From Wisconsin v. Yoder to Employment Division v. Smith:
Do we Still Have Religious Liberty?

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INTRODUCTION: THE BACKGROUND

The criminal defendants were Wallace Miller, Jonas Yoder and Adin Yutzy. On the morning of April 2, 1969, the hearing began in the Green County Wisconsin Courthouse, just south of Madison (Peters 86). What was the crime with which these three fathers—two Old Order Amish and one Amish Mennonite—were charged? They had allegedly violated Wisconsin's compulsory attendance law which required the parents to send their children to school until age 16 (Wis. Stat. Ann. Sec. 118.15 1969). Since the Amish, as a matter of religious conviction, believed that an eighth grade education was sufficient, their children, ages 14 and 15, were not in school.

It is important to note that "for most of their history in North America, Amish children attended public one-room country schools alongside of their English neighbors"[1] (Dewalt 4, emphasis mine.). In fact, their fathers often served as public school board members (Kraybill 120). However, "…as consolidation efforts closed these schools the Amish balked at sending their children on buses to schools in towns…" (DeWalt 9). The Amish often purchased the now-abandoned one-room schools (the byproduct of consolidation) and used them for instruction. In one of the largest Amish settlements, Lancaster County, Pennsylvania, 120 one-room schools were abandoned by the public school districts between 1919 and 1939 (Kraybill 121). So consolidation was occurring before WWII. This, coupled with legislation in some states which increased the required attendance age from what it had often been—14 years—to 16 or 18 years, led to conflict between the Amish and public school officials beginning in the late 1930s

[1] Amish schools existed in nine states: Delaware, Ohio, Tennessee, Iowa, Indiana, Missouri, Illinois and Maryland and Pennsylvania (Dewalt 27).

(Kraybill 122-129). The conflict, closest in time to the New Glarus, Wisconsin dispute, occurred in Iowa in 1965 and drew national attention. Public school officials from the Hazelton Public School District "…rode a public school bus to Amish School #1 and attempted to require students to board the bus and go to the public school in town. As the children were coming out of the Charity Flats School, a female voice shouted, 'Run' in German and the children scurried into the surrounding fields of corn." Photos of the fleeing children were carried in newspapers everywhere (DeWalt 36) (Peters 44-45) (Hostetler 264-267).

It was the prospect of their children being required to attend the consolidated New Glarus High School (public) that led a group of the New Glarus Wisconsin Amish to form their own school district (The Pleasant View Parochial School District) in the late summer of 1968 (Peters, 30). Since the school only provided education through the eighth grade, however, the parents of a typical Amish school graduate were still in violation of the compulsory attendance law unless their children continued their education for two more years in the public high school.

The participants that morning in the Green County Courthouse were two of the Amish defendants, Yoder and Miller, (Yutzy was excused from attending because he had moved out of the jurisdiction), the Superintendent of the New Glarus School District, Kenneth Glewen, Wisconsin Deputy Attorney General Robert Martinson, Judge Roger Elmer, and the defense Attorneys, William Bentley Ball, a nationally known Harrisburg, Pennsylvania lawyer (Peters 86-87) and a local Wisconsin attorney, Tom Ecklerle (64).

In a very real sense, the hearing had an "ecumenical" dimension. The Old Order Amish and the Amish Mennonites were in the Anabaptist Protestant tradition. The Mennonites were followers of Menno Simons and the members of the Old Order Amish, which had split from the Mennonites, and followed the teaching of Jacob Amman, who taught "strict adherence to

shunning and separation from the world" (DeWalt 15). Attorney Ball, who was a dedicated Roman Catholic layman, had been alerted about this case by the National Committee for Amish Religious Freedom (NCARF), which had been formed a few years earlier by Rev. William Lindholm, a Lutheran pastor. Lindholm had formed NCARF after learning of the plight of the Iowa Amish mentioned earlier. As different as their ecclesiastical allegiances were, they had one thing in common: They cherished religious liberty.

THE TRIAL BEGINS

The State's case was direct and short. Its key witness was Superintendent Glewen who testified that the children of defendant's Yoder and Miller, who should have been attending the public high school, had not been in attendance (Ball, 64). Ball's cross examination revealed that Superintendent Glewen had attempted "to persuade some of the Amish parents to 'hold off'on transferring their children out of the public school 'until the third Friday in September, when we count our school population'" (Peters 88-89). State aid depended upon student population and New Glarus District stood to lose around $18,000 in aid. The Amish refused to go along with such deception (Peters 89).

