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17.245 The Supreme Court, Civil Liberties, and Civil Rights  
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## Discussion 9: Religion, Free Exercise, and the Establishment Clause

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### Discussion of Employment Division vs. Smith, 1990

Background:

Smith is fired for testing positive for the drug peyote, which is banned by the state of Oregon, and was subsequently denied unemployment benefits. State laws say that benefits may be denied to someone who is fired for actions violating state laws. Mr. Smith contests the constitutionality of the denial of benefits, alleging that he used the drug for a religious ritual that is sanctioned by his Native American sect.

Constitutional questions:

2 Clauses of the First Amendment deal with religion:

- Establishment clause
- Free exercise clause

*Congress shall make no law **respecting an establishment of religion, or prohibiting the free exercise thereof**; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.* (1<sup>st</sup> Amendment, US Constitution)

There are some ambiguities as to what these clauses actually mean.

For instance, what does it mean to prohibit free exercise of religion?

- Does it mean simply that Congress may not ban a religion or belief?  
If this is true, then Congress may do just about anything to inconvenience specific religious establishments. This would be a very lenient view of the free exercise provision and would afford Congress a lot of power to restrict individual liberty.
- Does it mean Congress may not ban any exercise that is part of a religious ritual?  
If so, Congress' essentially has no power to limit individual conduct because so many forms of conduct can be justified on religious grounds.

How do we resolve these two extreme views?

Free exercise doctrine has evolved to mean that if the Congress or state government passes a law impairing your ability to practice your religion, there must be a compelling state interest.

Q. Are private businesses covered by the Constitution's free exercise provisions?

The civil rights revolution brought about application of free exercise clause to private businesses. Now anti-discrimination law protects people from deprivation of free exercise by private entities.

In-Class Debate

Arguments for Smith

- Religious convictions of Smith are not contested
- Law of Oregon functionally prohibits Smith's free exercise

- Strict scrutiny test should be used for laws restricting free exercise: people are entitled to an exemption from state law in order to practice their religion, unless there is a compelling state interest. Here there is no compelling state interest to deny unemployment benefits or prohibit use of peyote for a religious ritual.
- *Yoder vs. Wisconsin*: 406 U.S. 205 (1972) is the case in which the United States Supreme Court found that Amish children could not be placed under compulsory education past 8th grade, as it violated their fundamental right to freedom of religion.
- Stare Decisis: legal principle that prior court precedents should stand and a court must adhere to the principles of such decisions

#### Arguments for Oregon

- The petitioner has lost his benefits, not his right to exercise his religion
- There is a fundamental difference between a right to employment and a right to employment benefits. There is no positive right to employment benefits, it is a privilege granted and decided by the state.
- Oregon has a compelling state interest in enforcing its drug laws.
- There is no way of enforcing a general law of neutral applicability if there exists a religion that supports violation of such law.
- Carrying Smith's argument to its logical extreme, anyone could claim exemption from any law

#### Further discussion

*Sherbert* decision stands for the proposition that you may not fire someone for exercising their religion, and may not deny employment benefits as a result of free exercise.

*[Sherbert v. Verner, 374 U.S. 398 (1963), was a case in which the Supreme Court of the United States held that the Free Exercise Clause of the First Amendment required that government demonstrate a compelling government interest before denying unemployment compensation to someone who was fired because her job conflicted with her religion.]*

Justice Scalia's decision in *Smith* said that since the Oregon law is a neutral law, it survives constitutional scrutiny. Scalia says that in order to be unconstitutional under free exercise, the law must be targeted at specific religious practices, or must restrict free speech in conjunction with religious exercise.

After Scalia's opinion, Congress passed the Religious Freedom Restoration Act (RFRA) of 1993, which overturned Scalia's decision. The act restored *Yoder* and *Sherbert*, requiring the government to show a compelling government interest in order to enforce a neutral law impairing free exercise. The part of the law applying to a state's ability to restrict free exercise was then challenged and struck down in *City of Boerne* (1997) as exceeding Congress's enforcement powers under Section 5 of the 14<sup>th</sup> Amendment, leaving RFRA valid only with respect to the federal government. See the Court's recent *O Centro Espirita* decision (2006).

#### **Discussion of Rosenberger vs. University of Virginia, 1995**

The administration of the University of Virginia refused to fund a student group that was publishing of a magazine with a Christian view, claiming that awarding the funding amounts to an establishment of religion. The funds were allocated by the University specifically for student groups that create public fora for expression such as magazines and newspapers. Rosenberger argues that the University must give funding because the denial of funding

prevents the expression of a religious viewpoint and amounts to viewpoint discrimination in violation of the free speech clause.

Supreme Court says that in this circumstance the freedom of speech wins out because the program was a general fund for establishment of a limited public forum. When the University creates such a forum, the court says that it cannot discriminate in its funding decisions based on viewpoint. The court sides in favor of free expression over any potential danger that the government will support groups that espouse religious beliefs.

There is still debate about whether the establishment clause limits the state to enacting and enforcing secular laws, or whether it simply has to remain neutral on religion.

### **Discussion of Wallace vs. Jaffree, 1985**

An Alabama statute requiring one minute of silence for meditation or prayer in public schools is challenged under the establishment clause. The court held that the only purpose of such a law could be the establishment of religion, and it therefore violates the establishment clause.

Major case questions:

Would people feel discriminated against if they didn't participate?

This is an important question in cases involving laws that appear to establish or support religion in some way. The Court says that peer pressure in the school environment makes it likely that students who didn't participate could be singled out or discriminated against.

The Court determined that the Alabama statute was religiously motivated, and thus violated the establishment clause.

Rehnquist dissents, offering a long, descriptive reinterpretation of the history of the founding and debates about the government's role in religion. Rehnquist says that the framers wanted to allow religion to play an important role in public life, refuting the notion that Jefferson endorsed a wall of separation between church and state. Rehnquist's arguments reflect his "originalist" view of the Constitution, the view that the document should be interpreted as it was intended to be by the Framers.

### **Summary point:**

Throughout the history of First Amendment religion litigation the establishment clause and free exercise clause continually come into conflict with one another. There is often a hazy distinction between government protection of the free exercise of religion and actual government support amounting to an establishment of religion.