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From *Pierce* to *Smith*: The Oregon Connection and Supreme Court Religion Jurisprudence

As an Oregonian, as well as a Ninth Circuit judge privileged to have chambers in the Pioneer Courthouse in the heart of downtown Portland, Oregon, I thought it fitting to reflect on the role of two landmark decisions on religion by

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the Supreme Court of the United States arising out of this state: *Pierce v. Society of Sisters*,[1] decided over eighty years ago, and *Employment Division v. Smith*,[2] decided within the last eighteen. While both cases were brought by religiously observant plaintiffs seeking relief from restrictive state measures, each carries its own significance for religious freedom. Having become fascinated by the increasingly extensive scholarship on these very important cases, I thought it might be useful to explore curious connections between these two decisions, which lead me to some counterintuitive conclusions about their impact on religious freedom.

I

On June 1, 1925, the Supreme Court issued its opinion in *Pierce v. Society of Sisters*.[3] The decision responded to two appeals brought by Walter Pierce, the Governor of Oregon, with respect to the validity of the Oregon Compulsory Education Act of 1922, a voter-passed initiative that required Oregon parents to send children eight through sixteen years old to public school and imposed fines and prison terms for noncompliance.[4]

The Society of Sisters was (and still is) a religious order of Catholic nuns, which ran several boarding schools in Oregon, including St. Mary's Academy (now day students only) and St. Francis School in downtown Portland.[5] Fearing that the new Oregon law would deprive its schools of revenue and Catholic parents of the ability to obtain religious training for their children, the Society of Sisters challenged the Act in the United States District Court for the District of Oregon.[6] There, the order sought to enjoin enforcement of the law by three defendants: Walter Pierce, Governor of Oregon; Isaac Van Winkle, Attorney General of Oregon; and Stanley Myers,

1 268 U.S. 510 (1925).

2 494 U.S. 872 (1990).

3 268 U.S. 510.

4 *See id.* at 511.

5 *See* Sister Shawn Marie Barry, The History of St. Mary's Academy (Aug. 21, 1991), http://www.stmaryspdx.org/about/history.htm; *see also* Sisters of the Holy Names, Oregon, About Us, http://www.sistersoftheholynames.org/oregon/about/index.htm (last visited Feb. 6, 2008).

6 *See* Soc'y of the Sisters of the Holy Names of Jesus & Mary v. Pierce, 296 F. 928, 930–31 (D. Or. 1924), *aff'd*, 268 U.S. 510 (1925).

District Attorney for Multnomah County.[7] Arguing before a special three-judge panel, the religious order claimed that the law violated both the Due Process Clause of the Fourteenth Amendment and the Contracts Clause, and sought an injunction.[8] Consolidating the case with a challenge to the Act brought by the Salem, Oregon-based Hill Military Academy, a private nonreligiously affiliated school, the three-judge district court unanimously enjoined the Oregon statute on the grounds that it violated the Fourteenth Amendment.[9] The Supreme Court affirmed, holding that the Act violated the "liberty of parents and guardians to direct the upbringing and education of children under their control."[10]

A.

Public perceptions have cast the *Pierce* decision as a victory for religious liberty, and many academics encourage this view. Professor Stephen Carter of Yale Law School writes that "what *Pierce* ultimately represents is the judgment that in order to take religious freedom seriously, we must take the ability of parents to raise their children in their religion seriously."[11]

The Society of Sisters made an explicit argument for religious freedom in its bill of complaint, stating that "said pretended law attempts to control the free exercise and enjoyment of religious opinions and to interfere with the rights of conscience."[12] But, interestingly, the Society did not explicitly invoke the federal Free Exercise Clause, for that clause would not be incorporated against the states until 1940.[13] The Society instead claimed that the Oregon Compulsory Education Act deprived it of liberty

7 *See id.*

8 *Id.*

9 *Id.* at 938.

10 Pierce v. Soc'y of Sisters, 268 U.S. at 510, 534–35 (1925).

11 Stephen L. Carter, *Parents, Religion, and Schools: Reflections on* Pierce*, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1205 (1997).

12 Transcript of Record, *Pierce*, 296 F. 928 (No. 583), *reprinted in* OREGON SCHOOL CASES: COMPLETE RECORD 25 (1925) [hereinafter Transcript, *Pierce I*].

13 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). The Society of Sisters did invoke a similar clause in Section 3 of Article I of the Oregon Constitution, Transcript, *Pierce I*, *supra* note 12, which states: "No law shall in any case whatever control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience." OR. CONST. art. I, § 3, *reprinted in* OREGON SCHOOL CASES, *supra* note 12, at 702.

without due process of law as applied to the states under the Fourteenth Amendment.[14] This argument turned upon the freedom of parents to send their children to private schools, such as St. Mary's, which offered religious training as well as general education.

