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BY ITS FRUITS SHALL YE KNOW; *AXSON-FLYNN V. JOHNSON:* MORE ROTTED FRUIT FROM *EMPLOYMENT DIVISION V. SMITH*

BRADLEY C. JOHNSON*

> Vice is a monster of so frightful mien,
> As, to be hated, needs but to be seen;
> Yet seen too oft, familiar with her face,
> We first endure, then pity, then embrace.[1]

INTRODUCTION

When the French aristocrat Alexis de Tocqueville came to the United States in 1831, he declared that there was "no country in the world where . . . religion retains a greater influence over the souls of men."[2] Although religion's influence in America has undoubtedly declined since de Tocqueville's visit, the United States can still rightly be characterized as a religious nation. A substantial majority of Americans believe in God,[3] attend a church,[4] and feel that religion is an important part of their lives.[5]

It is not surprising then, that when *Employment Division v. Smith*[6] was decided, the shockwaves of the decision traveled quickly throughout religious communities. To many, the Supreme Court's decision in *Smith* gutted the First Amendment's Free Exercise Clause of any meaningful protection.[7] Immediately, a broad-based coalition of religious and civil liberties

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1. ALEXANDER POPE, THE POEMS OF ALEXANDER POPE 523 ll. 216–20 (John Butt ed., 1963).

2. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 314 (Phillips Bradley ed., Vintage Books 1945) (1835).

3. 95% of Americans state that they believe in God. George H. Gallup, Jr., *Gallup Index of Leading Religious Indicators*, GALLUP ORG., Feb. 12, 2002, *at* http://www.gallup.com/poll/content?ci=5317.

4. 59% of Americans attend church at least once a month, with 44% attending almost every week. Only 14% of Americans reportedly never attend church. Frank Newport, *Update: Americans and Religion*, GALLUP ORG., Dec. 23, 2004, *at* http://www.gallup.com/poll/content/default.aspx?ci=14446.

5. 83% of Americans report that religion plays an important part of their life, with 59% stating it plays a very important part, and 24% stating it plays a fairly important part. *Id.*

6. 494 U.S. 872 (1990).

7. *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 n.15 (1992) (citing numerous law review articles and notes that have condemned *Smith* for its effect on the free exercise area).

groups from both the left and right political spectrums joined a petition for the Court to rehear the matter,[8] which the Court subsequently denied.[9] Congress also responded to *Smith* by passing the Religious Freedom Restoration Act ("RFRA"), which sought to restore the pre-*Smith* free exercise standard.[10] Both houses of Congress overwhelmingly passed RFRA and President Clinton signed it into law; however, the Supreme Court subsequently struck down RFRA as unconstitutional when applied to the states.[11]

Although most legal scholars agreed that the Supreme Court's method of reaching the result in *Smith* was unsound, legal scholars fiercely debated whether *Smith* was an appropriate way to interpret the Free Exercise Clause.[12] Criticisms of *Smith* abounded in the aftermath of the decision,[13] but as time went on and the Supreme Court reaffirmed the holding of *Smith*,[14] legal commentary shifted its focus from criticizing *Smith* to analyzing the best way to salvage what little free exercise protection was left after *Smith*.[15]

Fifteen years have now passed since *Smith* changed the free exercise landscape. This Note is not another attempt to criticize the *Smith* opinion's reasoning or subterfuge in reaching its result but is an attempt to criticize *Smith* by looking at one adverse consequence that has resulted from the decision. That consequence confirms that the most devastating aspect of the *Smith* decision was not its tortured twisting of precedent but its surrender-

8. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990).

9. Employment Div. v. Smith, 496 U.S. 913 (1990).

10. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488. The RFRA mandated that the government could not substantially burden a person's exercise of religion unless it was in furtherance of a compelling governmental interest and it was the least restrictive means of furthering that interest. 42 U.S.C. §§ 2000bb–2000bb-4 (2000).

11. The Court found that the Act exceeded Congress' section 5 authority of the 14th Amendment. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

12. *See* Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 80 n.9 (2000) (listing representative examples of articles criticizing *Smith* and articles defending *Smith's* result).

13. *E.g.*, James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991).

14. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993) (reaffirming *Smith*).

15. *See* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 BYU L. REV. 275 (examining emerging trend of state courts to use state constitutions to protect free exercise); Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925 (2000) (arguing that the religious exemption doctrine is no longer tenable and scholars should construct a more defensible doctrine that would take into account the diminished place of religion in society); Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Use After* Boerne, 68 GEO. WASH. L. REV. 861 (2000) (examining Congress' latest attempt to ameliorate the effects of *Smith*).

ing the primary protection of free exercise rights to the political process. Although early critics of *Smith* could only postulate as to what consequences might flow from the decision,[16] fifteen years later, one concrete adverse consequence from *Smith* has now been revealed.

That adverse consequence is seen in the Tenth Circuit case *Axson-Flynn v. Johnson*, in which a drama student at a state university refused to say certain swear words because of her religious beliefs.[17] The issue before the Tenth Circuit was whether the Free Exercise Clause after *Smith* could protect the plaintiff from having to choose between leaving the university program on the one hand, and staying, but being compelled to swear on the other.[18] Although the Tenth Circuit avoided having to affirm the district court's holding that the university could require Axson-Flynn to swear, the Tenth Circuit's opinion was clear that the *Smith* Free Exercise Clause would allow for such a result.[19]

Axson-Flynn provides a nice vehicle to critique the *Smith* decision because it affirms the initial criticisms of *Smith* that the decision left little protection, if any, for free exercise rights.[20] *Axson-Flynn* shows that *Smith* has resulted in the adverse consequence that a state may constitutionally compel[21] an individual to swear in violation of his or her[22] religious beliefs.

16. *See* Kenneth Marin, Note, Employment Division v. Smith: *The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1474 (1991) (looking at implications of the *Smith* decision for religious individuals).

17. Axson-Flynn v. Johnson, 356 F.3d 1277, 1280 (10th Cir. 2004).

18. *Id.* at 1293.

19. *Id.* at 1294.

20. *See supra* note 13.

21. Some people may object to the Note's characterization that a state could ever "compel" someone to swear. *Webster's College Dictionary* defines the word "compel" as "to force or drive, esp. to a course of action." RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 276 (1995). This definition is broad enough to include other kinds of force besides physical force alone, such as withholding of benefits or punishment. In Axson-Flynn's case, if she did not agree to swear, she would not be allowed to complete the program. If she wished to receive the state benefit of the University's acting program, she had little choice but to swear. In this way she was compelled to swear. Of course, Axson-Flynn could, and in fact did, drop out of the program, and thus avoid swearing. Because Axson-Flynn had the choice to drop out of the program, it is a tougher case to say that by denying Axson-Flynn the opportunity to be part of the drama program, the state was compelling her to swear. However, clearly a resource denial can sometimes be considered a compelling force if the denial involves an important state resource. For example, if a state denies a needy individual his welfare benefits if he does not do certain things, one can validly say that the state is driving him to a certain course of action. To Axson-Flynn, denying her the opportunity to be a part of the University's program unless she agreed to swear was no small denial. Axson-Flynn wanted to be a career actress and the University of Utah had a well-respected acting program that would significantly help her obtain her desired career. Moreover, because the program was subsidized through the state, the program was more affordable as well as close to home. When Axson-Flynn chose not to swear and leave the program, she had to drop out of the prominent program, lose the money she had paid and the time she had invested, and join another program that was more inconvenient and less-respected. These burdens were by no means trivial, and, taken together,

Of course, the result that a state may compel someone to swear is only a critique of *Smith* if two things are true: (1) the consequence of compelling someone to swear against her religious beliefs is undesirable, and (2) *Smith* actually allows that consequence to happen. This Note will focus primarily on showing that the second assertion is true but will briefly address the first assertion, that allowing compelled swearing is undesirable, now.

Admittedly, it is not obvious to everyone that allowing a state to compel someone to swear constitutes much of a critique against *Smith*, and some individuals might not find the result of compelled swearing patently undesirable. In today's society, where swearing has become commonplace and uneventful, many might not be bothered by requiring someone to swear. One might think that if swearing is harmless, then requiring someone to swear in a drama class is not something society needs to be overly concerned with. A candid person may in fact be tempted to tell the plaintiff in *Axson-Flynn* to step out of her sheltered world and join the grown ups.

Paradoxically, this type of thinking reveals this Note's criticism of *Smith* and why *Axson-Flynn* is a good case to make that criticism: *Smith's* Free Exercise Clause standard primarily protects rights that are consistent with societal norms and majoritarian interests, and constitutional provisions must give more than that negligible protection. Contrary to *Smith's* underpinnings, the Constitution and its provisions should primarily protect those rights that go against societal norms, not with them.[23] It is axiomatic that a pure democracy is rule by the majority, and in many cases, tyranny against the minority. One of the primary purposes of choosing a constitutional democracy over a pure democracy is to identify fundamental rights on which the majority cannot infringe. It is important to have a mechanism in place, such as a constitution, that will protect fundamental rights even when it is not popular to do so.

In the United States' Constitution, one of these fundamental rights is free exercise of religion. America has chosen to protect free exercise of religion, even when it is not popular to do so. Thus, even if society does not

constituted great pressure that one may say could constitute a compelling force. Through the denial of such an important state benefit, one can argue that this could qualify as driving someone to take a certain course of action, and thus it would not be a misnomer to say a state could compel someone to swear through these means.

22. To avoid the redundant use of "his or her," this Note will alternate between using "his" or "her" rather than both as in this sentence. Unless the context indicates otherwise, both "his" or "her" should be construed as including either gender.

23. Indeed, if society cared only about ensuring that societal norms and majoritarian interests are protected, there would be little need for a constitution. As a republican form of government, the people's representatives have the incentive to pass laws that conform to the majority's wishes. Otherwise, they face getting voted out of office. Thus, in theory, most laws that are passed reflect societal norms and trends.

currently frown on swearing,[24] society still has an interest in ensuring that the Constitution fulfills its role of protecting rights that are not popularly supported. *Axson-Flynn* is not only a good case because it shows that *Smith* primarily protects rights consistent with societal norms, but it is also a good case because society's view against swearing has drastically changed throughout America's history.[25] The result that a state may compel an individual to swear is striking precisely because for most of America's history, swearing has been against the law.

Society's trend has gone from prohibiting swearing to protecting it, and *Smith* has opened the door for the final step to be taken: actually compelling someone to do what once was prohibited. This result is striking because it shows the need for the Constitution to protect minority rights against changing societal norms. Constitutional protections for the minority should not be subject to the changing whims of society, and *Axson-Flynn* is a biting critique of *Smith* because it shows that is exactly what *Smith* has done with the Free Exercise Clause.[26]

As previously mentioned, however, this Note must not only show that the consequence of allowing a state to compel someone to swear is undesirable, it must also show that *Smith* actually allows for this consequence to occur. As discussed below, the Tenth Circuit avoided holding in *Axson-Flynn* that the plaintiff would be compelled to swear; hence, no court has yet compelled someone to swear under *Smith*. However, this Note's thesis

24. However, it is not necessarily clear that swearing is still not a taboo. As commonplace as it has become, there are still many people who continue to find it distasteful, offensive, and even harmful, and not always for religious reasons. *See* MARLENE CARPENTER, THE LINK BETWEEN LANGUAGE AND CONSCIOUSNESS: A PRACTICAL PHILOSOPHY (1988) (arguing that swearing negatively affects a persons' attitude and well-being); JAMES V. O'CONNOR, CUSS CONTROL: THE COMPLETE BOOK ON HOW TO CURB YOUR CURSING (2000) (arguing that cussing has become too commonplace and offers suggestions to individuals to help them control their swearing).

