least presumptively protected by the Free Exercise Clause.

The Court today, however, interprets the clause to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as that prohibition is generally applicable. But a law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person's free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons. It is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns.

The Court responds that generally applicable laws are “one large step” removed from laws aimed at specific religious practices. The First Amendment, however, does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few states would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a state directly targets a religious practice. . . .

To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. The 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 Court attempts to support its narrow reading of the clause by claiming that “[W]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate.” But as the Court later notes, as it must, in cases such as *Cantwell* and *Yoder*, we have in fact interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct. Indeed, in *Yoder* we expressly rejected the interpretation the Court now adopts. . . .



The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them “hybrid” decisions, but there is no denying that both cases expressly relied on the Free Exercise Clause, and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence. Moreover, in each of the other cases cited by the Court to support its categorical rule, we rejected the particular constitutional claims before us only after carefully weighing the competing interests. That we rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.

## **B**

Respondents, of course, do not contend that their conduct is automatically immune from all governmental regulation simply because it is motivated by their sincere religious beliefs. The Court’s rejection of that argument might therefore be regarded as merely harmless dictum. Rather, respondents invoke our traditional compelling interest test to argue that the Free Exercise Clause requires the state to grant them a limited exemption from its general criminal prohibition against the possession of peyote. The Court today, however, denies them even the opportunity to make that argument, concluding that “the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling interest] test inapplicable to” challenges to general criminal prohibitions.

In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one’s own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. I would have thought it beyond argument that such laws implicate free exercise concerns. . . .

. . . Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the government to demonstrate that unbending application of its regulation to the religious objector “is essential to accomplish an overriding governmental interest,” or represents “the least restrictive means of achieving some compelling state interest.” To me, the sounder approach—the approach more consistent with our role as judges to decide each case on its individual merits—is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant, and whether the particular criminal interest asserted by the state before us is compelling. Even if, as an empirical matter, a government’s criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim. 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. . . .

The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result in a “constitutional anomaly,” the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a “constitutional nor[m],” not an “anomaly.” As the language of the clause itself makes clear, an individual’s free exercise of religion is a preferred constitutional activity. The Court’s parade of horrors not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests.

Finally, the Court today suggests that the disfavoring of minority religions is an “unavoidable consequence” under our system of government, and that accommodation of such religions must be left to the political process. In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah’s Witnesses and the Amish. . . . The compelling interest test reflects the First Amendment’s mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a “luxury” is to denigrate “[t]he very purpose of a Bill of Rights.”

### III

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

### A

There is no dispute that Oregon’s criminal prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion. Peyote is a sacrament of the Native American Church, and is regarded as vital to respondents’ ability to practice their religion. . . .

There is also no dispute that Oregon has a significant interest in enforcing laws that control the possession and use of controlled substances by its citizens. In light of our recent decisions holding that the governmental interests in the collection of income tax, a comprehensive social security system, and military



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conscription are compelling, respondents do not seriously dispute that Oregon has a compelling interest in prohibiting the possession of peyote by its citizens.

### **B**

Thus, the critical question in this case is whether exempting respondents from the state's general criminal prohibition "will unduly interfere with fulfillment of the governmental interest." Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them. Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon's stated interest in preventing any possession of peyote.

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

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

### **Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.**

This Court 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. Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a "constitutional anomaly." As carefully detailed in Justice O'Connor's concurring opinion, the majority is able to arrive at this view only by mischaracterizing this Court's precedents. The Court discards leading free exercise cases such as *Cantwell v. Connecticut*, and *Wisconsin v. Yoder*, as "hybrid." The Court views traditional free exercise analysis as somehow inapplicable to criminal prohibitions (as opposed to conditions on the receipt of benefits), and to state laws of general applicability (as opposed, presumably, to laws that expressly single out religious practices). The Court cites cases in which, due to various exceptional circumstances, we found strict scrutiny inapposite, to hint that the Court has repudiated that standard altogether. In short, it effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution. One hopes that the Court is aware of the



consequences, and that its result is not a product of overreaction to the serious problems the country's drug crisis has generated.

