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Free Exercise of Religion: A Luxury Our Nation Can No Longer Afford?

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CASENOTES

FREE EXERCISE OF RELIGION: A LUXURY OUR NATION CAN NO LONGER AFFORD?—*Employment Division v. Smith*, 110 S.Ct. 1595 (interim ed. 1990).

I. INTRODUCTION

Over the past 120 years, the United States Supreme Court has developed a standard for defining the protection of religious beliefs and actions provided by the free exercise clause of the first amendment.[1] While religious beliefs have traditionally been accorded absolute protection, religious conduct has merited only qualified protection.[2] Establishing the limits of that qualified protection has been the focus of frequent free exercise controversy.[3] Since 1963, government regulations imposing a burden upon religious conduct have been evaluated under a strict scrutiny standard.[4] Under this standard, the government is required to demonstrate that a challenged regulation involves a compelling governmental interest and is the least intrusive means of achieving that interest before it can burden the exercise of religion.[5] In *Employment Division v. Smith (Smith II)*[6] the Supreme Court rejected the strict scrutiny standard and eliminated free exercise protection for religious conduct that conflicts with a neutral, generally applicable governmental regulation.[7]

This casenote reviews *Smith II* and the strict scrutiny standard that existed prior to the decision. It shows that application of the strict

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1. U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

2. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). The first amendment "embraces two concepts — freedom to believe and freedom to act. The first is absolute but, . . . the second cannot be. Conduct remains subject to regulation for the protection of society." *Id.* The state's power must not unduly infringe upon religious conduct. *Id.* at 304; *see also* Reynolds v. United States, 98 U.S. 145, 166 (1878) (stating that although the courts "cannot interfere with mere religious belief and opinions, they may with practices")

3. *See infra* notes 65-121 and accompanying text.

4. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

5. *See infra* text accompanying notes 85-88.

6. 110 S. Ct. 1595 (interim ed. 1990) [hereinafter *Smith II*].

7. *Id.* at 1603-06.

scrutiny standard to the facts of *Smith II* would have upheld the right of free exercise of religion for the respondents. Finally, this casenote concludes with a discussion of the implications of the *Smith II* standard for courts, religious objectors and state governments when interpreting the limits of the free exercise clause.

II. FACTS AND HOLDING

The Native American Church (NAC) is the traditional church of Native Americans and represents "one of the oldest continuously practiced religions in the Western Hemisphere."[8] For centuries, Native Americans have worshiped the deity, peyote, as the central sacrament of the Native American religion.[9] Members of the NAC direct their prayers to the entity of peyote, which they believe has extensive healing powers.[10] Since peyote is so vital to its religious ceremonies, the Native American religion would cease to exist without its use.[11]

Peyote use is illegal in the state of Oregon. It is listed as a Schedule I hallucinogenic drug under the Oregon criminal code.[12] The stat-

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8. Brief Amici Curiae of the Association on American Indian Affairs, in Support of Respondents at 7, Employment Div. v. Smith, 485 U.S. 660 (No. 88-1213) (1989) (*Smith I*) (LEXIS, Genfed library, U.S. file) [hereinafter Brief of Assoc. Am. Indian Affairs]. The Native American Church of North America (NACNA) was incorporated under the laws of the State of Oklahoma in 1950. *Id.* "Most Native American Church (NAC) groups are affiliated with the NACNA." *Id.* Article 2 of the Articles of Incorporation states the following:

> The purpose of this Church shall be to foster and promote religious belief in Almighty God and the customs of a Heavenly Father; to promote morality, sobriety, industry, charity and right living; and to cultivate a spirit of self-respect and brotherly love and union among the members of the several tribes throughout North America.

Id. Although the NAC keeps no records documenting membership, estimates of NAC membership range from 30,000 to 250,000, depending on the definition of 'member.' People v. Woody, 61 Cal. 2d 716, 720, 394 P.2d 813, 817, 40 Cal. Rptr. 69, 73 (1964).

9. *See* Brief of Assoc. Am. Indian Affairs, *supra* note 8, at 7; *see also Woody*, 61 Cal. 2d at 719-20, 394 P.2d at 817-18, 40 Cal. Rptr. at 72-73.

> The plant Lophophora williamsii, a small, spineless cactus, found in the Rio Grande Valley of Texas and northern Mexico, produces peyote, which grows in small buttons on the top of the cactus. Peyote's principle constituent is mescaline. When taken internally by chewing the buttons or drinking a derivative tea, peyote produces several types of hallucinations, depending primarily upon the user. In most subjects it causes extraordinary vision marked by bright and kaleidoscopic colors, geometric patterns, or scenes involving humans or animals. In others it engenders hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia. Beyond its hallucinatory effect, peyote renders for most users a heightened sense of comprehension; it fosters a feeling of friendliness toward other persons.

Id.

10. Brief of Assoc. Am. Indian Affairs, *supra* note 8, at 7.

11. *Id.*

12. OR. REV. STAT § 475.992(4)(a) (1983). This statute provides in pertinent part:

> It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice. . . . Any

ute does not grant any exemptions for religiously motivated use of peyote.[13] Thus, members of the NAC could be prosecuted for their religious use of peyote. Interestingly, however, the State of Oregon has never enforced this provision against members of the NAC.[14]

Alfred Smith and Galen Black were members of the NAC.[15] Both had a history of substance abuse and were recovering from their addictions.[16] As required by the recovery process, neither used any form of recreational drugs or alcohol.[17] However, in the practice of their sincere religious beliefs, both Smith and Black participated in the peyote ceremony.[18]

Smith and Black had been employed as drug rehabilitation counselors by the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment Center (ADAPT), a private substance abuse treatment center.[19] ADAPT required that all counselors with a prior history of substance abuse abstain from any use of alcohol or drugs.[20] When informed that Black had participated in the peyote ceremony, ADAPT demanded that he undergo rehabilitative treatment, since ADAPT perceived such use as a "sign of relapse" and an "intentional violation of employer rules."[21] Black refused to undergo treatment and was discharged from his job.[22] Smith was similarly fired in 1984.[23] Consequently, both applied to the Employment Division of the Oregon Department of Human Resources (Employment Division) for unemployment compensation benefits.[24] However, the Employment Division

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person who violates this subsection with respect to: .

(a) A controlled substance in Schedule I, is guilty of a Class B felony.

Id.

OR. ADMIN. R. 885-80-021 (1987) provides: "Schedule I consists of the drugs and other substances, by whatever official, usual, chemical, or brand name designated, listed in this rule . . . (including) (3) [h]allucinogenic substances . . .[including] (8) peyote."

