SUPREME COURT OF THE UNITED STATES

No. 91–948

CHURCH OF THE LUKUMI BABALU AYE, INC. AND ERNESTO PICHARDO, PETITIONERS *v.* CITY OF HIALEAH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 11, 1993]

JUSTICE SOUTER, concurring in part and concurring in the judgment.

This case turns on a principle about which there is no disagreement, that the Free Exercise Clause bars government action aimed at suppressing religious belief or practice. The Court holds that Hialeah's animal-sacrifice laws violate that principle, and I concur in that holding without reservation.

Because prohibiting religious exercise is the object of the laws at hand, this case does not present the more difficult issue addressed in our last free-exercise case, *Employment Div., Dept. of Human Resources of Oregon* v. *Smith*, 494 U. S. 872 (1990), which announced the rule that a "neutral, generally applicable" law does not run afoul of the Free Exercise Clause even when it prohibits religious exercise in effect. The Court today refers to that rule in dicta, and despite my general agreement with the Court's opinion I do not join Part II, where the dicta appear, for I have doubts about whether the *Smith* rule merits adherence. I write separately to explain why the *Smith* rule is not germane to this case and to express my view that, in a case presenting the issue, the Court should re-
examine the rule *Smith* declared.

I

According to *Smith*, if prohibiting the exercise of religion results from enforcing a "neutral, generally applicable" law, the Free Exercise Clause has not

been offended. *Id*., at 878–880. I call this the *Smith* rule to distinguish it from the noncontroversial principle, also expressed in *Smith* though established long before, that the Free Exercise Clause is offended when prohibiting religious exercise results from a law that is not neutral or generally applicable. It is this noncontroversial principle, that the Free Exercise Clause requires neutrality and general applicability, that is at issue here. But before turning to the relationship of *Smith* to this case, it will help to get the terms in order, for the significance of the *Smith* rule is not only in its statement that the Free Exercise Clause requires no more than "neutrality" and "general applicability," but in its adoption of a particular, narrow conception of free-exercise neutrality.

That the Free Exercise Clause contains a "requirement for governmental neutrality," *Wisconsin* v. *Yoder*, 406 U. S. 205, 220 (1972), is hardly a novel proposition; though the term does not appear in the First Amendment, our cases have used it as shorthand to describe, at least in part, what the Clause commands. See, *e.g.*, *Jimmy Swaggart Ministries* v. *Board of Equalization of California*, 493 U. S. 378, 384 (1990); *Thomas* v. *Review Bd. of Indiana, Employment Security Div.*, 450 U. S. 707, 717 (1981); *Yoder*, *supra*, at 220; *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 792–793 (1973); *School Dist. of Abington* v. *Schempp*, 374 U. S. 203, 222 (1963); see also *McDaniel* v. *Paty*, 435 U. S. 618, 627–629 (1978) (plurality opinion) (invalidating a non-neutral law without using the term). Nor is there anything unusual about the notion that the Free Exercise Clause requires general applicability, though the Court, until today, has not used exactly that term in stating a reason for invalidation. See *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); cf. *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 585 (1983); *Larson* v. *Valente*, 456 U. S.

225, 245–246 (1982).[1]

[1]A law that is not generally applicable according to the Court's definition (one that "selective[ly] . . . impose[s] burdens only on conduct motivated by religious belief," *ante*, at 21) would, it seems to me, fail almost any test for neutrality. Accordingly, the cases stating that the Free Exercise Clause requires neutrality are also fairly read for the proposition that the Clause requires general applicability.

