# Encounter in the Courts

***Summary:*** *The First Amendment of the United States Constitution prohibits the establishment of religion and protects its free exercise. The meaning of these two provisions raises questions that often end up in the Supreme Court. A 1963 ruling required that governments prove that there exists compelling state interest behind legislation that burdens religious practice. This requirement (known as the Sherbert test) was weakened by later decisions, including a 1990 case that allowed states to enforce generally applicable laws even if they burden religious practice—a decision that faced considerable backlash by religious freedom advocates.*

The United States Constitution both prohibits the establishment of religion and protects the free exercise of religion. These twin principles have guided what have been called "church-state" relations in the United States. The issues have become increasingly complex in a multireligious America, where the "church" in question may now be the mosque, the Buddhist temple, the Hindu temple, or the Sikh *gurdwara*. Every religious tradition brings its own questions: Can a Muslim school teacher wear her *hijab*, or head-covering, on the job as a public school teacher? Can a Sikh student wear the *kirpan*, the symbolic knife required of all initiated Sikhs, to school, or a Sikh worker wear a turban on a hard-hat job, in apparent violation of safety regulations? Should a crèche be displayed in the Christmas season on public property? Can the sanctity of Native lands be protected from road-building? Should the taking of peyote by Native Americans be protected as the free exercise of religion? Can a city council pass an ordinance prohibiting the sacrifice of animals by the adherents of the Santería faith?

These difficult questions make clear that the courts are one vital arena of America's new pluralism. For better or worse, as fresh controversies arise, people of differing religions encounter one another in the courts. Just as the "church" is not a single entity in multireligious America, the "state" is multiple too: there are zoning boards, city councils, state governments, and the federal government. At all levels, courts hear disputes and offer interpretations of laws and regulations, and the constitutional principles that undergird them.

Cases involving the First Amendment principles of non-establishment of religion and free exercise of religion have often posed difficult questions. Sometimes the two principles almost seem to be in tension: the free exercise of religion calling for special protection of religious interests, while the non-establishment of religion prohibiting any such special treatment. Since the second half of the 20th century, "church-state" issues in America increasingly have been on the agenda of courts. Every year,

the Supreme Court rules on a number of cases that have made their way through the appeals process to the highest court in the land.

On the non-establishment side, a landmark decision was *Everson v. Board of Education* (1947) in which the Supreme Court first held that the non-establishment principle of the First Amendment applied to the states. Everson involved a challenge to a New Jersey law that authorized school districts to cover the transportation costs of students attending parochial schools. The Supreme Court upheld the law as constitutional and its decision was clearly and narrowly defined: the busing program was a generally available benefit that should not be denied to children simply because their destination was a religious school. While the Court has consistently ruled against state support of private religious schools, in this case, the benefit in question was not to the schools, but to the children. Justice Black wrote: "The First Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." The extended logic of this decision was that religious communities should have "equal access" to those benefits that are available to non-religious communities. In other words, if a high school gymnasium in Bethesda, Maryland can be used by the Girl Scouts or the Garden Club, it cannot be denied use by the Hindu Temple community for its annual fall Diwali festival.

In the area of free exercise, the case of *Sherbert v. Verner* (1963) set a precedent that guided religious liberty decisions for thirty years. In South Carolina, Adell Sherbert, a Seventh-Day Adventist, was fired from her job because she refused to accept a schedule requiring her to work on Saturday, her Sabbath, and was then refused state unemployment compensation. In her case, the Supreme Court articulated three questions to guide their decision: Has the religious freedom of a person been infringed or burdened by some government action? If so, is there a "compelling state interest" that would nonetheless justify the government action? Finally, is there any other way the government interest can be satisfied without restricting religious liberty? In sum, religious liberty is the rule; any exception to the rule can be justified only by a "compelling state interest." In the Sherbert case, the Court ruled that there was no state interest compelling enough to warrant the burden placed upon Ms. Sherbert's religious freedom.

