REVISITING *BOB JONES UNIVERSITY* IN AN ERA OF EXPANSIVE FREE EXERCISE

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INTRODUCTION

In the 1983 landmark case, *Bob Jones University v. United States*,[1] the Supreme Court ruled that an organization could not be tax-exempt under Code Section 501(c)(3) if the organization's activities are contrary to a fundamental public policy. At the time, Bob Jones University prohibited interracial dating.[2] The Court ruled that racial discrimination in education, even when based on sincerely held religious beliefs, clearly violated a fundamental public policy. As a result, the University lost its tax-exempt status under Code Section 501(c)(3). In the original *Bob Jones University* opinion, the Supreme Court dismissed the University's Free Exercise[3] claims out of hand, devoting just a single paragraph to the issue. The University's free speech argument didn't even warrant that treatment; it was denied in a footnote.

In 2017, Professor (*then Dean*) David Brennan and I wrote a chapter in the book *Feminist Judgments: Rewritten Tax Opinions,*[4] about *Bob Jones*

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[1] *Bob Jones Univ. v. United States*, 461 U.S. 574, 577 (1983).

[2] 461 U.S. at 579–83. The opinion also addressed a companion case, Goldsboro Christian Schools, a private religious elementary school with a racially discriminatory admissions policy. *Id.* at 583.

[3] "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof*…" U.S. Const. Am. I (emphasis added).

[4] Chapter 7 – *Bob Jones University v. United States,*" *in Feminist Judgments: Rewritten Tax Opinions*, Bridget J. Crawford and Anthony Infanti, eds., Cambridge University Press (2017). Then Dean Brennan, writing as Justice Brennan, concurred with the original *Bob Jones University* opinion, and I wrote the Commentary section following Justice Brennan's concurrence. Significant parts of Part II of this Article are based on that Commentary.

University. In the Commentary, I wrote

> To date, *Bob Jones University* has not been invoked to restrict gender-based discrimination (in education or otherwise) after the *Virginia Military Institute* case in 1996, which held that the male-only admission policy of VMI violated the Equal Protection Clause. This issue has arisen again in the public dialogue after the Supreme Court decided *Obergefell v. Hodges* last year, with many commentators wondering whether *Bob Jones University* could be invoked to deny tax-exempt status to churches or other Section 501(c)(3) organizations that discriminate on the basis of sexual orientation.

Immediately post-*Obergefell*, many commentators were hopeful about the expansion of *Bob Jones University*'s public policy doctrine to other forms of discrimination, such as sex, gender, or sexual orientation.

But much has passed since that time.

Given the current Court's stance on Free Exercise, it is now doubtful that we will see an expansion of *Bob Jones University's* public policy doctrine to other forms of discrimination. In fact, one wonders whether this Court would have decided *Bob Jones University* differently given their current Free Exercise jurisprudence.

This Article will review the original *Bob Jones University* case, including both the opinion itself as well as the controversy surrounding the case itself. Part II will try to place the Court's summary dismissal of the University's Free Exercise claim in the context of First Amendment jurisprudence as it existed at the time of the opinion. From there, the Article will examine how this Court's approach has fundamentally altered this jurisprudence. Finally, we consider whether this new approach would cause this Court to decide *Bob Jones University* differently, and what that portends for expansion of the public policy requirement to sex, gender, and sexual orientation discrimination.

I. *BOB JONES UNIVERSITY V. UNITED STATES*

A. The Background to Bob Jones University.

Bob Jones University was (and still is)[5] a private religious school in South Carolina.[6] Prior to 1971, the University had a racially discriminatory admissions policy; from 1971 to 1975, it admitted married African-Americans that were not part of an interracial marriage.[7] Starting in 1975, the University amended its admissions policy, but instead instituted a ban on interracial dating or marriage as well as supporting the belief in interracial dating or marriage.[8] The University justified its discriminatory policies on the basis of its religious beliefs, which the Supreme Court assumed were sincerely held.[9]

In 1954, the Supreme Court ended formal racial segregation in public schools in *Brown v. Board of Education.*[10] In response, some segregationist families formed private schools, which were in many cases overtly discriminatory in their admissions and administrative policies. The IRS recognized these private schools' tax-exempt status under Section 501(c)(3) in spite of their discriminatory practices.[11]