The district court had enjoined the Act based upon the schools' rights to economic liberty and substantive due process.[15] Citing *Lochner v. New York*,[16] *Murphy v. California*,[17] and *Meyer v. Nebraska*,[18] District Judge Wolverton wrote for the three-judge district court:

> The right to contract in relation to one's business is a liberty that may not be inhibited without entrenchment upon rights guaranteed by the Fourteenth Amendment. The right to engage in a useful, legitimate business, not harmful or vicious, is protected under the amendment, and cannot be abrogated. . . .
>
> . . . .
>
> It cannot be successfully combated that parochial and private schools have existed almost from time immemorial—so long, at least, that their privilege and right to teach the grammar grades must be regarded as natural and inherent, as much so as the privilege and right of a tutor to teach the German language with the grammar grades, as was held in *Meyer v. Nebraska*. The absolute right of these schools to teach in the grammar grades . . . and the right of the parents to engage them to instruct their children, we think, is within the liberty of the Fourteenth Amendment.[19]

Although the district court styled this right as part of the "liberty" component, its decision was grounded essentially in the schools' property rights to patronage. Despite the strong interest in religious education at stake, the court did not discuss religious liberty at all. Instead, the court granted relief on the same grounds to both the Society of Sisters and Hill Military Academy, holding that the Oregon Compulsory Education Act deprived all such schools of property without due process of law in violation of the Fourteenth Amendment to the Federal

14 Transcript, *Pierce I*, *supra* note 12, at 25.

15 *See Pierce*, 296 F. at 936–38.

16 198 U.S. 45 (1905).

17 225 U.S. 623 (1912).

18 262 U.S. 390 (1923).

19 *Pierce*, 296 F. at 936–37 (citations omitted).

Constitution.[20] The court expressly rejected the Society of Sisters' Privileges and Immunities Clause argument, concluding that the clause did not protect businesses such as schools.[21] As an aside, I should add that I feel some affinity with this panel because it included a late member of my own court, United States Circuit Judge William Ball Gilbert, sitting by designation, who was the first Oregonian to be appointed to the United States Court of Appeals for the Ninth Circuit.

B.

The state defendants appealed directly to the Supreme Court of the United States.[22] Governor Pierce emphasized in his Supreme Court brief that "after arguing the case mainly on the question of the deprivation of liberty without due process of law . . . [the judges] decide[d] the case solely on the question of the deprivation of property without due process of law."[23] Rather than defend the precise reasoning of the district court, however, the Society of Sisters responded that both a property right *and* a liberty interest were at stake.[24] The Society carefully pointed out that there were strong religious interests at stake but that it expected the Court to "sit[] in impartial judgment . . . upon all faiths and creeds."[25]

I mentioned that the Society did not ask the Court to rule based upon the Free Exercise Clause, which had not yet been incorporated against the states. Fascinatingly, it was the Oregon Attorney General, Isaac Van Winkle, in his separate appellate brief, who expressly raised the possibility that the Supreme Court might incorporate the clause so as to support the Society of Sisters' claims.[26] Vehemently arguing that the federal Free Exercise Clause did not protect against state laws indirectly limiting religious liberty, the Attorney General declared: "The

20 *See id.* at 937–38.

21 *Id.* at 931.

22 *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 511 (1925).

23 Brief of Appellant, Governor of Oregon, *Pierce*, 268 U.S. 510 (No. 583), *reprinted in* OREGON SCHOOL CASES, *supra* note 12, at 106.

24 *See* Transcript of Record, *Pierce*, 268 U.S. 510 (No. 583), *reprinted in* OREGON SCHOOL CASES, *supra* note 12, at 663 [hereinafter Transcript, *Pierce II*].

25 *Id.* at 669.

26 *See* Brief of Appellant, Isaac H. Van Winkle, *Pierce*, 268 U.S. 510 (No. 583), *reprinted in* OREGON SCHOOL CASES, *supra* note 12, at 168.

books are full of cases in which the contention has been advanced that the religious convictions of a party have required him to break the law, and . . . that the laws in question are [therefore] unconstitutional. The courts have everywhere refused to uphold this contention."[27]

Attorney General Van Winkle pointed to the Court's decision in *Reynolds v. United States*,[28] which ruled that Mormon believers had no First Amendment right to constitutional exemption from antipolygamy laws.[29] The *Reynolds* Court had explained: "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. Government could exist only in name under such circumstances."[30] The Governor argued that *Reynolds* and other precedent required the Court to uphold Oregon's law, which the State viewed as a legitimate requirement that "all immigrants admitted to all the advantages and opportunities of life in the United States . . . be taught by the state the English language, and the character of American institutions and government."[31]

In its oral argument before the Supreme Court, the Society of Sisters thereupon seized the opportunity to make a not-so-subtle claim that the Oregon law was motivated by anti-Catholic animus.[32] Pointing out that "the question of religious liberty [was] thrust into the case for the first time by the briefs filed on behalf of the Attorney General and the Governor of the State," the Society essentially argued that the government's briefs constituted an admission regarding the purpose of the law.[33] The Society asserted that the state's briefs revealed that the "underlying motive and the immediate intent and purpose of this measure were anti-religious and to prevent religious instruction to children."[34] The law, the Society continued, was as bad as "any atheistic or sovietic measure ever adopted in Russia"[35] and

27 *Id.*

28 98 U.S. 145 (1878).