Ball's defense strategy was to produce a trial record of testimony about the religious convictions and culture of the Amish that would be used upon appeal. He knew that the testimony of Wallace Miller and Freda Yoder, daughter of Jonas Yoder, would be "short and spare" (Ball 67). Ball called to the witness stand an expert, therefore, Dr. John Hostetler, Temple University Professor, and authority on Amish life and culture. The Amish, Hostetler said, adhered to "four chief beliefs: separation from worldliness, maintenance of a church community, maintenance of community rules binding on members, and a life close to the soil…" (Ball 67).

He bluntly concluded that "if the Amish youth are required to attend the value system of the high school as we know it today, the church community cannot last long. It will be destroyed" (68). Hostetler also stressed the Amish commitment to informal learning by experience (68-69). Deputy Attorney General Martinson then tried to shake Hostetler by asking if it were not true that the purpose of attending school was to get an education and one which would allow the child to take "his or her place in the world?" Hostetler's reply was stunning and direct. He said: "It depends on which world" (69).

After deliberating, the trial judge issued an opinion finding Yoder and Miller guilty and imposed fines of five dollars each on them. Technical rules required the case to be reheard by the Green County Circuit Court which was done on the basis of stipulated-to testimony. That Court also found against the defendants, Yoder and Miller (Peters 101-103). Attorney Ball then filed an appeal to the Supreme Court of Wisconsin.

YODER AND THE KEY FREE EXERCISE OF RELIGION QUESTION

Yoder would now become one of the key cases in which one of the most difficult constitutional questions is asked: What should happen when the exercise of the religious convictions of citizens and actions based upon those convictions conflicts with state mandates and requirements not particularly aimed at religious practices but nevertheless adversely impacting them? From the vantage point of *Yoder* we will look backward and then forward into U.S. constitutional history to answer that question.

YODER IN THE WISCONSIN SUPREME COURT

State of Wisconsin v. Yoder was decided by the Wisconsin Supreme Court in January, 1971, by a vote of 6-1 in which the majority held for the Amish defendants. In his opinion, Chief

Justice F. Harold Hallows maintained that "no liberty guaranteed by our constitution is more important or vital to our free society than is religious liberty protected by the free exercise clause of the first amendment" (Hallows, Wisc. Sup. Ct. 434). Relying on the 1963 U.S. Supreme Court case of *Sherbert v. Verner* Hallows applied a two-part balancing test weighing the burden on the free exercise of one's religion against the "importance of the state's interest asserted in justification of the substantial infringement" (434).

Hallows first explored whether the compulsory attendance law was an infringement of free exercise of religion. He concluded the "Amish religion requires the avoidance of worldly educational environment and imposes the duty on the adolescent to become mature in a wisdom different from what others may regard as wisdom and in skills and responsibilities which are proper and fitting for a life different from what others may wish to pursue" (Hallows 436). Hallows continued: "We think the burden of compulsory education is a heavy one. The law commands the appellants to perform affirmative acts which are repugnant to their religion" (437). Chief Justice Hallows summed up: "There is no question…the compulsory education law infringes upon the free exercise of religion by appellants [Yoder, Miller and Yutzy] within the protection of the first amendment" (437).

The Chief Justice then turned to the second part of the balancing test prescribed by *Sherbert*, that is, whether the state of Wisconsin had a compelling interest in nevertheless enforcing the compulsory attendance was justified. Under the compelling interest test, the state, according to the Wisconsin Supreme Court majority, had to show the "need to apply the regulation [compulsory attendance law] without exception to attain the purposes and objectives of the legislation" (Hallows 438). The majority opinion notes that if one of the purposes of required education is to produce good and responsible citizens, then "…The Amish claim, with

compelling merit, that their education produces as good a product as two additional years' compulsory high school education does" (439). Finally, the opinion opines: "We conclude that although education is a subject within the constitutional power of the state to regulate, there is not such a compelling state interest in two years' high school compulsory education as will justify the burden it places upon the appellants' free exercise of religion" (447). So Attorney Ball and the Amish had won at the state Supreme Court level. There will be a further exploration of the *Sherbert* decision below.