While general applicability is, for the most part, self-explanatory, free-exercise neutrality is not self-revealing. Cf. *Lee* v. *Weisman*, 505 U. S. ___, ___ (1992) (SOUTER, J., concurring) (considering Establishment Clause neutrality). A law that is religion neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids. Cf. McConnell & Posner, An Economic Approach to Issues of Religious Freedom, 56 U. Chi. L. Rev. 1, 35 (1989) ("a regulation is not neutral in an economic sense if, whatever its normal scope or its intentions, it arbitrarily imposes greater costs on religious than on comparable nonreligious activities"). A secular law, applicable to all, that prohibits consumption of alcohol, for example, will affect members of religions that require the use of wine differently from members of other religions and nonbelievers, disproportionately burdening the practice of, say, Catholicism or Judaism. Without an exemption for sacramental wine, Prohibition may fail the test of religion neutrality.[2]

It does not necessarily follow from that observation, of course, that the First Amendment requires an exemption from Prohibition; that depends on the

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[2]Our cases make clear, to look at this from a different perspective, that an exemption for sacramental wine use would not deprive Prohibition of neutrality. Rather, "[s]uch an accommodation [would] `reflec[t] nothing more than the governmental obligation of neutrality in the face of religious differences.'" *Wisconsin* v. *Yoder*, 406 U. S. 205, 235, n. 22 (quoting *Sherbert* v. *Verner*, 374 U. S. 398, 409 (1963)); see also *Lee* v. *Weisman*, 505 U. S. ___, ___ (1992) (SOUTER, J., concurring). The prohibition law in place earlier this century did in fact exempt "wine for sacramental purposes." National Prohibition Act, Title II, §3, 41 Stat. 308 (1919).

meaning of neutrality as the Free Exercise Clause embraces it. The point here is the unremarkable one that our common notion of neutrality is broad enough to cover not merely what might be called formal neutrality, which as a free-exercise requirement would only bar laws with an object to discriminate against religion, but also what might be called substantive neutrality, which, in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws. See generally Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993 (1990). If the Free Exercise Clause secures only protection against deliberate discrimination, a formal requirement will exhaust the Clause's neutrality command; if the Free Exercise Clause, rather, safeguards a right to engage in religious activity free from unnecessary governmental interference, the Clause requires substantive, as well as formal, neutrality.[3]

Though *Smith* used the term "neutrality" without a modifier, the rule it announced plainly assumes that free-exercise neutrality is of the formal sort. Distinguishing between laws whose "object" is to prohibit religious exercise and those that prohibit

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[3]One might further distinguish between formal neutrality and facial neutrality. While facial neutrality would permit discovery of a law's object or purpose only by analysis of the law's words, structure and operation, formal neutrality would permit enquiry also into the intentions of those who enacted the law. Compare *ante*, at 18–20 (opinion of KENNEDY, J., joined by STEVENS, J.) with *ante*, at 2–3 (opinion of SCALIA, J., joined by REHNQUIST, C. J.). For present purposes, the distinction between formal and facial neutrality is less important than the distinction between those conceptions of neutrality and substantive neutrality.

religious exercise as an "incidental effect," *Smith* placed only the former within the reaches of the Free Exercise Clause; the latter, laws that satisfy formal neutrality, *Smith* would subject to no free-exercise scrutiny at all, even when they prohibit religious exercise in application. 494 U. S., at 878. The four Justices who rejected the *Smith* rule, by contrast, read the Free Exercise Clause as embracing what I have termed substantive neutrality. The enforcement of a law "neutral on its face," they said, may "nonetheless offend [the Free Exercise Clause's] requirement for government neutrality if it unduly burdens the free exercise of religion." *Id*., at 896 (opinion of O'CONNOR, J., joined by Brennan, Marshall, and BLACKMUN, JJ.) (internal quotation marks and citations omitted). The rule these Justices saw as flowing from free-exercise neutrality, in contrast to the *Smith* rule, "requir[es] the government to justify *any* substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Id*., at 894 (emphasis supplied).

The proposition for which the *Smith* rule stands, then, is that formal neutrality, along with general applicability, are sufficient conditions for constitutionality under the Free Exercise Clause. That proposition is not at issue in this case, however, for Hialeah's animal-sacrifice ordinances are not neutral under any definition, any more than they are generally applicable. This case, rather, involves the noncontroversial principle repeated in *Smith*, that formal neutrality and general applicability are necessary conditions for free-exercise constitutionality. It is only "this fundamental nonpersecution principle of the First Amendment [that is] implicated here," *ante*, at 1, and it is to that principle that the Court adverts when it holds that Hialeah's ordinances "fail to satisfy the *Smith* requirements," *ante*, at 10. In applying that principle the

Court does not tread on troublesome ground.