29 Brief of Appellant, Isaac H. Van Winkle, *supra* note 26, at 168–69.

30 *Reynolds*, 98 U.S. at 167.

31 Brief of Appellant, Governor of Oregon, *supra* note 23, at 98.

32 Transcript, *Pierce II*, *supra* note 24, at 669.

33 *Id.*

34 *Id.*

35 *Id.*

sought to "destroy[] the right to religious liberty and freedom of education in the name, in the cant, on the pretense of Americanization."[36]

This claim was not surprising in light of the public perceptions of the law. Indeed, reports in the local *Morning Oregonian* newspaper commented that "[a]ccusations that the law was backed by the Ku Klux Klan and was aimed at the Roman Catholic church have been heard on every side since the statute was put on Oregon's books."[37] And evidence demonstrates that the most active supporters of the ballot initiative indeed were members of the KKK, who placed a similar compulsory education measure on the ballot in Washington state in 1924—after the Oregon district court's decision but before the Supreme Court rendered the final word on such laws.[38] The anti-Catholic innuendos also came through in the Governor's and Attorney General's briefs, which were laced with complaints about the lack of proper immigrant assimilation at a time when many immigrants were Catholic.[39]

Yet the Supreme Court declined to rule on religious liberty grounds. Not only did the Court fail to read the Free Exercise Clause as offering protection against state laws, but the Court did not specify that the "liberty interest" of the Fourteenth Amendment was a religious one. Instead, the Court struck down the law based upon the personal "liberty of parents and guardians to direct the upbringing and education of children under their control."[40] Thus the Court shifted away from the economic basis of the district court's decision and did not even reference the religious liberty arguments presented by both

36 *Id.* at 671.

37 Charles C. Hart, *U.S. Court Voids School Statute*, MORNING OREGONIAN, June 2, 1925, at 1.

38 Paula Abrams, *The Little Red Schoolhouse:* Pierce*, State Monopoly of Education and the Politics of Intolerance*, 20 CONST. COMMENT. 61, 67 nn.31–32 (2003); *see* David Norberg, *Ku Klux Klan in the Valley: A 1920s Phenomena*, WHITE RIVER J. (White River Valley Museum, Auburn, Wa.), Jan. 2004, at 2, 5–6, *available at* http://www.wrvmuseum.org/journal/journal_0104.htm.

39 *E.g.*, Brief of Appellant, Governor of Oregon, *supra* note 23, at 98 ("The voters of Oregon might have felt that the mingling together, during a portion of their education, of the children of all races and sects might be the best safeguard against future internal dissensions with the consequent weakening of the community against *foreign dangers*." (emphasis added)).

40 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

parties, choosing instead to articulate a form of parental liberty unconnected to economic or religious interests.

By grounding its decision in a *non*-religious-based parental right derived from the Fourteenth Amendment, the Court enabled the Hill Military Academy to emerge victorious in tandem with the Society of Sisters. And the holding meant victory to many more claimants than those at bar, for it heralded a substantive due process legacy that continues to unfold—with direct and indirect consequences for religious freedom.

C.

In the decades to come, this substantive due process reasoning would spawn consequences that undermined many of the traditional values held dear by adherents of religion. While the immediate result of *Pierce* was to preserve the rights of parents to send their children to private religious schools, *Pierce* soon was cited in support of the far less traditional rights of contraception, abortion, and sodomy. These three "rights" would not only be deeply confounding to the order of nuns who brought the case, but to many others who hold similar values and care about religious freedom.

In *Griswold v. Connecticut*, the Court articulated an expansive right to privacy based in the Fourteenth Amendment's Due Process Clause and the emanations and penumbras of the Bill of Rights.[41] The Court expressly invoked *Pierce* for precedential support, reading the case to stand for religious liberty under the First Amendment as well as due process rights under the Fourteenth Amendment.[42] The *Griswold* Court did not limit the *Pierce* decision to parental rights, nor did it appear to notice that *Pierce* did not cite the First Amendment at all. The *Griswold* Court's citation to *Pierce* made clear that the latter would be used by the Court as an increasingly flexible tool to expand personal liberties beyond those defined by the constitutional text.

This point became all the more evident in *Roe v. Wade*,[43] when the Court widened the reasoning in *Pierce* to include a right to abortion. In discussing what it called "the roots" of "this

41 Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

42 *Id.* at 481–83.

43 410 U.S. 113 (1973).

guarantee of personal privacy," the Court noted that *Pierce* had established the right in the realm of "child rearing and education."[44] When the Court reaffirmed *Roe* fifteen years later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, it invoked the case law supporting substantive due process and cited *Pierce* as one of the first decisions demonstrating "an aspect of liberty [to be] protected against state interference by the substantive component of the Due Process Clause."[45]

In *Lawrence v. Texas*, the Court struck down a state ban on sodomy, concluding that the ban conflicted with the Court's "broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including *Pierce v. Society of Sisters*."[46] Again, *Pierce* provided the Court with crucial support for a substantive due process decision that left many advocates of traditional religious values very much perplexed.