13. Smith v. Employment Div., 307 Or. 68, 72-73, 763 P.2d 146, 148 (1988) [hereinafter *Smith, Or. II*].

14. *Smith II*, 110 S. Ct. 1595, 1617 (interim ed. 1990).

15. *Id.* at 1597-98.

16. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Oregon in Support of Respondents at 3, Employment Div. v. Smith, 485 U.S. 660 (1989) (No. 88-1213) (LEXIS, Genfed library, Briefs file) [hereinafter Brief of the ACLU].

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Black v. Employment Div., 75 Or. App. 735, 738, 707 P.2d 1274, 1276 (1985), *aff'd as modified*, 301 Or. 221, 721 P.2d 451 (1986).

22. *Id.*

23. *Id.*

24. *Smith II*, 110 S. Ct. 1595, 1598 (interim ed. 1990).

refused their request, relying on a state law which disqualified benefit applicants terminated for work-related misconduct.[25]

Smith and Black filed separate claims with the Employment Division.[26] Both asserted that their use of peyote was religiously motivated and protected under both the United States Constitution's free exercise clause and the constitution of the State of Oregon.[27] They asserted that the state was required to grant their unemployment benefits.[28] The Employment Division rejected their constitutional arguments, basing the decision on the contention that the "behavior constituted 'misconduct' disqualifying [them] from employment benefits."[29]

A. *Oregon Court of Appeals*

Both cases were appealed to the Oregon Court of Appeals. That court found that denying unemployment benefits based on the ceremonial use of peyote was a substantial burden on free exercise rights under the first amendment.[30] Moreover, the court determined that the state's asserted interest in protecting the unemployment fund from depletion was insufficient to override the free exercise challenge.[31] Thus, the court held that Smith and Black were entitled to receive unemployment benefits.[32] The Employment Division appealed.[33]

B. *The Oregon Supreme Court*

The Oregon Supreme Court consolidated the two cases[34] and found that payment of unemployment benefits was not required under the Oregon Constitution.[35] Despite this finding, the court affirmed the

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25. OR. REV. STAT. § 657.176(2)(a) (1987). This statute provides that "[a]n individual shall be disqualified from the receipt of benefits . . . if . . . the individual . . . [h]as been discharged for misconduct connected with work." *Id.* OR. ADMIN. R. 471-30 038(3) (1986) provides in pertinent part: "misconduct is a wilful violation of the standards of behavior which an employer has the right to expect of an employe [sic]." Smith v. Employment Div., 310 Or. 209, 215, 721 P.2d 445, 448 (1986) [hereinafter *Smith, Or. I*] (quoting OR. ADMIN. R. 471-30 038(3) (1986)).

26. Brief of the ACLU, *supra* note 16, at 4. Smith and Black also filed claims with the Equal Employment Opportunity Commission (EEOC), alleging violation of Title VII of the Civil Rights Act of 1964 which prohibits religious discrimination in employment. As a result, ADAPT revised its policy to exempt religiously motivated use of peyote. EEOC v. ADAPT, Civil No. 685-6139-E (D. Or. 1986).

27. *Black*, 75 Or. App. at 739, 707 P.2d at 1277.

28. *Id.*

29. Brief of the ACLU, *supra* note 16, at 4.

30. *Black*, 75 Or. App. at 743, 707 P.2d at 1280.

31. *Id.* at 741, 707 P.2d at 1279.

32. *Id.*

33. *Smith, Or. I*, 301 Or. 209, 721 P.2d 445 (1986).

34. *Id.* at 216, 721 P.2d at 448-49.

35. *Id.* The Oregon Supreme Court relied on the United States Supreme Court's holdings in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Bd.*, 450 U.S. 707 (1981). *Smith,*

decision of the Court of Appeals.[36] The state's highest court relied upon the language of the federal constitution, holding that the first amendment's free exercise clause requires payment of unemployment benefits when an employee is discharged due to a sincere religious practice.[37] It further held that the state's interest "in denying unemployment benefits to a claimant discharged for religiously motivated misconduct must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote."[38] Thus, it was immaterial to Oregon's unemployment compensation law whether the use of peyote violated a criminal statute.[39] Finally, the Oregon Supreme Court concluded that prior decisions had affirmed free exercise claims where the state's interest had been even more compelling than its interest in the compensation fund.[40] Therefore, the state was required to pay unemployment benefits as mandated by the first amendment free exercise clause.[41]

C. *The United States Supreme Court, Smith I*

The Employment Division appealed to the United States Supreme Court to determine whether the federal Constitution required a state to pay unemployment benefits to a person whose religiously motivated drug use was criminal under state law.[42] In *Smith I*, the Court held that if a state, consistent with the free exercise clause, has prohibited certain religiously motivated conduct through a criminal law, that state is free to deny unemployment benefits to persons who would otherwise be disqualified because of violation of that law.[43] However, the Court neither raised nor answered the question of whether a law criminalizing even religious use of peyote is consistent with the free exercise clause.[44] The Court did not decide whether the religious use of peyote is prohibited under state law,[45] but it remanded the case for determination of that issue.[46]

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36. *Smith, Or. I*, 301 Or. at 220, 721 P.2d at 451.
37. *Id.*
38. *Id.* at 218-19, 721 P.2d at 450. "The legality of [claimant's] ingestion of peyote has little direct bearing on this case." *Id.* at 219, 721 P.2d at 450.
39. *Id.*
40. *Id.* at 219-20, 721 P.2d at 450-51.
41. *Id.* at 220, 721 P.2d at 451.
42. Employment Div. v. Smith, 485 U.S. 660 (1989) [hereinafter *Smith I*].
43. *Id.* at 673-74.
44. *Id.* at 672.
45. *Id.* at 674.
46. *Id.*

The possibility that respondents' conduct would be unprotected if it violated the State's criminal code is, however, sufficient to counsel against affirming the state court's holding that the Federal Constitution requires the award of benefits to these respondents. If the

D. *The Oregon Supreme Court Revisited*

On remand, the Oregon Supreme Court determined that under state law, religious use of peyote is a criminal violation.[47] However, the court continued in its prior conviction, that regardless of criminal sanctions, Oregon's prohibition of religious peyote use is a violation of the first amendment's free exercise clause.[48] Again, the Oregon Supreme Court held that Smith and Black were entitled to receive unemployment benefits.[49] The State of Oregon appealed.