In considering, for example, whether Hialeah's animal-sacrifice laws violate free-exercise neutrality, the Court rightly observes that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," *ante*, at 10, and correctly finds Hialeah's laws to fail those standards. The question whether the protections of the Free Exercise Clause also pertain if the law at issue, though nondiscriminatory in its object, has the effect nonetheless of placing a burden on religious exercise is not before the Court today, and the Court's intimations on the matter are therefore dicta.

The Court also rightly finds Hialeah's laws to fail the test of general applicability, and as the Court "need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights," *ante*, at 21, it need not discuss the rules that apply to prohibitions found to be generally applicable. The question whether "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability," *Yoder*, 406 U. S., at 220, is not before the Court in this case, and, again, suggestions on that score are dicta.

II

In being so readily susceptible to resolution by applying the Free Exercise Clause's "fundamental nonpersecution principle," *ante*, at 1, this is far from a representative free-exercise case. While, as the Court observes, the Hialeah City Council has provided a rare example of a law actually aimed at suppressing religious exercise, *ibid*., *Smith* was typical of our free-

exercise cases, involving as it did a formally neutral, generally applicable law. The rule *Smith* announced, however, was decidedly untypical of the cases involving the same type of law. Because *Smith* left those prior cases standing, we are left with a free-exercise jurisprudence in tension with itself, a tension that should be addressed, and that may legitimately be addressed, by reexamining the *Smith* rule in the next case that would turn upon its application.

A

In developing standards to judge the enforceability of formally neutral, generally applicable laws against the mandates of the Free Exercise Clause, the Court has addressed the concepts of neutrality and general applicability by indicating, in language hard to read as not foreclosing the *Smith* rule, that the Free Exercise Clause embraces more than mere formal neutrality, and that formal neutrality and general applicability are not sufficient conditions for free-exercise constitutionality:

> "In a variety of ways we have said that `[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.'" *Thomas*, 450 U. S., at 717 (quoting *Yoder*, 406 U. S., at 220).
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> "[T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." *Ibid*.

Not long before the *Smith* decision, indeed, the Court specifically rejected the argument that "neutral and uniform" requirements for governmental benefits need

satisfy only a reasonableness standard, in part because "[s]uch a test has no basis in precedent." *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U. S. 136, 141 (1987) (internal quotation marks and citations omitted). Rather, we have said, "[o]ur cases have established that `[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'" *Swaggart Ministries*, 493 U. S., at 384–385 (quoting *Hernandez* v. *Commissioner*, 490 U. S. 680, 699 (1989)).

Thus we have applied the same rigorous scrutiny to burdens on religious exercise resulting from the enforcement of formally neutral, generally applicable laws as we have applied to burdens caused by laws that single out religious exercise: "`only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.'" *McDaniel* v. *Paty*, 435 U. S., at 628 (plurality opinion) (quoting *Yoder*, *supra*, at 215). Compare *McDaniel*, *supra*, at 628–629 (plurality opinion) (applying that test to a law aimed at religious conduct) with *Yoder*, *supra*, at 215–229 (applying that test to a formally neutral, general law). Other cases in which the Court has applied heightened scrutiny to the enforcement of formally neutral, generally applicable laws that burden religious exercise include *Hernandez* v. *Commissioner*, *supra*, at 699; *Frazee* v. *Illinois Dept. of Employment Security*, 489 U. S. 829, 835 (1989); *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U. S., at 141; *Bob Jones University* v. *United States*, 461 U. S. 574, 604 (1983); *United States* v. *Lee*, 455 U. S. 252, 257–258 (1982); *Thomas*, *supra*, at 718; *Sherbert* v. *Verner*, 374 U. S. 398, 403 (1963); and *Cantwell* v. *Connecticut*, 310 U. S. 296, 304–307 (1940).