ON TO THE U.S. SUPREME COURT

Wisconsin was not content to end the dispute and instead filed a petition for *certiorari* with the U.S. Supreme Court. The petition was granted and oral argument and briefing followed. The case, now *Wisconsin v. Yoder* was decided in May, 1972 affirming the Supreme Court of Wisconsin. Before venturing into that opinion it would be helpful to review several of the key "free exercise" cases that preceded Chief Justice Burger's opinion in *Yoder*.

A BRIEF LOOK AT EARLIER FREE EXERCISE CASES

The first and oldest case is *Reynolds v. United States* (1879). George Reynolds, a member of the Church of Latter-Day Saints, believed that his religion, sometimes called Mormonism, required him to marry more than one wife which he had done in the Territory of Utah. A federal law made bigamy a criminal act in any territory over which the United States had jurisdiction which included Utah at that time. Reynolds' defense was that the First Amendment free exercise clause, which forbade the Congress from making any law prohibiting the free exercise of religion, extended protection to him from the application of the federal law. He was claiming a religious exemption.

The U.S. Supreme Court, in a unanimous decision, found against him. Chief Justice Morrison Waite first affirmed that the United States had the "legislative power" to pass the anti-bigamy law (*Reynolds* 166). "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…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 such a sacrifice?" (166). Waite's opinion created what is commonly referred to as the "belief/conduct" distinction. As Peters summarizes it: "Reynolds, in short, was free to *believe* anything he wished, but his *conduct* remained very much subject to regulation by the state…" (Peters 73).

THE REYNOLDS' DISTINCTION HOLDS ITS OWN

In large measure in the post WWII era, state courts followed the *Reynolds'* distinction between the freedom to <u>believe</u> and the right to <u>act</u> on that belief when it came to conflicts between the Amish and the compulsory attendance laws. For example, in *Commonwealth v. Beiler (1951),* the Pennsylvania Superior Court refused to grant the Amish a First Amendment free exercise exemption. Citing *Reynolds it wrote*: "Religious liberty includes the absolute right to believe but only a limited right to act" (*Beiler* 468).[2] Had *Yoder* been decided in this time period, it is likely that the outcome would have been different. Over time, however, the U.S. Supreme Court was modifying its view of the free exercise clause. In a series of cases too numerous to catalogue here, the Court determined "that religious conduct was protected under

[2] In the case of Cantwell v. Connecticut (1940) the U.S. Supreme Court "incorporated" the First Amendment's "free exercise" clause into the Due Process clause of the 14th Amendment and, by doing so, restrained states from interfering with the free exercise of religion.

the First Amendment's free exercise clause, even if the conduct was only indirectly burdened by government regulation. The Court also attempted to fashion a standard to evaluate free exercise challenges to neutral, generally applicable law" (Long 54). Then in 1963, the Court, in the case of *Sherbert v. Verner* (1963), "entered the next stage in free exercise jurisprudence" (55), which case was to be heavily relied upon by Attorney Ball in the *Yoder* case.

SHERBERT V. VERNOR—FREE EXERCISE REFORMULATED

Adell Sherbert was a member of the Seventh-Day Adventist Church and Saturday was her day of worship. She sought unemployment compensation due to being discharged from her job. The South Carolina Employment Security Commission, however, denied benefits to her because she was not willing to present herself for work on Saturday, her day of worship. The South Carolina statute said that to receive compensation, the applicant had to be ready to accept work, apparently no matter which day of the week it was offered. The case was eventually appealed to the State Supreme Court which affirmed the Commission's decision to deny benefits and then to the U.S. Supreme Court. Commentators like Carolyn Long say that Brennan's opinion in *Sherbert* "completely reformulated the free exercise doctrine" (Long 55).

Justice Brennan, writing for the Court set out the requirements of cases where religious freedom clashed with governmental regulation. The first prong of the inquiry under what became known as the *Sherbert* test was to ask whether the governmental regulation or law "imposes any burden on the free exercise of…religion" (*Sherbert* 403). Brennan concludes that it did impose such a burden because it "forces her to choose between following the precepts of her religion and forfeiting benefits…" (404).