25. Admittedly, some may object to the assertion that if the Free Exercise Clause is simply enforced, then the government will not be able to compel someone to swear. Clearly, the Free Exercise Clause text says nothing about protection from compelled swearing, and one might argue that enforcing the Free Exercise Clause does not inevitably lead to that result. However, deciding what a minimal enforcement of the Free Exercise Clause would and would not protect is outside the scope of this Note. This Note focuses primarily on showing that someone likely could not be compelled to swear under the Free Exercise Clause standard prior to *Smith*, but that *Smith* made this result doctrinally possible.

26. If one still finds it difficult to see why society should be concerned about compelling someone to swear, consider that Axson-Flynn also refused to perform any nudity. Axson-Flynn v. Johnson, 356 F.3d 1277, 1281 (10th Cir. 2004). Unlike swearing, compelling someone to perform nude clearly goes against society's mores, and one would be hard pressed to find many people who would be comfortable with requiring someone to involuntarily undress, even among those who wish to protect the right to perform nude. For those who would find this Note's critique of *Smith* more convincing if Axson-Flynn had been compelled to perform nude, simply insert nudity wherever the Note discusses swearing, because the analysis would not change. Under *Smith*, if someone can be compelled to swear, they can be compelled to undress. Both with swearing and with performing nudity, the only viable protection found in *Smith's* Free Exercise Clause against compelling an individual to do either action is the compassion of government leaders and entities. *See* Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

is that unless *Smith* is reinterpreted or overruled, no doctrinal way exists to prevent the result that a state may constitutionally compel someone to swear in violation of his religious beliefs. Accordingly, a large part of this Note will be devoted to examining whether there are any principled constitutional arguments that *Smith* does not need to be modified or overruled to prevent the result of compelled swearing.

This Note is divided into four parts. Part I will introduce *Axson-Flynn v. Johnson*, discuss the facts of the case, and discuss how the lower courts applied *Smith*. Part II will briefly review how the prohibition against swearing stems from a deep religious tradition and how the United States has gone from prohibiting swearing to protecting it. Part III will examine the pre-*Smith* free exercise standard and how *Smith* changed that standard. Part IV will defend the Note's thesis that *Smith* allows for state compulsion of swearing by rebutting five arguments that contend that even under *Smith*, a court need not find that a state may constitutionally compel an individual to swear. The Note concludes that in order for state compulsion of swearing to be considered unconstitutional, *Smith* must be overruled or reinterpreted.

I. *AXSON-FLYNN V. JOHNSON*

Christina Axson-Flynn ("Axson-Flynn") grew up wanting to be an actress.[27] Raised by two professional actors,[28] Axson-Flynn was surrounded by the theater world and discovered early that she had a love for acting.[29] In 1998, Axson-Flynn applied to the University of Utah's Actor Training Program ("ATP"), a highly respected acting program.[30] During Axson-Flynn's audition, the program directors asked her if there was anything she felt uncomfortable doing.[31] Axson-Flynn responded that she would not remove her clothing, "take the name of God in vain, take the name of Christ in vain or say the four-letter expletive beginning with the letter F."[32] Following a discussion where the directors attempted to persuade Axson-Flynn that it was appropriate at times to say those words as an actress, Axson-Flynn stated that she "would rather not be admitted to [the] program than use these words."[33]

27. Brief for Appellant at 5, *Axson-Flynn*, 356 F.3d 1277 (No. 01–4176).

28. Both of Axson-Flynn's parents have had successful acting careers, appearing in productions ranging from television's *Touched by an Angel* to the movie *Footloose*. *Id.* at 4–5.

29. *Id.* at 5.

30. *Id.* at 5–6.

31. *Axson-Flynn*, 356 F.3d at 1281.

32. *Id.* (internal quotation marks omitted).

33. *Id.* (internal quotation marks omitted).

Axson-Flynn's refusal to perform any nude scenes or swear[34] stemmed from her religious beliefs as a practicing member of The Church of Jesus Christ of Latter-Day Saints ("Mormon" or "LDS").[35] Axson-Flynn believed it was against the Ten Commandments to use the name of deity in a profane way.[36] She also found it religiously offensive to use the "F" word because it vulgarized what she as a Mormon considered to be a sacred act.[37]

Axson-Flynn was subsequently admitted to the ATP and began classes that fall.[38] Because nothing else was said about her refusal to perform nudity or say certain words, Axson-Flynn assumed that her acceptance into the ATP was not conditioned on her willingness to do those things.[39] During the semester, Axson-Flynn was assigned to perform a monologue called *Friday*, which included two profane references to deity.[40] Without notifying her instructor, Axson-Flynn deleted the offending words but performed the rest of the monologue as written.[41] She received an "A" grade on the assignment.[42]

Later in the semester, Axson-Flynn was assigned to play the part of an unmarried girl who recently had an abortion in a scene from a play titled *Quadrangle*.[43] The scene required Axson-Flynn to say the "F" word as well as profane the name of deity multiple times.[44] Although Axson-Flynn did not have any concerns with the role itself, she informed the instructor that she objected to using the words in the scene.[45] The instructor responded by inquiring why she had been willing to say the words in the monologue *Friday* but not in *Quadrangle*.[46] When the instructor learned that Axson-

34. Axson-Flynn objected only to saying the "F" word and the name of deity. She was not opposed to saying other words that might be considered swearing, such as "shit" or "damn." *Id.* at 1281 n.2.

35. Members of The Church of Jesus Christ of Latter-Day Saints are often popularly referred to as "Mormons" because of their belief in a book they hold to be scripture, titled *The Book of Mormon: Another Testament of Jesus Christ.*

36. Axson-Flynn v. Johnson, 151 F. Supp. 2d 1326, 1328 (D. Utah 2001), *rev'd*, 356 F.3d 1277 (10th Cir. 2004).

37. *Id.* For a general view of how Mormons view intercourse as a sacred act, see Jeffrey R. Holland's talk entitled *Of Souls, Symbols, and Sacraments*, *in* JEFFREY R. HOLLAND & PATRICIA T. HOLLAND, ON EARTH AS IT IS IN HEAVEN 182 (1989), *talk available at* http://speeches.byu.edu/htmlfiles/holland88.html.

38. *Axson-Flynn*, 356 F.3d at 1281.

39. Brief for Appellant at 7, *Axson-Flynn*, 356 F.3d 1277 (No. 01-4176).

40. *Axson-Flynn*, 356 F.3d at 1281.

41. *Id.*

42. *Id.*

43. *Id.* at 1282.

44. *Id.*

45. *Id.*

46. *Id.*

Flynn had omitted the words from the *Friday* monologue, she became angry and told Axson-Flynn that she would have to "get over" her language concerns and that she could "still be a good Mormon and say these words."[47] Axson-Flynn asked whether she could do another scene instead, but the instructor refused, stating that she must perform the *Quadrangle*[48] scene as written or take a zero on the assignment.[49] Axson-Flynn responded that she would take a zero on this assignment or any other assignment that would require her to say those words.[50]

The instructor made an effort to persuade Axson-Flynn to change her mind and gave her the weekend to think it over, but when Axson-Flynn again confirmed after the weekend that she would rather receive a zero on the assignment than say the words, the instructor relented and allowed her to omit the words from the scene.[51] Axson-Flynn again received a high grade for her performance.[52] For the rest of the semester, Axson-Flynn was allowed to omit the specific words that she had refused to say from her assignments.[53]

At the end of the semester, Axson-Flynn attended her semester review and was informed by two of her instructors and the head of the ATP that her refusal to swear was "unacceptable behavior."[54] They encouraged her to talk with other Mormon girls who were good Mormons, but who did not have a problem saying the words.[55] Axson-Flynn's review ended with an ultimatum from the instructors: "You can choose to continue in the program if you modify your values. If you don't, you can leave. That's your choice."[56]

47. *Id.* (internal quotation marks omitted).

48. Ironically, when Jon Jory, the author of *Quadrangle*, later learned about the case, she indicated that she would have had no problem allowing Axson-Flynn to omit the words from the script. In a telephone interview with the *Salt Lake City Weekly*, Jory explained,

> [i]f it's true that she couldn't get a grade because she wouldn't say those words, that would strike me as being tasteless. If someone had an ethical or moral reason for why they wouldn't want to do the scene, I'd assign them another scene or let them sit it out.

Ben Fulton, *Profane Charges, Profound Questions*, SALT LAKE CITY WKLY., Feb. 3, 2000, at 10.

49. *Axson-Flynn*, 356 F.3d at 1282.

50. *Id.* Axson-Flynn, however, had no objections to other people in the class using the words, and in fact, her acting partner in the *Quadrangle* scene used the words without her objection. Axson-Flynn's only objection was to having to use the words herself; she did not object to the class curriculum itself. Brief for Appellant at 9, *Axson-Flynn*, 356 F.3d 1277 (No. 01–4176).

51. *Axson-Flynn*, 356 F.3d at 1282.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* (internal quotation marks omitted).

Axson-Flynn appealed to the coordinator of the ATP program, but he stood by the instructors' decision.[57] Following the start of Axson-Flynn's second semester, the instructor continued to pressure Axson-Flynn to use the offensive language.[58] Axson-Flynn finally went to the director of the ATP one more time and clarified with him that the ATP's stance was that Axson-Flynn either needed to use the language or leave the program.[59] The director confirmed that this was correct, and Axson-Flynn left the program.[60]

Axson-Flynn subsequently sued the various individuals from the University of Utah's ATP for violating her First Amendment free exercise rights.[61] The district court granted the defendants' motion for summary judgment, finding that Axson-Flynn's free exercise rights had not been violated.[62] The district court cited *Employment Division v. Smith*, which held that neutral rules of general applicability do not violate the First Amendment's Free Exercise Clause, even if they burden a particular religious practice or belief.[63] Finding that the instructor's policy of prohibiting script changes was neutral and generally applicable, the district court held that the instructors and leaders of the ATP did not violate Axson-Flynn's free exercise rights.[64]

On appeal, however, the Tenth Circuit Court of Appeals reversed the district court, finding that summary judgment was inappropriate.[65] The Tenth Circuit held that there was a genuine issue of material fact as to whether the ATP's requirements were actually neutral or whether they were a pretext for discriminating against Axson-Flynn's religious beliefs.[66] The Tenth Circuit also found that there was a genuine issue of material fact as to whether Axson-Flynn qualified for the *Smith's* individualized-exemption exception.[67] *Smith* held that when the government gives individual exemptions from a general requirement, the government cannot

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1282–83.

61. *Id.* at 1283. Axson-Flynn also sued for violation of her free speech rights but was unsuccessful with that claim as well. Axson-Flynn v. Johnson, 151 F. Supp. 2d 1326, 1328 (D. Utah 2001), *rev'd*, 356 F.3d 1277 (10th Cir. 2004).

62. *Axson-Flynn*, 151 F. Supp. 2d at 1342.

63. *Id.* at 1330–31.

64. *Id.* at 1331, 1334.

65. *Axson-Flynn*, 356 F.3d at 1301.

66. *Id.* at 1294.

67. *Id.* at 1299.

refuse to extend those exemptions to cases of religious hardship without showing a compelling state interest.[68]

The Tenth Circuit emphasized that while Axson-Flynn was in the ATP, a Jewish student was allowed to miss certain assignments because of Jewish holidays, despite the fact that the assignments could not be made up.[69] The Jewish student was not penalized in any way for missing these assignments.[70] Thus, the Tenth Circuit held that there was an issue of material fact as to whether the individualized-exemption exception from *Smith* should have been applied to Axson-Flynn's case.[71] The Tenth Circuit reversed the district court and remanded the case for further proceedings to determine whether the ATP's policy was actually neutral and whether the individualized-exemption exception applied.[72] However, the Tenth Circuit opinion made it clear that if the ATP's policy was actually neutral and generally applicable, the Free Exercise Clause would not prohibit the University from requiring Axson-Flynn to use the religiously offensive words. Before further action was taken at the district court level, however, Axson-Flynn and the University of Utah reached a settlement,[73] and the case was dropped.