Though *Smith* sought to distinguish the free-exercise cases in which the Court mandated exemptions from secular laws of general application, see 494 U. S., at 881–885, I am not persuaded. *Wisconsin* v. *Yoder*, and *Cantwell* v. *Connecticut*, according to *Smith*, were not true free-exercise cases but "hybrid[s]" involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children." *Smith*, *supra*, at 881, 882. Neither opinion, however, leaves any doubt that "fundamental claims of religious freedom [were] at stake." *Yoder*, *supra*, at 221; see also *Cantwell*, *supra*, at 303–307.[4] And the distinction *Smith* draws

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[4]*Yoder*, which involved a challenge by Amish parents to the enforcement against them of a compulsory school attendance law, mentioned the parental rights recognized in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), as *Smith* pointed out. See *Employment Div., Dept. of Human Resources of Oregon* v. *Smith*, 494 U. S. 872, 881, n. 1 (1990) (citing *Yoder*, 406 U. S., at 233). But *Yoder* did so only to distinguish *Pierce*, which involved a substantive due process challenge to a compulsory
school attendance law and which required merely a showing of "`reasonable[ness].'" *Yoder*, *supra*, at 233 (quoting *Pierce*, *supra*, at 535). Where parents make a "free exercise claim," the *Yoder* Court said, the *Pierce* reasonableness test is inapplicable and the State's action must be measured by a stricter test, the test developed under the Free Exercise Clause and discussed at length earlier in the opinion. See 406 U. S., at 233; *id*., at 213–229. Quickly after the reference to parental rights, the *Yoder* opinion makes clear that the case involves "the central values underlying the Religion Clauses." *Id*., at 234. The Yoders raised only a free-exercise defense to their

strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote-smoking ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Smith sought to confine the remaining free-exercise exemption victories, which involved unemployment compensation systems, see *Frazee*, *supra*; *Hobbie*, *supra*; *Thomas*, *supra*; and *Sherbert*, *supra*, as "stand[ing] for the proposition that where the State

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prosecution under the school-attendance law, *id*., at 209, and n. 4; certiorari was granted only on the free-exercise issue, *id*., at 207; and the Court plainly understood the case to involve "conduct protected by the Free Exercise Clause" even against enforcement of a "regulatio[n] of general applicability." *Id*., at 220.

As for *Cantwell*, *Smith* pointed out that the case explicitly mentions freedom of speech. See 494 U. S., at 881, n. 1 (citing *Cantwell* v. *Connecticut*, 310 U. S. 296, 307 (1940)). But the quote to which *Smith* refers occurs in a portion of the *Cantwell* opinion (titled: "*second*," and dealing with a breach-of-peace conviction for playing phonograph records, see 310 U. S., at 307) that discusses an entirely different issue from the section of *Cantwell* that *Smith* cites as involving a "neutral, generally applicable law" (titled: "*first*," and dealing with a licensing system for solicitations, see *Cantwell*, *supra*, at 303–307). See *Smith*, *supra*, at 881.

has in place a system of individual exemptions, it may not refuse to extend that system to cases of `religious hardship' without compelling reason." 494 U. S., at 884. But prior to *Smith* the Court had already refused to accept that explanation of the unemployment compensation cases. See *Hobbie*, 480 U. S. 142, n. 7; *Bowen* v. *Roy*, 476 U. S., at 715–716 (opinion of BLACKMUN, J.); *id*., at 727–732 (opinion of O'CONNOR, J., joined by Brennan and Marshall, JJ.); *id*., at 733 (WHITE, J., dissenting). And, again, the distinction fails to exclude *Smith*: "If *Smith* is viewed as an unemployment compensation case, the distinction is obviously spurious. If *Smith* is viewed as a hypothetical criminal prosecution for peyote use, there would be an individual governmental assessment of the defendants' motives and actions in the form of a criminal trial." McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1124 (1990). *Smith* also distinguished the unemployment compensation cases on the ground that they did not involve "an across-the-board criminal prohibition on a particular form of conduct." 494 U. S., at 884. But even Chief Justice Burger's plurality opinion in *Bowen* v. *Roy*, on which *Smith* drew for its analysis of the unemployment compensation cases, would have applied its reasonableness test only to "denial of government benefits" and not to "governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons," *Bowen* v. *Roy*, 476 U. S., at 706 (opinion of Burger, C. J., joined by Powell and REHNQUIST, JJ.); to the latter category of governmental action, it would have applied the test employed in *Yoder*, which involved an across-the-board criminal prohibition and which Chief Justice Burger's opinion treated as an ordinary free-exercise case. See *Bowen* v. *Roy*, *supra*, at 706–707; *id*., at 705 n. 15; *Yoder*, 406 U. S., at 218; see also