Similarly, when an Amish community in Wisconsin insisted on withdrawing its children from public schools after the eighth grade and the State of Wisconsin insisted the children comply with compulsory

education laws, the Supreme Court applied the three-pronged test and ruled that the religious freedom of the Amish outweighed the state's interest in four years' more compulsory education (*Wisconsin v. Yoder*, 1972).

Beginning in the 1980s, however, a series of Supreme Court rulings gradually weakened the force of the Sherbert test and, in the view of many, weakened the Constitutional guarantee of the free exercise of religion. In each case, the government did not have to demonstrate a compelling interest or alter its basic procedures to accommodate a specific religious claim. For example, in *Bowen v. Roy* (1986), an Abnaki Indian asked that his daughter, Little Bird of the Snow, be exempt from having to have a Social Security number in order to receive benefits from the Aid to Families with Dependent Children program. The father insisted that to assign a number to his daughter would "rob her of her spirit" and interfere with her spiritual growth by making her a number, regulated by the Federal government. The Court ruled that requirement did not impair the free exercise of religion and, as a result, the government did not need to demonstrate a compelling interest. Little Bird of the Snow would have to have a Social Security number.

Altering government procedures to accommodate various religious practices was also at stake in the case of *Goldman v. Weinberger* (1986). Dr. Goldman, an Orthodox Jewish psychiatrist serving in the U.S. Air Force, insisted on his right to wear his *yarmulke* on duty in the hospital, even though Air Force regulations prohibited a uniformed officer from wearing a head covering inside. The Air Force insisted that its code of military discipline requires that it not be continually making exceptions. The Court concluded that the compelling state interest test did not apply to the military. Deferring to the Air Force's judgment, the Court upheld the regulation as constitutional.

The case of *O'Lone v. Estate of Shabazz* (1987) was decided along similar lines. Here, a Muslim prison inmate wanted to return from outside work at noon for Friday prayers with other Muslims. He was turned down because officials insisted that it would require extra prison security at the worksite and the gate in order to bring him back, and the Court upheld the prison system's refusal to alter prison practices. In making this ruling, the Court also said that a restrictive institution like the prison system had security needs and regulations that would necessarily mean that inmates' Constitutional rights would not be as broad as those of ordinary citizens and thus the government need not demonstrate a compelling state interest.

In the case of *Lyng v. The Northwest Indian Cemetery Protective Association* (1988), the issue was whether the Native Americans' right to preserve intact their sacred sites outweighed the government's right to build roads through Forest Service land. The Yurok, Karok, and Tolowa Indians argued that building a logging road through the land would have "devastating effects" on their religious ways. A lower court acted to prevent the Forest Service from building the road, but the Forest Service appealed to the Supreme Court. In this case, the Supreme Court supported the Forest Service, saying: "Incidental effects of government programs which may make it more difficult to practice certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs [do not] require government to bring forward a compelling justification for its otherwise lawful actions… However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires… Whatever rights the Indians may have to the use of the area, however, those rights do not divest the government of its right to use what is, after all, its land." Here, the balance tipped in favor of the government.

These increasingly restrictive interpretations of the guarantees of the First Amendment culminated in a controversial Supreme Court decision about the use of peyote, a hallucinogen. In *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), two members of the Native American Church ingested peyote, as is common in the ceremonial life of the church, and were subsequently fired from their jobs for "misconduct." The state of Oregon denied them unemployment compensation because they had been dismissed for the use of peyote, which was classified as an illegal drug. The Supreme Court upheld Oregon's decision, arguing that the state had a "generally applicable" law against drug use. The law did not specifically target the Native American Church or any other group, and to carve out exceptions to the laws would be impracticable. Justice Scalia argued that to require the government to demonstrate a compelling state interest in enforcing generally applicable laws would be "courting anarchy."

