

## REJECTING BOTH *SMITH* AND RFRA

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Currently, the United States is divided into two regimes on how to resolve free exercise of religion questions. The official rule, of course, is *Employment Division v. Smith*, which, as we all know, held that so long as the criminal statute did not single out religious violators for negative treatment, the law is constitutional.<sup>1</sup> Thus, so long as the government can generally punish somebody for smoking peyote, it can punish a member of the Native American Church for doing the same without any inquiry into the importance (or lack thereof) of the government interest, or the harm to religion occasioned thereby.<sup>2</sup>

To say that *Smith* did not sit well with the Legislature is surely an understatement. Congress immediately responded by passing the Religious Freedom Restoration Act (RFRA).<sup>3</sup> Just as quickly, the Court invalidated it.<sup>4</sup> Undaunted by the Court's invalidation of its handiwork, Congress responded with the Religious Land Use and Institutionalized Person's Act (RLUIPA), which, like the RFRA before it, requires that to interfere with a religious liberty, the government interest must be compelling, and the means used must have been the least restrictive.<sup>5</sup> Unlike the RFRA, it was more narrowly targeted, and, consequently, has been upheld.<sup>6</sup>

In addition, sixteen states have enacted their own RFRAs.<sup>7</sup> Thus, in those states, all free exercise of religion cases are governed by the compelling state

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1. See *Emp't Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-80 (1990) [hereinafter *Emp't Div. v. Smith*], *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

2. See *id.*

3. Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

4. See *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5 (2006)). The United States Supreme Court held that Congress had exceeded its constitutional powers and that the RFRA was unconstitutional. *Id.*

5. 42 U.S.C. §§ 2000cc to 2000cc-5.

6. See *Cutter v. Wilkinson*, 544 U.S. 709, 719-21 (2005). The Court in *Cutter* held that RLUIPA was an example of congressional accommodation of prisoners' religious beliefs, and therefore the free exercise of those beliefs was not a violation of the Establishment Clause. *Id.*

7. See Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 477 n.67 (2010) (citing ARIZ. REV. STAT. ANN. §§ 41-1493 to -1493.02 (2009); CONN. GEN. STAT. ANN. § 52-571b (West 2009); FLA. STAT. ANN. §§ 761.01-.05 (West 2010); IDAHO CODE ANN. §§ 73-401 to -404 (2009); 775 ILL. COMP. STAT. ANN. 35/1-99 (West 2009); MO. ANN. STAT. §§ 1.302-307 (West 2010); N.M. STAT. §§ 28-22-1 to 28-22-5 (2006); OKLA. STAT. ANN. tit. 51, §§ 251-258 (West 2010); 71 PA. CONS. STAT. ANN. §§ 2401-2407 (West 2009); R.I. Gen. Laws §§ 42-80.1-1 to -4 (2006); S.C. CODE ANN. §§ 1-32-

interest test.<sup>8</sup> In the other thirty-four states, cases governed by RLUIPA use the compelling interest test, while the remaining cases use *Smith*,<sup>9</sup> unless, of course, some of the states construe their state constitution to give free exercise of religion greater rights.<sup>10</sup>

The questions propounded to this panel are: (1) Should free exercise of religion ever be a defense to an otherwise valid criminal statute?, and (2) Did *Smith* get it right? My answer is yes to the first question and, unsurprisingly, no to the second. To illustrate, consider the following hypothetical (I will not say how hypothetical).

Assume that on Passover, my house guests include my twenty-year-old daughter and her twenty-seven-year-old husband. The Passover ceremony includes the consumption of four cups of wine. While small children and those who cannot tolerate wine are permitted to substitute grape juice, the default and generally preferred ceremonial beverage is wine.

Suppose that I ask, “Who wants wine?” Consider further that both my daughter and her husband indicate that they want wine. I proceed to pour. I could fill my son-in-law’s glass with wine and later come back and fill my daughter’s glass with grape juice. Suffice it to say, that would not go over too well.

So, let us surmise that I decide to be a good father and take the path of least resistance and allow my daughter to adhere to the religious wine-drinking ritual by pouring her wine. Assume further that during some of the wonderful discussion that tends to accompany Seders, my daughter reveals that she was married at eighteen and is currently twenty. Finally, assume that one of the guests is an assistant district attorney and at the close of the evening informs me that I am being cited for providing alcohol to a minor.

