

benefits to persons discharged for such use." Neutral laws of general applicability do not violate the Free Exercise Clause of the First Amendment.

Chief Justice
William Rehnquist

Associate Justices
William J. Brennan, Jr. • Byron White
Thurgood Marshall • Harry Blackmun
John P. Stevens • Sandra Day O'Connor
Antonin Scalia • Anthony Kennedy

Majority **Scalia, joined by Rehnquist, White, Stevens, Kennedy**

Concurrence **O'Connor, joined by Brennan, Marshall, Blackmun (parts I, II)**

Dissent **Blackmun, joined by Brennan, Marshall**

U.S. Const. amend. I

Employment Division v. Smith

- ***Employment Division, Department of Human Resources of Oregon v. Smith***, 494 U.S. 872 (1990), is a United States Supreme Court case that determined that the state could deny unemployment benefits to a person fired for violating a state prohibition on the use of peyote, even though the use of the drug was part of a religious ritual. Although states have the *power* to accommodate otherwise illegal acts done in pursuit of religious beliefs, they are not *required* to do so.

[edit] Facts

Alfred Smith and Galen Black were members of the Native American Church and counselors at a private drug rehabilitation clinic. They were both fired because they had ingested peyote, a powerful entheogen, as part of their religious ceremonies as members of the Native American Church. At that time intentional possession of peyote was a crime under Oregon law without an affirmative defense for religious use. The counselors filed a claim for unemployment compensation with the state, which was denied because the reason for their dismissal was deemed work-related "misconduct." The Oregon Court of Appeals reversed that ruling, holding that denying them unemployment benefits for their religious use of peyote violated their right to exercise their religion. The Oregon Supreme Court agreed, although it relied not on the fact that peyote use was a crime but on the fact that the state's justification for withholding the benefits—preserving the "financial integrity" of the workers' compensation fund—was outweighed by the burden imposed on Smith's and Black's exercise of their religion. The state appealed to the U.S. Supreme Court, again arguing that denying the unemployment benefits was proper because using peyote was a crime.

The U.S. Supreme Court left the Oregon Supreme Court's judgment against the disgruntled employees, and returned the case to the Oregon courts to determine whether or not sacramental use of illegal drugs violated Oregon's state drug laws (485 U.S. 660 (1988)). On remand, the Oregon Supreme Court concluded that while Oregon drug law prohibited the consumption of illegal drugs for sacramental religious uses, this prohibition violated the free exercise clause. The case returned to the U.S. Supreme Court in this new posture. The state asked the U.S. Supreme Court to review this second decision of the Oregon Supreme Court, and it agreed to do so. In earlier rulings, the Court had deliberated that the government could not condition access to unemployment insurance or other benefits on an individual's willingness to give up conduct required by their religion. However, the Supreme Court did not find that this principle also applied when the conduct in question is justifiably prohibited by law. For the first time in an unemployment compensation case, the Court found against the believer and for the state.

Of particular importance was the fact that the Oregon law was not directed at the Native Americans' religious practice specifically; thus, it was deemed constitutional when applied to all citizens:

"It is a permissible reading of the [free exercise clause]...to say that if prohibiting the exercise of religion is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended....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.' To adopt a true 'compelling interest' requirement for laws that affect religious practice would lead towards anarchy."

Note the case full name: "Employment Division, Oregon Department of Human Resources v. Smith".

[edit] Majority opinion

The majority opinion was delivered by Justice Scalia. The First Amendment forbids government from prohibiting the "free exercise" of religion. This means, of course, that government may not regulate beliefs as such, either by compelling certain beliefs or forbidding them. Religious belief frequently entails the performance of physical acts— assembling for worship, consumption of bread and wine, abstaining from certain foods or behaviors. Government could no more ban the performance of these physical acts when engaged in for religious reasons than it could ban the religious beliefs that compel those actions in the first place. "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."

But Oregon's ban on the possession of peyote is not a law specifically aimed at a physical act engaged in for a religious reason. Rather, it is a law that applies to everyone who might possess peyote, for whatever reason—a "neutral law of general applicability," in the Court's phrasing. The Court characterized Smith's and Black's argument as an attempt to use their religious motivation to use peyote in order to place themselves beyond the reach of Oregon's neutral, generally applicable ban on the possession of peyote. The Court held that the First Amendment's protection of the "free exercise" of religion does not allow a person to use a religious motivation as a reason not to obey such generally applicable laws. "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." Thus, the Court had held that religious beliefs did not excuse people from complying with laws forbidding polygamy, child labor laws, Sunday closing laws, laws requiring citizens to register for Selective Service, and laws requiring the payment of Social Security taxes.