II. SWEARING AS PROHIBITED BEHAVIOR IN SOCIETY

A. *The Prohibition Against Swearing in Religious Society*

Many of the major world religions have a rich tradition of prohibitions against swearing, particularly two of the world's great religions, Judaism and Christianity. A religious prohibition against swearing begins at least with the first monotheistic religion: Judaism. It is found in the third commandment of the Decalogue, "[t]hou shalt not take the name of the Lord thy God in vain; for the Lord will not hold him guiltless that taketh his name in vain."[74] Not only is profaning God's name prohibited in Judaism,

68. Employment Div. v. Smith, 494 U.S. 872, 884 (1990).

69. *Axson-Flynn*, 356 F.3d at 1298.

70. *Id.*

71. *Id.* at 1299.

72. *Id.* at 1301.

73. The settlement required the University of Utah to appoint a committee to create a policy allowing students to request a reasonable accommodation based on sincerely held religious beliefs. The policy would also include an appeals process for students whose requests are denied. In addition to the policy, the University of Utah reimbursed Axson-Flynn for her attorneys' fees, tuition, and fees. The school also offered her an invitation to rejoin the ATP, which Axson-Flynn declined. Angie Welling, *U., Axson-Flynn Settle Civil Rights Suit*, DESERET MORNING NEWS, July 15, 2004, at A1.

74. *Exodus* 20:7 (King James).

but so is using sexually profane language. According to the Talmud, "[a]ll know for what purpose a bride enters the bridal canopy, yet against whomsoever who speaks obscenely [thereof], even if a sentence of seventy years' happiness had been sealed for him, it is reversed for evil."[75]

As an offshoot of Judaism, Christianity also embraces the Old Testament commandment against swearing, and the prohibition is renewed in the New Testament. The Apostle Paul instructed ancient Christians to "put off all these; anger, wrath, malice, blasphemy, filthy communication out of your mouth,"[76] while the Apostle James proclaimed that,

> the tongue can no man tame; it is an unruly evil, full of deadly poison. Therewith bless we God, even the Father; and therewith curse we men, which are made after the similitude of God. Out of the same mouth proceedeth blessing and cursing. My brethren, these things ought not so to be.[77]

As a subset of Christianity,[78] Axson-Flynn's LDS faith embraces both the Old and New Testament teachings on swearing and adds some of its own. Mormon leaders have consistently taught that to "strip profanity and vulgarity from one's vocabulary not only is commendable and a mark of refinement but it is also a commandment from God."[79] A recent booklet authorized by the present-day Mormon prophet and apostles counsels Mormon youth to:

> Always use the names of God and Jesus Christ with reverence and respect. Misusing their names is a sin. Profane, vulgar, or crude language or gestures, as well as jokes about immoral actions, are offensive to the Lord and to others. Foul language harms your spirit and degrades you. Do not let others influence you to use it.[80]

Thus, the prohibition against swearing and using sexual terms as profanity has a rich religious history, and the prohibition is still in force for millions of religious individuals across the world.

75. THE BABYLONIAN TALMUD 153 (Rabbi Dr I. Epstein ed., trans., 1938).

76. *Colossians* 3:8 (King James).

77. *James* 3:8–10 (King James).

78. Many people would deny that Mormonism is a Christian religion and would vehemently argue against categorizing it as a subset of Christianity. The argument that Mormonism is not a Christian church stems primarily from Mormonism's rejection of certain traditions recognized in other Christian churches, such as a closed cannon of scripture, the Trinitarian three-in-one concept, and a strict dichotomy of heaven and hell. The Mormon Church argues just as vehemently that it is a Christian church and points to the fact that it believes Jesus Christ of the New Testament was the Messiah, and that it accepts both the Old and New Testament as scripture. Obviously, these debates are not relevant to this Note and far exceed its scope. For an interesting discussion on the topic, see CRAIG L. BLOMBERG & STEPHEN E. ROBINSON, HOW WIDE THE DIVIDE: A MORMON & AN EVANGELICAL IN CONVERSATION (1997).

79. Grant Von Harrison, *Profanity*, *in* 3 ENCYCLOPEDIA OF MORMONISM 1158 (Daniel H. Ludlow ed., 1992).

80. THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, FOR THE STRENGTH OF YOUTH 22 (2001).

B. The Evolution from Prohibiting Swearing to Protecting Swearing

Early American law reflected the Judeo-Christian prohibition against swearing.[81] The fourteen states that had ratified the Constitution by 1792 also had made blasphemy, profanity, or both, statutory crimes.[82] Despite the fact that ten of those fourteen states had guarantees of free speech in their constitutions, none of them saw a conflict between prohibiting blasphemy and profanity and the guarantee of free speech.[83] In at least one case, even when swearing was not a statutory crime, one state supreme court held that it was a criminal offense at common law.[84] Although the penalty for swearing was not heavy, most people in early America agreed with New York Supreme Court Chief Justice James Kent's statement that "[n]othing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful."[85]

Until World War I, swearing continued to be seen as mostly disgraceful and characteristic of a vulgar person.[86] Things began to change during World War I and World War II, when among soldiers, swearing became a sign of manliness.[87] The American public was not willing to censure the soldiers' swearing too harshly, however, because it was thought that young men who were sent off to kill and be killed should be given latitude for the vice, and it struck many as unpatriotic to criticize them for it.[88] Notwithstanding the prevalence of swearing among soldiers, increased swearing was not limited to just soldiers, and wartime enthusiasm served as an excuse for members of the public to also violate society's swearing taboo.[89] As one editor reported, "'[o]ne can hardly talk of the Kaiser,' . . . without using the word 'damn.'"[90]

81. Some may argue there is a slight difference between swearing and profanity, but this Note will use them interchangeably. See entries for "swearword" and "profanity" in *Webster's College Dictionary*. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY, *supra* note 21, at 1077, 1349 (defining profanity as "irreverent or blasphemous speech" and a swearword as "a profane or obscene word").

82. *See* Paris Adult Theatre v. Slaton, 413 U.S. 49, 104 (1973) (Brennan, J., dissenting); Roth v. United States, 354 U.S. 476, 482 n.12 (1957) (listing various state statutes that prohibited profanity or blasphemy in 1792).

83. *See* Updegraph v. Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824) (holding that blasphemy and profanity are not protected under the free speech provision of the state constitution).

84. *People Against Ruggles*, 8 Johns. 290 (N.Y. Sup. Ct. 1811).

85. *Id.* at 293.

86. JOHN C. BURNHAM, BAD HABITS: DRINKING, SMOKING, TAKING DRUGS, GAMBLING, SEXUAL MISBEHAVIOR, AND SWEARING IN AMERICAN HISTORY 210, 216 (1993).

87. *Id.* at 216–23.

88. *Id.* at 216, 220.

89. *Id.* at 217.

90. *Id.* at 216.

Nevertheless, despite the loosening of society's swearing taboo, long after the Fourteenth Amendment incorporated the First Amendment and applied it against the states, swearing could still be punished without violating free speech. In 1942, the Supreme Court opined that there were "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."[91] Included among these limited classes of speech was profanity, which tended by "[its] very utterance [to] inflict injury or . . . incite an immediate breach of the peace."[92]

If the World Wars cracked opened the door to public swearing, the Vietnam and Watergate era unscrewed the hinges and removed the door. The Vietnam War was fertile ground for forces that advocated for unlimited expression rights and for anything that might spurn and shock those in authority.[93] Radical leaders and youth sought for more opportunity to level the playing field with authority figures and organizations. Bobby Seale of the Black Panthers typified many youths prone to profanity at that time when he shrugged off criticism of his swearing by responding that "the filthiest word I know is 'kill' and this is what other men have done to the Negro for years."[94] Times had drastically changed for society's swearing taboo, and for many people, "censorship" was a dirtier word than any swear word could ever be.

Finally in 1971, the changed atmosphere reached the Supreme Court, and the Court held for the first time that the First Amendment protected profanity from being prohibited outright.[95] The Court narrowed its prior decision in *Chaplinsky* by holding that profanity did not automatically breach the peace but required some additional threatening action to accompany it.[96] The Court later affirmed this holding and found that profanity used to rile up an antiwar crowd was not "fighting words" for purposes of the First Amendment and was thus protected speech.[97] Swearing's journey from prohibition to protection was complete.

91. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

92. *Id.* at 572.

93. Revelations that "prudish" leaders such as President Nixon, who once attacked an opponent for using a mild expletive, was himself excessively foulmouthed also added fuel to the fire. BURNHAM, *supra* note 86, at 225.

94. *Id.*

95. Cohen v. California, 403 U.S. 15, 20 (1971).

96. *Id.* at 26.

97. Hess v. Indiana, 414 U.S. 105, 108–09 (1973) (per curiam).

III. SWEARING AS A COMPELLED BEHAVIOR IN SOCIETY?

A. *The Doctrine of Free Exercise Prior to* Employment Division v. Smith

Like other constitutional doctrines, the Supreme Court's free exercise doctrine has not remained static and has developed incrementally over time. Prior to *Smith*, the Court's free exercise doctrine can be categorized into three different periods: (1) The *Reynolds* Years (1791–1890), (2) The *Cantwell* Years (1891–1959), and (3) the *Sherbert* Years (1960–1990).

1. The *Reynolds* Years: 1791–1890

The first hundred years of the free exercise debate were relatively quiet and almost silent until 1878, when the Supreme Court decided *Reynolds v. United States*.[98] In *Reynolds*, the Supreme Court upheld a federal law prohibiting plural marriage.[99] The defendant, a Mormon, argued that because it was his religious duty to practice plural marriage, he was protected by the Free Exercise Clause.[100] The Supreme Court rejected this argument by distinguishing between beliefs and conduct and stating that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[101] Finding that plural marriage "fetters the people in stationary despotism," and thus "was subversive of good order," the Court held that the Free Exercise Clause did not protect the defendant's practice of plural marriage.[102] Other free exercise cases that followed during this period dealt primarily with upholding various federal prohibitions and penalties on plural marriage.[103]

2. The *Cantwell* Years: 1891–1959

Beginning in the late nineteenth- and early twentieth-century, the Supreme Court began to hear more free exercise cases. Jehovah's Witnesses provided the impetus for most of the cases brought throughout this pe-

98. 98 U.S. 145 (1878).

99. *Id.* at 168.

100. *Id.* at 161–62.

101. *Id.* at 164.

102. *Id.* at 164–67.

103. *See* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (upholding the confiscation of church property for continuing to teach polygamy); Davis v. Beason, 133 U.S. 333 (1890) (holding that individuals can be required to take an oath that they do not belong to any order teaching polygamy before they are allowed to vote); Murphy v. Ramsey, 114 U.S. 15 (1885) (upholding Congressional Act excluding polygamists from voting or holding office).

riod.[104] In the most famous case of this period, *Cantwell v. Connecticut*, the Supreme Court incorporated the Free Exercise Clause into the Fourteenth Amendment and struck down a state law prohibiting solicitation of funds without a license.[105] The Jehovah's Witnesses violated the law by distributing religious literature and asking for donations without obtaining a license.[106] The Court once again recognized the distinction from *Reynolds* between the freedom to believe and the freedom to act and stated that although protection of belief was absolute, the protection of religious conduct was "subject to regulation for the protection of society."[107] However, because the Jehovah's Witnesses' actions of handing out religious literature did not breach the peace in any way, the Court held their conduct was protected by the Free Exercise Clause.[108]

Another seminal First Amendment case during this period was *West Virginia State Board of Education v. Barnette*, in which the Court struck down a law requiring all students in public schools to participate in saluting the flag.[109] Jehovah's Witnesses once again led the way by refusing to participate in the pledge because it violated their religious beliefs.[110] In lofty and exalting language, the Court penned that "[o]ne's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[111] The Court thus emphatically struck down the state law requiring the pledge as violating both free speech and free exercise rights.[112]

Not all of the cases during this period, however, were a triumph for free exercise rights,[113] and as with *Barnette*, many of the victories of religious freedom were grounded primarily under the rubric of free speech,

104. *See* Scott E. Thompson, Comment, *The Demise of Free Exercise: An Historical Analysis of Where We Are, and How We Got There*, 11 REGENT U. L. REV. 169, 176 & n.47 (1998) (listing the free exercise cases during this period and noting that the majority of them were municipal ordinances challenged by Jehovah's Witnesses).