McDaniel v. *Paty*, 435 U. S., at 628, n. 8 (noting cases in which courts considered claims for exemptions from general criminal prohibitions, cases the Court thought were "illustrative of the general nature of free-exercise protections and the delicate balancing required by our decisions in *Sherbert* and *Yoder*, when an important state interest is shown").

As for the cases on which *Smith* primarily relied as establishing the rule it embraced, *Reynolds* v. *United States*, 98 U. S. 145 (1879) and *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586 (1940), see *Smith*, *supra*, at 879, their subsequent treatment by the Court would seem to require rejection of the *Smith* rule. *Reynolds*, which in upholding the polygamy conviction of a Mormon stressed the evils it saw as associated with polygamy, see 98 U. S., at 166 ("polygamy leads to the patriarchal principle, and . . . fetters the people in stationary despotism"); *id*., at 165, 168, has been read as consistent with the principle that religious conduct may be regulated by general or targeting law only if the conduct "pose[s] some substantial threat to public safety, peace or order." *Sherbert* v. *Verner*, 374 U. S., at 403; see also *United States* v. *Lee*, 455 U. S., at 257–258; *Bob Jones University*, 461 U. S., at 603; *Yoder*, *supra*, at 230. And *Gobitis*, after three Justices who originally joined the opinion renounced it for disregarding the government's constitutional obligation "to accommodate itself to the religious views of minorities," *Jones* v. *Opelika*, 316 U. S. 584, 624 (1942) (opinion of Black, Douglas, and Murphy, JJ.), was explicitly overruled in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943); see also *id*., at 643–644 (Black and Douglas, JJ., concurring).

Since holding in 1940 that the Free Exercise Clause applies to the States, see *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), the Court repeatedly has stated that the Clause sets strict limits on the government's

power to burden religious exercise, whether it is a law's object to do so or its unanticipated effect. *Smith* responded to these statements by suggesting that the Court did not really mean what it said, detecting in at least the most recent opinions a lack of commitment to the compelling-interest test in the context of formally neutral laws. *Smith*, *supra*, at 884–885. But even if the Court's commitment were that palid, it would argue only for moderating the language of the test, not for eliminating constitutional scrutiny altogether. In any event, I would have trouble concluding that the Court has not meant what it has said in more than a dozen cases over several decades, particularly when in the same period it repeatedly applied the compelling-interest test to require exemptions, even in a case decided the year before *Smith*. See *Frazee* v. *Illinois Dept. of Employment Security*, 489 U. S. 829 (1989).[5] In sum,

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[5]Though *Smith* implied that the Court, in considering claims for exemptions from formally neutral, generally applicable laws, has applied a "water[ed] down" version of strict scrutiny, 494 U. S., at 888, that appraisal confuses the cases in which we purported to apply strict scrutiny with the cases in which we did not. We did not purport to apply strict scrutiny in several cases involving discrete categories of governmental action in which there are special reasons to defer to the judgment of the political branches, and the opinions in those cases said in no uncertain terms that traditional heightened scrutiny applies outside those categories. See *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 349 (1987) ("prison regulations . . . are judged under a `reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights"); *Goldman* v. *Weinberger*, 475 U. S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential

it seems to me difficult to escape the conclusion that, whatever *Smith*'s virtues, they do not include a comfortable fit with settled law.