At my trial, do I have a defense? Under *Smith*, I think not.<sup>11</sup> The law is generally valid. The absence of an exception for parents is generally valid.<sup>12</sup>

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10 to -60 (2010); TENN. CODE ANN. § 4-1-407 (2009); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012 (West 2009); UTAH CODE ANN. §§ 63L-5-101 to -403 (2008); VA. CODE ANN. §§ 57-1 to -2.02 (2009)). Although technically, Utah’s RFRA statute involves land use and is more of a state RLUIPA. *See id.*

8. *See* 42 U.S.C. § 2000bb-1 (2006). The RFRA’s compelling interest test requires the government to demonstrate that the burden is in furtherance of a compelling interest and that the burden is the least restrictive means of furthering that compelling interest. *See id.*

9. *See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 212 (2004). Professor Laycock contends that more than half of the states have adopted some variation of the *Sherbert-Yoder* test. *Id.*

10. *See* Lund, *supra* note 7, at 477 n.67. Alabama’s state RFRA statute, which is embedded in its state constitution, should make it immune from state constitutional challenges and attempts at limiting or repeal by state statutes. *See id.*; ALA. CONST. art. I, § 3.01; Thomas C. Berg & Frank Myers, *The Alabama Religious Freedom Amendment: An Interpretative Guide*, 31 CUMB. L. REV. 47, 56-58 (2000-2001).

11. *See* *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990).

12. *See* TEX. ALCO. BEV. CODE ANN. § 106.04 (West 1997). In some states, such as Texas, a minor’s consumption of alcohol in the visible presence of his parent, guardian, or spouse, is an affirmative defense to prosecution. *See, e.g.*, § 106.04(b). In other states, such as North Carolina, no similar defense is available. *See, e.g.*, N.C. GEN. STAT. § 18B-302 (2005). For the purposes of these hypothetical scenarios, assume there is no parental defense available.

Ergo, under *Smith* I should lose and I should be convicted.<sup>13</sup> But, speaking normatively, is that the way the law should be?

Most people would, I think, say no. They would reason that it is generally harmful to serve alcohol to minors. Further, it may be unwise to make a parental exception because not all parents would be judicious in serving alcohol to minors. Furthermore, the issue is not just the potential harm to the minor, but the harm that the minor might do the community while inebriated.

Some of those things could happen with Passover wine, of course. Four cups is a lot for a twenty-year-old who is going to drive home. In this case, however, my daughter was going to spend the night at my house and sleep off any ill effects. In that sense, she is very much like Alfred Smith and Galen Black, who took peyote under controlled circumstances where any adverse effects from the drug would not harm the populace.<sup>14</sup>

So, if I am correct that I should have a defense, then Smith and Black should have had a defense had they been criminally prosecuted.<sup>15</sup> Thus, under *Smith*, it would seem that I could not have a defense, and I would have to pay my fine or go to jail for my “depraved behavior.”<sup>16</sup>

But a defender of *Smith* might like to vary the hypothetical. Suppose two years earlier, my eighteen-year-old daughter and her boyfriend come to my house to announce the joyous news of their engagement. Further assume that they suggest we celebrate with champagne. So, I break out my best bottle of Dom Pérignon and we have a glass of champagne. Two hours later, after regaining total sobriety, the happy couple leaves. Subsequently, they tell a friend who happens to work in the district attorney’s office how they celebrated their engagement, and I am cited for providing alcohol to a minor.

Here, I would not have a religious defense. To the defender of *Smith*, this shows the equality of the decision. In both the Seder and the engagement case, there was a family event where it seemed appropriate to serve wine to my minor (under twenty-one) child. So, the issue is joined. Should I have more right to serve alcohol for a religious family reason than a non-religious family reason? If the answer is no, *Smith* may be rightly decided.<sup>17</sup> If the answer is yes, *Smith* would seem to be wrongly decided.<sup>18</sup>

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13. See *Smith*, 494 U.S. at 890.

