

MODULE 8

Free Exercise, Part I

Reynolds · Sherbert · Yoder · Smith · Hosanna-Tabor · Our Lady of Guadalupe

First Amendment Law · Fall 2026 · Professor Jorge R. Roig

The religion clauses, mapped

My board's top line. Two clauses, and a doctrine between them.

FREE EXERCISE

- Belief and conduct.
- Modules 8 and 8A.

MINISTERIAL EXCEPTION

- Rests on both clauses.
- Module 8.

ESTABLISHMENT

- No official religion.
- Modules 9 and 9A.

Two commands in one clause — and they pull in opposite directions.

Belief: absolutely protected

What the government may never do — and the two things it may.

Burden a belief

Never

Cantwell, 1940.

Compel a belief

Never

Barnette, 1943.

Judge a belief's truth

Never — only sincerity

Ballard, 1944.

Decide doctrine

Never — neutral principles only

Jones v. Wolf, 1979.

Cantwell: freedom to believe is absolute; freedom to act “cannot be.”

Reynolds: conduct can be regulated

1879. The first free exercise case, and the sentence Smith revived.

THE CLAIM

- Plural marriage was a duty.
- So the law could not apply.

THE COURT

- Belief is free; practice is not.
- Conviction affirmed.

“... in effect to permit every citizen to become a law unto himself.”

Conduct: three eras

My 2022 board: before Smith, Smith, after Smith.

1963–1990

Before Smith: strict scrutiny, “or something like it.”

1990

Smith: neutral, general laws get rational basis.

2021–2025

After Smith: not overruled — but narrowed.

Four struck down: Sherbert, Yoder, Lukumi, Trinity Lutheran.

Sherbert v. Verner, 1963

No fine, no jail — just no benefits. Still a burden.

THE CHOICE

- Keep the Sabbath and lose benefits.
- Or work, and break the Sabbath.

THE COURT, 7-2

- A penalty on free exercise.
- Only a compelling interest will do.

Benefits conditioned on violating “a cardinal principle of her religious faith.”

Wisconsin v. Yoder, 1972

The Amish, and two more years of school.

THE BURDEN

- High school pulls children away.
- Amish formation is undermined.

THE STATE'S INTEREST

- Citizenship and self-reliance.
- Two more years add little.

“Only those interests of the highest order” can outweigh free exercise.

Employment Division v. Smith, 1990

The peyote case. The rule that still governs.

THE LAW

- Peyote banned for everyone.
- No religious exception.

THE COURT, 5-4 ON THE RULE

- Neutral, general law: no exemption.
- Rational basis.

Accommodation is for the political process — “an unavoidable consequence of democratic government.”

What Smith left standing

Three ways a law still gets strict scrutiny.

TARGETED

- Aimed at religious practice.
- Lukumi; Masterpiece.

EXEMPTIONS FOR OTHERS

- Case-by-case, or secular carve-outs.
- Sherbert; Fulton.

A YODER BURDEN

- Parents' religious upbringing.
- Yoder; Mahmoud.

Otherwise: Smith, and rational basis.

Fulton v. Philadelphia, 2021

The Court was asked to overrule Smith. It declined.

THE POLICY

- No agency may refuse families.
- An official may grant exceptions.

THE COURT, 9-0

- Discretion to exempt: not general.
- Strict scrutiny. Smith untouched.

“But we need not revisit that decision here.”

Mahmoud v. Taylor, 2025

Yoder, revived — without asking about neutrality.

THE POLICY

- Storybooks in the curriculum.
- No opt-outs for parents.

THE COURT, 6-3

- A burden of the Yoder kind.
- Strict scrutiny, neutral or not.

Smith's rule does not reach a burden “of the same character as that in Yoder.”

Hosanna-Tabor, 2012

A church may choose its ministers.

THE CLAIM

- A “called” teacher, fired.
- Retaliation under the ADA.

THE COURT, 9-0

- Both clauses bar the claim.
- Smith does not control.

“A church's selection of its ministers is unlike an individual's ingestion of peyote.”

Our Lady of Guadalupe, 2020

Who is a minister? Look at the job, not the title.

HOSANNA-TABOR

- Four circumstances weighed.
- Title, training, role, function.

OUR LADY, 7-2

- Function is what matters.
- Religion teachers are covered.

“What matters, at bottom, is what an employee does.”

Which standard applies?

Sort the law, and the case nearly decides itself.

A drug ban for everyone	Rational basis	Smith
A ban on “ritual” killing only	Strict scrutiny	Lukumi
Benefits unless “good cause”	Strict scrutiny	Sherbert
A rule waivable by an official	Strict scrutiny	Fulton
No opt-outs from a curriculum	Strict scrutiny	Mahmoud
A church fires its religion teacher	No claim	Hosanna-Tabor

Current case: **Mirabelli v. Bonta**

March 2026. Mahmoud, extended on the emergency docket.

THE POLICIES

- No telling parents without consent.
- Names and pronouns as the child asks.

THE COURT

- Parents: likely to succeed.
- Mahmoud's strict scrutiny applies.

Yoder: attendance. Mahmoud: curriculum. Mirabelli: what the school tells parents. Where does it stop?

For discussion: five claims

A hypothetical. Every case in this module is in play.

THE CLAIMS

- No benefits for refusing Saturday work.
- Gathering limits that spare stores.
- A unit with no opt-out.
- A chaplain and a billing officer fired.
- A religion of one, and a vaccine rule.

QUESTIONS FOR DISCUSSION

1. Sherbert or Smith?
2. Generally applicable?
3. A Yoder burden?
4. Who is a minister?
5. Sincerity or truth?

Module 8 on one slide

One line per rule.

THE LINE, ONE RULE AT A TIME

- Belief: absolute; sincerity, not truth (Cantwell; Ballard).
- Neutral, general laws: rational basis (Smith).
- Targeted, or exemptions for others: strict (Lukumi; Fulton).
- Yoder burdens: strict, neutral or not (Mahmoud).
- Ministers: the church decides (Hosanna-Tabor; Our Lady).

Next — Module 8A, asynchronous: Free Exercise, Part II.

Next: Module 8A (asynchronous) — Free Exercise, Part II; then Module 9 — The Establishment Clause, Part I.