B

The *Smith* rule, in my view, may be reexamined consistently with principles of *stare decisis*. To begin with, the *Smith* rule was not subject to "full-dress

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than constitutional review of similar laws or regulations designed for civilian society"); see also *Johnson* v. *Robison*, 415 U. S. 361, 385–386 (1974); *Gillette* v. *United States*, 401 U. S. 437, 462 (1971). We also did not purport to apply strict scrutiny in several cases in which the claimants failed to establish a constitutionally cognizable burden on religious exercise, and again the opinions in those cases left no doubt that heightened scrutiny applies to the enforcement of formally neutral, general laws that do burden free exercise. See *Swaggart Ministries*, *supra*, 493 U. S., at 384–385 ("Our cases have established that [t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden") (internal quotation marks and citation omitted); *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 450 (1988) ("[T]his Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to [the] scrutiny" employed in *Sherbert* v. *Verner*, *supra*); see also *Braunfeld* v. *Brown*, 366 U. S. 599, 606–607 (1961) (plurality opinion). Among the cases in which we have purported to apply strict scrutiny, we have required free-exercise exemptions more often than we have denied them. Compare *Frazee* v. *Illinois Dept. of Employment Security*, 489 U. S. 829 (1989); *Hobbie* v. *Unemployment Appeals*

argument" prior to its announcement. *Mapp* v. *Ohio*, 367 U. S. 643, 676–677 (1961) (Harlan, J., dissenting). The State of Oregon in *Smith* contended that its refusal to exempt religious peyote use survived the strict scrutiny required by "settled free exercise principles," inasmuch as the State had "a compelling interest in regulating" the practice of peyote use and could not "accommodate the religious practice without compromising its interest." Brief for Petitioners in *Smith*, O. T. 1989, No. 88–1213, p. 5; see also *id*., pp. 5–36; Reply Brief for Petitioners in *Smith*, pp. 6–20. Respondents joined issue on the outcome of strict scrutiny on the facts before the Court, see Brief for Respondents in *Smith*, pp. 14–41, and neither party squarely addressed the proposition the Court was to embrace, that the Free Exercise Clause was irrelevant to the dispute. Sound judicial decisionmaking requires "both a vigorous prosecution and a vigorous defense" of the issues in dispute, *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412,

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Comm'n, 480 U. S. 136 (1987); *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981); *Yoder*, *supra*; *Cantwell*, *supra*, with *Hernandez* v. *Commissioner*, 490 U. S. 680 (1989); *Bob Jones University* v. *United States*, 461 U. S. 574 (1983); *United States* v. *Lee*, 455 U. S. 252 (1982). And of the three cases in which we found that denial of an exemption survived strict scrutiny (all tax cases), one involved the government's "fundamental, overriding interest in eradicating racial discrimination in education," *Bob Jones University*, *supra*, at 604; in a second the Court "doubt[ed] whether the alleged burden . . . [was] a substantial one," *Hernandez*, *supra*, at 699; and the Court seemed to be of the same view in the third. See *Lee*, *supra*, at 261, n. 12. These cases, I think, provide slim grounds for concluding that the Court has not been true to its word.

419 (1978), and a constitutional rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument. Cf. *Ladner* v. *United States*, 358 U. S. 169, 173 (1958) (declining to address "an important and complex" issue concerning the scope of collateral attack upon criminal sentences because it had received "only meagre argument" from the parties, and the Court thought it "should have the benefit of a full argument before dealing with the question").

The *Smith* rule's vitality as precedent is limited further by the seeming want of any need of it in resolving the question presented in that case. JUSTICE O'CONNOR reached the same result as the majority by applying, as the parties had requested, "our established free exercise jurisprudence," 494 U. S., at 903, and the majority never determined that the case could not be resolved on the narrower ground, going instead straight to the broader constitutional rule. But the Court's better practice, one supported by the same principles of restraint that underlie the rule of *stare decisis*, is not to "`formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885)). While I am not suggesting that the *Smith* Court lacked the power to announce its rule, I think a rule of law unnecessary to the outcome of a case, especially one not put into play by the parties, approaches without more the sort of "*dicta* . . . which may be followed if sufficiently persuasive but which are not controlling." *Humphrey's Executor* v. *United States*, 295 U. S. 602, 627 (1935); see also *Kastigar* v. *United States*, 406 U. S. 441, 454–455 (1972).