By contrast, the cases in which the Court had allowed a religious motivation to exempt a person from a neutral, generally applicable law involved the assertion of both the right of free exercise along with some other right. Thus, religious publishers are exempt from a law requiring them to obtain a license if that license may be denied to any publisher the government deems nonreligious. The government may not tax religious solicitors. The government may not require the Amish to send their children to school because their religion demands otherwise, and Amish parents, like all parents, have the right to direct the education of their children. Because Smith and Black were not asserting a hybrid right, they could not claim a religious exemption under the First Amendment from Oregon's ban on peyote.

In the alternative, Smith and Black argued that at the very least, the Court should only uphold Oregon's ban on peyote as applied to them if Oregon had a compelling interest in prohibiting their religious use of peyote. The Court had, after all, invalidated three other unemployment compensation restrictions under this standard. But those other restrictions

themselves required consideration of individualized circumstances, such as when unemployment compensation was denied to a person who could not, for religious reasons, work on Saturdays. If a state has in place a system of individualized consideration, the constitution did not allow the state to refuse to extend that system to cases of religious hardship without a compelling reason.

But the difference between the other unemployment cases the Court had decided and Smith's and Black's case was that Oregon's ban on peyote applied to everyone equally—in other words, it made no room for individualized consideration of the reasons a person might want to use peyote.

- “ 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, see, e.g., *Palmore v. Sidoti*, or before the government may regulate the content of speech, see, e.g., *Sable Communications of California v. FCC*, 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. ”

The Supreme Court has sharply limited scrutiny of incidental burdens in the context of speech and religion. If it permitted a wide approach, it would be quite easy for citizens to evade compulsory military service, child abuse laws, drug laws, minimum wage laws, animal cruelty laws, and anti-discrimination laws.

Rather than interpret the First Amendment to require the exemption that Smith and Black sought, the Court encouraged them to seek redress in the legislature. It observed that Arizona, Colorado, and New Mexico already specifically exempted religious uses from their otherwise generally applicable peyote bans. “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 afforded to religious belief can be expected to be solicitous of that value in its legislation as well.” To be sure, requiring claims for religious exemptions to be vetted through the legislative process might put less popular religions at a disadvantage. But the Court held that this situation was preferable to the relative anarchy that would result from “a system in which each conscience is a law unto itself.”

[edit] Concurring opinion

Justice O'Connor took issue with the analytical framework the majority had constructed, preferring to apply the traditional compelling interest test to Oregon's ban on peyote. She agreed with the Court's initial premise that the Free Exercise Clause applied to religiously

motivated action as well as pure belief. She pointed out, however, that even a so-called neutral law of general applicability imposes a burden on a person's exercise of religion if that law prevents someone from engaging in religiously motivated conduct or requires someone to engage in conduct forbidden by his or her religion. The First Amendment has to reach both laws that expressly target religion as well as generally applicable laws; otherwise, the law would relegate the constitutional protection of the free exercise of religion to "the barest level of minimum scrutiny that the Equal Protection Clause already provides."

However, the First Amendment freedoms are not absolute; the law tolerates burdens on the free exercise of religion that serve a compelling governmental interest and are narrowly tailored to meet 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 encroachment upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests of the highest order." Justice O'Connor rejected the idea that this test should only apply when neutral laws of general applicability face some hybrid free-exercise challenge, because those laws burden the free exercise of religion in addition to whatever other right they burden. Furthermore, the exemption from Oregon's ban on peyote was not a pretext for Smith and Black. It was directly linked to the exercise of their religious beliefs, the sincerity of which the Court does not and should not question. Smith and Black merely asked the Court to subject Oregon's ban on peyote as applied to their religious use of it to the same compelling interest test to which the Court had subjected numerous other laws.