The second prong of the inquiry was to ask whether "some compelling state interest" exists which is sufficiently important to override the free exercise claim (*Sherbert* 406). The

phrase “compelling state interest” signals that the Court is using what is called a “strict scrutiny” approach. This means that the Court assumes that the governmental action is unconstitutional and the government has the heavy burden of showing it is not (Hall 845). South Carolina argued that it was possible that spurious claims for religious exemption would be made, undermining the unemployment fund and disrupting work scheduling. The Court rejected these possibilities, however, as not compelling enough to warrant infringement of religious liberty (*Sherbert* 407). Ms. Sherbert was vindicated and her religious liberty preserved.

PIERCE V. SOCIETY OF SISTERS, ANOTHER KEY CASE

The other case providing a background to *Yoder* was *Pierce v. the Society of Sisters (1925).* In 1922, the state of Oregon had enacted a compulsory school attendance law requiring parents to send their children “to a public school” (*Pierce* 530). According to commentators like Barbara B. Woodhouse, the Oregon law and others like it were spawned by a combination of anti-Catholic sentiment, anti-foreign prejudice and a false patriotic fervor aimed at Americanizing students by compulsory common schooling (Bybee 894). The Society of Sisters operated, among other things, independent primary and high schools in which the curriculum was consistent with Oregon requirements and in addition the students were given “systematic religious instruction and moral training according to the tenets of the Roman Catholic Church” (*Pierce* 532). Justice McReynolds writing for the Court found in favor of the Society of Sisters, saying that the 1922 Act unreasonably interfered “with the liberty of parents and guardians to direct the upbringing and education of children under their control” (534-535). Furthermore, in memorable language often quoted McReynolds said: “The fundamental theory of liberty…excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those

who nurture him and direct his destiny have the right, coupled with the duty, to recognize and prepare him for additional obligations" (535).

CHIEF JUSTICE BURGER ON YODER

These two cases—*Sherbert v. Verner and Pierce v. Society of Sisters*—served as the foundation for Chief Justice Burger's majority opinion in *Yoder.* Burger first began with a description of the religious views held by the Old Order Amish. Relying on the expert testimony that Attorney Ball provided in the lower court record, Burger emphasized three central beliefs. First, the Amish believed that their own salvation and that of their children "requires a life in a church community separate and apart from the world and worldly influence" (*Sherbert* 210). Burger pointed out that the Amish do not object to education in the "three Rs" through the eighth grade so that they can gain the basic skills "to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs" (212). The Amish objection, however, "to formal education beyond the eighth grade is firmly grounded in…religious concepts" (210). The public high school tends to emphasize "intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students" (211). By contrast Amish society "emphasizes 'learning through doing,' a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society" (211).

The Court accepted the expert testimony of Dr. Hostetler "that compulsory high school attendance could not only result in great psychological harm to Amish children, because of the conflicts it would produce, but would also…ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today" (*Sherbert* 212).

Chief Justice Burger then applied what is essentially the *Sherbert v. Verner* test to the case. Burger restates *Sherbert* when he says that in order for Wisconsin to compel attendance at a public high school, the essential questions are whether the State's requirement "does not deny the free exercise of religious belief…or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause" (*Sherbert* 214).

The Court first considered whether the Amish religious beliefs and their way of living were actually "inseparable and interdependent" (*Sherbert* 215). Burger concludes that the Old Order Amish had maintained a constancy to their beliefs even in the midst of society around them becoming "more populous, urban, industrialized, and complex" (217). Their history of "almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education…would gravely endanger, if not destroy, the free exercise of respondents' religious faith" (219).

The remaining question, however, was whether or not the State's interest in requiring two more years of high school education was "compelling" enough to raise the State's interest to be "paramount" to the religious practices of the Amish? (*Sherbert* 219) As mentioned earlier, the requirement of "compelling state interest," in constitutional law parlance means that the requirement is one of "strict scrutiny," which is an extremely high standard, the same one insisted upon by the Court when a state uses race as a basis for its action, in the affirmative action cases. So, according to the *Sherbert* test used here, when a free exercise claim is asserted, the reasons for the state governmental action or regulation have to meet a very high standard.

Burger then addresses Wisconsin's contention that while <u>belief</u> is protected by the Free Exercise Clause, <u>actions</u> are not. The Court rejects that distinction, first set forth in the *Reynolds*

case, mentioned above, saying that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment" (*Sherbert* 220).