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

For these reasons, I agree with Justice O'Connor's analysis of the applicable free exercise doctrine, and I join parts I and II of her opinion. As she points out, “the critical question in this case is whether exempting respondents from the state's general criminal prohibition ‘will unduly interfere with fulfillment of the governmental interest.’” I do disagree, however, with her specific answer to that question.

## I

In weighing respondents' clear interest in the free exercise of their religion against Oregon's asserted interest in enforcing its drug laws, it is important to articulate in precise terms the state interest involved. It is not the state's broad interest in fighting the critical “war on drugs” that must be weighed against respondents' claim, but the state's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote. . . .

The state's interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, cannot be merely abstract or symbolic. The state cannot plausibly assert that unbending application of a criminal prohibition is essential to fulfill any compelling interest if it does not, in fact, attempt to enforce that prohibition. In this case, the state actually has not evinced any concrete interest in enforcing its drug laws against religious users of peyote. . . .

Similarly, this Court's prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded evidentiary support for a refusal to allow a religious exception. . . .

The state proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote has ever harmed anyone. The factual findings of other courts cast doubt on the state's assumption that religious use of peyote is harmful. . . .

The fact that peyote is classified as a Schedule I controlled substance does not, by itself, show that any and all uses of peyote, in any circumstance, are inherently harmful and dangerous. . . .

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs. . . .



...

### III

Finally, although I agree with Justice O'Connor that courts should refrain from delving into questions of whether, as a matter of religious doctrine, a particular practice is “central” to the religion, I do not think this means that the courts must turn a blind eye to the severe impact of a state’s restrictions on the adherents of a minority religion. . . .

If Oregon can constitutionally prosecute them for this act of worship, they, like the Amish, may be “forced to migrate to some other and more tolerant region.” This potentially devastating impact must be viewed in light of the federal policy—reached in reaction to many years of religious persecution and intolerance—of protecting the religious freedom of Native Americans....

### IV

For these reasons, I conclude that Oregon’s interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents’ right to the free exercise of their religion. Since the state could not constitutionally enforce its criminal prohibition against respondents, the interests underlying the state’s drug laws cannot justify its denial of unemployment benefits. . . .

I dissent.



**CORE READING 4: *Burwell, Secretary of Health and Human Services, et al. v. Hobby Lobby Stores, Inc., et al.* | June 30, 2014**

**SOURCE: <https://teachingamericanhistory.org/document/burwell-secretary-of-health-and-human-services-et-al-v-hobby-lobby-stores-inc-et-al/>**

*The Hobby Lobby case excited political passions over the contraception mandate issued under the auspices of the Affordable Care Act (ACA) (2010). Hobby Lobby and another family-owned corporation alleged that their right to free exercise of religion was denied by the ACA because it required them, in opposition to their religious principles, to provide for their employees certain contraceptives that aborted fertilized eggs. In a 5–4 decision, Justice Samuel A. Alito wrote for the Court that family-owned, for-profit corporations are legal persons, who may exercise religious freedom rights. In this case, the Hobby Lobby corporation may exercise religious free exercise rights under the amended Religious Freedom Restoration Act (RFRA). In dissent, Justice Ruth Bader Ginsburg’s point-by-point criticisms of the Court opinion argued that the Court radically diverged from previous understandings of RFRA, the rights of for-profit corporations, and recent laws acknowledging equal rights for women. We present excerpts from Justice Alito’s Court opinion and the dissent of Justice Ginsberg, while omitting Justice Anthony Kennedy’s concurrence and Justice Elena Kagan’s dissent.*

*In a related case involving contraception coverage and religious liberty, *Zubik v. Burwell* (May 16, 2016), known as the *Little Sisters of the Poor* case, the Court by per curiam (no signed opinion) order vacated the judgments in four federal courts of appeal and ordered that the parties “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.’”*

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**Justice Alito delivered the opinion of the Court.**

... As we have seen, RFRA [the Religious Freedoms Restoration Act] was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required. As we will show, Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA’s definition of “persons.” But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings....