14. See RICHARD EVANS SCHULTES & ALBERT HOFFMAN, *The Track of the Little Deer*, in PLANTS OF THE GODS—THEIR SACRED, HEALING, AND HALLUCINOGENIC POWERS (1992), available at <http://www.peyote.org/>. Peyote ceremonies differ according to tribe; however, the all-night ceremony typically takes place in a traditional native structure, for example, a teepee. See *id.* Sacramental peyote is consumed as a communion, and the members spend the night praying, singing, and communing with spirits. See *id.*

15. See *Smith*, 494 U.S. at 878-79. Of course, they never were criminally prosecuted. See *id.* at 874-75. The Court merely held that they could be denied unemployment compensation because they could have been criminally prosecuted. See *id.* at 878-89.

16. See *id.* at 890.

17. See *id.* at 878-79.

18. See *id.* Unless one decides that the answer under *Smith* is so often right that it is worth the occasional error.

I think that the answer depends on whether religion is worth anything. If it is truly neutral, it is hard to quarrel with *Smith*. But it seems to me that the presence of the Free Exercise Clause itself answers that question.<sup>19</sup> If the Free Exercise Clause was intended to give religion no special privilege, why have it?

One answer is that it prevents religion from being discriminated against. Thus, a law permitting most animal slaughter but prohibiting ritualistic animal slaughter would violate the Free Exercise Clause, but a law which forbade all animal slaughter would be upheld despite its impact on religions practicing ritualistic slaughter.<sup>20</sup>

I must say that a constitutional provision saying “Congress shall make no law respecting an establishment of religion, or *prohibiting* the free exercise thereof” seems like a convoluted way of saying “Congress shall not discriminate against religion.”<sup>21</sup>

But let us make the dichotomy even sharper. Assume that two families, the Goldbergs and the Harrisons, are next-door-neighbors. Max Goldberg and his family are Orthodox Jews. John Harrison and his family are atheists. Each have a daughter, Alice Goldberg and Barbara Harrison, both born on January 14, 1990. Unsurprisingly, they grow up to be the best of friends and even matriculate to the same college.

Assume that they come home together during spring break of 2010. Barbara informs her father that she is engaged to a young man whom her father had been encouraging her to marry. Overcome by excitement, Mr. Harrison pops open a bottle of champagne and pours himself, his wife, and his daughter a glass that they all consume. Meanwhile, next door, Alice and her family are engaging in various Seder rituals, including drinking wine.

So, how should we resolve the criminal cases of John Harrison and Max Goldberg when they come to court? Most of us would probably hope that neither are prosecuted. But in my hypothetical, they could be, and nothing short of jury nullification or a constitutional defense will get them off the hook.

Most likely, John will not have a defense.<sup>22</sup> The parental-rights argument seems weak. Parents do not have a right to give their child a substance that the state deems harmful. Historically, parents have not had the right to challenge the appropriateness or necessity of applying the statute to any particular situation.<sup>23</sup> So, unless I am missing something, John will be convicted, and the conviction will be upheld on appeal.

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19. See U.S. CONST. amend. I.

20. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542-55 (1993).

21. U.S. CONST. amend. I (emphasis added).

22. See *supra* note 12 and accompanying text.

23. See Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 975, 977-78 (1988) (discussing the legal history in recognizing parental control as subject to legislative power and the current forms of state regulation that limit parental choices, such as child labor, vaccination, and compulsory school attendance).

So too will Max, unless the state has an RFRA statute.<sup>24</sup> Well, what should the law be? Given the conviction of John in the same court on the same day, do we want Max to be acquitted? We certainly do not want Jews treated better than atheists. So, the question is whether the acts are the same.

My conclusion is that they are not the same. Imbibing wine for religious purposes should be protected in a way that imbibing wine for other purposes need not. My reason is basically that because the Constitution views religious freedom as especially worthy of protection, something more than a harmless violation of a generally valid law should be required for a conviction.

Having so concluded, does that put me on the side of the RFRA? The answer is no. The RFRA sought to incorporate the compelling interest test first developed in *Sherbert v. Verner*.<sup>25</sup> *Sherbert*, ironically preserved on its facts by *Smith*, involved a Seventh-day Adventist who was unable to continue working when the cotton mills in her community expanded from a Monday through Friday workweek to a Monday through Saturday workweek.<sup>26</sup> Because South Carolina did not have a compelling interest in saving money, the Court thought that Adele Sherbert was entitled to unemployment compensation.<sup>27</sup>

But, the compelling interest test does not tell the whole story. Assume that at the same time Adele Sherbert told her employer that she could not work on Saturday, Mary Jones told her employer the same thing. But, Mary's reason was different. As a single mother, she had to be home with her children on Saturday because of the absence of available day care. Thus, both Adele and Mary leave work on the same day because neither can work on Saturday.