Wisconsin went on to argue that it had a compelling state interest in the further education of Amish children in order to prepare them to be "self-reliant and self-sufficient participants in society" (*Sherbert* 221). But, the Court says that while that might be true for participation in modern society, the Amish do not intend to participate in that kind of society but instead in a "separated agrarian community that is the keystone of the Amish faith" (222). Professor Albert Keim refers to this stance as "the right not to be modern" (Keim 1). Wisconsin had argued further that additional education was necessary to protect Amish children from "ignorance" (*Sherbert* 222). The Court was not convinced by such a claim, noting that the Amish were "productive and very law-abiding" citizens (222).

Wisconsin had resorted to a "fall back" argument that even if an eighth grade education was preparation enough for participation in Amish society, if children left the Amish religion, they would be ill-prepared to make their way in the non-Amish world (*Sherbert* 224). The Court rejected such a concern as speculative and then added that there is nothing in this record to suggest that the Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today's society" (224).

Finally, the State had argued, on the basis of *Prince v. Massachusetts (1944)*, the Court was ignoring the right of the Amish child to a secondary education with the State as *parens patriae*. *Prince* was a child labor case and the Court points out that the case at bar, unlike *Prince*, "is not one in which any harm to the physical, or mental health of the child or to the public safety, peace, order or welfare has been demonstrated" (*Sherbert* 230).

Burger ends his opinion by invoking *Pierce v. Society of Sisters.* "However read, the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children" (*Sherbert* 233). The combination of the "interests of parenthood" with "free exercise" means that the State will have to show more than "some purpose" to regulate (233). The Court finds for the Amish and against Wisconsin.

YODER DIMINISHED: EMPLOYMENT DIVISION V. SMITH

Yoder has been called "the high-water" for the Free-Exercise Clause (Choper 657; Bonventre 1410). A decision, however, 18 years after *Yoder* significantly changed the free-exercise landscape. In fact, one commentator summarizes this way: "*Yoder* survives *Smith.*…[but] *Yoder* as a pure free exercise case would seem to be dead" (Bybee 890). The case that changed free exercise jurisprudence so abruptly was *Employment Division v. Smith (1990).*

In *Smith* the parties, Alfred Smith and Galen Black, were denied unemployment benefits because they had been fired from their jobs with a drug rehabilitation organization for "misconduct" specifically, ingesting peyote, a controlled substance, in the course of a religious ceremony of the Native American Church. They were both members of the church. They claimed that Oregon's denial of benefits violated their free exercise rights (*Smith* 874). The legal dispositional history of the case is complicated but finally, it came to the U.S. Supreme Court, from the Oregon Supreme Court, which held that the denial of benefits by the Employment Division violated the free exercise rights of Smith and Black.

The U.S. Supreme Court reversed the Supreme Court of Oregon. That itself was not surprising because the application of the compelling interest test does not guarantee that the government will lose. But, what caused quite an uproar among constitutional observers was the reasoning of the decision. Noted commentator on free exercise, law professor Jesse Choper

called the reasoning of the decision "very surprising" and "wholly unexpected," for example (Choper 673). With Justice Scalia writing, the Court rejected the long-standing test of compelling state interest and strict scrutiny under the doctrine of *Sherbert*. In fact, the opinion claimed: "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" (*Smith* 878-879).

Scalia returned to the largely untenable distinction between belief and conduct first set forth in the 1879 case of *Reynolds v. United States*, where the Court had refused to recognize a free exercise defense interposed by defendant Reynolds against charges of polygamy. Justice Scalia also cited *United State v. Lee (1982),* in which the Amish were unsuccessful in seeking exemption from Social Security taxes based on claim that their religious faith prohibited participation in governmental aid programs. True, the Amish lost in *Lee;* however, the Court there used the same *Sherbert*-like test that it had been using in free exercise cases. The Court first asked if paying into and receiving benefits from Social Security conflicted with Amish religious doctrine and concluded that it did (*Lee* 258). It then asked the second question whether the government's interest in providing a comprehensive Social Security system overrode religious liberty in this case. It determined that it did. The Court called the government's interest in requiring near universal participation by employers in Social Security "apparent" and "very high" (*Lee* 258-259*)*. This is another way of saying that the government had a "compelling interest". (Incidentally, how the Social Security system suffered from the acts of person who neither paid into the system nor claimed benefits from it is perplexing.)