105. 310 U.S. 296 (1940).

106. *Id.* at 301–02.

107. *Id.* at 303–04.

108. *Id.* at 311.

109. 319 U.S. 624, 642 (1943).

110. *Id.* at 629.

111. *Id.* at 638.

112. *Id.* at 642.

113. *See* Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding conviction of woman who violated child labor laws because she believed it was her child's religious duty to pass out religious literature); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934) (holding that state university may require courses in military training even if against religious beliefs).

rather than free exercise.[114] In the free exercise area, the Court's main thrust up through this period seemed to be that the Free Exercise Clause did protect religious conduct, but religious conduct could still be regulated to protect society and social order.[115] Additionally, more potent protection was available if the conduct could be cast as a free speech issue as well as a free exercise one.

3. The *Sherbert* Years: 1960–1990

The pinnacle of free exercise protection blossomed in 1963 when the Supreme Court decided *Sherbert v. Verner*.[116] In *Sherbert*, a Seventh-Day Adventist was fired from her work because she refused to work on Saturday, her religious Sabbath.[117] When the plaintiff was subsequently unable to find work because of her refusal to work Saturdays, she filed for unemployment compensation; however, the Employment Security Commission ("ESC") denied her benefits because it determined that her refusal to work Saturdays disqualified her for eligibility.[118]

In examining whether the ESC's actions violated the Free Exercise Clause, the Supreme Court laid out a two-part test that countless subsequent cases would echo as the free exercise standard: potential violations of the Free Exercise Clause depend on (1) whether the state's action burdens the individual's free exercise of his religion,[119] and (2) if so, whether the state has a compelling interest[120] that justifies the infringement.[121] In explicating the second prong, the Court declared that "no showing merely of a

114. *See* Lovell v. City of Griffin, 303 U.S. 444 (1938) (striking down ordinance prohibiting distribution of literature and handbills as a violation of free speech and freedom of the press).

115. *See* Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (state may "safeguard the peace, good order and comfort of the community" without violating free exercise).

116. 374 U.S. 398 (1963).

117. *Id.* at 399.

118. *Id.* at 399–401. The South Carolina Unemployment Compensation Act provided that, to be eligible for benefits, "a claimant must be able to work and . . . available to work; and, further, that a claimant is ineligible for benefits if . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer." *Id.* at 400–01 (internal quotation marks and citation omitted). The Employment Security Commission felt that by refusing to work Saturdays, the plaintiff was refusing available suitable work and thus was ineligible for benefits. *Id.*

119. *Id.* at 403. Although North Carolina's law was not directly prohibiting the plaintiff from exercising her religious rights, the Supreme Court found that the state was indirectly burdening her rights by withholding benefits from her. The Court held that this indirect burden was sufficient to trigger the protection of the First Amendment. *Id.* at 403–06.

120. *Id.* Subsequent Court decisions affirmed that the *Sherbert* case did indeed lay out a compelling interest standard for the free exercise area. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 140 (1987) ("We concluded [in *Sherbert*] that the State had imposed a burden . . . that had not been justified by a compelling state interest."); Thomas v. Rev. Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.").

121. *Sherbert*, 374 U.S. at 403.

rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[122] The Court found no such state interest present in *Sherbert*, and thus held the state's withholding of unemployment benefits unconstitutional.[123]

Another well-known case during this period is *Wisconsin v. Yoder*, in which the Supreme Court applied the compelling interest standard from *Sherbert* and struck down Wisconsin's compulsory school attendance law as it applied to the Amish.[124] The state of Wisconsin had argued that while religious beliefs were clearly free of state control, religious conduct was outside the protection of the First Amendment.[125] The Court stated that its precedent rejected the idea that the First Amendment did not protect religious conduct.[126] The Court also flatly recognized 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."[127] Thus, although the Court recognized that Wisconsin's interest in compulsory education after the eighth grade was highly important, that interest was not sufficient to overcome the Amish's free exercise rights.[128]

Although the Supreme Court continued to maintain that the compelling interest standard was the proper standard for the Free Exercise Clause, *Sherbert* and *Yoder* represent the apex of free exercise protection. Admittedly, the Supreme Court did not always follow its own lofty language in applying the compelling interest test;[129] more often than not, the Court applied varying forms of heightened scrutiny instead.[130] However, even in the Court's most watered down free exercise cases, the Court still subjected the state's actions to some form of heightened scrutiny; the Court's standard was never the toothless rationality review that would come from *Smith*.[131]

122. *Id.* at 406 (internal quotation marks, alterations, and citation omitted).

123. *Id.* at 407.

124. 406 U.S. 205, 234 (1972). The Amish refused to send their children to public schools after the 8th grade because they felt their children's religious beliefs and upbringing would be corrupted by public schools. *Id.* at 210–11.

125. *Id.* at 219.

126. *Id.* at 219–20.

127. *Id.* at 220.

128. *Id.* at 213.

129. *See* United States v. Lee, 455 U.S. 252, 263 (1982) (Stevens, J., concurring) (commenting that according to the Court's reasoning, the Court must be applying a different standard than that of a compelling interest one).

130. McConnell, *supra* note 8, at 1127.

131. *Id.* at 1128.

Thus, prior to *Smith*, an individual like Axson-Flynn would likely have been protected against compelled swearing unless it could be shown that her refusal was "subversive of good order"[132] or that the compulsion was necessary to protect society.[133] Because either argument would be difficult to make successfully, free exercise doctrine prior to *Smith* likely was sufficient to find state compulsion of swearing unconstitutional. If an individual would likely have been protected against swearing under the early *Reynolds* and *Cantwell* free exercise standards, surely a state could not have constitutionally compelled an individual to swear under *Sherbert's* compelling interest standard.

B. Employment Division v. Smith

Because most scholars and courts agreed prior to *Smith* that the Free Exercise Clause provided individuals some form of heightened scrutiny protection, if not always a compelling interest one, the *Smith* decision drastically changed the free exercise landscape. When *Smith* was argued before the Supreme Court, the legal world barely took notice. At the time, the free exercise area was fairly stable, and although some criticized the Court's free exercise doctrine, most legal scholars and lower courts agreed on what the test was, even if they disagreed on its application.[134] From the innocuous facts of *Smith*, very few in the legal world, if any, saw the dark clouds on the free exercise horizon and the storm that the Court was about to unleash.

The facts of *Smith* were straightforward. Two individuals were fired from their jobs because they had ingested peyote.[135] The plaintiffs were members of the Native American Church and had ingested the peyote as part of a religious ceremony.[136] When the plaintiffs filed for unemployment benefits from Oregon, they were denied because they had been discharged for "misconduct."[137] No one ever disputed that the defendant's religious beliefs were sincere or that they only ingested peyote for religious purposes.[138]

132. Reynolds v. United States, 98 U.S. 145, 164 (1878). As discussed previously in this Note, during the time when *Reynolds* was decided, swearing was actually against the law; therefore, there would have been virtually no possibility that the state could have compelled someone to swear. However, even if one extrapolates *Reynolds'* reasoning to today's society, one would be hard pressed to persuasively argue that someone's religious refusal to swear is subversive of good order.

133. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

134. McConnell, *supra* note 8, at 1109–10.

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

136. *Id.*

137. *Id.*

138. *Id.*

The plaintiffs appealed the denial of benefits, and the Oregon Court of Appeals and the Oregon Supreme Court sided with the plaintiffs.[139] The Oregon Supreme Court held that the denial of unemployment benefits unjustifiably burdened the defendant's religious beliefs and thus violated the Free Exercise Clause.[140] The Supreme Court granted certiorari on the case but remanded it to the Oregon State Supreme Court for a determination of whether Oregon's controlled substance law prohibited the religious use of peyote.[141] The Oregon Supreme Court affirmed that Oregon state law prohibited the ceremonial use of peyote but noted that this fact was hypothetical because Oregon did not currently enforce its drug laws against sacramental peyote use.[142] The Oregon Supreme Court also noted that this fact was irrelevant as well, because even if Oregon did enforce its drug laws against sacramental peyote use, Oregon state law was interpreted so that religiously motivated conduct could not be considered "misconduct" for purposes of unemployment benefits.[143] Despite the fact that the question of whether Oregon's drug laws prohibited the sacramental use of peyote was both hypothetical and irrelevant, the Supreme Court granted certiorari once again.[144]

Both sides focused their briefs and oral arguments on whether the state had a compelling interest in controlling drug use that would justify infringing the plaintiffs' free exercise rights.[145] The State of Oregon expressly conceded in its brief that the compelling interest standard was the appropriate standard, and neither party asked the Court to reconsider its free exercise standard.[146] Indeed, neither of the parties ever touched on or discussed the applicability of any other standard besides the compelling interest standard.[147] Thus, as one prominent legal scholar opined "[t]he most important decision interpreting the Free Exercise Clause in recent history, then, was rendered in a case in which the question presented was entirely hypothetical, irrelevant to the disposition of the case as a matter of state law, and neither briefed nor argued by the parties."[148]

139. *Id.* at 874–75.
140. *Id.* at 875.
141. *Id.* at 875–76.
142. McConnell, *supra* note 8, at 1112–13.
143. *Id.* at 1112.
144. *Smith*, 494 U.S. at 876.
145. McConnell, *supra* note 8, at 1113.
146. *Id.*
147. *Id.*
148. *Id.* at 1114.

The *Smith* opinion began by pointing out the well-known distinction in free exercise doctrine between religious belief and religious conduct.[149] Acknowledging the uncontroversial principle that the First Amendment "excludes all governmental regulation of religious beliefs as such," the Court then proceeded to draw a line between permissible government regulations and nonpermissible government regulations.[150] The Court stated that if a law sought to ban conduct only when that conduct was done for religious reasons, that law would likely[151] run afoul of the First Amendment. However, if the law prohibited the conduct without regard to whether there was a religious motivation behind it, the law would not violate the First Amendment.[152]

Whereas *Reynolds* focused on protecting religious conduct as long as it was not subversive of good order[153] and *Sherbert* focused on whether the state could justify regulating religious conduct through a compelling state interest,[154] the *Smith* opinion focused on whether the state law was a neutral and generally applicable one.[155] Thus, the new *Smith* free exercise standard was born: "if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[156]

Instead of recognizing the new standard the Court had created, the Court insisted that this test was not new at all, but was supported by the Court's "record of more than a century of . . . free exercise jurisprudence."[157] However, the Court was then left with the difficult task of distinguishing many of its cases, such as *Yoder* and *Sherbert*, which virtually

149. *Smith*, 494 U.S. at 877.

150. *Id.*

151. The Court was even hesitant to give this much protection to religious conduct as it pointed out that no case has involved the hypothetical law it was discussing, and thus the Court could only "think" that the First Amendment would strike down such a law. *Id.* This view was later affirmed, however, in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) (striking down a law that was intended solely to prohibit religious conduct).

152. *Smith*, 494 U.S. at 878.

153. Reynolds v. United States, 98 U.S. 145, 164 (1878).

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

155. *Smith*, 494 U.S. at 878.