The *Smith* decision effectively undermined many years of court precedent that normally followed Sherbert and required the demonstration of a compelling state interest to justify an infringement on the free exercise of religion. Many critics insisted that refusing to apply the compelling state interest test to "generally applicable laws" would seriously damage the First Amendment protection of religious freedom. The *Smith* decision, critics argued, would be especially hard on minority religions, since generally applicable laws are passed by the majority. Freedom of religion, on the other hand, is not

subject to majority rule. The purpose of the Bill of Rights was precisely to limit the power of the majority in areas of fundamental rights—such as freedom of conscience and speech.

Concern over the power of the majority was at the center of a case entitled *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993). The case began in 1987 when Ernesto Pichardo, a priest of the Afro-Caribbean Santería religion, purchased a building and a former used car lot to open a place of worship. Ceremonial practice in Santería includes the sacrifice of chickens, pigeons or other small animals to the *orisha*, their gods. The city council of Hialeah, Florida met to consider the matter and passed three ordinances that effectively prohibited animal sacrifice within the city limits. As the city attorney explained, "This community will not tolerate religious practices which are abhorrent to its citizens." Ernesto Pichardo and others protested, however, that the ordinances specifically targeted Santería, as they did not prohibit the killing of animals within city limits for secular reasons, but only for religious ones, and only, seemingly, for those of the Santería religion. Indeed, the ordinances specifically excluded Jewish kosher slaughter practices. The Supreme Court unanimously struck down the ordinances, stating that they were not generally applicable laws at all, but specifically aimed at the Santería religion. As Justice Kennedy wrote, "Although the practice of animal sacrifice may seem abhorrent to some, 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'"

The Santería case was an easy one, resting on the principle that "government may not enact laws that suppress religious belief or practice." However, there were many people, including Justice Souter, who were still disquieted about the merits and the precedent of the Smith decision. By this time, legislation called the Religious Freedom Restoration Act (RFRA) had been introduced in Congress precisely to restore the religious freedom many felt had been eroded with the *Smith* decision. This Act, passed in 1995, stated simply: "The government cannot burden a person's free exercise of religion, even if the burden results from a rule of general applicability, unless the burden is essential to further a compelling governmental interest and is the least restrictive means of furthering that interest."

The Supreme Court, however, severely limited the scope of RFRA in a case entitled *City of Boerne v. Flores* (1997). In this case, the Catholic Archbishop of San Antonio invoked RFRA to challenge a local zoning board decision as a violation of his congregation's free exercise of religion. The Supreme Court rejected the claim, concluding that Congress did not have the power to redefine a constitutional right.

Because the First Amendment as interpreted by the *Smith* case did not require a compelling state interest for a generally applicable law, Congress could not impose such a requirement on the states. Congress, however, could impose such a requirement on the federal government. RFRA remains valid as to federal laws and regulations and has since been used in cases in which the Supreme Court decides that the law is applicable. This was true in *Burwell v. Hobby Lobby* (2014): the Court ruled that the Green family, which owns a large craft store chain, was protected by RFRA and did not have to provide their employees with coverage for contraceptives, a requirement of the Affordable Care Act that the Greens insisted conflicted with their Christian religious beliefs.

The intersection of religious belief and commerce is contested ground; in the past decade, a series of conflicts have concerned whether businesses can refuse to provide services if doing so violates a religious principle. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), Jack Phillips, a baker from Colorado, argued that creating cakes was a form of artistic expression and free speech. When two men requested a wedding cake to celebrate their upcoming marriage, Phillips refused on the grounds that using his talents in service of a message that contradicted his religious beliefs infringed upon his First Amendment right to free expression. His refusal was found by the Colorado Civil Rights Commission to be a violation of the Colorado Anti-Discrimination Act. The United States Supreme Court ruled in Phillips' favor, citing comments made by one member of the Commission as evidence that the body had been hostile towards Phillips' religion. Although the ruling was extremely narrow, it was a particularly prominent example of a larger trend of legal contests between religious, often Christian, creative professionals (including bakers, florists, and illustrators) and same-gender couples seeking services for their weddings.