That all changed in 1970, when the District Court for the District of Columbia enjoined the IRS from granting tax-exempt status to discriminatory private schools in Mississippi in *Green v. Kennedy*.[12] Thereafter, the IRS finally announced that it would no longer recognize racially discriminatory private schools as tax-exempt.[13] Revenue Ruling 71-447 stated that "all charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary

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[5] *See generally* https://www.bju.edu/. The University's tax-exempt status was reinstated in 2017. Nathaniel Cary, *Bob Jones University regains nonprofit status 17 years after it dropped discriminatory policy*, GREENVILLEONLINE.COM (Updated Feb. 21, 2017) found athttps://www.greenvilleonline.com/story/news/education/2017/02/16/bju-regains-nonprofit-status-17-years-after-dropped-discriminatory-policy/98009170/.

[6] *Bob Jones*, 461 U.S. at 579–83.

[7] *Id*., at 580.

[8] *Id.* at 580–81.

[9] *Id.* at 602 n.28.

[10] 347 U.S. 483 (1954).

[11] *Bob Jones*, 461 U.S. at 577.

[12] *Green v. Kennedy,* 309 F. Supp. 1127, *appeal dism'd sub nom. Cannon v. Green,* 398 U.S. 956 (1970).

[13] Rev. Rul. 71-447, 1971-2 C.B. 230 (1971).

to public policy."[14] Treasury reasoned that the tax-exempt purposes enumerated in Code Section 501(c)(3) incorporated the common law notion of charity, which historically excluded purposes that were contrary to public policy even if they were not illegal.[15]

In the wake of *Green v. Kennedy* and Revenue Ruling 71-447, the IRS revisited the tax-exempt status of discriminatory private schools. After years of administrative proceedings, in 1975 the IRS revoked the Bob Jones University's exemption retroactively to December 1, 1970 (the day after the University was informed of the change in policy).[16]

Intense congressional debate and litigation followed.[17] While the IRS first examined the university's exemption during the Nixon administration,[18] the Ford and Carter administrations continued to defend the revocation throughout the late 1970s.[19]

On the eve of oral argument, however, the Reagan administration balked. Two days before the government's Supreme Court brief was due, the Reagan administration decided not to pursue the case.[20] Simultaneously, however, the Court of Appeals for the D.C. Circuit in *Wright v. Regan*[21] enjoined the IRS from recognizing the tax-exempt status of racially discriminatory schools. While *Wright* forced the Reagan administration to litigate *Bob Jones* further, the Supreme Court appointed William Coleman as a friend of the court at the last minute, to argue in defense of the Fourth Circuit's opinion upholding the denial of tax-exempt status on public policy grounds.[22]

B. Bob Jones University: The Original Opinion

In *Bob Jones University v. United States*, the Supreme Court struggled

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[14] *Id.*

[15] *Id.,* (*citing* RESTATEMENT (SECOND) OF TRUSTS § 377 cmt. c (AM. LAW. INST. 1959).

[16] *Id.* at 581–82.

[17] *See* Olatunde Johnson, *The Story of* Bob Jones University v. United States*: Race, Religion, and Congress' Extraordinary Acquiescence*, *in* STATUTORY INTERPRETATION STORIES 127–63 (William N. Eskridge, Jr. et al. eds., 2011), at 133–38.

[18] Johnson, *supra* note **Error! Bookmark not defined.**6, at 141.

[19] *Id*. at 141–42. The Supreme Court decided an Anti-Injunction Act issue before deciding the case on its merits. *See* Bob Jones Univ. v. Simon, 416 U.S. 725 (1974).

[20] Johnson, *supra* note **Error! Bookmark not defined.**6, at 144.

[21] *Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981).

[22] Johnson, *supra* note **Error! Bookmark not defined.**6, at 148.

to define "charitable" in the context of the tax-exempt status of racially discriminatory private schools. [23] The problem was, as set forth in Revenue Ruling 71-447, that neither Code Section 501(c)(3) nor its regulations explicitly contain a public policy limitation. The Court found that Congress understood the term "charitable" in its common law sense,[24] which meant that the public policy limitation was inherent in the statutory language.[25] Because exempt status confers a public benefit, an "institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred."[26]

Having found that Code Section 501(c)(3) inherently included a public policy limitation, the Court held that tax-exempt status should be denied when there is "*no doubt* that the activity involved is contrary to a *fundamental* public policy."[27] Accordingly, the Court's test consisted of two separate elements: the public policy must be "fundamental;" and there must be "no doubt" that the policy is violated.