By providing an extratextual ground for constitutional freedom in the context of private religious education, *Pierce* profoundly affected the methodology of the Court and the trajectory of the law. That seminal case has paved the way for new interpretations of the personal liberty guaranteed by the Fourteenth Amendment and the particular rights accorded to members of the human family vis-à-vis one another and vis-à-vis the state. These changes have affected a realm in which religion has long played a predominant role in inculcating values and practices. And, in time, these legal changes appear to have taken on a moral stature of their own: the frequent coincidence of moral and legal commands—such as those against murder, theft, and perjury—leads many to presume the law to carry both juridical and normative weight. Today, persons adhering to traditional faith-based teachings might have good reason to be less sanguine about that 1925 victory in Oregon.

II

In the decades following *Pierce*, the Supreme Court made jurisprudential changes that would alter the way it approached religious liberty claims. In the 1940 decision *Cantwell v. Connecticut*, the Court, perhaps inevitably after *Gitlow v. New*

[44] *Id.* at 152–53.

[45] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992).

[46] Lawrence v. Texas, 539 U.S. 558, 564 (2003).

York,[47] incorporated the Free Exercise Clause against the states.[48] In the 1963 decision *Sherbert v. Verner*, the Court articulated the now-familiar free exercise test that barred states from infringing on free exercise in the absence of a compelling state interest.[49] In *Sherbert*, the state had refused to provide unemployment compensation to a Seventh Day Adventist who had been fired for refusal to work on a Saturday, the Sabbath day of her faith.[50] The Court held that the state was required to provide an exemption to the rule in order to avoid forcing a religious adherent to "abandon his religious convictions" in order to retain his livelihood.[51] "'To deny an exemption . . . [would be] in effect to penalize'" the exercise of religious liberty, the Court concluded.[52] The *Sherbert* decision became the core basis for claims of religious exemption from neutral and generally applicable laws.

A.

But in 1990, another Oregon case would once again determine the scope of religious liberty under the Free Exercise Clause, and in a most unanticipated way. In *Employment Division v. Smith*, two religious claimants sued the State of Oregon for denial of unemployment benefits.[53] Alfred Smith and Galen Black had "ingested peyote for sacramental purposes at a ceremony of the Native American Church," and as a result, had

47 268 U.S. 652 (1925). In *Gitlow*, the Court considered the validity of the statutory penalization of "criminal anarchy" under New York Penal Law §§ 160–161. *Id.* at 654. Gitlow had been convicted of such crime and raised facial and as-applied challenges to the law based upon the Due Process Clause of the Fourteenth Amendment. *See id.* at 664. Although ultimately affirming Gitlow's conviction, the Court stated:

> For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.

Id. at 666.

48 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

49 Sherbert v. Verner, 374 U.S. 398, 403 (1963).

50 *Id.* at 399–400.

51 *Id.* at 410.

52 *Id.* at 406 (quoting Speiser v. Randall, 357 U.S. 513, 518 (1958)).

53 Employment Div. v. Smith, 494 U.S. 872, 874 (1990).

been fired from their jobs at a private drug rehabilitation organization.[54] Although the two men were not criminally prosecuted for their drug use, Oregon denied them unemployment benefits because they had been fired for "work-related 'misconduct.'"[55]

Citing *Sherbert*, Smith and Black argued that the Free Exercise Clause required an exemption from the general rule.[56] They argued that the state's interest in "preserv[ing] the financial integrity of the [unemployment] compensation fund" did not constitute a compelling reason to infringe on free exercise.[57] They asserted that the relevant consideration could not be the state's much more important interest in enforcing its criminal laws, because they had not been prosecuted.[58]

Although successful in the Supreme Court of Oregon, the claimants failed to persuade the Supreme Court of the United States, where then Attorney General of Oregon David Frohnmayer (now President of the University of Oregon) personally argued the state's case and prevailed.[59] In a 5-4 opinion authored by Justice Scalia, the Court rejected Smith and Black's free exercise claims.[60] The opinion's legal analysis began with the text of the Free Exercise Clause.[61] Although Justice Scalia conceded that "no case of ours has involved the point," he stated "[i]t would doubtless be unconstitutional" for the government to ban "acts or abstentions only when they are engaged in for religious reasons."[62] On the other hand, Justice Scalia found the clause ambiguous as to whether "'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)."[63] Without any reference to the history of the clause, Justice Scalia wrote that "it is a *permissible* reading of the text

54 *Id.*

55 *Id.*

56 *See id.* at 875.

57 *See id.*

58 *See id.*

59 *Id.* at 873.

60 *Id.* at 890.

61 *Id.* at 877.

62 *Id.*

63 *Id.* at 878 (alteration in original).

. . . to say that if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect . . . the First Amendment has not been offended."[64] Characteristically, Justice Scalia went on to ensure that this reading was not only permissible but correct. Uncharacteristically, he looked solely to precedent—without considering the original meaning and history of the clause—to make this determination.