Having already held that Mary is not entitled to unemployment compensation because she was physically able to work on Saturday,<sup>28</sup> what should South Carolina do with Adele Sherbert? Well, South Carolina thought that it should treat them equally, and thus, it denied Adele's claim as well.<sup>29</sup> But, the Supreme Court disagreed, contending that the Constitution was not concerned with child-care issues but was concerned with free exercise issues.<sup>30</sup> Thus, even though under state law Mary was not entitled to unemployment compensation, the Constitution demands that Adele be so entitled.

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24. See *supra* note 8 and accompanying text. Max may assert that the State placed a substantial burden on his religious practice, and unless the State can pass the two-prong test, he may be shielded from criminal liability. See also *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006) (holding that the government failed to demonstrate a compelling interest in barring a religious group from its sacramental use of a narcotic).

25. See *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

26. *Id.* at 399 n.1; *supra* note 1 and accompanying text.

27. *Sherbert*, 374 U.S. at 408-09.

28. See, e.g., *Stone Mfg. Co. v. S.C. Emp't Sec. Comm'n*, 64 S.E.2d 644, 647 (S.C. 1951) (holding that a wife's decision to quit her employment to follow her husband was "voluntarily without good cause"); *Judson Mills v. S.C. Unemp't Comp. Comm'n*, 28 S.E.2d 535, 537 (S.C. 1944) (holding that a mother's inability to find child caretakers did not entitle her to unemployment benefits).

29. *Sherbert v. Verner*, 125 S.E.2d 737, 745-46 (S.C. 1962), *rev'd*, 374 U.S. 398 (1963).

30. *Sherbert*, 374 U.S. at 416.

But you might ask, since I supported giving Max a defense that John did not have in regard to providing alcohol for their respective daughters, why would I not support giving Adele unemployment benefits that Mary does not get? There are two answers. The first is that in Max's case, the State is directly forbidding him from carrying out a religious duty or "mitzvah." Max is a criminal if he gives his daughter wine. Adele is not a criminal for not working on Saturday. She just does not get unemployment compensation.

Second, and at least as important, in the *Sherbert* situation, by giving Adele the benefit it does, the State actually puts financial pressure on Mary to become a Seventh-day Adventist. Mary knows that she cannot work on Saturday because of her children. She also knows that if only she were a Seventh-day Adventist (or a Jew) she would be entitled to unemployment compensation. Thus, she knows it would be financially beneficial for her to change her religion.

Although I do not believe that very many people like Mary will actually change their religion in order to share in the State's largess, that is not the point. The point is that the State should not make it financially better for her to do so, thus leaving her full of resentment if she does not. That is, Mary now knows that if only she becomes an Adventist then her family's future will be brighter.

John is in a different situation. Even if he were to become a Jew, he still could not serve his daughter wine to celebrate her engagement. To be sure, he could serve her wine at a Passover Seder, but that is hardly an incentive to become Jewish. Whereas Mary would like the money Adele gets for being an Adventist, John has no desire whatsoever to serve wine at a Seder.

So, ironically, the *Smith* rule actually works pretty well in the one place it cannot be used: unemployment compensation. Instead, unemployment compensation cases seem almost sacrosanct. Even when an employee changes her religious beliefs and thus cannot fulfill her original contract, she is entitled to unemployment compensation.<sup>31</sup>

The rule should be that nobody can be compelled to work in a manner inconsistent with his religion, but if his religion does not allow him to do the work, the State should not have to compensate him. The actual facts of *Smith* are quite illustrative. Alfred Smith, a Native American Church Member, knowing that his religion compelled the use of peyote and that he could not have the job if he used drugs, took a job as a drug rehabilitation counselor.<sup>32</sup> Consequently, when he was discharged for using drugs, he should not have been entitled to unemployment compensation.<sup>33</sup> Thus, *Smith* was actually correct on its facts in denying unemployment compensation.