Under any test,[28] the Court would have found that racial discrimination in education violated a fundamental public policy: "[T]here can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice."[29] The Court asserts that the public policy against racial discrimination already existed;[30] the Court merely discerned its existence from the government actions taken between *Brown* in 1954 and *Bob Jones* in 1983. As evidence, the Court listed the legislative, executive, and judicial actions taken following *Brown* to demonstrate that segregation in education violated federal public policy. For judicial support, the Court cites an "unbroken line of cases following" *Brown*.[31] Legislatively, the opinion highlights the passage of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968 as indicative of a federal public policy against racial discrimination.[32] Finally, the Court describes various presidential actions—Republican and Democratic—to demonstrate the executive branch's stance

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[23] 461 U.S. 574 (1983).

[24] Congress held hearings but did not amend the statute. *Id.* at 599.

[25] *Id.* at 589.

[26] *Id.* at 592.

[27] *Id.* (emphasis added).

[28] Although hesitant, Justice Powell stated that "if any national policy is sufficiently fundamental … , it is the policy against racial discrimination in education." *Id.* at 607.

[29] *Id.* at 592.

[30] *Id.* at 592–94.

[31] *Id.* at 593.

[32] *Id.* at 594.

against racial discrimination, including Truman's and Kennedy's executive orders barring discrimination and Eisenhower's deployment of the National Guard to enforce desegregation orders.[33]

One of the University's defenses was that the… unconstitutionally burdened religion on the Free Exercise clause.[34] The Court acknowledged that the Constitution prohibits the regulation of religious beliefs.[35] Further, it stated that the Free Exercise clause offered "substantial protection for lawful conduct grounded in religious belief."[36] That being said, the Court noted that a burden on religion is not unconstitutional if it is "it is essential to accomplish an overriding governmental interest."[37] Some governmental interests, the Court noted, are "so compelling" as to justify a burden on religious liberties.[38] With regard to the loss of tax exemption, the Court stated that it would impact the operations of private schools but would not keep them from observing their religious beliefs.[39] The Court concluded that the governmental interest in ending racial discrimination

> substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest.[40]

C. The Public Policy Requirement After Bob Jones University

Bob Jones was met with vocal disdain from some quarters. Bob Jones Jr. stated, "We're in a bad fix when eight evil old men and one vain and foolish woman can speak a verdict on American liberties."[41] Despite the Court's view that racial discrimination in education clearly violated existing public policy, the issue remained controversial. . The litigation itself took over a decade, during which Congress hotly debated the issue. Therefore, the opinion promoted "deeply and widely held views of elementary

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[33] *Id.* at 594–95.
[34] *Id.*, at 603.
[35] *Bob Jones*, 461, U.S. at 603.
[36] *Bob Jones*, 461 U.S. at 603.
[37] *Id.*
[38] *Id*.
[39] *Bob Jones*, 461 U.S. at 603-4.
[40] *Bob Jones*, 461 U.S. at 604; the full text of the Court's discussion of Free Exercise is included at the end of this Article as Exhibit A.
[41] *Id.* at 127; *see also* JAMES J. FISHMAN ET AL., NONPROFIT ORGANIZATIONS 364 (5th ed. 2015).

justice"[42] that were, in actuality, not necessarily shared by all.

Despite its broad holding, the IRS,[43] the IRS has only used the public policy requirement in cases involving racial discrimination or criminal behavior.[44] It has never been used to deny tax-exemption on the basis of sex or gender, even though various Court rulings have found those to be protected classes in some circumstances.[45] After *Obergefell v. Hodges*,[46] some commentators wondered whether *Bob Jones*'s public policy doctrine could be applied to sexual orientation discrimination.[47]

III. FREE EXERCISE, THEN AND NOW

The history of the jurisprudence around the Free Exercise clause is voluminous. My attempt to summarize it here in order to place *Bob Jones University* in context will no doubt not do that jurisprudence justice. This review should show, however, that the current Roberts Court is leaning toward a return to something like the *Sherbert v. Verner* test that was in existence at the time of *Bob Jones University* – with the potential for a critical difference in application.

A. Free Exercise at the Time of the Bob Jones Opinion

The Supreme Court's discussion of the Free Exercise clause at the end of its opinion constitutes about four paragraphs, including citations.[48] Citing *Sherbert v. Verner,*[49] and *Thomas v. Review Board of Indiana,*[50] ,[51]

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[42] *Bob Jones*, 461 U.S. at 592.