The *Smith* Court invoked *Reynolds v. United States*[65] as the first occasion the Court had to assert the rule that "'[c]onscientious scruples . . . [do not] relieve[] the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.'"[66] That was precisely the argument made, and the case cited, by the Attorney General of Oregon in *Pierce*, when he argued that religious liberty did not justify overturning the Compulsory Education Act.[67] The Court had declined to discuss the matter in its *Pierce* opinion, but it met the argument head-on in *Smith*. Quoting *Reynolds*, Justice Scalia reiterated:

> "Laws" . . . "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? 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."[68]

Justice Scalia made clear that the argument for nonexemption—ignored by the Court in *Pierce*—was dispositive in *Smith*. He stated: "There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls."[69]

But the application of *Reynolds* was less likely in 1990 than it would have been in 1925, due to the interposition of *Sherbert*'s

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64 *Id.* (emphasis added).

65 98 U.S. 145 (1878).

66 *Smith*, 494 U.S. at 879 (quoting Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594–95 (1940)).

67 *See supra* pp. 639–40.

68 *Smith*, 494 U.S. at 879 (quoting *Reynolds*, 98 U.S. at 166–67).

69 *Id.* at 882.

compelling interest test. Recognizing that *Sherbert* could be read to require religious exemptions based on free exercise, Justice Scalia meticulously distinguished the case. Although acknowledging that *Sherbert* addressed "the denial of unemployment benefits,"[70] he concluded that the case was different in crucial ways. Most importantly, Smith and Black had violated a criminal law, whereas "the conduct at issue in [*Sherbert*] was not prohibited by law."[71] And Justice Scalia pointed out that *Sherbert* had only limited significance for religious liberty even outside the realm of unemployment benefits, because "[a]lthough we have sometimes purported to apply the *Sherbert* test in contexts other than [the denial of unemployment benefits], we have always found the test satisfied."[72]

B.

Justice Scalia's decision not to address the history of the Free Exercise Clause or its original meaning has been assailed by scholars like my fellow United States Circuit Judge Michael McConnell of the Tenth Circuit, who believe that the clause envisioned legal exemptions in cases where religious liberty could not be reconciled with civil laws.[73] Even though other scholars, such as Professors Michael Malbin and Ellis West, appear to offer different, and perhaps more persuasive, arguments to the contrary,[74] Justice Scalia engaged none of them.

I suggest that the *Smith* opinion's failure to enlist historical analysis to support its decision weakens it considerably. What is most surprising is that Justice Scalia did not offer any of the compelling arguments made by scholars like Malbin and West, and later built upon by Professor Philip Hamburger of Columbia

70 *Id.* at 883.

71 *Id.* at 876.

72 *Id.* at 883.

73 Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1137–41 (1990).

74 MICHAEL J. MALBIN, RELIGION AND POLITICS 39–40 (1978); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 624 (1990).

Law School,[75] despite the fact that such arguments would have considerably strengthened *Smith* in the eyes of many jurists, who were appalled by the decision's impact on religious liberty. Attention to history and original meaning might at least have placated those who despaired over the dim prospects *Smith* left for claims of religious freedom. Some critics would view the decision as an anomaly for a justice known to decry other established precedents—such as *Roe v. Wade*—in favor of a more careful reading of the constitutional text. Many have wondered why the conservative jurist, normally so attentive to tradition and original meaning, would author a decision cutting back on religious freedom.

The answer, and a reasonable one at that, appears to lie in Justice Scalia's conviction that the courts have limited competence and must remain above the religious fray. In addition to citing precedent, Justice Scalia's *Smith* opinion presents a pragmatic and structural argument for a narrow reading of the Free Exercise Clause. He argues that "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim,"[76] for evaluating such matters in objective terms would prove "utterly unworkable."[77] Requiring religious exemptions in some cases but not others would authorize judges to make impermissible value judgments and would raise "the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[78] Anarchy and arbitrariness, in short.

This was neither the first nor the last time Justice Scalia would argue that such matters could not be determined by the courts in a principled manner. Ten years after authoring *Smith*, Justice Scalia wrote in a case involving the parental right originally articulated in *Pierce*. In that case, *Troxel v. Granville*, the majority rejected a visitation-rights claim made by two

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75 *See generally* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (using a historical analysis to argue that the First Amendment was not intended to grant broad religious exemptions from civil laws).

76 *Smith*, 494 U.S. at 887.

77 *Id.* at 887 n.4.