E. *The United States Supreme Court, Smith II*

The United States Supreme Court heard the case again and this time addressed the federal constitutional issue.[50] With Justice Scalia writing for the majority, the Court held that the free exercise clause does not preclude the state from prohibiting sacramental peyote use.[51] Thus, the state could properly deny unemployment benefits to persons discharged for peyote use.[52] In reaching this conclusion, the Court stated that a law does not violate the free exercise clause unless it specifically targets a religious practice, or violates another constitutionally protected right, such as freedom of speech or parental rights.[53] As a result of the *Smith II* decision, a neutral, generally applicable law will be presumed valid regardless of whether it seriously burdens the exercise of religion.[54]

III. BACKGROUND

A. *Theoretical Foundation of the Free Exercise Clause*

The first amendment to the United States Constitution provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[55] Free exercise pro-

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Oregon Supreme Court's holding rests on the unstated premise that respondents' conduct is entitled to the same measure of federal constitutional protection regardless of its criminality, that holding is erroneous. If, on the other hand, it rests on the unstated premise that the conduct is not unlawful in Oregon, the explanation of that premise would make it more difficult to distinguish our holdings in *Sherbert*, *Thomas*, and *Hobbie*.

Id. at 673-74.

47. *Smith, Or. II*, 307 Or. 68, 72-73, 763 P.2d 146, 148 (1989).

48. *Id.* at 73-76, 763 P.2d at 148-50. "[An] outright prohibition of good faith religious use of peyote by adult members of the Native American Church would violate the First Amendment directly and as interpreted by Congress." *Id.* at 73, 763 P.2d at 148.

49. *Id.*

50. *Smith II*, 110 S. Ct. 1595, 1599 (1990).

51. *Id.* at 1606.

52. *Id.*

53. *Id.* at 1602.

54. *See infra* notes 140-41 and accompanying text.

55. U.S. CONST. amend. I.

tections have developed under this clause as a fundamental, but not absolute, right.[56]

One of the basic precepts of the founders was that the new government should not interfere with individuals' values of religion and conscience. As stated by Justice Douglas in *United States v. Ballard*,[57]

> [t]he Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state.[58]

James Madison proposed that, in order to create an efficient democratic government, government must grant protection to a wide variety of interests.[59] One of the interests essential to a stable democratic government is the right to free exercise of religion.[60] "When the state compels an individual to choose between deeply held religious commitments and fundamental liberty or property interests, it risks not only its claim to legitimacy in the eyes of the believer but also the moral underpinning of the rule of law."[61]

In this line of reasoning, the United States Supreme Court has noted that the history of the first amendment dictates that an essential purpose of the free exercise clause is to protect minority religions with unusual beliefs and practices from interference by the majority through government action.[62] The Court has also stated that "the freedom to

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56. *See infra* notes 65-121 and accompanying text.

57. 322 U.S. 78 (1944).

58. *Id.* at 87.

59. THE FEDERALIST NO. 51, at 324-35 (J. Madison) (C. Rossiter ed. 1961).

> In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. . . . It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practicable sphere, the more duly capable it will be of self-government.

Id.

60. *See Special Project, Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1704 (1987). "The free exercise clause of the first amendment may simply reflect the framers' recognition of the political truth that to deny religious freedom is to encourage outright revolt." *Id.*

61. *Id.* at 1703.

62. Everson v. Bd. of Educ., 330 U.S. 1, 33-41 (1947) (Rutledge, J., dissenting).

believe and to practice strange and, it may be, foreign creeds—has classically been one of the highest values of our society."[63]

Whether the underlying principle is one of morality or practical wisdom, the free exercise of religion is a fundamental right embodied in the Constitution. Establishing this fundamental constitutional right as a functional reality has traditionally been within the authority of the judicial process.[64]

B. Judicial Evolution of Free Exercise Protections

1. Early Decisions and the Belief-Action Distinction

In 1878, the United States Supreme Court first addressed the question of free exercise of religion in *Reynolds v. United States*.[65] The Court in *Reynolds* affirmed the conviction of a Mormon for bigamy, even though bigamy was alleged to be central to the Mormon religion.[66] The Court established a distinction between the absolute right accorded religious belief and the qualified right of religious action.[67] This rule stated that although the courts "cannot interfere with mere religious belief and opinions, they may with practices."[68] The Court reaffirmed the belief-action distinction in 1944[69] and in 1961.[70]

However, in 1940, the Court initiated a departure from strict application of the belief-action distinction. In *Cantwell v. Connecticut*,[71] the Court reversed a conviction of a Jehovah's Witness for soliciting funds for a religious cause without a permit.[72] The Court recognized that the first amendment "embraces two concepts—freedom to believe and freedom to act. The first is absolute, but . . . the second cannot be.

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63. Wisconsin v. Yoder, 406 U.S. 205, 238 (1972) (White, J., concurring) (citation omitted).

64. *See infra* notes 65-121 and accompanying text.

65. 98 U.S. 145 (1878).

66. *Id.* at 166. "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." *Id.* at 164.

67. *Id.* at 166.

68. *Id.*

69. Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding the application of child labor laws to a guardian who permitted a minor to distribute religious materials, even though both the guardian and the minor believed that they had a religious duty to distribute the literature).

70. Braunfeld v. Brown, 366 U.S. 599 (1961) (sustaining the constitutionality of a Pennsylvania criminal statute proscribing Sunday retail sale of specified commodities). Adopting the reasoning of *Reynolds*, the Court held that the indirect burden placed on orthodox Jews was constitutionally acceptable because the criminal statute did not curtail the freedom to hold religious views, but simply made religious practice more expensive. *Id.* at 605-06. *See Smith II*, 110 S. Ct. 1595, 1605 (interim ed. 1990) (pointing out the imprudence of deeming regulation of religious conduct presumptively invalid).

71. 310 U.S. 296 (1940).

72. *Id.* at 311.

Conduct remains subject to regulation for the protection of society."[73] However, the Court held that the state's power must not "unduly infringe" on religious conduct.[74] The direct effect of this decision on free exercise protections was limited, since the Court relied on free speech analysis to uphold the right of religious expression.[75] However, *Cantwell* did establish that the free exercise clause applied to the states by incorporation of the fourteenth amendment.[76] Further, the requirement that the state's action not 'unduly interfere' with religious activities implied that some consideration must be given to the effect of a state regulation on religious conduct.[77]

2. Development of the Free Exercise Balancing Test

a. Sherbert v. Verner

In *Sherbert v. Verner*,[78] the Court made its first definitive departure from the rule that only religious belief, and not religiously motivated conduct, enjoys free exercise protection.[79] *Sherbert* applied a form of strict scrutiny to a free exercise challenge based upon a compelling-state-interest/least-restrictive-alternative balancing test.[80] *Sherbert* also established that a neutral, generally applicable statute may not withstand a free exercise challenge if the statute fails to pass the strict scrutiny test.[81]

In *Sherbert*, a Seventh-Day Adventist had been terminated as a result of her religiously motivated refusal to work on Saturday.[82] The Court created an exemption in a generally applicable statute to allow Sherbert to receive unemployment compensation.[83] The Court reasoned that as a result of state law, Sherbert had to choose whether to follow her religious obligations and forfeit benefits or to violate her religious obligations in order to work, a choice which imposed "the same kind of burden upon [her] free exercise of religion as would a fine imposed against . . . her Saturday worship."[84]

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73. *Id.* at 303-04.