[43] Justice Powell expressed concern that "there … [is] little to circumscribe the … almost unfettered power of the Commissioner ." *Id.* at 611.

[44] *See, e.g.*, Rev. Rul. 75-384, 1975-2 C.B. 204 (civil disobedience); I.R.S. Priv. Ltr. Rul. 2013-23-025 (March 14, 2013) (support of polygamy).

[45] *United States v. Virginia*, 518 U.S. 515 (1996)(an Equal Protection Clause violation in some all-male admission policies); *see also Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) (single-sex admissions at The Citadel).

[46] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *see also United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down a portion of the federal Defense of Marriage Act).

[47] Laurie Goodstein & Adam Liptak, *Schools Fear Gay Marriage Ruling Could End Tax Exemptions*, N.Y. TIMES (June 24, 2015), http://www.nytimes.com/2015/06/25/us/schools-fear-impact-of-gay-marriage-ruling-on-tax-status.html?_r=0.

[48] *Bob Jones*, 461 U.S. at 602-604.

[49] *Sherbert v. Verner,* 374 U. S. 398, 374 U. S. 402 (1963).

[50] *Thomas v. Review Bd of Indiana Employment Security Div.,* 450 U. S. 707 (1981).

[51]The Court also cited *Wisconsin v. Yoder,* 406 U. S. 205, 406 U. S. 219 (1972) ("compulsory education past the eighth grade for members of the Amish community was a violation of the Free Exercise clause under the Sherbert test.").

the Court clearly noted that the Free Exercise Clause set a high bar in scrutinizing state burdens on individual religious practice.

In *Sherbert*, the plaintiff, a Seventh Day Adventist, refused to work on Saturday in violation of her religious beliefs.[52] As a result, she was fired and disqualified from receiving workers' compensation.[53] In setting up the standard of review for her claim of a violation of the Free Exercise clause, the Court noted

> It must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . .[54]

According to the test set forth in *Sherbert*, the Court is first required to determine whether the government has caused an individual to have to choose to forego a religious practice by imposing a penalty or withholding a benefit.[55] If this burden is established, then the government can still justify the burden on religious practice if it can demonstrate that both (1) the state has a compelling state interest,[56] and (2) no alternative remedy can achieve the state's interest.[57]

In discussing whether the denial of employment benefits constituted a burden on religious practice, the Court cited to the earlier case of *Speiser v. Randall,*[58] involving the denial of a tax exemption for individuals who were unwilling to take a loyalty oath. In analyzing *Speiser*, the Court noted that "conditions upon public benefits cannot be sustained if they so operate,

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[52] Sherbert, 374 U.S. at ___; see also, *Hobbie v. Unemplt. Appeals Comm'n* 480 U.S. 136 (1987) (Seventh Day Adventist unconstitutionally denied unemployment compensation in Florida for refusing to work on Saturdays.)

[53] *Id*. At ___.

[54] *Sherbe*rt, 374 U.S. at 403.

[55] *Sherbet*, 374 U.S. at 404 ("The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.")

[56] *Sherbert*, 374 U.S. at 406.

[57] *Sherbert*, 374 U.S. at 407 ("For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.")

[58] *Speiser v. Randall,* 357 U. S. 513.

whatever their purpose, a to inhibit or deter the exercise of First Amendment freedoms."[59] The *Sherbert* Court characterized the *Speiser* holding as "the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights."[60] While the *Speiser* case involved First Amendment freedom of expression rights, the Court analogized to Free Exercise religious rights, noting that "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[61] After finding a clear burden on religious practice, it was not difficult for the Court to find that the government's interest in uniform unemployment compensation laws and in combatting fraud were not sufficiently compelling to justify the religious burden.[62]

Similarly, in *Thomas v. Review Bd*., a Jehovah's Witness quit his job after the factory in which he worked closed, and he was transferred to another factory that made munitions. When he quit, he asserted that helping to create weapons was against his religious beliefs.[63] The state of Indiana unemployment compensation board subsequently denied him unemployment compensation.[64]

The Court reiterated 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."[65] As in Sherbert, the Court found a burden on religion in that the factory worker was given a choice to either "modify his behavior and to violate his beliefs"[66] or to be fired and disqualified from workers' compensation. The Court did not believe that the state's interest in preventing individuals from leaving for personal reasons and having to inquire about religious beliefs were sufficient to warrant the burden. The Cour found that there was no evidence that there were a significant number of individuals asserting

[59] *Sherbert*, 374 U.S. at 405-6, *citing Speiser*.
[60] *Sherbert*, 374 U.S. at 405.
[61] *Sherbe*rt, 374 U.S. at 406.
[62] *Sherbert*, 374 U.S. at 409.
[63] Thomas, 450 U.S. at 709-710.
[64] Thomas, 450 U.S. at 712.
[65] Thomas at 717, citing Yoder.
[66] Thomas at 718.

religious beliefs as a reason for termination as to cause disruption in the unemployment compensation system.[67]

That being said, that bar set by the *Sherbe*t test was, at least at the time, not insurmountable.