Justice O'Connor found such a compelling interest, and thus rejected Smith's and Black's constitutional challenge. Peyote is a sacrament in the Native American Church; thus, members must "choose between carrying out the ritual embodying their religious beliefs and avoidance of criminal prosecution. That choice is... more than sufficient to trigger First Amendment scrutiny." But peyote is also a Schedule I drug, meaning Congress has found that it has a high potential for abuse, no currently accepted medical use, and a lack of safety standards for using the drug under medical supervision. These findings led Oregon to ban the use of peyote, and Smith and Black did not dispute that Oregon's interest in doing so was compelling. Justice O'Connor believed that this general ban was "essential to accomplish" the state's objective in stamping out the harm caused by peyote. "Oregon's criminal prohibition represents that state's judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous. 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." Furthermore, society's interest in preventing trafficking in controlled substances was similarly central to effectuating Oregon's ban on peyote. Justice O'Connor likewise suggested that Smith and Black seek redress in the state legislature and not the courts, for the fact that other states allow religious use of peyote does not compel Oregon to follow suit.

[edit] Dissenting opinion

Justice Blackmun agreed with Justice O'Connor that the compelling interest test should apply to Oregon's ban on peyote, but disagreed with her that the ban was supported by a compelling interest that was narrowly tailored. Blackmun began by "articulat[ing] in precise terms the state interest involved" in the ban. Blackmun focused narrowly on the state's interest in not exempting religious use from its otherwise generally applicable ban on peyote rather than the state's broader interest in "fighting the critical 'war on drugs.'" Blackmun framed the issue as he did because "failure to reduce the competing interests to the same plane of generality tends to distort the weighing process in the state's favor." Blackmun questioned whether Oregon actually did enforce its criminal prohibition on peyote against religious users, noting that it had not actually prosecuted Smith or Black. Because Oregon had not prosecuted any religious users of peyote, its "asserted interest thus amounts only to the symbolic preservation of an unfettered prohibition. But a government interest in symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot suffice to abrogate the constitutional rights of individuals."

Oregon also claimed an interest in protecting the health and safety of its citizens from the dangers of illegal drug use. But there was no evidence that religious use of peyote actually harmed anyone. The fact that peyote was a Schedule I drug did not persuade Blackmun. The federal government may have placed peyote on Schedule I, but the federal government also tolerated the religious use of peyote. In addition, other Schedule I drugs (such as cannabis) have lawful uses. Religious use was not recreational use; the Native American Church ritual in which peyote is consumed is heavily supervised, thus mitigating Oregon's health and safety concerns. The religious use occurs in a context that harmonizes with the state's general ban. The Native American Church discourages nonreligious use of peyote, and promotes family harmony, self-reliance, and abstinence from alcohol. Research suggests that religious use of peyote can help curb "the tragic effects of alcoholism on the Native American population." And as for the state's interest in abolishing drug trafficking, Blackmun pointed out that there is "practically no illegal traffic in peyote."

Finally, Blackmun expressed concern for "the severe impact of a state's restrictions on the adherents of a minority religion." Eating peyote is "an act of worship and communion," a "means for communicating with the Great Spirit." If Oregon is a hostile environment in which to practice the Native American religion, its adherents might be forced to "migrate to some other and more tolerant region." Blackmun felt it inconsistent with First Amendment values to denigrate an "unorthodox" religious practice in this way.

[edit] Aftermath

Congress would pass the Religious Freedom Restoration Act in response to this case, which required the strict scrutiny test on actions restricting religious practices. While the statute applies to actions by the Federal government, the statute was found in City of Boerne v. Flores to be unconstitutional in application against state governments.^[1] In response to the Boerne ruling, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000, which grants special privileges to religious land owners.^[2]

[edit] Current Oregon law on religious use of peyote

Oregon Revised Statutes

475.840

(4) In any prosecution under this section for manufacture, possession or delivery of that plant of the genus *Lophophora* commonly known as peyote, it is an affirmative defense that the peyote is being used or is intended for use:

(a) In connection with the good faith practice of a religious belief;

(b) As directly associated with religiously done practices; and

(c) In a manner that is not dangerous to the health of the user or others who are in the proximity of the user.

(5) The affirmative defense created in subsection (4) of this section is not available to any person who has possessed or delivered the peyote while incarcerated in a correctional facility in this state.

[Formerly 475.992]^[1] Fetched 08/08/2009