In a Nutshell: The Free Exercise Clause

Lawmakers, staff, and lawyers alike are familiar with the saga of *Employment Division v. Smith*—the infamous 1990 Supreme Court decision authored by Justice Antonin Scalia that held that if a law applied to everyone (was "generally applicable") and was not intended to target religion or a religious practice ("neutral"), no exemptions needed to be made if that law restricted a person's religious practice.

The practical result of this decision was, at times, to dramatically lower the standard to which a court would hold the government when a law restricted someone's free exercise of religion. Rather than hold the government to the highest standard of accountability, known as strict scrutiny, the *Smith* decision gave government officials a free pass to ignore religious belief in some situations. The decision left many religious minorities—and others with unpopular beliefs or without the means to successfully lobby elected officials—without any ability to protect their religious exercise.

The decision in *Smith* prompted a legislative response to restore the strict scrutiny standard when a diverse and unprecedented coalition of Members, scholars, and religious and advocacy groups came together to pass the **Religious Freedom Restoration Act** (RFRA). This statute passed Congress with overwhelming bipartisan support and was signed into law by President Clinton in 1993.

But in the three decades since *Smith* was decided, the Supreme Court's Free Exercise analysis has undergone significant development, explaining numerous broad categories of laws and government actions that are not governed by *Smith* and instead require courts to apply the high bar of strict scrutiny review. Some examples:

Category	Explanation	Authority
All Federal Law	Thanks to RFRA, religious claimants don't have to rely on *Smith*'s rule under federal law. Claims are evaluated by a court on a case-by-case, fact-specific basis. Studies have shown that this statute has benefitted religious minorities the most.	42 U.S.C. § 2000bb
Land Use	If a federal, state, or local government substantially burdens religious land use, then strict scrutiny applies because of the Religious Land Use and Institutionalized Persons Act (RLUIPA).	42 U.S.C. §§ 2000cc, et seq.
Institutionalized Persons	Similarly, RLUIPA requires courts to apply strict scrutiny when a federal, state, or local government places a substantial burden on the religious practice of institutionalized persons.	42 U.S.C. §§ 2000cc, et seq.
Church Autonomy	For more than 150 years, federal courts have repeatedly recognized the principle that religious groups must be free from government interference when they determine their religious beliefs, establish their religious practices, and order their own internal affairs. Otherwise, the government would unconstitutionally entangle itself with religion and infringe religious groups' rights to make their internal religious decisions. The ministerial exception is one component of church autonomy, and it protects the religious group's choice of leaders.	*Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC (2012)* *Our Lady of Guadalupe Sch. v. Morrissey-Berru (2020)*

Category	Explanation	Authority
Forced Participation in Ceremonies	Is a student required to stand and salute the American flag? No. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."	*West Virginia Board of Education v. Barnette (1943)*
Parental Right to Control the Religious Education of Children	Parents have the right to direct the religious education of their children, including by sending them to religious schools.	*Wisconsin v. Yoder (1972)* *Pierce v. Society of Sisters (1925)*
Hostility Towards Religion	Religious institutions are protected from being discriminated against simply for being religious. If the government restricts a religious practice on the grounds that it is religious, then the law is not neutral.	*Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n (2018)*
Individualized or Discretionary Exemptions	If the government imposes a restriction but exempts some people from that burden or retains the discretion to give exemptions, the law is not generally applicable and the denial of a religious accommodation is subject to strict scrutiny.	*Fulton v. City of Philadelphia (2021)*
Treating Religious Activity Unequally	When a law is written in a way that specifically burdens a religious practice or when other comparable activities are treated more favorably, then it is not generally applicable.	*Church of the Lukumi v. City of Hialeah (1993)* *Tandon v. Newsom (2021)*
Participating in Government-Created Benefits	The government cannot exclude religious individuals and groups from generally available benefits. Denying a benefit to people or religious organizations because of religion is, according to the Supreme Court, "odious to the Constitution."	*Trinity Lutheran Church of Columbia, Inc. v. Comer (2017)* *Espinoza v. Montana Dep't of Revenue (2020)*