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B. Free Exercise Post-Bob Jones.

A significant change in Free Exercise jurisprudence came in 1990 in *Employment Division v. Smith*[68], in which the Supreme Court altered the strict scrutiny regime that it set up in *Sherbert* for neutral laws of general applicability. In *Smith*, the respondents were fired from a private drug rehabilitation center over their use of peyote, a controlled substance, as part of a Native American religious observance.[69] They were thereafter denied unemployment compensation.[70]

At first glance, *Smith* appears to follow in the direct path of *Sherbert* and *Thomas*. Smith involved an individual religious practice that set up a choice between religious observance and state unemployment benefits. Similarly, the state proffered the financial integrity of the unemployment compensation fund as its compelling state interest.[71] One significant difference, however, is that in the case of Smith the conduct was criminal[72] – peyote, as a controlled substance under the Federal Controlled Substances Act.[73] The state of Oregon had classified possession of controlled substance as a Class B felony[74] and there was no exception for religious use.[75]

In the years following *Thomas*, however, the Court had increasingly distinguished or did not apply the *Sherbert* test. As a result, it was not a

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[67] Thomas 718-719.

[68] *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872 (1990).

[69] *Smith* 494 U.S. at 874.

[70] *Smith*, 494 U.S. at 874.

[71] *Smith*, 494 U.S. at 875, *citing Sherbert* and *Thomas*.

[72] Smith, 494 U.S. at 876.

[73] *Smith*, 494 U.S. at 874, *citing* the Federal Controlled Substances Act, 21 U.S.C. §§ 811-812 (1982 ed. and Supp. V),

[74] *Smith,* 494 U.S. at 874, *citing* Ore. Rev. Stat. § 475.992(4)(a).

[75] The Court had originally remanded Smith to the Oregon Supreme Court for a determination as to whether there was an exception for religious use. The Oregon Supreme Court found no such exception, and the case returned to the Court for decision. Smith, 494 U.S. at 876 citing 07 Or. 68, 72-73, 763 P.2d 146, 148 (1988).

complete surprise when the Smith Court declined to apply the *Sherbert* test outside of the unemployment compensation context. In distinguishing the unemployment compensation cases, Justice Scalia note that the unemployment compensation system required the government to make independent determinations on a employee-by-employee basis, which required a showing of good cause for the termination of employment. Such exemptions "improperly invite the government to decide that secular motivations are more important than religious ones."[76] *Smith* was careful to note that "the government may not…punish the expression of religious doctrines it believes to be false."[77]

In *Smith*, however, the criminal laws did not set up a system that required individualized consideration of religious versus secular motives. The Oregon Supreme Court had specifically confirmed to the Supreme Court that there were no religious exemptions from the application of the controlled substance laws. The *Smith* Court noted that First Amendment "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes or (prescribes) conduct that his religion prescribes (or proscribes).'"[78] As a result, *Smith* takes the position that something akin to rational review, rather than strict scrutiny, was applicable to neutral laws of general applicability.[79]

In taking the position that the *Sherbert* test did not apply, the Court noted that there had been other circumstances in which they purport to have not applied the test.[80] For our purposes, it is important to note that many of the cases involved tax-related issues. In *Bowen v. Roy*,[81] the plaintiffs objected to obtaining a social security number for their child on religious grounds; the Court did not apply the Sherbert test and found the social security requirement constitutional. Similarly, the Court found the requirement to collect social security taxes did not violate the First Amendment rights of Amish employers in *United States v. Lee*.[82] In 1989, the Court held that the required payment of income taxes did not burden religion in the *Hernandez* case, which discussed the qualification of the charitable deduction to certain Scientology payments.[83]

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[76] *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*

[77] Smith 494, U.S. at 877.