So *Smith* was a departure from the *Sherbert* test. For the purposes of this paper the question is obviously, what specifically does the *Smith* decision do to *Yoder* and to those families

who claim exemption from compulsory education laws due to religious convictions? Furthermore, what does *Smith* do to free exercise protection generally? Are those who say that free exercise rights are dead or at least badly wounded, right?

Justice Scalia realized that he must, at the very least, address the question about *Yoder*. He did so by claiming that cases like *Yoder* and *Pierce v. Society of Sisters* should really not be classified as pure free exercise cases but as what he calls "hybrids." They do not involve "…the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections…" (*Smith* 881). The other constitutional protection in *Yoder* and *Pierce* is the liberty right of parents to direct the education of their children (881). Concludes Scalia, therefore, since the *Smith* peyote case "does not present such a hybrid situation, but a free exercise claim unconnected with any…parental right" or other constitutional protection, the *Sherbert* test should not be used (882). Scalia's analysis basically leaves *Yoder* and *Pierce* in tack. He went on further to say that state legislatively-devised exemptions to governmental regulations that impacted the religious beliefs of citizens, were allowable but that this "…is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts" (890).

THE LEGISLATIVE RESPONSE: RELIGIOUS FREEDOM RESTORATION ACT (RFRA)

What *Smith* meant, however, for other free exercise claims caused considerable concern within the American religious community.[3] That concern found expression in new legislation—the Religious Freedom Restoration Act (RFRA). It was signed into law on November 16, 1993, by President Bill Clinton (Long 240). The purposes of the Act were stated candidly in Sec. 4(b):

[3] For a thorough discussion of the process of drafting and adoption, see Carolyn N. Long, Chpt. 10, Religious Freedom and Indian Rights.

"Purposes: The purposes of this Act are—(1) 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; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government" (RFRA). The legislative authority asserted by the drafters was the "enforcement" language of section five of the Fourteenth Amendment. The rationale is complicated. The Fourteenth Amendment Due Process clause protects life, liberty and property against state law encroachment. The First Amendment Free Exercise clause, though originally intended as a restraint on the federal government, had been applied to state governments from 1940 on after the decision in *Cantwell v. Connecticut* through the language of the Due Process clause. Since Congress is given power to enforce violations of the Fourteenth Amendment by section 5 of that Amendment, Congress can act to protect First Amendment free exercise rights against state laws that infringe upon those rights.

THE SUPREME COURT STRIKES DOWN THE RFRA

The legislative "fix," so to speak, would not last long without a challenge. That challenge came in 1997 in the case of *City of Boerne v. Flores*. St. Peter Catholic Church in San Antonio, Texas, sought to increase the size of its church building to accommodate the growth in the number of its parishioners. That plan was approved by the Archbishop, P.F. Flores, but denied by the City of Boerne's municipal authorities who relied on the church being in an "historic district" under the city's zoning ordinance (*City of Boerne* 512). The church appealed citing, among other grounds, the protections provided by the Religious Freedom Restoration Act.

Archbishop Flores filed suit in the United State Federal District Court. That Court found for City of Boerne, concluding that the RFRA was unconstitutional because Congress had

exceeded its claimed legislative powers. The U.S. Court of Appeals for the 5th Circuit, however, reversed, upholding the RFRA. The City appealed to the U.S. Supreme Court (512).

In an opinion written by Justice Kennedy, the Court struck down the RFRA as applied to local and state governments and the laws they enacted. Much like the Federal District Court had found, the Supreme Court determined that Congress had exceeded the authority it claimed under section 5 of the Fourteenth Amendment, which gives Congress power to pass legislation to enforce other provisions of the Fourteenth Amendment. Justice Kennedy said that section 5 power is remedial and limited and does not include the power to intrude into state governments' "general authority to regulate for the health and welfare of their citizens" (*City of Boerne* 534). So the RFRA had threatened the principle of federalism. Furthermore, wrote Kennedy: "The RFRA was designed to control cases and controversies" by which he means that the Congress was encroaching into the realm of the judiciary. "It is the Court's precedent, not RFRA, which must control," opined Kennedy (536). Professor Herbert Titus points out, critiquing the RFRA: "Congress is revising a court opinion which it perceives to be an erroneous interpretation of the Constitution and imposing that revised interpretation upon the courts" (Titus 42).