156. *Id.*

157. *Id.* at 879. The idea that the Court had never held that the free exercise clause required exemptions from generally applicable law is curious because Justices who had disagreed with allowing religious exemptions had often dissented on that very point. Even more curiously, Justice Scalia, who authored the majority opinion in *Smith*, had stated fourteen months earlier that the Free Exercise Clause granted religion-specific exemptions from otherwise applicable laws. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting) ("[W]e [have] held that the Free Exercise Clause of the First Amendment *required* religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws.") (emphasis in original).

everyone had understood to stand for the very proposition the Court was now rejecting. The Court distinguished these cases by dividing them into two different categories and designating each a precedential "exception" to the *Smith* rule, which refused to exempt religious conduct from generally applicable laws.[158]

The Court dealt with cases such as *Cantwell*, *Barnette*, and *Yoder* by stating that these cases provided an exception to the *Smith* rule, because these cases involved not only the Free Exercise Clause, but the Free Exercise Clause in conjunction with some other constitutional provision.[159] In this revisionist light, *Ccntwell* and *Barnette* involved both the Free Exercise Clause and the Free Speech Clause, while *Yoder* involved the Free Exercise Clause and the fundamental right of parents to direct the upbringing of their children.[160] Thus, this exception holds that although the Free Exercise Clause alone provides no assistance against a generally applicable law, another constitutional right can be joined with the Free Exercise Clause to provide the equivalent of a constitutional steroid. This exception has become known as the "hybrids rights exception."

The other line of cases the Court had to deal with were those represented by *Sherbert*. The Court here acknowledged that although the Court had purported to apply the *Sherbert* test in other contexts besides state unemployment compensation rules, the test had always been satisfied.[161] Hence, the Court had the luxury of simply limiting the *Sherbert* test to the unemployment compensation field.[162] However, wanting to further prop up its shaky assertion that its new test was supported by precedent, the Court held that even if *Sherbert* applied outside of the unemployment compensation context, *Sherbert* simply stood for the proposition 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."[163] Thus, when a state has decided to allow individual exemptions from a certain law, the state must have a compelling interest for not extending that exemption to religious individuals. This second exception has become known as the "individualized exemptions exception."

Having dispensed with its troublesome precedent, the *Smith* Court then finished its opinion by discussing the policy justifications for the new

158. *Smith*, 494 U.S. at 881–85.
159. *Id.* at 881.
160. *Id.* at 881–82.
161. *Id.* at 883.
162. *Id.*
163. *Id.* at 884.

standard along with its ramifications.[164] The Court primarily focused its policy argument on the "parade of horribles"[165] that would follow from allowing a person, through the use of his religious beliefs, to be exempt from generally applicable laws.[166] In the Court's words, it would allow the individual "to become a law unto himself."[167] The Court then set out a long list of laws that the religious person might opt out of if the Court required the state to show a compelling interest and opined that allowing "a private right to ignore generally applicable laws . . . [would produce] a constitutional anomaly" that was unheard of in constitutional jurisprudence.[168]

However, recognizing that there would be those who would be concerned about the tattered remnants of free exercise protection after its decision, the Court offered the hope that perhaps the political process might be more protective of free exercise concerns than the Constitution seemed to be.[169] The Court mused that because society itself valued religious belief, then perhaps legislatures would be solicitous of religious values and independently exempt some religious conduct from its laws.[170] The Court then ended its opinion with an observation that seems widely out of place in a *constitutional* decision that would be laughable if it were not so serious: "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself."[171] And thus the Court ended its opinion with the odd implication that protection of religious free exercise must primarily come from politics, not from the Constitution itself.

IV. ARGUMENTS AGAINST COMPELLED SWEARING UNDER *SMITH*

As discussed previously, the thesis of this Note is that under *Smith*, it becomes very difficult doctrinally to avoid reaching the result that a state may constitutionally compel somebody to violate his religious beliefs by swearing. This section explores five arguments that contend that even under *Smith*, the Free Exercise Clause provides sufficient protection against compelled swearing. If any one of these arguments can show that under a

164. *Id.* at 886–90.
165. *Id.* at 889 n.5.
166. *Id.* at 888–89.
167. *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).
168. *Id.*
169. *Id.* at 890.
170. *Id.*
171. *Id.*

current interpretation of *Smith*, a state may constitutionally compel someone to swear, then this Note's criticism of *Smith* becomes unfounded.

The five arguments rely on five alternate, independent bases: (1) the hybrid rights exception from *Smith*; (2) the individualized-exemption exception from *Smith*; (3) protection under other constitutional provisions, such as the Free Speech Clause; (4) a criminal/noncriminal distinction; or (5) a compelled/prohibited distinction.

A. Smith's *Hybrid Rights Exception*

As discussed previously, the *Smith* Court recognized two exceptions to the *Smith* rule that a neutral and generally applicable law would not violate the Free Exercise Clause.[172] The first of these two exceptions is known as the hybrid rights exception. The hybrid rights exception holds that when a free exercise claim is combined with another constitutional claim, the state must show a compelling state interest that would justify infringing on the individual's free exercise rights.[173] In other words, by joining a free exercise claim with another constitutional claim, the plaintiff's cause of action is transformed into a highly potent constitutional argument that drastically increases the amount of free exercise protection in comparison to what the Free Exercise Clause provides standing alone.

Thus, as long as one can allege two constitutional violations, then the state must show a compelling state interest before it could require that individual to swear. It is difficult to imagine what compelling state interest a state could put forward that would justify requiring someone to swear. Therefore, if another constitutional violation could be argued, then the hybrid rights exception would most likely be sufficient to prevent the undesired result of compelling someone to swear.

Because swearing is a form of speech, the seemingly natural constitutional companion would be the Free Speech Clause. Unquestionably, the Free Speech Clause protects not only the right to speak, but also the right to refrain from speaking.[174] Accordingly, a corresponding free speech right to refrain from swearing should exist. Hence, by joining a free exercise claim

172. *Id.* at 881–88.

173. *Id.* at 881.

174. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"); Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("We begin with the proposition that [First Amendment protection] includes both the right to speak freely and the right to refrain from speaking at all."); W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that the Free Speech Clause protected against being compelled to say the Pledge of Allegiance).

and a free speech claim, the *Smith* hybrid rights exception should, in theory, be sufficient to prevent a state from constitutionally compelling someone to swear without having to modify or overrule *Smith*.

Unfortunately, the hybrids rights exception from *Smith* does not go very far in preventing compelled swearing for two reasons: (1) the *Smith* Court likely did not intend the hybrid rights exception to be an actual substantive exception, and (2) even if the *Smith* Court was serious about the exception, the test itself is illogical and unworkable.

1. The Supreme Court in *Smith* likely did not intend the hybrid rights exception to be a substantive exception.

In all likelihood, the *Smith* Court never meant the hybrid rights exception to be a substantive exception. The *Smith* Court introduced the hybrid rights exception in two sentences in which it distinguished past cases that had used the compelling interest test.[175] The Court then added one more sentence to state that the *Smith* facts did not involve a hybrid rights claim.[176] The Court thus efficiently dealt with the entire exception in three sentences—not what one would expect for a substantive exception. The Court gave no further details on how broad the exception should be, how the exception would work, or how viable the exception would be in the future. As one *Smith* critic deadpanned after rhetorically asking why the Court did not address a possible hybrid claim in *Smith*,[177] "[t]he answer, a legal realist would tell us, is that the *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously."[178]

Indeed, at least one circuit, the Sixth Circuit, has agreed with the above critic's assertion and has refused to take the hybrid rights exception seriously. After a plaintiff argued that the hybrid rights exception required the court to use the higher compelling interest standard, the Sixth Circuit declined to recognize the hybrid rights exception until the Supreme Court made it clear that it actually intended for the exception to actually exist.[179] The Second Circuit has also cast doubt on the exception, stating that the exception is dictum and thus not binding on them.[180]

175. *Smith*, 494 U.S. at 881.

176. *Id.*

177. The argument for finding a hybrid claim in *Smith* is that ingesting peyote in a sacred ritual is a form of communication about the adherent's faith in his church, and thus a form of symbolic speech. Thus, the argument goes, the prohibition against peyote use infringed on both free exercise rights and free speech rights and hence, the hybrid rights exception should have been available in *Smith*. McConnell, *supra* note 8, at 1122.

178. *Id.*

179. Kissinger v. Bd. of Trs. of Ohio St. Univ., 5 F.3d 177, 180 (6th Cir. 1993).

180. Knight v. Conn. Dep't of Pub. Health, 275 F. 3d 156, 167 (2d Cir. 2001).

2. The hybrid rights exception is too illogical and unworkable to give sufficient protection against compelled swearing.

Even if the *Smith* Court intended for the hybrid rights exception to be an actual exception rather than a convenient tool to distinguish precedent, the test itself has been heavily criticized as illogical and unworkable.[181] Justice Souter, in a subsequent concurring opinion, gave oft-repeated criticism of the hybrid rights exception:

> [T]he distinction *Smith* draws 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* . . . . 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.[182]

Most of the circuits have echoed Justice Souter's complaints and have struggled with fleshing out a workable hybrid rights exception.[183]

Three possible theories have arisen in the lower courts of how to apply the hybrid rights exception: (1) the independently-viable rights theory, (2) the implication theory, and (3) the colorable claim theory.[184] The independently-viable rights theory requires that the adjoining constitutional claim be independently viable in its own right.[185] Using this theory, however, the hybrid rights exception would be moot because if the individual is already protected by an independent constitutional claim, there is no need for the free exercise claim.[186]

The second theory, the implication theory, requires that the governmental action merely implicate a second constitutional claim, basically meaning that the second claim be nonfrivolous.[187] This theory, however,

181. *See, e.g.*, Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN. ST. L. REV. 573 (2003) (criticizing the hybrid rights exception).

182. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (Souter, J., concurring in part and concurring in the judgment).

183. *See* William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211 (1998) (examining how lower courts have interpreted and applied the hybrid rights exception); Timothy J. Santoli, Note, *A Decade After* Employment Division v. Smith: *Examining How Courts are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U.L. REV. 649, 668 (2001) (examining how courts are dealing with the exception).

184. Santoli, *supra* note 183, at 669–70.

185. *Id.* at 669.

186. *Id.*

187. *Id.*

swallows up the *Smith* rule.[188] Virtually any free exercise claim could be joined with another nonfrivolous constitutional claim, thus requiring the compelling interest test to be applied in almost every case. Under this theory, the three-sentence exception from *Smith* would devour the entire *Smith* opinion.

The third theory, the colorable claim theory, requires that the plaintiff show a companion constitutional claim that is "colorable," usually defined as requiring the plaintiff to show a fair likelihood of success on the merits.[189] This seems to be the most sensible theory; it neither swallows the *Smith* rule nor makes the exception meaningless. Unsurprisingly, the colorable claim theory is the theory that most of the circuits have adopted, including the Tenth Circuit.[190]

Although requiring a colorable claim makes sense in theory, in practice, the colorable claim theory often resembles the independent-viable theory. Lower courts that have used the colorable claim theory show that the result often turns on whether the independent constitutional claim can stand on its own.[191] If the independent constitutional claim fails, then the hybrid rights exception fails as well.[192] Alternatively, if the independent constitutional claim succeeds, then the court usually bases its holding on that claim and merely adds the hybrid rights exception for extra support.[193]

On examination, lower courts' propensity to treat the colorable claim theory just like the independent-viable theory makes sense. It is difficult for a court to analyze a constitutional claim only halfway. Hence, if a court has all the necessary facts, it will simply decide whether there is a successful claim, but it will couch it in terms of whether the claim is "likely" to succeed.

Axson-Flynn provides a good example of what happens when courts apply the colorable claim theory. In *Axson-Flynn*, the Tenth Circuit discussed the various ways it could apply the hybrid rights exception and found that the colorable claim theory was the sensible middle ground.[194] However, the court did not decide the hybrid rights claim because it re-

188. *Id.*

189. *Id.* at 669–70.

190. Axson-Flynn v. Johnson, 356 F.3d 1277, 1295 (10th Cir. 2004).

191. *See, e.g.*, Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 699–700 (10th Cir. 1998) (applying the colorable theory to dismiss a hybrid claim); *see also* Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 570 (2004); Esser, *supra* note 183, at 242–43.

192. Esser, *supra* note 183, at 242–43.

193. *Id.*

194. 356 F.3d at 1295–97.

manded Axson-Flynn's free speech claim for further fact development.[195] Thus, the Tenth Circuit first needed to know whether the free speech claim likely would be successful in its own right before it could determine whether the hybrid rights exception would be available.[196] Had the Tenth Circuit eventually found that the free speech claim successful in its own right, it appears that any further hybrid rights exception discussion would be purely icing on the cake.