[78] *Smith* at 167, *citing, inter alia, United States v. Lee*, 455 U.S. 252, 264 n.3 (1982).

[79] *Smith* at ___.

[80] *But see*, *Smith*, 494 U.S. at 900 (O'Connor, J., concurring in result)("Moreover, we have not "rejected" or "declined to apply" the compelling interest test in our recent cases.")

[81] *Bowen v. Roy,* 476 U. S. 693, 699-701. (1986),

[82] *United States v. Lee,* 455 U.S. at 455 U. S. 258-261

[83] *Hernandez v. Commissioner,* 490 U. S. 680 (1989)

Smith quote: "It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that, if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax, but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. *Compare Citizen Publishing Co. v. United States,* 394 U. S. 131, 139 (1969) (upholding application of antitrust laws to press), *with Grosjean v. American Press Co.,* 297 U. S. 233, 297 U. S. 250-251 (1936) (striking down license tax applied only to newspapers with weekly circulation above a specified level); *see generally Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U. S. 575, 460 U. S. 581 (1983).[84]

While arguing against a strict application of strict scrutiny laws, the Court warned

> precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid,* as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind … [including] laws providing for equality of opportunity for the races, *see, e.g., Bob Jones University. United States*… [85]

In response to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (known as RFRA).[86] RFRA Section 3 specifically codifies the Sherbert test, as follows:

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[84] *Smith*, 494 U.S. at 878.

[85] *Smith*, 494 U.S. at 888-89.

[86] Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4. RFRA Section 2(a)(4) specifically points to the *Employment Division v. Smith* and seeks to restore the *Sherbert* test in Section 2(b)(1). In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held that RFRA does not apply to state actions, only federal government actions.

> SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.
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> (a) IN GENERAL.—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) EXCEPTION.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering compelling governmental interest.

As a result, any federal government action must comply with the provisions of RFRA, and by extension, the Sherbert test.

C. Free Exercise and the current Court

"Under the Roberts Court, there has not been a single case where claims of free exercise of religion have been rejected. The court has consistently defended the rights of an individual or minority to impose its religious views on a majority."[87] Cases such as *Bremerton v. Kennedy* (allowing a public school football coach to pray on field after football games) and *Carson v. Maken*[88] *(*allowing tuition assistance at religious schools) support this general observation.

For purposes of thinking about the future of *Bob Jones University*, however, the case of *Fulton v. City of Philadelphia*[89] appears to be the most troublesome. The City of Philadelphia contracted with private foster care agencies to locate suitable families to foster children in need.[90] One of the agencies that it historically had contracted with was Catholic Social Services (CSS).[91] Pursuant to Catholic teaching, CSS would only approve

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[87]David Shultz, *The Roberts Court takes aim at the Establishment Clause*, TheHill.com, (May 31, 2023) found at https://thehill.com/opinion/judiciary/4026628-the-roberts-court-takes-aim-at-the-establishment-clause/

[88] *Carson v. Maken*, 596 U.S. ____ (2022)(Allowing state tuition assistance to be used at religious private schools.)

[89] *Fulton v. City of Philadelphia,* 593 U.S. ____ (2021) (pagination to slip opinion).

[90] *Fulton*, at 2.

[91] *Fulton*, at 2.

married, heterosexual couples as foster families; it would not certify unmarried couples regardless of orientation or same sex married couples. It would, however, certify gay or lesbian individuals as single foster parents.[92] After a news investigation in 2018, the Philadelphia Commission on Human Relations examined the CSS foster care arrangement. The Commission determined that CSS' refusal to certify same sex couples violated a non-discrimination provision in the foster care contract as well as a city non-discrimination ordinance.[93] As a result, the city terminated its dealings with CSS, and CSS and some foster families that worked through the agency brought suit.[94]

The District Court[95] (and the Third Circuit upon review),[96] citing *Smith*, found the contractual non-discrimination clause and the city's non-discrimination ordinance to be neutral and generally applicable laws.[97] This finding triggered *Smith*'s more lenient, rational basis review for Free Exercise purposes. Under this standard, the District Court found that the City's non-discrimination requirements furthered the state's interest and did not unduly burden CSS' religious beliefs.

Because the case did not involve action by the federal government, RFRA did not apply; thus, the preliminary question was to determine if the rational basis standard in *Smith* applied or if the more stringent rules of *Sherbert* would require strict scrutiny.