74. *Id.* at 304.

75. *Id.* at 307. "The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged." *Id.*

76. *Id.* at 303.

77. *Id.* at 304.

78. 374 U.S. 398 (1963).

79. *Id.* at 403. "[A]ppellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation." *Id.*

80. *Id.* at 406-09.

81. *Id.*

82. *Id.* at 399.

83. *Id.* at 410.

84. *Id.* at 404.

The Court announced that the strict scrutiny standard would be applied in cases involving free exercise claims.[85] Once a burden on free exercise of religion has been shown, "[i]t is basic that no showing merely of a 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.' "[86] State regulation would thus only be tolerated where the religiously motivated conduct "invariably posed some substantial threat to public safety, peace or order."[87] Moreover, even where the state could show a compelling interest, a statutory burden on religious conduct could not be sustained unless the statute used the least restrictive means available and unless granting a religious exemption "would have rendered the entire statutory scheme unworkable."[88]

Thus, following *Sherbert*, the belief-action distinction of *Reynolds* was no longer the rule. Freedom of belief retained its status as an absolute right. Freedom of action remained subject to limitation, but only when the state could demonstrate a compelling need for limitation.[89] After an initial showing that a religious interest was impaired, the rule required that the state show a compelling interest, the lack of a less restrictive means to further that interest, and a valid justification for refusing to grant an exemption for the religious practice.[90]

b. Wisconsin v. Yoder

In *Wisconsin v. Yoder*,[91] the Court strengthened its commitment to the free exercise of religion by granting another religious exemption in a secular statute.[92] The Court held unconstitutional the imposition of criminal penalties against Amish parents who refused to send their children to a public high school through the age of sixteen.[93] *Yoder* reaffirmed the *Sherbert* balancing test by holding that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[94]

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85. *Id.* at 406-09.

86. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

87. *Id.* at 403.

88. *Id.* at 409. The Court purports to distinguish the holding in *Braunfeld v. Brown*, 366 U.S. 599 (1961), by asserting that the Sunday closing law challenged in *Braunfeld* served a "strong state interest" where no such interest was at stake in *Sherbert*. 374 U.S. at 408. However, this decision effectively overruled *Braunfeld*. *See Id.* at 418 (Stewart, J., concurring), 421 (Harlan, J., dissenting).

89. *See supra* text accompanying notes 85-88.

90. *Id.*

91. 406 U.S. 205 (1972).

92. *Id.* at 234-36.

93. *Id.* at 234.

94. *Id.* at 215.

The Court also declared that a neutral statute[95] was subject to the strict scrutiny standard.[96] The Court found that the state's general, albeit important, interest in education was inadequate to justify the state's infringement upon the practice of Amish faith.[97]

> Where fundamental claims of religious freedom are at stake . . . we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.[98]

Where *Sherbert* and its progeny dealt with violations of generally applicable civil law, *Yoder* presented a conflict between free exercise claims and a universally recognized public interest regulated by state criminal statutes. In weighing the added element of criminality, the Court found that, rather than elevating the state's interest, the criminal element, by its compulsive nature, increased the state's burden on religious freedom.[99] The criminal sanctions coerced the Amish to choose between abandoning fundamental religious beliefs and relocating to an area more tolerant of their beliefs.[100]

Finally, in reaching its conclusion, the Court relied on empirical data to evaluate the sincerity and centrality of the Amish free exercise claim.[101] The Court extensively reviewed the history of the Amish, their long established traditions, and their peaceful existence within the community.[102] After a lengthy analysis, the Court not only accepted the centrality of the free exercise claim to the religious practice of the Amish, but considered it in the application of the balancing test.[103] Thus, *Yoder* not only reaffirmed the application of the strict scrutiny standard to free exercise claims, but further extended its application to state claims based on neutral, generally applicable, criminal statutes. Moreover, the free exercise claim withstood the challenge of one of the state's most important interests: education. Further, the Court utilized

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95. A "neutral statute" is one which applies to the population in general, rather than specifically targeting a religious practice. *Id.* at 220-21.

96. *Id.* at 215.

97. *Id.* at 234-36.

98. *Id.* at 221.

99. *Id.* at 218.

100. *Id.*

101. *Id.* at 215-19.

102. *Id.*

103. *Id.* at 218-19.

empirical data to assess the centrality of the conduct to the religion, the sincerity of the participants, and the over-all traditions of the religious group.

Following the guidelines established in *Sherbert* and *Yoder*, the Court in *Thomas v. Review Board*[104] reversed a lower court ruling that denied a Jehovah's Witness unemployment compensation after he refused, for religious reasons, to work in the production of munitions.[105] The Court applied the strict scrutiny balancing test, stating that "[t]he state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."[106]

c. Recent Attempts to Limit Application of the Balancing Test

In recent years, the Court has denied several claims by religious objectors seeking relief from facially neutral regulations. In *United States v. Lee*,[107] the Court rejected an Amish farmer's request for an exemption from social security taxes.[108] The Court applied the strict scrutiny test, but nevertheless found the government's interest to be overriding.[109] The Court applied a less stringent test for free exercise challenges in the military in *Goldman v. Weinberger*.[110] Similarly, in *O'Lone v. Shabazz*,[111] the Court applied a relaxed standard in a prison setting.[112]

In a recent free exercise case, the Court virtually abandoned the strict scrutiny standard.[113] In *Bowen v. Roy*, the Court held that a rea-

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104. 450 U.S. 707 (1981).

105. *Id.* at 720.

106. *Id.* at 718. The Court continued, "[h]owever, it is still true that 'only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.'" *Id.* (quoting *Yoder*, 406 U.S. at 215).

107. 455 U.S. 252 (1982).

108. *Id.* at 260.

109. *Id.* (holding that the state's interest in collecting taxes overbalanced Lee's religious objection to mandatory social security payments). In a concurring opinion, Justice Stevens argued that the Court's efforts to distinguish *Yoder* were "unconvincing because precisely the same religious interest is implicated in both cases, and Wisconsin's interest in requiring its children to attend school until they reach the age of 16 is surely not inferior to the federal interest in collecting these social security taxes." *Id.* at 263 n.3 (Stevens, J., concurring).