Because in practice courts tend to apply the hybrid rights exception as if it were the independent-viable theory, there is little hope that the hybrid rights exception will provide a safe haven against compelled swearing. Even if the Supreme Court validates the exception, its application in the lower courts suggests the need for joining an independent constitutional claim.[197]

B. Smith's *Individualized-Exemptions Exception*

The second exception from *Smith* is the individualized-exemptions exception. Unlike the hybrid rights exception, the Supreme Court has reaffirmed this exception after *Smith*.[198] The Court explained this exception by stating that "in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[199] Hence, when systems provide for individualized exemptions,[200] the state must show a compelling state interest before it can infringe on an individual's free exercise rights.

Requiring a state to show a compelling state interest would clearly be sufficient to prevent a state from compelling an individual to swear. The argument that *Smith's* individualized exemption exception will suffice to prevent the undesired result finds some support in *Axson-Flynn*. The Tenth

195. *Id.* at 1297.

196. *Id.*

197. The obvious question arises as to whether there is an independent constitutional claim that would protect against being compelled to swear. This is in fact one of the arguments addressed below and so will not be addressed here.

198. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993).

199. *Id.* (quoting Employment Div. v. Smith, 494 U.S. 882, 884 (1990)).

200. Courts have disagreed on exactly what constitutes a system of individualized exemptions. Some courts hold that the exception is limited to systems that are designed to make case-by-case determinations. Other courts hold that the exception includes statutes that contain exceptions for objectively defined categories of persons. For this Note's purposes, the analysis is not affected by how a court defines a system of individualized exemptions. *See* Carol M. Kaplan, Note, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1062, 1081–83 (2000) (discussing how courts have applied the exception).

Circuit determined in *Axson-Flynn* that there was a genuine issue of material fact as to whether the University of Utah maintained a discretionary system of case-by-case exemptions from the acting program requirements.[201] Because the ATP instructor had allowed other people to miss assignments without penalty, the Tenth Circuit held that this might qualify as a system of individualized exemptions that would require the ATP to show a compelling interest in refusing to extend those same exemptions to Axson-Flynn.[202] Hence, the individualized exemption exception played a large part in preventing the Tenth Circuit from outright affirming the district court's decision that the ATP could compel Axson-Flynn to swear.

The individualized-exemptions exception, however, relies too much on the constitutional good luck of a government entity having a system of individualized exemptions in place to sufficiently protect against compelled swearing. Further, not only is the exception available solely when such a system is present, it is the governmental entity that will determine what kind of system it will have. Accordingly, any protection that the exception gives to religious conduct relies exclusively on the government. If the government does not create a system of individualized exemptions, the exception is wholly unavailable. Clearly an exception that gives the government the key to its use cannot be relied on to give adequate protection against government-compelled swearing.

Admittedly, because some governmental entities may need a system of individualized exemptions to meet their purposes, not all governmental entities will have the luxury of simply choosing not to have such a system. However, even with the acknowledgment that the government will not always be able to simply avoid having a system of individualized exemptions, the exception is also inadequate because it relies on a form of constitutional good luck.[203] The result turns not on balancing the importance of the religious conduct with the importance of the government's interest, but on whether there is the good fortune of having another individual who successfully obtains an exemption. Moreover, the same exact statute in two different states could have differing free exercise standards for the same exact religious conduct. Relying on good luck to determine whether the Free Exercise Clause will protect similarly situated plaintiffs is illogical and fundamentally unfair.

201. Axson-Flynn v. Johnson, 356 F.3d 1277, 1299 (10th Cir. 2004).

202. *Id.* at 1298–99.

203. *See* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627 (2003) (arguing that the individualized exemption exception relies on the good fortune of having secular exceptions available).

Fraternal Order of Police Newark Lodge v. City of Newark provides a good illustration.[204] In *Fraternal Order*, the Third Circuit held that a policy requiring police officers to be clean-shaven violated the Free Exercise Clause, because it exempted officers who could not shave for medical reasons but did not extend that same exemption to officers who could not shave for religious reasons.[205] The plaintiff in that case was fortunate that there were officers on the force who could not shave for medical reasons. Had there been no such officers with that particular medical condition on the force, the plaintiff would have been constitutionally out of luck.

Axson-Flynn's situation provides another example. It was providential for Axson-Flynn that the instructor had exempted a Jewish student from class assignments. Had the Jewish student not been in the class, there would have been no exemptions from the class assignments and thus no exception available for Axson-Flynn. However, even with the Jewish student, this is a case where the governmental entity easily held the key to the exception. The ATP's downfall was that it provided individualized exemptions from its course curriculum. If the ATP had refused the Jewish student's request for an exemption, even providence would not have saved Axson-Flynn. The key to the exception was solely in the ATP's hands: simply follow its own policy on class assignments and the individualized-exemption exception would not have been available.

These examples illustrate an inherent limit to the individualized exemption exception. The exception can never fully protect against compelled swearing because it relies on the good fortune of governmental entity exceptions. The individualized-exemption exception simply does not provide any protection against a governmental law or entity that provides no exemptions. As a result, it cannot bear the needed burden of protecting someone from being compelled to swear.

C. *Using Other Constitutional Provisions Such as Free Speech to Prevent Compelled Swearing*

The first two arguments in Part IV have tested this Note's thesis that *Smith* must be overruled or reinterpreted to prevent compelled swearing. As discussed above, the two exceptions from *Smith* are inadequate. Part IV will now examine three non-*Smith* based arguments that *Smith* need not be overruled or reinterpreted to protect adequately against compelled swearing.

204. 170 F.3d 359 (3d Cir. 1999).
205. *Id.* at 360.

The first of these arguments advocates using some other constitutional provision besides the Free Exercise Clause to protect against compelled swearing. If one could locate a constitutional provision that would independently protect an individual from being compelled to swear, there would be no need to criticize *Smith* for not preventing that result. Of course, because swearing is an obvious form of speech, the natural constitutional candidate is the Free Speech Clause. The Supreme Court has repeatedly recognized that the Free Speech Clause protects not only the right to speak, but also the right to refrain from speaking.[206] Hence, the Free Speech Clause seems the ideal independent constitutional provision to use to protect against what the Free Exercise Clause does not. This seems especially true when one considers that even before *Smith*, the Free Speech Clause provided much greater protection than the Free Exercise Clause.[207] Thus, the argument is that because swearing is a form of speech, the Free Speech Clause will act as an adequate safeguard against compelled swearing.

However, using another constitutional provision such as the Free Speech Clause to protect against compelled swearing is unlikely to work, and in any case, hurts free exercise rights by deemphasizing their importance. The *Axson-Flynn* case itself shows the practical problem that the Free Speech Clause may not provide the needed protection because Axson-Flynn in fact made both a free speech claim and a free exercise claim.[208] In analyzing Axson-Flynn's free speech claim, the Tenth Circuit applied the Supreme Court's free speech standard[209] from *Hazelwood School District v. Kuhlmeier*.[210] In *Hazelwood*, the Court emphasized that although students' free speech rights are not shed at the school doors, they are also not coextensive with free speech rights in other contexts.[211] Although *Hazelwood* dealt with a high school setting, the Tenth Circuit held that the same standard should apply to the university setting.[212] The Tenth Circuit also

206. *See supra* note 174.

207. *See* Patrick M. Garry, *Inequality Among Equals: Disparities in the Judicial Treatment of Free Speech and Religious Exercise Claims*, 39 WAKE FOREST L. REV. 361 (2004) (detailing how greater protection has been given to free speech rights than to free exercise rights).

208. Axson-Flynn v. Johnson, 356 F.3d 1277, 1283 (10th Cir. 2004).

209. This Note will not go into a detailed analysis of the Free Speech Clause, but will merely touch on some relevant factors. Going into an in-depth free speech analysis is not necessary for this Note because the second reason for not using free speech rights to protect free exercise would apply regardless of how much protection free speech would give. For a more detailed analysis of free speech rights in the university context, see Thomas J. Davis, Note, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 IND. L.J. 267 (2004).

210. *Axson-Flynn*, 356 F.3d at 1289.

211. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

212. *Axson-Flynn*, 356 F.3d at 1289.

found that the type of speech involved in *Axson-Flynn* should be categorized as school-sponsored speech.[213] Accordingly, the school could place restrictions on speech as long as its actions were reasonably related to legitimate pedagogical concerns.[214]

Although the Tenth Circuit did not dispute that the ATP's stated reasons[215] for its policy of requiring students to perform the scripts as written were reasonably related to legitimate pedagogical concerns, the court did find that there was a genuine issue of fact as to whether the ATP's pedagogical concerns were pretextual.[216] If the ATP's reasons were pretextual, then the ATP's actions almost certainly violated Axson-Flynn's free speech rights. The Tenth Circuit consequently remanded Axson-Flynn's free speech claim to the lower court so it could determine whether the ATP's reasons for the script adherence requirement were truly pedagogical or merely a pretext for religious discrimination.[217]

Despite Axson-Flynn's victory in having her free speech claim remanded, it was clear from the court's opinion that if the ATP's justifications for requiring Axson-Flynn to swear were not pretextual, the Free Speech Clause would not protect Axson-Flynn from being compelled to swear.[218] Therefore, the Free Speech Clause would not likely prevent someone from being compelled to swear in the school context.[219]

Even if the Tenth Circuit incorrectly applied free speech jurisprudence in *Axson-Flynn* and the Free Speech Clause could successfully prevent someone from being compelled to swear, the second argument against using the Free Speech Clause or other constitutional provisions for protection would still apply: by abandoning the Free Exercise Clause for other constitutional provisions, free exercise rights are further deteriorated and devalued. The Free Exercise Clause would likely be harmed by using the Free

213. *Id.* at 1290.

214. *Id.* (quoting *Hazelwood*, 484 U.S. at 273).

215. The ATP leaders argued that requiring students to perform offensive scripts advanced the school's pedagogical interest in at least three ways:

> (1) it teaches students how to step outside their own values and character by forcing them to assume a very foreign character and to recite offensive dialogue; (2) it teaches students to preserve the integrity of the author's work, and (3) it measures true acting skills to be able convincingly to portray an offensive part.

Id. at 1291.

216. *Id.* at 1293.

217. *Id.*

218. *Id.* at 1290.

219. The Free Speech Clause likely would prevent a state from compelling someone to swear outside of the school context. *See* Wooley v. Maynard, 430 U.S. 705 (1977) (holding that the Free Speech Clause prohibits a state from requiring someone to carry a license plate with the state motto on it because it forced the person to speak the state's message). However, even if free speech would usually be sufficient protection, the second reason for not using the Free Speech Clause would still apply.

Speech Clause or other constitutional provisions for protection in three ways: (1) if potential free exercise cases are increasingly protected under other constitutional provisions, courts would likely afford less protection to the Free Exercise Clause and consequently, religious conduct that is not protected by other constitutional provisions would become more vulnerable; (2) using other constitutional provisions to protect religious conduct decreases the recognition that free exercise values deserve to have in their own right; and (3) using free speech protection may endanger religious accommodation from government.

As intimated earlier, the history of free exercise shows that there is a large overlap in conduct that can be categorized both as speech and free exercise.[220] Over time, the Free Speech Clause has broadened to include many things that one does not readily imagine to be "speech."[221] This broadening has included conduct that can be categorized as symbolic speech and many types of religious conduct.[222] However, the overlapping spheres are not coterminous. Some religious conduct will not fit into free speech or other constitutional provisions.[223]

Like the muscle in one's body, the Free Exercise Clause may lose some of its strength if it is infrequently used. If a court believes that religious conduct is well protected through other constitutional provisions, it may be less likely to infuse the Free Exercise Clause with independent strength of its own. Without a vigorous enforcement of the Free Exercise Clause, religious conduct that is not protected under other constitutional provisions may be vulnerable to dwindling constitutional protection.