Chief Justice Roberts begins the opinion by noting that the requirement that CSS certify same sex married couples was clearly a burden on religion, citing Thomas for the proposition that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[98] With that condition met, the question became whether the non-discrimination provisions were neutral and generally applicable, thereby subjecting the provisions only to "good cause" review under *Smith*.

The Chief Justice started with a reference to its opinion in *Masterpiece Cakeshop*, the recent Supreme Court case that allowed private businesses to

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[92] *Fulton,* at 2.
[93] *Fulton*, at 3.
[94] *Fulton*, at 3.
[95] Fulton DC cite here
[96] Fulton Third Circuit cite here
[97] *Fulton*, at 4.
[98] *Fulton*, at 5 *citing Thomas*, 450 U.S. at 714.

discriminate in the provision of services based on religious belief under the Free Exercise clause: "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."[99]

"Smith later explained that the unemployment benefits law in Sherbert was not generally applicable because the "good cause" standard permitted the government to grant exemptions based on the circumstances underlying each application. Smith went on to hold that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." [100]

Importantly, both Justices Gorsuch and Alito, in concurrence, came out in favor of simply overruling *Smith.* The Chief Justice avoided addressing because he found that *Smith* simply didn't apply in this case; therefore, it was unnecessary to overrule it.[101] Justices Barrett, Kavanaugh and Breyer, in concurrence, were loathe to overrule *Smith* without setting forth what would take its place.[102] In her concurrence, Barrett worried, "But I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime…."[103]

CONCLUSION: BOB JONES UNIVERSITY, REVISITED

At the time, the Supreme Court summarily dismissed Bob Jones University's Free Exercise claim. While the Court did cite *Sherbert* for the strict scrutiny standard of review that was in effect at the time, it had no issue finding a compelling state interest in ending racial discrimination in education. In fact, it does so with the following discussion, in its entirety:

> As discussed … *supra,* the Government has a fundamental, overriding interest in eradicating racial discrimination in education -- discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history.

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[99] Fulton, at 5, citing *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Comm'n*, 584 U. S. _ (2018) (slip op., at 16–17); *see also* 303 Creative LLC v. Elenis, 600 U.S. ___ (2023)(allowing discrimination against gay couples by a private business as a matter of Free Speech).

[100] *Fulton*, at 6, *citing Smith* at 884.

[101] *Fulton*, at 5, *citing* the Alito and Gorsuch concurrences.

[102] John Inazu, *First Amendment Scrutiny: Aligning First Amendment Doctrine Around Government Interests*.

[103] Fulton, at Barrett J Concurrence at ___ .

The question is, given the state of Free Exercise jurisprudence today, would the result be the same? General outline of conclusion:

1. Does Smith apply? Current jurisprudence seems to say that the current court would not treat this as neutral and generally applicable but rather as a law with exceptions ala Sherbert, even though Smith has a bunch of references to tax and social security as example of general applicability.

2. That assumes that Smith survives – at least two Justices are okay with it going away, and three more might be convinced if they are satisfied with what comes after.

3. And anyway RFRA – it's a federal government action, and so it feels like the codification of Sherbert would apply here in any event.

4. So its back to Sherbert and compelling state interest – isn't that what the court in Bob Jones did?

5. Yes it was the standard but the manner in which the current Court looks at compelling state interest seems somewhat harsher than before and they would not accept the conclusory statement of the Court in Bob Jones.

6. They've telegraphed that religious viewpoints need to be respected even if you disagree. See the language of Smith that was repeated in Fulton, and the citation to Masterpiece Cake. Seems clear based on this that there will be no expansion to sex/gender/orientation.

7. But would they go as far as racial discrimination? Again, the language in Fulton seems to say that they don't care if the belief is abhorrent if its sincerely held. They also don't see racial discrimination as a third rail – see the Harvard affirmative action case, and the Voting Rights Act cases. They also don't have a problem overturning precedent – see Roe, Chevron.

8. In reality, I think they take the Reagan admin tack and say the public policy requirement isn't statutory, so they punt on the Free Exercise but get the same result without having to be apologists for racial discrimination. But where does that lead? Congress is going in the other direction with the Hamas/Palestine university free speech tests.

Exhibit A

The Court's Entire Free Exercise Discussion in *Bob Jones University*

III

Petitioners contend that, even if the Commissioner's policy is valid as to nonreligious private schools, that policy cannot constitutionally be applied to schools that engage in racial discrimination on the basis of sincerely held religious beliefs.[104] [Footnote 28]

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As to such schools, it is argued that the IRS construction of § 170 and § 501(c)(3) violates their free exercise rights under the Religion Clauses of the First Amendment. This contention presents claims not heretofore considered by this Court in precisely this context.