I do not, of course, mean to imply that a broad constitutional rule announced without full briefing

and argument necessarily lacks precedential weight. Over time, such a decision may become "part of the tissue of the law," *Radovich* v. *National Football League*, 352 U. S. 445, 455 (1957) (Frankfurter, J., dissenting), and may be subject to reliance in a way that new and unexpected decisions are not. Cf. *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U. S. ___, ___ (1992). *Smith*, however, is not such a case. By the same token, by pointing out *Smith*'s recent vintage I do not mean to suggest that novelty alone is enough to justify reconsideration. "*[S]tare decisis*," as Justice Frankfurter wrote, "is a principle of policy and not a mechanical formula," *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940), and the decision whether to adhere to a prior decision, particularly a constitutional decision, is a complex and difficult one that does not lend itself to resolution by application of simple, categorical rules, but that must account for a variety of often competing considerations.

The considerations of full-briefing, necessity, and novelty thus do not exhaust the legitimate reasons for reexamining prior decisions, or even for reexamining the *Smith* rule. One important further consideration warrants mention here, however, because it demands the reexamination I have in mind. *Smith* presents not the usual question of whether to follow a constitutional rule, but the question of which constitutional rule to follow, for *Smith* refrained from overruling prior free-exercise cases that contain a free-exercise rule fundamentally at odds with the rule *Smith* declared. *Smith*, indeed, announced its rule by relying squarely upon the precedent of prior cases. See 494 U. S., at 878 ("Our decisions reveal that the . . . reading" of the Free Exercise Clause contained in the *Smith* rule "is the correct one"). Since that precedent is nonetheless at odds with the *Smith* rule, as I have discussed above, the result is an intolerable tension in free-exercise law

which may be resolved, consistently with principles of *stare decisis*, in a case in which the tension is presented and its resolution pivotal.

While the tension on which I rely exists within the body of our extant case law, a rereading of that case law will not, of course, mark the limits of any enquiry directed to reexamining the *Smith* rule, which should be reviewed in light not only of the precedent on which it was rested but also of the text of the Free Exercise Clause and its origins. As for text, *Smith* did not assert that the plain language of the Free Exercise Clause compelled its rule, but only that the rule was "a permissible reading" of the Clause. *Id*., at 878. Suffice it to say that a respectable argument may be made that the pre-*Smith* law comes closer to fulfilling the language of the Free Exercise Clause than the rule *Smith* announced. "[T]he Free Exercise Clause . . . , by its terms, gives special protection to the exercise of religion," *Thomas*, 450 U. S., at 713, specifying an activity and then flatly protecting it against government prohibition. The Clause draws no distinction between laws whose object is to prohibit religious exercise and laws with that effect, on its face seemingly applying to both.

Nor did *Smith* consider the original meaning of the Free Exercise Clause, though overlooking the opportunity was no unique transgression. Save in a handful of passing remarks, the Court has not explored the history of the Clause since its early attempts in 1879 and 1890, see *Reynolds* v. *United States*, 98 U. S., at 162–166, and *Davis* v. *Beason*, 133 U. S. 333, 342 (1890), attempts that recent scholarship makes clear were incomplete. See generally McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990).[6] The curious absence of history

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[6]*Reynolds* denied the free-exercise claim of a Mormon convicted of polygamy, and *Davis* v. *Beason* upheld

from our free-exercise decisions creates a stark contrast with our cases under the Establishment Clause, where historical analysis has been so prominent.[7]

This is not the place to explore the history that a century of free-exercise opinions have overlooked, and it is enough to note that, when the opportunity to reexamine *Smith* presents itself, we may consider recent scholarship raising serious questions about the *Smith* rule's consonance with the original understanding and purpose of the Free Exercise Clause. See Mc-

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against a free-exercise challenge a law denying the right to vote or hold public office to members of organizations that practice or encourage polygamy. Exactly what the two cases took from the Free Exercise Clause's origins is unclear. The cases are open to the reading that the Clause sometimes protects religious conduct from enforcement of generally applicable laws, see *supra*, at 11–12 (citing cases); that the Clause never protects religious conduct from the enforcement of generally applicable laws, see *Smith*, 494 U. S., at 879; or that the Clause does not protect religious conduct at all, see *Yoder*, 406 U. S., at 247 (Douglas, J., dissenting in part); McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1488, and n. 404 (1990).