Additionally, by using the Free Speech Clause or other constitutional provisions to protect free exercise, free exercise rights are deprived of the recognition that religious activities are deserving of protection in their own right.[224] Continually characterizing religious activities as simply a subset of speech generally diminishes the uniqueness and distinctiveness of religion

220. *See, e.g.*, *Wooley*, 430 U.S. 705 (refusal to have license plate with state motto could fall within both the Free Speech Clause and the Free Exercise Clause); W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (requirement to repeat the pledge of allegiance involved both free speech and free exercise).

221. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (nude dancing considered speech); Texas v. Johnson, 491 U.S. 397, 405–06 (1989) (burning the flag considered speech); *Wooley*, 430 U.S. 705 (holding that free speech protects against state requirement to use license plate with state motto).

222. *See* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 121–23 (2002) (examining overlaps between free speech and free exercise).

223. Evidently, *Smith* itself was a case of this because the Court failed to recognize a free speech/free exercise hybrid claim in that case. *See* McConnell, *supra* note 8, at 1122.

224. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993) (arguing that the law and society trivializes religious belief).

as a value worthy of constitutional protection.[225] Although many in today's modern society would argue that religion should not be given preferential protection,[226] the fact remains that the Constitution has expressly set apart religious beliefs and activities as something worthy of protection. Although society's mores may be trending away from giving preferential treatment to religious activities, the judiciary must still engage the Constitution as it is written.[227] The answer for those who disagree with the Constitution's preferential treatment of religion is to amend the Constitution, not to deplete the Free Exercise Clause of any substantive protections.

Finally, using the Free Speech Clause to protect religious activity may endanger some of the accommodations and exemptions made for religion by government.[228] As Justice Scalia pointed out in *Smith*, the government is often solicitous of religious values and frequently provides legislative accommodations that apply only to religious activities.[229] Indeed, Justice Scalia not only pointed out these government accommodations but offered their existence as the primary comfort to those religious individuals concerned with the Court's decision.[230] However, using the Free Speech Clause to protect religious exercise may endanger exactly the comfort that the *Smith* Court promised: government accommodation.[231]

Under free speech jurisprudence, if a viewpoint is given favorable treatment over other viewpoints, this constitutes viewpoint discrimination and is subject to strict scrutiny.[232] If religious activities are increasingly characterized as expression for purposes of free speech protection, it becomes difficult to avoid the conclusion that the government's preferential accommodations to religion constitute viewpoint discrimination and consequently should be subject to strict scrutiny analysis.[233] Most government accommodations will not survive strict scrutiny analysis. Accordingly, the

225. *See* Widmar v. Vincent, 454 U.S. 263, 284 (1981) (White, J., dissenting) (recognizing that if religious worship was not any different from normal speech, "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech").

226. *See* Gedicks, *supra* note 15, at 927. Of course, people may debate over the meaning of religion in the Constitution, but whatever its meaning, the Constitution clearly sets religion apart for protection.

227. *See* Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 314 (1996) ("For whatever reason, the Constitution does give special protection to liberty in the domain of religion, and we cannot repudiate that decision without rejecting an essential feature of constitutionalism, rendering all constitutional rights vulnerable to repudiation if they go out of favor.").

228. Brownstein, *supra* note 222, at 164–69.

229. Employment Div. v. Smith, 494 U.S. 872, 890 (1990). *Smith* itself provides an example of this because Oregon subsequently changed its laws to exempt those who use peyote as part of a religious ceremony.

230. *Id.*

231. Brownstein, *supra* note 222, at 164–69.

232. *Id.* at 164–65.

233. *Id.* at 166.

last refuge of *Smith*, government grace, is endangered by relying too much on the Free Speech Clause for protection of free exercise rights.

As the above arguments show, serious problems, both practical and otherwise, exist with adopting a strategy of using the Free Speech Clause or other constitutional provisions to protect free exercise rights. Hence, even if one could use free speech or some other constitutional provision to prevent compelled swearing, it would be unwise to do so. For those reasons, the Free Exercise Clause must stand or fall on its own in preventing the undesired result.

D. *Finding a Criminal/Noncriminal Distinction in* Smith

Another possible argument that *Smith* does not need to be modified or overruled to prevent compelled swearing is that *Smith* was only meant to apply in the criminal context. The *Smith* opinion was decided in the context of whether the Free Exercise Clause exempted someone from a state criminal statute. Arguably, society's interest is at its highest when it is enforcing its criminal prohibitions. Criminal laws are designed to protect society from harmful individuals and exempting someone from a criminal law is a much different matter than exempting someone from a school assignment. An argument can be made then that the *Smith* decision may be confined to the criminal context.

One can safely assume that a state would not make it a crime to refuse to swear. The plausible place for the state to compel swearing is a situation similar to *Axson-Flynn*, when government policy is involved rather than an actual criminal law. Hence, the argument is that confining *Smith* to the criminal context should be sufficient to prevent someone from being compelled to swear.

However, the *Smith* decision's language and reasoning reject confining its holding to the criminal context and to do so would be counterintuitive. The argument that *Smith* should be confined to the criminal context is inadequate for a number of reasons.[234] The principal reason for not confining *Smith* to the criminal context is that the *Smith* opinion itself seems to foreclose this possibility. Although the opinion makes clear that the Court is aware that the law at issue is a criminal prohibition,[235] the Court's language does not indicate that the Court would accept confining *Smith* to the

234. Many of the arguments from this section come from the Third Circuit decisions in Fraternal Order of Police Newark Lodge v. City of Newark, 170 F.3d 359 (3d Cir. 1999) and Salvation Army v. Dept. of Cmty. Affairs of N.J., 919 F.2d 183 (3d Cir. 1990).

235. *See Smith*, 494 U.S. at 884 (declining to apply *Sherbert* in the context of a generally applicable criminal law).

criminal context. The *Smith* Court repeatedly used language that encompassed criminal as well as noncriminal regulations.[236] Further, the Court had to distinguish past precedents involving noncriminal statutes, but in distinguishing these cases, the Court gave no indication of a criminal/noncriminal distinction.[237] Had the Court intended *Smith* to apply only to the criminal context, it could have simply distinguished these cases on the basis that they involved noncriminal statutes. Instead, the Court found other ways to distinguish these cases that required much more creativity than simply using a criminal/noncriminal dichotomy.

In addition to the *Smith* Court's language and precedent, it would be counterintuitive to interpret *Smith* as holding that the Free Exercise Clause applies only when criminal laws are involved but not when civil laws or government policies are concerned.[238] This is because a religious person faces much higher burdens when faced with breaking a criminal law as opposed to a civil law or governmental policy.[239] A religious person who violates a criminal law faces such high burdens as the loss of his liberty or the stigma of being branded a criminal, whereas these high burdens are not present when one violates a civil statute. It would be odd to hold that the Free Exercise Clause offers protection only when the burdens on the religious individual are low but not when the burdens are at their highest. *Smith* itself repudiates this logic when the Court states that "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it *certainly follows that it may impose the lesser burden* of denying unemployment compensation benefits to persons who engage in that conduct."[240]

Finally, the Supreme Court has had other opportunities since *Smith* to introduce a criminal/noncriminal distinction, but the Court has refused to do so. In *City of Boerne v. Flores*, the law at issue was a noncriminal land-

236. Such language includes "[o]ur most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion," *id.* at 880; "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone," *id.* at 881; "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development," *id.* at 885 (internal quotation marks and citation omitted).

237. Some of these noncriminal cases included United States v. Lee, 455 U.S. 252 (1982) (social security payroll taxes); Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory attendance laws); and Wooley v. Maynard, 430 U.S. 705 (1977) (compelled display of license plate slogans).

238. *See Fraternal Order of Police*, 170 F.3d at 363–64 (making the argument that the distinction would be counterintuitive).

239. *Id.*

240. *Smith*, 494 U.S. at 875 (emphasis added) (quoting Employment Div., Dep't of Human Resources of Or. v. Smith, 485 U.S. 660, 670 (1988)).

mark ordinance.[241] The Supreme Court had to determine whether the Religious Freedom Restoration Act ("RFRA"), which attempted to restore the compelling interest test to the free exercise area, was consistent with *Smith*.[242] If the Court intended a criminal/noncriminal distinction in *Smith*, there would have been no need to even discuss *Smith* because the ordinance at issue was noncriminal. However, not only did the Court discuss *Smith*, but it struck down the RFRA as being inconsistent with *Smith*.[243]

The majority of circuits that have faced the issue have agreed that the Supreme Court never intended *Smith* to be confined to the criminal context.[244] Moreover, because the Supreme Court made it clear in *Smith* and subsequent opinions that *Smith* should not be confined to the criminal context, it is extremely unlikely that one could successfully use this distinction to prevent someone from being compelled to swear.

E. Finding a Compelled/Prohibited Distinction in Smith

The final argument that *Smith* does not need to be modified or overruled to prevent compelled swearing is that *Smith* should not apply when someone is being compelled to do something, rather than merely prohibited. In *Smith*, the plaintiff was being prohibited from ingesting peyote, while in *Axson-Flynn*, the plaintiff was being compelled to swear. In the first case, the individual was being prohibited from performing a religious requirement, while in the latter case, the individual was being compelled to take action that she considered to be a sin. One may argue that there is a fundamental distinction between merely prohibiting someone from taking action and compelling someone to perform an action that is offensive to them.[245] While prohibiting someone from doing something limits the range of actions that person may take, compelling someone to do something actu-

241. 521 U.S. 507, 512 (1997).

242. *Id.*

243. *Id.* at 536.

244. *See* Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 292–94 (5th Cir. 2001) (applying the *Smith* standard to school uniform policy); Iskcon of Potomac, Inc. v. Kennedy, 61 F.3d 949, 953 (D.C. Cir. 1995) (applying *Smith* standard to National Park Service regulations); Sherman v. Comty. Consol. Sch. Dist. 21 of Wheeling Township, 980 F.2d 437, 445 (7th Cir. 1992) (applying *Smith* standard to state statute requiring recitation of the pledge of allegiance); Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 932 (6th Cir. 1991) (agreeing with other circuits that *Smith* standard is not limited to criminal context); *Salvation Army*, 919 F.2d at 195–96 (holding that *Smith* standard applies to the policy of police department, rejecting plaintiff's argument that *Smith* standard only applies to criminal prohibitions).

245. In fact, *Reynolds* distinguished past precedent on this very distinction. The Court in *Reynolds* pointed to an English case where the parents of a sick child refused to call for medical help because of their religious beliefs but were found not guilty of manslaughter. The Court stated that if the parents had taken the positive act of starving their children because of religious beliefs, then it would have been an entirely different scenario. 98 U.S. 145, 167 (1878).

ally forces them to take a single action. While both infringe on the liberty of the person, the latter creates a form of involuntary servitude in that they are forced to do something with their own body that they do not want to do. Therefore, one can argue that because compelling action is more offensive than prohibiting action, *Smith* should be confined to cases where action is being prohibited rather than compelled. Clearly, this would prevent compelled swearing.

1. *Smith*'s language and reasoning reject finding a distinction between compelled action and prohibited action.