This Court has long held the Free Exercise Clause of the First Amendment to be an absolute prohibition against governmental regulation of religious beliefs, *Wisconsin v. Yoder,* 406 U. S. 205, 406 U. S. 219 (1972); *Sherbert v. Verner,* 374 U. S. 398, 374 U. S. 402 (1963); *Cantwell v. Connecticut,* 310 U. S. 296, 310 U. S. 303 (1940). As interpreted by this Court, moreover, the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief, *see Wisconsin v. Yoder, supra,* at 406 U. S. 220; *Thomas v. Review Board of Indiana Employment Security Div.,* 450 U. S. 707 (1981); *Sherbert v. Verner, supra,* at 374 U. S. 402-403. However,

> "[n]ot all burdens on religion are unconstitutional. . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."

United States v. Lee, 455 U. S. 252, 455 U. S. 257-258 (1982). *See, e.g., McDaniel v. Paty,* 435 U. S. 618, 435 U. S. 628, and n. 8 (1978); *Wisconsin v. Yoder, supra,* at 406 U. S. 215; *Gillette v. United States,* 401 U. S. 437 (1971).

On occasion, this Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct. In *Prince v. Massachusetts,* 321 U. S. 158 (1944), for example, the Court held that neutrally cast child labor laws prohibiting sale of printed materials on public streets could be applied to prohibit children from dispensing religious literature. The Court found no constitutional infirmity in "excluding [Jehovah's Witness children] from doing there what no other children may do." *Id.* at 321 U. S. 171. *See also Reynolds v. United States,* 98 U. S. 145 (1879); *United States v. Lee, supra; Gillette v. United States, supra.* Denial of tax benefits will inevitably have a substantial

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impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.

The governmental interest at stake here is compelling. As discussed in 461 U. S. *supra,* the Government has a fundamental, overriding interest in eradicating racial discrimination in education [Footnote 29] -- discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, *see United States v. Lee, supra,* at 455 U. S. 259-260; and no "less restrictive means," *see Thomas v. Review Board of Indiana Employment Security Div., supra,* at 450 U. S. 718, are available to achieve the governmental interest. [Footnote 30]

Footnotes

FN 28

The District Court found, on the basis of a full evidentiary record, that the challenged practices of petitioner Bob Jones University were based on a genuine belief that the Bible forbids interracial dating and marriage. 468 F. Supp. at 894. We assume, as did the District Court, that the same is true with respect to petitioner Goldsboro Christian Schools. *See* 436 F. Supp. at 1317.

FN 29

We deal here only with religious schools -- not with churches or other purely religious institutions; here, the governmental interest is in denying public support to racial discrimination in education. As noted earlier, racially discriminatory schools "exer[t] a pervasive influence on the entire educational process," outweighing any public benefit that they might otherwise provide, Norwood v. Harrison, 413 U. S. 455, 413 U. S. 469 (1973). See generally Simon, 495-496.

FN 30

Bob Jones University also contends that denial of tax exemption violates the Establishment Clause by preferring religions whose tenets do not require racial discrimination over those which believe racial intermixing is forbidden. It is well settled that neither a state nor the Federal Government may pass laws which "prefer one religion over another," *Everson v. Board of Education,* 330 U. S. 1, 330 U. S. 15 (1947), but "[i]t is equally true" that a regulation does not violate the Establishment Clause merely because it "happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland,* 366 U. S. 420, 366 U. S. 442 (1961). *See Harris v. McRae,* 448 U. S. 297, 448 U. S. 319-320 (1980). The IRS policy at issue here is founded on a "neutral, secular basis," *Gillette v. United States,* 401 U. S. 437, 401 U. S. 452 (1971), and does not violate the Establishment Clause. *See generally* U.S. Comm'n on Civil Rights, Discriminatory Religious Schools and Tax Exempt Status 10-17 (1982). In addition, as the Court of Appeals noted,

"the uniform application of the rule to all religiously operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief."

639 F.2d 147, 155 (CA4 1980) (emphasis in original). *Cf. NLRB v. Catholic Bishop of Chicago,* 440 U. S. 490 (1979). *But see generally* Note, 90 Yale L.J. 350 (1980).