110. 475 U.S. 503 (1986). Against a free exercise challenge, the Court upheld an Air Force regulation prohibiting the wearing of yarmulke indoors. *Id.* at 510. The Court declined to apply the strict scrutiny standard developed in *Sherbert*, requiring only that the Air Force demonstrate that the regulation advanced legitimate military ends while accommodating the individual to an appropriate degree. *Id.* at 506-08.

111. 482 U.S. 342 (1987).

112. *Id.* at 349. The Court refused to grant prisoners a relief from work to worship. *Id.* at 353. "[P]rison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights." *Id.* at 349.

113. Bowen v. Roy, 476 U.S. 693, 703-08 (1986).

sonable means of promoting a legitimate public interest was sufficient to defeat a free exercise challenge.[114] However, this relaxed standard was rejected just nine months after its development, and the Court reaffirmed strict scrutiny for free exercise claims in *Hobbie v. Unemployment Appeals Commission.*[115] In *Hobbie*, the Court reversed a decision denying unemployment benefits to a Seventh-Day Adventist who had been terminated for refusing to work on her Sabbath.[116]

The Supreme Court reversed its course again in 1988. In *Lyng v. Northwest Indian Cemetery Protective Association.*[117] the Court refused to apply the strict scrutiny standard in a free exercise case where burdens were imposed by governmental land use policies.[118] Thus, the *Sherbert* test was not applied.[119] However, in 1989, just one year prior to the decision in *Smith II*, the Court, in *Frazee v. Illinois Department of Employment Security*,[120] again changed its course by reaffirming the rule that, absent compelling justification, a state cannot enforce a generally applicable statute which imposes a serious burden on the free exercise of religion.[121]

IV. ANALYSIS

The strict scrutiny standard provides courts, free exercise claimants and states relatively clear and established guidelines to assess the merits of free exercise claims. Adherence to these guidelines protects minority religions as anticipated by the creators of the first amendment.

This analysis reviews the rationale used in the majority, concur-

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114. *Id.* at 707-08, 712. The *Bowen* Court was faced with a free exercise claim by a Native American that the use of a social security number required for receiving welfare benefits would rob a child of her spirit. *Id.* at 697. The Court found that a Social Security number is a reasonable means of promoting the legitimate public interest of preventing fraudulent claims, an interest which outweighed the parents' free exercise interest. *Id.* at 707-10. Justice O'Connor dissented, since the holding was in conflict with the principles established in *Sherbert* and *Thomas*. *Id.* at 731-33 (O'Connor, J., dissenting).

115. 480 U.S. 136 (1987).

116. *Id.* at 138-39. The Court relied on the analysis of *Sherbert* and *Thomas* to uphold the free exercise claims. *Id.* at 139-44.

117. 485 U.S. 439 (1988).

118. *Id.* at 458. The Court held that the free exercise clause did not bar government construction of a road upon public lands which had traditionally been the cite of Native American religious rituals. *Id.*

119. *Id.* at 452. "Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Id.* at 451.

120. 109 S. Ct. 1514 (interim ed. 1989).

121. *Id.* at 1518. While "there may exist state interests sufficiently compelling to override a legitimate claim to the free exercise of religion. . .," denying benefits for religious refusal to work on Sunday does not such an interest. *Id.*

ring and dissenting *Smith II* opinions. It demonstrates how the strict scrutiny standard, had it been used, would have been applied to the facts of the case. This analysis shows not only that application of the balancing test would have warranted a different outcome, but that allowing a religious exemption for members of the NAC would have been the least intrusive means of achieving the state's interests. Such an exemption would have, at most, only minimally inhibited the state's pursuit of its interests. Finally, this analysis reviews the potential effects of the *Smith II* decision on future free exercise challenges.

A. The Decision in Smith II

Justice Scalia wrote the majority opinion.[122] Justice O'Connor joined in the holding that the NAC should not be allowed religious use of peyote, but refused to join in the opinion. Her concurring opinion[123] strongly criticized the process by which the majority reached its conclusion. She found that the majority opinion "dramatically depart[ed] from well-settled First Amendment jurisprudence, appear[ed] unnecessary to resolve the question presented, and [was] incompatible with our Nation's fundamental commitment to individual religious liberty."[124]

Justice Blackmun's dissent concurred in Justice O'Connor's opinion but disagreed with her conclusion, finding that religious use of peyote is protected under the free exercise clause.[125] The dissenting opinion reviewed the background of the NAC, and analyzed the effects that granting an exemption to the NAC would have had on the interests of the state.[126]

The majority attempted at length to justify the broad proposition that a generally applicable law is not subject to the free exercise clause.[127] It included an analysis of the belief-action distinction,[128] the dependence of the free exercise clause on other constitutional protections,[129] a distinction of precedential cases,[130] the effect of criminal as-

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122. The majority opinion was joined by Justices Rehnquist, White, Stevens, and Kennedy.

123. Justices Brennan, Marshall and Blackmun joined in Parts I and II of Justice O'Connor's concurring opinion, but did not join in her conclusion.

124. *Smith II*, 110 S. Ct. 1595, 1606 (1990) (O'Connor, J., concurring).

125. *Id.* at 1616 (Blackmun, J., dissenting). The Court's "distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a 'luxury' that a well-ordered society cannot afford . . . and that the repression of minority religions is an 'unavoidable consequence of democratic government.' " *Id.* Justices Brennan and Marshall joined the dissent. *Id.* at 1615.

126. *Id.* at 1618-23.

127. *Id.* at 1597-606.

128. *See infra* notes 136-145 and accompanying text.

129. *See infra* notes 145-159 and accompanying text.

130. *See infra* notes 148-151 and accompanying text.

pects of the statute[131] and the difficulty posed for the judiciary in evaluating the centrality of a particular conduct to a religion.[132] Finally, the Court stated that a policy of absolute protection of the free exercise of religion is too great a demand on a democratic government[133] and that the implementation of any means to do so should be established by legislatures rather than courts.[134]

Justice O'Connor traced each of these arguments and provided an alternative perspective to Justice Scalia's opinion.[135] The following section compares the two opinions.

1. The Scope of the Free Exercise Clause

Relying on *Reynolds*,[136] Justice Scalia narrowly defined the scope of the free exercise clause, stating "the free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[137] When religious acts are involved, the Court conceded only that the free exercise clause would prevent government sanctions from *directly* targeting religious conduct.[138] However, a "neutral, generally applicable regulatory law that compel[s] activity forbidden by an individual's religion" is not covered by the constitutional mandate.[139] Justice Scalia wrote that the Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[140]

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131. *See infra* notes 158-160 and accompanying text.

132. *See infra* notes 168-170 and accompanying text.

133. *See infra* notes 176-179 and accompanying text.

134. *See infra* notes 181-185 and accompanying text.

135. *See infra* notes 136-186 and accompanying text.