In sum, we refuse to sustain the challenged regulations on the ground— never maintained by the government—that dropping insurance coverage eliminates the substantial burden that the HHS [the Department of Health and Human Services] mandate imposes. We doubt that the Congress that enacted RFRA—or, for that matter, ACA [the Affordable Care Act]—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.



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In taking the position that the HHS mandate does not impose a substantial burden on the exercise of religion, HHS's main argument (echoed by the principal dissent) is basically that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated. HHS and the dissent note that providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee chose to take advantage of the coverage and to use one of the four methods at issue.

This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step. See, e.g., *Oregon v. Smith*, 494 U. S., at 887 (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim”) Moreover, in *Thomas v. Review Bd. of Indiana Employment Security Div.* (1981), we considered and rejected an argument that is nearly identical to the one now urged by HHS and the dissent. . . .

Here . . . the plaintiffs do assert that funding the specific contraceptive methods at issue violates their religious beliefs, and HHS does not question their sincerity. Because the contraceptive mandate forces them to pay an enormous sum of money—as much as \$475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs....

Under HHS's view, RFRA would permit the government to require all employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide. The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the nation. RFRA was enacted to prevent such an outcome. In its final pages, the principal dissent reveals that its fundamental objection to the claims of the plaintiffs is an objection to RFRA itself. The dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws, and the dissent expresses a desire to keep the



courts out of this business. But Congress, in enacting RFRA, took the position that “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.” The wisdom of Congress’s judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful.

**Justice Ginsburg, with whom Justice Sotomayor joins, and with whom Justice Breyer and Justice Kagan join as to all but Part III–C–1, dissenting.**

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a “less restrictive alternative.” And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a religion-based exemption, the government, i.e., the general public, can pick up the tab.

The Court does not pretend that the First Amendment’s Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. Instead, the Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA), dictated the extraordinary religion-based exemptions today’s decision endorses. In the Court’s view, RFRA demands accommodation of a for-profit corporation’s religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners’ religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court’s judgment can introduce, I dissent.

## I

“The ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives.” Congress acted on that understanding when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women’s needs. . . .

## II

Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga might assert is foreclosed by this Court’s decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990). The First



Amendment is not offended, Smith held, when “prohibiting the exercise of religion is not the object of [governmental regulation] but merely the incidental effect of a generally applicable and otherwise valid provision.” The ACA’s contraceptive coverage requirement applies generally, it is “otherwise valid,” it trains on women’s well-being, not on the exercise of religion, and any effect it has on such exercise is incidental. Even if Smith did not control, the Free Exercise Clause would not require the exemption Hobby Lobby and Conestoga seek. Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties.

The exemption sought by Hobby Lobby and Conestoga would override significant interests of the corporations’ employees and covered dependents. It would deny legions of women who do not hold their employers’ beliefs access to contraceptive coverage that the ACA would otherwise secure. . . .

### III

#### A

Lacking a tenable claim under the Free Exercise Clause, Hobby Lobby and Conestoga rely on RFRA, a statute instructing that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” unless the government shows that application of the burden is “the least restrictive means” to further a “compelling governmental interest.” In RFRA, Congress “adopt[ed] a statutory rule comparable to the constitutional rule rejected in Smith.”

RFRA’s purpose is specific and written into the statute itself. The act was crafted to “restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened.” . . .

...

Until this litigation, no decision of this Court recognized a for-profit corporation’s qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. . . .

Reading RFRA, as the Court does, to require extension of religion-based exemptions to for-profit corporations surely is not grounded in the pre-Smith precedent Congress sought to preserve. Had Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation. . . .

The Court’s determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. . . .