It is important to note that because the *Boerne* decision only involved <u>state</u> and <u>not</u> federal law, the decision, while negating the RFRA's application to the states, allows the RFRA to remain applicable to the federal government and its laws. In fact, the Supreme Court affirmed a Tenth Circuit Court of Appeals decision in which the Tenth Circuit had recognized and followed the requirements of the RFRA in the case of *Gonzales v.O Centro Espirita Beneficente Uniao Do Vegetal* (2006). The Court found that the federal Controlled Substances Act should not be applied to a sacramental tea used by the members of the Uniao Do Vegetal (UDV) church's shipment of tea even though the tea contained DMT, a hallucinogen regulated under Schedule I

of the Act. In doing so, it followed the compelling governmental interest test and strict scrutiny required by the RFRA (City of Boerne 423-424).

Two notable things have happened since the decision in *City of Boerne v. Flores*: First, rewritten legislation similar in content to the RFRA was drafted. Since Congress must always legislate under its enumerated powers, the drafters planned to make use of the two most broadly-interpreted clauses in the Constitution—the Interstate Commerce clause and the Spending Clause. The details of the drafting and the efforts to gain support are outlined by Long (262-270), but the bill never became law.

STATE RFRAs—HOPEFUL BUT NOT A COMPLETE ANSWER

The second more successful effort to respond to the negative effects of *Beorne* and *Smith* was a movement to support the passage of state laws patterned closely after the RFRA. The Coalition for the Free Exercise of Religion encouraged such efforts in a variety of states (Long 270-272) (Bonventre 1403). A recent article by Professor Christopher Lund puts the number of states which have passed state RFRAs at sixteen. These sixteen, along with additional states which have state constitutional provisions that can been said to be more protective of free exercise than the *Smith* case, make the number of states protective of free exercise at about thirty (Lund 467). As Lund points out, these state laws and state constitutional interpretations are important because "most religious liberty disputes arise over state and local laws…" (467). As Lund complains, this number conveys a more optimistic picture than is warranted for several reasons. First, two major states, California and New York do not have state RFRAs at all (479). Secondly, while in a few jurisdictions, RFRAs have been "heavily litigated," in many states that have RFRA laws practically no litigation has occurred (479-482). Thirdly, state courts in RFRA states have often "watered down" the clear requirements of the state RFRA so that the analysis

that the courts provide falls well short of a compelling interest/strict scrutiny review (485). Other technical requirements plus ample exclusions make the laws less effective (490-493). So, litigation experience may gradually overcome some of these problems, but the state RFRAs are not yet producing the kind of certainty of protection that free exercise rights deserve.

CONCLUSION

The Free exercise of religion protected by the First Amendment (and eventually applied to the states) first received attention in *Reynolds*, where the Court insisted that free exercise referred only to beliefs, not actions based upon those beliefs. But, in the early 1960s in *Sherbert* the Court produced an interpretation that gave the free exercise of religion considerable protection by requiring governments whose laws and regulations burdened a person's religion to produce evidence that the laws or regulations were compelling. This test, called strict scrutiny, required the government to make an exceedingly strong case, that is a compelling case, for the need to encroach upon religious faith. Cases like *Yoder* illustrate the application of that *Sherbert* test. Without much warning, however, the Court in the *Smith* case abandoned, for the most part, that settled approach to free exercise cases and instead produced a test that only required governments to show that the laws and regulations they enacted were of neutral and general application. This considerable shift alarmed defenders of free exercise and that produced a federal law, The Religious Freedom Restoration Act, which sought to reestablish the *Sherbert/Yoder* test and approach to free exercise litigation. The Court, however, struck down the Act as applied to the state governments although it remains effective against the Federal government. The result was a movement to enact at the state level "little RFRAs" to resurrect the greater protections originally provided by the *Sherbert/Yoder* test. That movement produced legislative success in sixteen states and even there, various problems with enforcement and

interpretation have made that effort less effective. Proponents of the free exercise of religion should be genuinely concerned about the movement away from *Yoder and Sherbert.*

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