136. United States v. Reynolds, 98 U.S. 145 (1878). In *Reynolds*, the Court originally determined the distinctions between the free exercise protections accorded religious beliefs and religious conduct. *Id.; see supra* notes 65-70 and accompanying text.

137. *Smith II*, 110 S. Ct. 1595, 1599 (1990).

138. *Id.*

> It would be true, we think (though no case of ours has involved the point), that a state would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of 'statues that are to be used for worship purposes,' or to prohibit bowing down before a golden calf.

Id.

139. *Id.* at 1601. "[I]f prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 1600.

140. *Id.* at 1600. In reaching this conclusion, Justice Scalia not only relied on *Reynolds*, which was decided over a century ago, but referred twice to *Minersville School Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586 (1940). *Id.* In *Gobitis*, the Court, against the religious objections of Jehovah's Witnesses, upheld a state law which made it compulsory to salute the flag. *Id.* at 600.

Justice O'Connor challenged this distinction, stating that:

> [t]he First Amendment . . . does not distinguish between laws that are generally applicable and laws that target particular religious practices. . . . If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.[141]

Recognizing that there is no absolute right to freedom of religious conduct,[142] Justice O'Connor cited free exercise precedent to support the contention that the Court traditionally has "respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the Government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest."[143]

Justice Scalia stated that free exercise protection of religious conduct has never, on its own validity, withstood a neutral, generally applicable law.[144] Rather, the courts have required a concurrent violation of another constitutional provision, such as freedom of speech, freedom of the press or parental rights.[145] The present case, according to Justice Scalia, "does not present such a hybrid situation, but is rather a free

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However, this decision was distinctly overruled only three years later by *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). When citing *Gobitis*, Justice Scalia failed to mention that it is no longer valid law. Moreover, Justice Scalia failed to mention *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which also invalidated a generally applicable state law requiring compulsory education and imposing criminal sanctions on religious violators. *Id.* at 218-19, 225, 234-36.

141. *Smith II*, 110 S. Ct. at 1608 (O'Connor, J., concurring). "Indeed, few states would be so naive as to enact a law directly prohibiting or burdening a religious practice as such." *Id.*

142. *Id.*

143. *Id.*

> The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests 'of the highest order.'; 'Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.'

Id. at 1609 (*quoting* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Bowen v. Roy, 476 U.S. 693, 728 (1986)); *see also* Hernandez v. Commissioner, 109 S. Ct. 2136, 2148 (interim ed. 1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987); United States v. Lee, 455 U.S. 252, 257-58 (1982); Thomas v. Review Bd., 450 U.S. 707, 718 (1981); McDaniel v. Paty, 435 U.S. 618, 626-29 (1978); Gillette v. United States, 401 U.S. 437, 462 (1971); Sherbert v. Verner, 374 U.S. 398, 403 (1963).

144. *Smith II*, 110 S. Ct. at 1601.

145. *Id.* Justice Scalia cited as examples: Wisconsin v. Yoder, 406 U.S. 205 (1972) (parental rights); Follett v. McCormick, 321 U.S. 573 (1944) (freedom of the press); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (freedom of speech); Cantwell v. Connecticut, 310 U.S. 296 (1940) (freedom of speech); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parental rights).

exercise claim unconnected with any communicative activity or parental right."[146] Thus, since the Oregon statute did not violate free speech, parental rights or intentionally target religious beliefs, the rule of *Reynolds* applied.[147]

Justice O'Connor maintained, however, that precedential decisions of the Court require a different interpretation. Although both *Cantwell* and *Yoder* involved other constitutional rights, both "expressly relied" on the free exercise clause in their holdings.[148] Both are "part of the mainstream of our free exercise jurisprudence" and cannot be so easily ignored.[149]

The Court then determined that the application of the strict scrutiny standard was not appropriate in this case. In support of this contention, the Court narrowly cited precedent to conclude that the *Sherbert* test had invalidated state regulation only in limited factual situations involving unemployment compensation.[150] Justice Scalia stated that, in the most recent cases, strict scrutiny had not even been considered by the Court.[151] He failed, however, to provide a reasoned analysis of the recent cases to support this contention.[152]

Justice O'Connor again disagreed. Her opinion noted that the strict scrutiny standard had been either applied or considered in all recent cases.[153] Factual situations existed, however, where the state's compelling interest outweighed the free exercise claim.[154] The strict scrutiny standard has been found inapplicable only in special contexts, such as military[155] and prison settings.[156] She maintained that deviation

146. *Smith II*, 110 S. Ct. at 1602.

147. *Id.*

148. *Id.* at 1609 (O'Connor, J., concurring).

149. *Id.*

150. *Id.* at 1602.

151. *Id.*

152. *Id.*

153. *Id.* at 1611 (O'Connor, J., concurring).

154. *Id.* In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447 (1988) and *Bowen v. Roy*, 476 U.S. 693, 707-08 (1986), the religious group had not demonstrated a sufficient burden on the practice of their religion, nor the element of coercion. Thus, the strict scrutiny standard was not applied.

155. *Smith II*, 110 S. Ct. at 1612 (O'Connor, J. concurring). In *Goldman v. Weinberger*, 475 U.S. 527 (1986), a more relaxed standard of scrutiny was applied since the case arose in a military setting. The Court did not address the distinction between this case and those in which a coercive regulation burdens religious conduct in a civilian setting.

156. *Smith II*, 110 S. Ct. at 1612 (O'Connor, J. concurring). In *O'Lone v. Shabazz*, 482 U.S. 342 (1987), the Court employed reasoning similar to that in *Goldman*. The Court applied a reasonableness standard since the free exercise challenge arose in a prison setting. Again, the Court did not distinguish this case from those arising in a civilian setting.

from precedent based on special factual situations did not preclude application of the strict scrutiny standard in the present case.[157]

Justice Scalia also distinguished *Smith II* from prior decisions on the basis that the statute in *Smith II* invoked criminal sanctions, while prior decisions "have [had] nothing to do with an across-the-board criminal prohibition on a particular form of conduct."[158] He denied that the strict scrutiny standard had ever invalidated a criminal law.[159] Thus, he concluded, "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to [criminal] challenges."[160]

Justice O'Connor refuted this contention, stating that "given the wide range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries a criminal sanction, and is generally applicable, that the First Amendment never requires the state to grant a limited exemption for religiously motivated conduct."[161] She preferred that the Court abide by its traditions, addressing individually each claim, and weighing the government's interests against the burden imposed upon the religious behavior.[162]

Justice Scalia also discussed what he perceived to be the significant differences between freedom of speech and protection against racial discrimination, as opposed to freedom of religious conduct.[163] He distinguished the application of the strict scrutiny standard to speech and race as constitutional norms, but in the free exercise application as merely a "constitutional anomaly" or "a private right to ignore generally applicable laws."[164]