78 *Id.* at 888.

grandparents.[79] Citing *Pierce*, the Court stated that "the 'liberty of parents and guardians' includes the right 'to direct the upbringing and education of children under their control.'"[80] The mother, therefore, could deny the grandparents access to her child.[81]

Justice Scalia, in a powerful dissent, assailed the substantive due process reasoning of the majority and argued that the "theory of unenumerated parental rights . . . has small claim to *stare decisis* protection."[82] But he conceded his own belief that "a right of parents to direct the upbringing of their children is among the 'unalienable Rights' with which the Declaration of Independence proclaims 'all men . . . are endowed by their Creator,'" and suggested that this right was "among the 'othe[r] [rights] retained by the people' which the Ninth Amendment says the Constitution's enumeration of rights 'shall not be construed to deny or disparage.'"[83]

But of utmost importance, Justice Scalia finds the competence to define such a right to rest in the legislative and not the judicial branch. While it would be "entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has *no power* to interfere with parents' authority over the rearing of their children," he had no power as a judge "to deny legal effect to laws that (in [his] view) infringe upon what is (in [his] view) that unenumerated right."[84] Justice Scalia's *Troxel* dissent may give context to his approach in *Smith*. If *Smith* is viewed as a part of Justice Scalia's larger efforts to rein in what he views as the lawlessness of substantive due process (particularly as defined in the abortion context), his *Smith* decision may appear more palatable to advocates of traditional religious values. This argument suggests that the *Smith* decision, like his *Troxel* dissent, can be read as a consistent approach to the Constitution after all.

79 Troxel v. Granville, 530 U.S. 57, 63 (2000).

80 *Id.* at 65 (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925)).

81 *See id.* at 75.

82 *Id.* at 92 (Scalia, J., dissenting).

83 *Id.* at 91.

84 *Id.* at 91–92.

But in a fascinating twist, the *Smith* decision appears to place increased emphasis on the role of substantive due process in vindicating religious freedom. For the *Smith* decision makes clear that an observant claimant will not win a free exercise exemption from a neutral and generally applicable law unless he or she can show an impermissible legislative intent to discriminate against religion or otherwise invoke substantive due process. Justice Scalia's *Smith* opinion acknowledges in a remarkable way the doctrinal stature of substantive due process, and seems even to increase its importance for religious claims by stating:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press,[85] or the right of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children.[86]

In other words, *Smith* makes clear that only substantive due process could support religious exemptions from the law that state legislatures did not choose to provide. This ruling leaves the *Cantwell* door open but means that few religious claims for exemption can cross its threshold. And if the Roberts Court

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[85] Here the Court cited *Cantwell v. Connecticut*, 310 U.S. 296 (1940), *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Follett v. McCormick*, 321 U.S. 573 (1944). The suggestion that free exercise claims, which alone would fail, could succeed if framed "in conjunction with other constitutional protections," Employment Div. v. Smith, 494 U.S. 872, 881 (1990), has generated considerable debate. Eight years ago, I discussed the unusual character of such rights on behalf of a panel of my court. *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 704 (9th Cir. 1999) (applying strict scrutiny to claims of violations of the "hybrid rights" of free exercise and free speech), *withdrawn and superseded by* 220 F.3d 1134, 1142 (9th Cir. 2000) (en banc) (deeming the claims unripe for review). Academics have continued the analysis. *See, e.g.*, Kyle Still, Comment, Smith*'s Hybrid Rights Doctrine and the* Pierce *Right: An Unintelligent Design*, 85 N.C. L. REV. 385, 409 (2006) (quoting the three-judge opinion in *Thomas*: "'Perhaps not surprisingly in view of the Supreme Court's rather cryptic explanations, the courts of appeals have struggled to decipher *Smith*'s hybrid-rights formula and have reached divergent conclusions as to exactly what constitutes a hybrid-rights claim.'" (quoting *Thomas*, 165 F.3d at 703)); *see also* Bradley L. Davis, Comment, *Compelled Expression of the Religiously Forbidden: Pharmacists, "Duty to Fill" Statutes, and the Hybrid Rights Exception*, 29 U. HAW. L. REV. 97, 109–19 (discussing the Ninth Circuit's analysis of hybrid rights theory in *Thomas*, 165 F.3d at 730).

[86] *Smith*, 494 U.S. at 881.

follows the admonitions of its conservative justices and continues its slow retreat from substantive due process, religious practitioners may have even narrower grounds on which to base their claims.

III

So where does that leave us? I suggest that as a result of its narrow reading of the Free Exercise Clause, *Smith* ensures, for better or worse, that religious liberty will depend largely on legislative action and less on judicial protection. Analysis of demographic trends adds interest to the jurisprudential shift; for the religious views of voting citizens, and their connections to established churches, have changed considerably since the time of the founding and even more so since *Pierce*. In 1925, religious liberty was attacked by a law passed on the initiative of a sectarian, anti-Catholic majority. Today, a growing percent of Americans associate with no organized religion at all.[87] In recent decades, West Coast states have led a trend away from established churches, and Oregon has often appeared at the helm.[88]

What do trends toward secularization and religious individualism mean for religious liberty after *Smith*? I discern three primary concerns. First, restrictive laws may be passed with the purpose of inhibiting religion. Fortunately, the Supreme Court has made clear that, even after *Smith*, "[t]he Free Exercise Clause protects against governmental hostility which is masked as well as overt," and "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."[89]

Second, and perhaps more troubling, restrictive laws may be enacted—or simply enforced—out of sheer *insensitivity* to religion. This may be a special concern in a time of increasing secularism and preoccupation with self-centered and temporal

[87] *See* Cathy Lynn Grossman, *Charting the Unchurched in America*, USA TODAY, Mar. 7, 2002, at 1D, *available at* http://www.usatoday.com/life/2002/2002-03-07-no-religion.htm.