Similar to the criminal/noncriminal distinction, both Supreme Court precedent and practical problems stand in the way of finding a prohibited/compelled distinction. Once again, *Smith* itself seems to reject any type of distinction between compelled and prohibited conduct. The *Smith* Court's reasoning focused heavily on distinguishing between religious belief and religious action.[246] The Court held that the Free Exercise Clause protects primarily the former and not the latter.[247] Because compelling conduct and prohibiting conduct both deal with religious action, the Court's reasoning does not support finding a distinction between the two. In both instances, it is conduct being regulated, not belief. Thus, the *Smith* Court rejected the plaintiffs' argument that "requiring any individual to observe a generally applicable law that *requires (or forbids) the performance of an act that his religious belief forbids (or requires)*" violates free exercise.[248]

Another argument rejected by the *Smith* Court was that the compelling interest test could be limited to conduct that was "central" to the individual's religious beliefs.[249] The Court emphatically rejected this argument on the basis that courts should not be involved in determining what religious beliefs are "central" anymore than they should be involved in deciding what ideas are "important" in the free speech field.[250] The centrality argument offered by the plaintiffs essentially posits that central religious beliefs should have a higher level of protection because infringement on "central" beliefs constitutes a higher burden on the religious individual. The compelled/prohibited distinction similarly rests on the notion that religious individuals should be protected from burdens that are particularly heavy. Because the *Smith* Court was not persuaded to accept the higher burden

246. *Smith*, 494 U.S. at 877.
247. *Id.* at 877–78.
248. *Id.* at 878 (emphasis added).
249. *Id.* at 886–87.
250. *Id.*

argument inherent in the centrality argument, the Supreme Court also likely would not accept the higher burden argument contained in the compelled/prohibited distinction.

Consistent with the *Smith* Court's reasoning, the Court interpreted past Supreme Court decisions in a way that also rejects any basis for distinguishing between compelled action and prohibited action. The *Smith* Court stated that "[s]ubsequent decisions have consistently held that the right of free exercise 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)*."[251] The Court then cited past opinions that included cases in which the plaintiff was compelled to perform conduct that was against his religious belief.[252]

Additionally, although the Supreme Court has not explicitly addressed an argument after *Smith* that *Smith* should be confined to prohibited conduct, the Court has expressly addressed a compelled/prohibited distinction in the free speech area.[253] If one can argue that it is more offensive for a state to compel someone to do a specific act rather than simply prohibiting someone from acting, one should also be able to argue that it is also more offensive for a state to force someone to speak a specific message rather than merely prohibiting a person from speaking. However, despite the fact that the reasoning behind recognizing a compelled/prohibited distinction would seemingly apply to the free speech area as well, the Supreme Court has consistently refused to recognize any distinction between the two. The Court has held in its free speech jurisprudence that although "[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance."[254]

Lower court rulings also have been consistent with the argument that the *Smith* decision is not limited to prohibiting conduct. Although none of the circuits have expressly faced an argument for recognizing a compelled/prohibited distinction, circuit courts have faced religious individuals being compelled to do something against their religious beliefs, and none have had any hesitation in applying *Smith*. For example, in *Kissinger v. Board of Trustees of the Ohio State University, College of Veterinary*

251. *Id.* at 879 (emphasis added) (internal quotation marks and citation omitted).

252. *Id.* at 879–80. For example, two of the cases the Court cites are Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 595 (1940) (student compelled to say pledge of allegiance) and United States v. Lee, 455 U.S. 252 (1982) (Amish compelled to collect social security taxes).

253. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796–97 (1988).

254. *Id.*

Medicine, the plaintiff was enrolled in Ohio State's veterinary college and refused to operate on live animals because it was against her religious beliefs.[255] The Sixth Circuit had no difficulty applying *Smith* and holding that the Free Exercise Clause did not prevent the school from requiring the plaintiff to operate on live animals in order to graduate.[256] Other circuit courts have held similarly.[257]

2. The distinction between compelled and prohibited action is not always clear-cut and would be difficult to apply.

Even if the Supreme Court wanted to recognize a compelled/prohibited distinction, the distinction often would be difficult to apply. Activities can often be characterized as either an act of omission or commission. For example, one Third Circuit case dealt with a plaintiff who refused to shave as required by police department policy.[258] The policy could be characterized as a prohibition against beards, or it could be characterized as a requirement to shave. Another example can be seen from a Ninth Circuit case in which a Quaker organization refused to follow a federal law that prohibited an employer from hiring or continuing to employ an unauthorized alien.[259] This law violated the Quakers' religious beliefs, which required them to "welcome . . . the sojourner, the stranger, the poor, and the dispossessed in their midst."[260] The law could be characterized as simply prohibiting the Quaker organization from hiring illegal aliens, or it could be characterized as requiring the Quaker organization to "turn away" illegal aliens or fire them if they are currently employed. Even in the *Axson-Flynn* case, one could make an argument that the school's policy is simply a prescription against altering the assigned scripts rather than a requirement to compel swearing.

As these examples show, the practical difficulty in the prohibited/compelled distinction is that even prohibitions often require affirmative action to comply. One solution may be to characterize the law or policy based on how the law or policy is worded, but surely free exercise protection should not turn on how the policy happens to be worded. Al-

255. 5 F.3d 177, 178 (6th Cir. 1993).

256. *Id.* at 179.

257. *See, e.g.*, Ryan v. United States Dep't of Justice, 950 F.2d 458, 461 (7th Cir. 1991) (holding that free exercise did not prevent FBI from requiring FBI agent to investigate matters that violated his religious beliefs).

258. Fraternal Order of Police Newark Lodge v. City of Newark, 170 F.3d 359, 360–61 (3d Cir. 1999).

259. Am. Friends Serv. Comm. Corp. v. Thornburgh, 941 F.2d 808, 809 (9th Cir. 1991).

260. *Id.*

though the prohibited/compelled distinction makes sense in theory, its application would show that the distinction might prove to be a slippery concept with seemingly random and unequal results.

3. A compelled/prohibited distinction likely is not a meaningful distinction to the religious individual.

Even if courts could overcome the practical difficulties in applying the compelled/prohibited distinction, it still may be a distinction without a difference to the religious individual. The argument for the compelled/prohibited distinction assumes that it is more offensive for a religious individual to be compelled to do something religiously forbidden to him than merely prohibiting him from doing something that is religiously required. This assumption, however, is not necessarily tenable. Whether a religious individual is being compelled to perform a sin of omission or a sin of commission, either way, he is being compelled to sin.

For example, if a religious individual believes that baptism is a prerequisite to salvation,[261] would it really be less offensive to him merely to be prohibited from being baptized rather than to be compelled to do something that is prohibited by his religious belief? The answer does not lie in the compelled/prohibited distinction, but in what type of religious burden is put on the individual. For someone who believes that baptism is essential for salvation, prohibiting baptism would place an extremely high burden on that individual. However, if the person were merely prohibited from doing something that was not essential to his salvation, such as having a public prayer at school graduation, the burden would not be as heavy.

The same can be said for compelled conduct. Although using profanity of any kind was against Axson-Flynn's religious belief, she was willing to use some profane words such as "damn" and "shit"[262] because using them was not as serious a religious violation as was using God's name in a profane way. Hence, in addition to the fact that the Supreme Court has already seemingly rejected the compelled/prohibited distinction and is not likely to change its mind, the distinction would also be difficult to apply and in any case is not one that would assist much in protecting an individual's free exercise rights when protection is important. Thus, the compelled/prohibited distinction cannot be relied on to prevent someone from being compelled to swear.

261. Many Christian religions interpret John 3:5 as a strict requirement for baptism as a prerequisite to salvation. John 3:5 states that "[e]xcept a man be born of water and of the spirit, he cannot enter into the kingdom of God." (King James).

262. Axson-Flynn v. Johnson, 356 F.3d 1272, 1281 n.2 (10th Cir. 2004).

CONCLUSION

When one understands the *Smith* Court's theoretical view of the Free Exercise Clause, it becomes clear that under *Smith*, a state may constitutionally compel someone to swear in violation of his religious beliefs. The Court's ultimate concern in *Smith* appears to be twofold: (1) the difficulty in defining and limiting the term "religion" in today's pluralistic society, and (2) the belief that courts have no business determining the significance of an individual's religious beliefs. For the *Smith* Court, these two concerns appear to lead to the conclusion that the Free Exercise Clause must protect everything or it must protect virtually nothing. As a result, the Court perceives its only available options are to leave free exercise protection to the political process or to allow a "system in which each conscience is a law unto itself."[263]

If one accepts the Court's assumption that these are the only two viable options, then admittedly, the Court has a stronger argument. But surely the Free Exercise Clause cannot be summarily dismissed as too difficult to apply and thus should not be applied at all. The Constitution does not give the judiciary the option of simply refusing to interpret its provisions. The First Amendment dictates that free exercise of "religion" must be protected.[264] Accordingly, the Constitution compels the Court to struggle with the contours of what constitutes "religion." There is no constitutional opt-out provision for constitutional words that are difficult to apply.

Nor does the Constitution give the Court the option of simply ignoring constitutional mandates. A large area of middle ground exists between the Court's two opposing alternatives for free exercise jurisprudence. Unfortunately, this middle ground requires the Court to tackle difficult issues such as defining religion and possibly evaluating the significance of a religious belief against the importance of a specific law. The Court describes the results of choosing this middle ground where "federal judges will regularly balance against the importance of general laws the significance of religious practice," and then dismisses it as a "parade of horribles" that is too "horrible to contemplate."[265]

It is not clear whom the Court feels would be most hurt by this "parade of horribles." Surely not religious individuals; they would undoubtedly prefer their religious beliefs to be probed for sincerity and significance rather than acquiesce to the Court's approach of simply refusing to grant

263. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

264. *See supra* note 227.

265. *Smith*, 494 U.S. at 889 n.5.

any constitutional significance to their beliefs at all. If the Court is concerned about requiring lawmakers at times constitutionally to exempt religious individuals from statutory provisions, its concern is misplaced. It is the lawmakers who have sought to prevent the Court from dismantling the Free Exercise Clause through such legislation as the RFRA, and in any case, the Court certainly should not be overly concerned about hurting legislatures' feelings by requiring their laws to conform to constitutional dictates. Perhaps the Court is concerned about putting such a burden on judges. If so, it would truly be odd to say that requiring the judiciary to perform its appointed role as constitutional interpreters is a burden no judge should be expected to fulfill.

To be sure, finding a balance in interpreting the Free Exercise Clause is difficult and will increase the discretion of judges; however, as one free exercise scholar has put it, "when the Constitution imposes limits on governmental power, interpretation of those limits in marginal cases is—to borrow some of the *Smith* Court's words—the 'unavoidable consequence' of constitutionalism."[266]

This Note has critiqued *Smith* by examining one adverse consequence of the Court's *Smith* decision: that a state may constitutionally compel a religious individual to swear. This consequence affirms the criticism of *Smith* that *Smith* inappropriately left free exercise protection primarily to the political process. In doing so, *Smith* left free exercise rights vulnerable in two ways: (1) the Free Exercise Clause no longer sufficiently protects free exercise rights that conflict with changing societal norms and majoritarian interests, and (2) even where free exercise rights are protected by societal norms, these rights are still vulnerable where there are governmental actors who choose not to follow those norms. *Axson-Flynn* provides a case where both of these vulnerabilities were arguably present. Axson-Flynn's protection against being compelled to swear from societal norms had been deteriorated by the weakening of society's swearing taboo, and even though most people would still hesitate to require someone to swear, Axson-Flynn was faced with a state university who did not share those hesitations. Consequently, *Axson-Flynn* affirms the criticisms of *Smith*.

Notably, this Note has primarily been a critique of *Smith* and is not an offered plan for what should replace *Smith*. Although other articles argue over the appropriate free exercise standard,[267] this Note's primary focus

266. McConnell, *supra* note 8, at 1153.

267. *See, e.g.*, Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925 (1998) (arguing that *Smith* should be revisited and replaced with an intermediate scrutiny standard for the Free Exercise Clause).

has been on showing that the *Smith* standard does not adequately protect against compelled swelling. However, almost any kind of standard with heightened scrutiny would better serve the Free Exercise Clause than the *Smith* standard. Although the Free Exercise Clause before *Smith* never actually gave the level of protection it purported to, the heightened protection it did give was more than enough to prevent a state from compelling someone to swear. Hence, a return to the pre-*Smith* standard should ameliorate the adverse consequence that *Smith* has produced. In any case, unless *Smith* is reinterpreted or overruled, there remains no constitutional way to prevent a state entity from compelling a religious individual to swear in violation of his or her beliefs. *Smith* repudiendus est.[268]

268. Latin for "*Smith* must be overruled." Brownstein, *supra* note 222, 213 n.310.