Justice O'Connor strongly disagreed with this point, stating that "the First Amendment unequivocally makes freedom of religion, like freedom from racial discrimination and freedom of speech, a 'constitutional nor[m],' not an 'anomaly.' "[165] Freedom of religion is protected by the language of the first amendment,[166] and deserves application of strict scrutiny protection as applied in racial discrimination, freedom of speech, or equal protection cases.[167]

The Court found it inappropriate to decide whether the prohibited

157. *Smith II*, 110 S. Ct. at 1612 (O'Connor, J., concurring).
158. *Id.* at 1603.
159. *Id.* The court seems to overlook the fact that *Yoder* invalidated a criminal sanction.
160. *Id.* at 1603.
161. *Id.* at 1611 (O'Connor, J., concurring).
162. *Id.*
163. *Id.* at 1604.
164. *Id.*
165. *Id.* at 1612 (O'Connor, J., concurring).
166. *Id.*
167. *Id.*

conduct is central to the religious belief,[168] since courts do not have the means to evaluate such a subjective concept.[169] Having made this statement, however, Justice Scalia did not describe the reason why a court's inability to determine centrality precludes application of the strict scrutiny standard, other than to render it more difficult to limit religious claims.[170]

Justice O'Connor conceded that assessing centrality is not a function of the Court.[171] However, she distinguished between centrality and sincerity.[172] Although that distinction may be difficult, courts have traditionally made the distinction when the factual situation so demands.[173] She stated that courts are not precluded from making "factual findings as to whether a claimant holds a sincerely held religious belief that conflicts with, and thus is burdened by, the challenged law."[174] Thus, the balancing test can be applied to religious claims by a process of evaluating sincerity of the belief, rather than centrality to the religion.[175]

The most troubling of Justice Scalia's arguments is the determination that reliance on the compelling interest test to evaluate religious claims would be "courting anarchy."[176] He stated that the more diverse the society, the greater the threat of anarchy.[177] Since we "value that diversity, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[178] Conduct that the Court feared would create anarchy if peyote use were to be exempted from the statute include: health and safety regulations, vaccination laws, drug laws, traffic laws, social welfare legislation, child labor laws, and animal cruelty laws.[179]

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168. *Id.* at 1604.
169. *Id.*
170. *Id.* at 1604-05.
171. *Id.* at 1615 (O'Connor, J., concurring).
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 1605.
177. *Id.*
178. *Id.*
179. *Id.* Justice Scalia cited an extensive list of cases to support his contention that an exemption for religiously motivated peyote use would mandate similar exemptions for any claimed religiously motivated conduct, thus creating anarchy. This list of cases includes the following: Susan & Tony Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) (social welfare); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (racial equal opportunity); United States v. Lee, 455 U.S. 252 (1982) (tax); Gillette v. United States, 401 U.S. 437 (1971) (compulsive military service); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor); Cox v. New Hampshire, 312 U.S. 569 (1941) (parades in city streets); Olsen v. Drug Enforcement Admin., 878 F.2d

Justice O'Connor referred to this "parade of horribles," not as justification for abandoning the compelling interest test, but rather as an indication that "courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and compelling state interests."[180] Again, Justice O'Connor would prefer to invoke the Court's power to address individual cases in order to protect the free exercise of religion.

Finally, the Court delegated the traditional judicial responsibility of protecting the individual rights of minority group members to the legislature.[181]

> [T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It 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 or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[182]

Justice O'Connor viewed the balancing of interests as an essential element of the judicial role. Abandoning the protection of minority rights to the political process ignores "the harsh impact majoritarian rule has had on unpopular or emerging religious groups."[183] She stated that the true purpose of the first amendment is to "establish the [Bill of Rights] as legal principles to be applied by the courts" and to protect individuals who adopt minority religions from majoritarian legislative decision-making.[184] Delegating the protection of those rights to the leg-

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1458 (D.C. Cir. 1989) (drug control); Church of Lukumi Babalu Aye, Inc., v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989) (animal cruelty); United States v. Little, 638 F. Supp. 337 (D. Mont. 1986) (environmental protection); Cude v. State, 237 Ark. 927, 377 S.W.2d 816 (1964) (compulsory vaccinations); Funkhouser v. State, 763 P.2d 695 (Okla. Crim. App. 1988) (manslaughter and child neglect).

180. *Smith II*, 110 S. Ct. at 1612-13 (O'Connor, J., concurring).

181. *Id.* at 1606. "Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. . . . [A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." *Id.*

182. *Id.*

183. *Id.* at 1613 (O'Connor, J., concurring).

184. *Id.*

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . may not be submitted to vote; they depend on the outcome of no elections.

Id. (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 625, 638 (1943)); *see also* United

islature, she stated, "is to denigrate '[t]he very purpose of the Bill of Rights.' "[185]

Although both Justice Scalia and Justice O'Connor concluded that the NAC should not be allowed to utilize peyote in violation of a state law criminalizing such use, Justice O'Connor's approach is more appropriate in view of constitutional values and judicial precedent. Justice Scalia's approach undermines the whole basis of free exercise of religion, leaving a first amendment clause with words having no meaning. Thus, the two opinions differ widely in interpreting the scope of the free exercise clause. Justice Scalia views the free exercise clause as applicable only when a law directly and specifically targets religious conduct. Justice O'Connor views the free exercise clause more broadly, requiring the government to justify any action which results in a burden on religious practice, preferring a balancing approach, "sensitive to the facts of each particular claim."[186]

2. Justice Blackmun's Dissent

Justice Blackmun's dissent supported Justice O'Connor's allegations against the majority opinion. He agreed that the majority opinion violated prior first amendment jurisprudence by "mischaracteriz[ing]" the Court's precedents, and because the founding fathers could not have intended that freedom from religious persecution become a "luxury."[187] He agreed that the "critical question in this case is whether exempting respondents from the state's general criminal prohibition 'will unduly interfere with fulfillment of the governmental interest.' "[188] However, he disagreed with Justice O'Connor's resolution of the question, believing that the interests of the state should not outweigh the free exercise claim.[189] The remainder of his opinion was devoted to an application of the strict scrutiny standard to the facts of the case, concluding that religiously motivated use of peyote is protected under the free exercise clause.[190] The following section discusses the strict scrutiny standard and its application to the facts in *Smith II*.

B. The Strict Scrutiny Standard Should Have Been Applied

Free exercise protections for the past 27 years have been based

States v. Ballard, 322 U.S. 78 (1944).

185. *Smith II*, 110 S. Ct. at 1613 (O'Conner J., concurring).