[88] *See id.*

[89] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993).

pursuits. Third, even if the legislatures are willing to pass laws to protect religious practices, there is a significant risk that such statutes may be ruled unconstitutional by the courts. This last concern suggests that advocates of religious freedom may be caught between a rock and a hard place, as both courts and legislatures lose the ability to grant them shelter.

A.

Restrictions on faith-based activities will not affect only members of the Catholic Church, as in *Pierce*, or the Native American Church, as in *Smith*. A look at current free exercise conundrums shows that practices of diverse faiths may be endangered. Will Muslim women be forced to strip their heads of traditional garb required by their faith? France has required as much, and while it has far outpaced even Oregon in its secularization, we may not be that far behind.

B.

But we need not look abroad to see how law has already limited the practices of various religious persons and organizations. Recently, several pharmacists in Illinois were fired from their jobs for refusing on religious grounds to comply with state rules requiring them to distribute the morning-after pill.[90] They filed suit in federal district court, citing the Free Exercise Clause.[91] The judge denied the state's motion to dismiss, allowing the pharmacists to proceed on their claim that the state rules were motivated by antireligious animus.[92] On October 9, 2007, the plaintiffs reached a compromise with the state and dropped the suit.[93]

In Massachusetts, state antidiscrimination laws have been enforced without an exception that would allow Catholic adoption agencies to give children only to heterosexual

[90] Menges v. Blagojevich, 451 F. Supp. 2d 992, 998 (C.D. Ill. 2006).

[91] *Id.* at 999.

[92] *Id.* at 1005.

[93] Agreed Joint Motion of Plaintiff Walgreen Co. and Defendants to Stay Case, *Menges*, 451 F. Supp. 2d 992 (No. 05-3307). Of considerable interest, the House recently passed the Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. § 1 (2007). The purpose of the act is to prohibit "employment discrimination on the basis of sexual orientation." *Id.* at § 2(1). Currently, the proposed legislation contains an exemption for religious organizations. *Id.* at § 6.

couples.[94] As a result, the Catholic Church has concluded that it could not reconcile the practice with its faith and withdrew from providing adoption services altogether.[95] The Anglican, Catholic, and Lutheran churches may face other conflicts as well: will prosecutors begin to press charges for violations of underage drinking laws, when minors receive communion in both species (bread and wine) at daily liturgies?

Antidiscrimination laws protecting women from employment harassment might also be applied to force churches with male clergies to hire female pastors or priests. And evidentiary rules might be enacted that would apply to all persons, without exemptions for priest-penitent communications.[96] While such laws might serve otherwise worthy purposes and be enacted without any intention of restricting religious freedom, they might be read in ways that would severely constrain faith-related practices.

As I have emphasized before, these concerns do not affect one church or a single faith. The anti-Catholic sentiments that prevailed in Oregon in 1925 have been subsumed by indifference

94 *See* Steve LeBlanc, *Catholic Charities to Halt Adoptions over Issue Involving Gays*, BOSTON.COM, Mar. 10, 2006, http://www.boston.com/news/local/massachusetts/articles/2006/03/10/catholic_charities_to_halt_adoptions_over_issue_involving_gays/.

95 *See id.*

96 All fifty states provide such a privilege, though they differ as to which person can waive the protection. *See* 1 MCCORMICK ON EVIDENCE § 76.2 (5th ed. 1999). In *Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997), the Ninth Circuit ruled that the taping of a prison inmate's confession violated the inmate's rights under the Fourth Amendment and the Religious Freedom Restoration Act. *Id.* at 1534. Writing for the court, Judge Noonan noted that the inmate's expectation of privacy in his communications with his confessor, Father Mockaitus, was reasonable: "[T]he history of the nation has shown a uniform respect for the character of sacramental confession as inviolable by government agents interested in securing evidence of crime from the lips of [a] criminal." *Id.* at 1532. By taping the confession, the government violated the Fourth Amendment. *Id.* at 1534. Judge Noonan also concluded that taping the confession violated the provisions of the Religious Freedom Restoration Act that barred government from "'substantially burden[ing] a person's exercise of religion'" unless acting "'in furtherance of a compelling governmental interest'" and using "'the least restrictive means.'" *Id.* at 1528 (quoting 42 U.S.C. § 2000bb-1 (1994)). Judge Noonan's opinion rejected constitutional and statutory challenges to the Religious Freedom Restoration Act, concluding that Congress had full authority to enact such protective legislation. *Id.* at 1529–30. But less than half a year later, the Supreme Court disagreed, and struck down the statute. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997). It would appear that the priest-penitent privilege continues to enjoy Fourth Amendment protection, however.

and hostility toward other faiths as well. And while *Pierce* ensured that private schools, including religious ones, retained a right to exist, such schools may face new threats. For example, could antidiscrimination laws be invoked to require Jewish, Amish, Muslim, and other religious communities to hire nonbelievers to teach in their schools?