[7]See *Engel* v. *Vitale*, 370 U. S. 421, 425–436 (1962); *McGowan* v. *Maryland*, 366 U. S. 420, 431–443 (1961); *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 8–16 (1947); see also *Lee* v. *Weisman*, 505 U. S. ___, ___-___ (1992) (SOUTER, J., concurring); *Wallace* v. *Jaffree*, 472 U. S. 38, 91–107 (1985) (REHNQUIST, J., dissenting); *School Dist. of Abington* v. *Schempp*, 374 U. S. 203, 232–239 (1963) (Brennan, J., concurring); *McGowan* v. *Maryland*, *supra*, at 459–495 (Frankfurter, J., concurring); *Everson*, *supra*, at 31–43 (Rutledge, J., dissenting).

Connell, The Origins and Historical Understanding of Free Exercise of Religion, *supra*; Durham, Religious Liberty and the Call of Conscience, 42 DePaul L. Rev. 71, 79–85 (1992); see also Office of Legal Policy, U. S. Dept. of Justice, Report to the Attorney General, Religious Liberty under the Free Exercise Clause 38–42 (1986) (predating *Smith*). There appears to be a strong argument from the Clause's development in the First Congress, from its origins in the post-Revolution state constitutions and pre-Revolution colonial charters, and from the philosophy of rights to which the Framers adhered, that the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God, unless those activities threatened the rights of others or the serious needs of the State. If, as this scholarship suggests, the Free Exercise Clause's original "purpose [was] to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority," *School Dist. of Abington* v. *Schempp*, 374 U. S., at 223, then there would be powerful reason to interpret the Clause to accord with its natural reading, as applying to all laws prohibiting religious exercise in fact, not just those aimed at its prohibition, and to hold the neutrality needed to implement such a purpose to be the substantive neutrality of our pre-*Smith* cases, not the formal neutrality sufficient for constitutionality under *Smith*.[8]

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[8]The Court today observes that "historical instances of religious persecution and intolerance . . . gave concern to those who drafted the Free Exercise Clause." *Ante*, at 10 (internal quotation marks and citations omitted). That is no doubt true, and of course it supports the proposition for which it was summoned, that the Free Exercise Clause forbids religious persecution. But the Court's remark merits this observation: The fact that the Framers were concerned about victims of religious persecution by

The scholarship on the original understanding of the Free Exercise Clause is, to be sure, not uniform. See, *e.g.*, Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992); Bradley, Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism, 20 Hofstra L. Rev. 245 (1991). And there are differences of opinion as to the weight appropriately accorded original meaning. But whether or not one considers the original designs of the Clause binding, the interpretive significance of those designs surely ranks in the hierarchy of issues to be explored in resolving the tension inherent in free-exercise law as it stands today.

III

The extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the individual to government and to

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no means demonstrates that the Framers intended the Free Exercise Clause to forbid only persecution, the inference the *Smith* rule requires. On the contrary, the eradication of persecution would mean precious little to a member of a formerly persecuted sect who was nevertheless prevented from practicing his religion by the enforcement of "neutral, generally applicable" laws. If what drove the Framers was a desire to protect an activity they deemed special, and if "the [Framers] were well aware of potential conflicts between religious conviction and social duties," A. Adams & C. Emmerich, A Nation Dedicated to Religious Liberty 61 (1990), they may well have hoped to bar not only prohibitions of religious exercise fueled by the hostility of the majority, but prohibitions flowing from the indifference or ignorance of the majority as well.

God. "Neutral, generally applicable" laws, drafted as they are from the perspective of the nonadherent, have the unavoidable potential of putting the believer to a choice between God and government. Our cases now present competing answers to the question when government, while pursuing secular ends, may compel disobedience to what one believes religion commands. The case before us is rightly decided without resolving the existing tension, which remains for another day when it may be squarely faced.