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31. See *Hobbie v. Unemp't Appeals Comm'n*, 480 U.S. 136, 139-40 (1987) (holding that the State's refusal to award unemployment benefits to a worker who was discharged after she refused to work on her Sabbath violated the Free Exercise Clause).

32. See *Emp't Div. v. Smith*, 494 U.S. 874, 874 (1990).

33. *Id.* at 890.

More generally, there should be no need to accommodate a person whose religion will not let him do a particular job. An illustrative case is *Swanner*, where a property manager, because of his Christian scruples, refused to rent to unmarried cohabiting tenants in direct violation of the law prohibiting property managers from engaging in such discrimination.<sup>34</sup> It seems to me that this is a relatively easy question. Swanner's Christian scruples required that he not rent to fornicators.<sup>35</sup> The law of his community required that, as a property manager, he must.<sup>36</sup> Therefore, the only reasonable solution is that he not be a property manager in his community.<sup>37</sup> He needs to change his job, his community, or his religious beliefs. Because the last is not a viable alternative, he must change one of the other two.

Yet, if the RFRA were the law, a court may well decide that there is no compelling interest in preventing discrimination against cohabiting fornicators because they could always rent elsewhere. Consequently, one person's religious beliefs would be allowed to trump the social judgment of the community even though there is no religious reason why the person needs to hold the position that creates the problem.

So, in a free exercise of religion case, the factors that should matter are the importance of the regulation to the state, the directness of the interference to religion, and the cost to nonbelievers. Sometimes one factor clearly predominates. For example, in *United States v. Lee*, taking the religious claimant at his word, it is a direct violation of the Amish religion to pay social security tax for Amish employees.<sup>38</sup> Yet, if the Amish employer does not pay his worker's social security taxes, he will clearly have a competitive advantage over his competitors who do make such payments. While one might hesitate to put one to the choice of being an employer or violating his religion, it is probably better than allowing one to use religion to put his competitors at a disadvantage. Consequently, *Lee* correctly held that Lee's free exercise claim could not prevail over a need for all employers to carry the same tax burden.<sup>39</sup>

Let me conclude this way: *Smith* and the RFRA are easy. *Smith* is a simple matter of religious equal protection, and the RFRA is the classic compelling interest test.<sup>40</sup> The test that I am proposing is hard. Max Goldberg wins under my proposal but loses under *Smith*. Adele Sherbert loses under my proposal but wins under the RFRA.<sup>41</sup> Also, Michael Swanner and Jacob Lee lose under my proposal but probably win under the RFRA.<sup>42</sup>

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34. *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 276-77 (Alaska 1994).

35. *Id.* at 278.

36. *Id.*

37. *See id.* at 282-83 (stating that "Swanner has made no showing of a religious belief which requires that he engage in the property-rental business").

38. *United States v. Lee*, 455 U.S. 252, 257 (1982).

39. *See id.* at 259.

40. *See* 42 U.S.C. § 2000bb-1 (2000).

41. *See id.* In the actual case, which she won, her victory may have been justifiable because South Carolina protected Sunday Sabbatarians from discrimination when the mills were open on Sunday. *See*

Of course, a balancing test is not easy to apply, and the results are far from certain. But given the multifarious possibilities of religious liberty, any hard and fast rule is bound to yield cases with a bad result. Thus, *Smith* is, and should be, criticized for undervaluing religiously inspired conduct. The RFRA, on the other hand, undervalues the interest of the non-adherent. Finding a balance is not easy, but it is worth the candle. And that is what this paper attempts to do.

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*Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963). Given the special treatment of Sunday worshipers, the *Sherbert* result may have been correct. But, the principle under which the case was decided was not. See Arnold H. Loewy, *Rethinking Free Exercise of Religion After Smith and Boerne: Charting a Middle Course*, 68 Miss. L.J. 105, 134-35 (1998).

42. See *Lee*, 455 U.S. at 259; *Swanner*, 874 P.2d at 278-85. To be sure, Lee did actually lose under what the Court said was a compelling interest test, but as Justice Stevens's concurrence so convincingly demonstrated, the compelling interest was not apparent. See *Lee*, 455 U.S. at 261-63 (Stevens, J., concurring).