Smith does not offer much hope for exemptions from state antidiscrimination laws. It would be ironic—though certainly possible—for courts to find a discriminatory purpose behind such laws. But without proof of such purpose, or the aid of another constitutional right, religious claims for relief would fail. As these examples show, persons who care about freedom and faith must keep a watchful eye for animus. They must, however, turn their primary efforts to persuasion, so that their fellow citizens and their legislators can share their concerns and reach appropriate accommodations.

C.

Unfortunately, as already mentioned, a third impediment to religious freedom may arise in the context of legislative action: statutes designed to protect faith-based practices may be deemed unconstitutional. For example, in *City of Boerne v. Flores*, the Supreme Court struck down a provision of the Religious Freedom Restoration Act, in which Congress had sought to provide greater protection for free exercise.[97] The Act rejected the limitations on free exercise allowed by the Court's opinion in *Smith*, and required federal courts to apply the more protective *Sherbert* test[98] when analyzing religious claims.[99] In *City of Boerne*, the Court rejected Congress's attempt to protect religious freedom, ruling that the Act exceeded the scope of congressional authority.[100] The Court emphasized that Congress may not "enact legislation that expands the rights [enumerated

97 *City of Boerne*, 521 U.S. at 536.

98 Sherbert v. Verner, 374 U.S. 398, 403 (1963); *see supra* Part II.

99 *See* 42 U.S.C. § 2000bb-1 (1994), *invalidated by City of Boerne*, 521 U.S. 507 (1997).

100 *See City of Boerne*, 521 U.S. at 536.

in the Constitution],"[101] or "define its own powers by altering the [Constitution's] meaning."[102]

Thus, the Court's decision in *City of Boerne* undercut the assurance it had given in *Smith* that legislative action could protect free exercise. In *Smith* the Court had presented structural arguments emphasizing that legislatures could decide whether to expand religious freedom; in *City of Boerne* the Court applied structural arguments to cabin Congress's competence to do just that. While both decisions may be defended for their fidelity to the separation of powers, their interplay suggests yet a further hurdle for advocates of religious freedom.

The troubling interplay of the Court's free exercise decisions and its ruling in *City of Boerne* were noted in a dissent to that decision. There, Justice Souter expressed reluctance to limit Congress's power to protect religious freedom and urged the Court to dismiss the writ of certiorari as improvidently granted.[103] He argued that *Smith* should not be applied to strike down the Religious Freedom Restoration Act without closer analysis of the claims and "the historical arguments going to the *original understanding of the Free Exercise Clause* . . . which raise[] very substantial issues about the soundness of the *Smith* rule."[104] Justice Souter's concerns did not sway the majority, but his dissent underscored the problems for religious freedom that arise from the intersection of the Court's decisions.[105]

101 *Id.* at 527–28.

102 *Id.* at 529.

103 *Id.* at 565–66 (Souter, J., dissenting).

104 *Id.* at 565 (emphasis added).

105 Justice Scalia concurred in the majority decision in *City of Boerne*, with the exception of Subsection III-A-1, in which the Court discussed the legislative history of the Fourteenth Amendment. *See id.* at 509; *id.* at 537 (Scalia, J., concurring). On the other hand, he had vehemently dissented in an earlier case in which the Court invalidated legislative protections of religious exercise. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 29 (1989) (Scalia, J., dissenting). In *Texas Monthly*, the Supreme Court had struck down a statute exempting religious periodicals from sales tax. *Id.* at 25 (majority opinion). The Court ruled that the statute violated the Establishment Clause and was not mandated by the Free Exercise Clause. *See id.* Justice Scalia disagreed. *Id.* at 29 (Scalia, J., dissenting). He noted the long history of state statutes providing such tax exemptions, and added: "In practice, a similar exemption may well exist in even more States than that, since until today our case law has suggested that [the exemption] is *not only permissible but perhaps required*." *Id.* at 30–31 (emphasis added). Of course, it is ironic that Justice Scalia, author of *Smith*, would suggest that exemptions from generally applicable tax laws

IV

The future of religious freedom may now shift to the hands of voters and lawmakers. Although the courts can continue to protect religious practices against laws motivated by discriminatory purposes, or grant relief when Free Exercise claims are made "in conjunction with other constitutional protections," most protective action must be legislative.

Believers must learn to attract the support of legislators—a task that may well become more difficult as secularism grows in the voting population. But at least the responsibility of pursuing religious liberty rests with those most committed to its preservation. If believers raise their voices, I have no doubt that they will be heard and will eventually prevail in what is, deep down, a tolerant and respectful society, such that their faiths and freedoms will be protected in a nation built upon those values. For despite trends toward secularization, most Americans continue to profess religious faith, which, I suggest, enables them to understand the importance of faith-based practices and the value of accommodation. As American society and law remain grounded in moral norms and faith-based traditions, those asserting claims grounded in religious freedom may strike sympathetic chords. But to strike such chords, they first must speak. Only by the energy and perseverance of their voices can our nation retain in its fullest form the freedom for which it was designed.

were "perhaps required" by prior Supreme Court precedent, but the *Texas Monthly* dissent certainly accords with his view that legislatures can provide, and have traditionally provided, solicitude for free exercise.