186. *Id.* at 1611.

187. *Id.* at 1616 (Blackmun, J., dissenting).

188. *Id.*

189. *Id.*

190. *Id.* at 1622-23.

upon the balancing test devised in *Sherbert* and modified in *Yoder*.[191] The test demands that "a statute that burdens the free exercise of religion . . . may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means."[192] This section analyzes and applies the three elements of the test: burden, compelling interest and least restrictive means, and discusses their relationship to the state's interest.

1. Burden

The State of Oregon did not challenge the allegation that the statute imposed a significant burden upon the religious practices of NAC members.[193] However, for the purpose of this analysis a brief overview is necessary.

To initiate a free exercise challenge, the party asserting the right must prove the existence of a burden placed by government regulation upon a sincerely held religious belief.[194] The burden may be either direct or indirect.[195] Once a burden on a religious practice has been demonstrated, the burden of proof shifts to the state.[196] The state is then required to show that a compelling interest exists and that the

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191. Tyner, *Is Religious Liberty a Luxury We Can No Longer Afford?*, LIBERTY, Sept.-Oct. 1990, at 1, 4 (1990). "Since 1963, the *Sherbert* test has become the analytic tool for deciding cases of governmental burdens on religious practices. As of May 30, 1990, *Sherbert* had been cited in 546 recorded federal court cases and 393 state court cases—a total of 939 applications over 27 years." *Id.*

192. *Smith II*, 110 S. Ct. at 1615; *see also* Hernandez v. Commissioner, 109 S. Ct. 2136, 2148 (interim ed. 1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987); Bowen v. Roy, 476 U.S. 693, 732 (1986); United States v. Lee, 455 U.S. 252, 257-58 (1982); Thomas v. Review Bd., 450 U.S. 707, 718 (1981); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

193. Brief of Council on Religious Freedom as Amicus Curiae in Support of Respondents at 6, Employment Div. v. Smith, 485 U.S. 660 (No. 88-1213) (1989) (*Smith I*) [hereinafter Brief of the Council on Religious Freedom].

194. *Smith II*, 110 S. Ct. 1595, 1610 (1990); *see also* Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981). "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Id.*; "The fact that the underlying dispute involves an award of benefits rather than an exaction of penalties does not grant the Government license to apply a different version of the Constitution. . . ." Bowen v. Roy, 476 U.S. 693, 731 (1986); "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." Sherbert v. Verner, 374 U.S. 398, 404 (1963).

195. *See* Thomas v. Review Bd., 450 U.S. 707, 718 (1981); Sherbert v. Verner, 374 U.S. 398, 404 (1963).

196. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987).

challenged law is the least restrictive means of achieving that interest.[197]

Criminalizing the religiously motivated use of peyote clearly imposes a burden on the NAC. The NAC has a long history of peyote use for religious worship.[198] Peyote is the central sacrament of the NAC ceremonies.[199] Peyote, itself, is the object of worship, and prayers are offered to peyote as if to God.[200] "To prohibit the use of peyote results in a virtual inhibition of the practice of defendants' religion."[201]

The federal and state governments have recognized both the centrality of peyotism to the religion and the fundamental importance of protecting that practice. Accordingly, when Congress passed legislation against generalized use of peyote in the 1965 Drug Abuse Control Amendments Act, it included an express exemption for such use in bona fide religious ceremonies of the NAC.[202] The 1978 passage of the

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197. *Id.*

198. Brief of the Association on American Indian Affairs, *supra* note 8, at 6.

> Peyotism . . . is one of the oldest continuously practiced religions in the Western Hemisphere. Its roots have been documented back at least ten thousand years before the discovery of the North American continent, to the aboriginal people of the lower Rio Grande River in the continental United States and Mexico who were familiar with peyote and its spiritual qualities.

Id.

199. *Id.*

> The sacramental use of peyote in the rites of the Native American Church is very complex and not given to simple explanation. To the members, peyote is consecrated with powers to heal body, mind and spirit. It is a teacher; it teaches the way to spiritual life through living in harmony and balance with the forces of the Creation.
>
> The rituals are an integral part of the life process. They embody a form of worship in which the sacrament Peyote is the means for communicating with the Great Spirit. . . . Through prayer and meditation, the participants prepare themselves to receive the powers of healing and cleansing; through the music and testimonials, they exalt their Creator.

Id. at 6-7.

200. People v. Woody, 61 Cal. 2d 716, 721, 394 P.2d 813, 817, 40 Cal. Rptr. 69, 73 (1964).

> The 'meeting,' a ceremony marked by the sacramental use of peyote, composes the cornerstone of the peyote religion. The meeting convenes in an enclosure and continues from sundown Saturday to sunrise Sunday. To give thanks for the past good fortune or find guidance for future conduct. . . .
>
> A meeting connotes a solemn and special occasion. Whole families attend together, although children and young women participate only by their presence. Adherents don their finest clothing . . . pray, sing, and make ritual use of drum, fan, eagle bone, whistle, rattle and prayer cigarette, the symbolic emblems of their faith. The central event, of course, consists of the use of peyote in quantities sufficient to produce a hallucinatory state.

Id.

201. *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

202.. *See* Drug Enforcement Administration, Justice, 21 C.F.R. § 1307.31 (1990).

> The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

American Indian Religious Freedom Act[203] further demonstrates the intention of Congress "to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions . . . including but not limited to the use and possession of sacred objects and the freedom to worship through ceremonials and traditional rights."[204] Similarly, many states with substantial Native American populations have also enacted legislation for the protection of religiously motivated peyote use.[205] Other state courts have upheld free exercise challenges by the NAC.[206] These facts are indicative of both federal and state recognition of the centrality of peyote to

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203. Pub. L. No. 95-341, § 1, 92 Stat. 469 (1978) (codified as amended at 42 U.S.C. § 1996 (1988)).

204. *Id.*

> To the Indians, these natural objects have religious significance because they are sacred, they have power, they heal, they are necessary to the exercise of rites of the religion, they are necessary to the cultural integrity of the tribe and, therefore, religious survival or a combination of these reasons. To the Federal Government, these substances are restricted because the non-Indian has made them scarce, as in endangered species, or because they pose a health threat to those who misuse them, as in peyote.
>
> The Federal court system has shown that this apparent conflict can be overcome with the institution of well thought out exceptions. Although acts of Congress prohibit the use of peyote as a hallucinogen, it is established Federal law that peyote is constitutionally protected when used by a bona fide religion as a sacrament.

H.R. 1308, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1262, 1263. The federal structure of our government prevents the authority of these Acts from prescribing particular behavior to the states.

> Apart from the limitation of federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-51 (1985).

205. State statutes containing exemptions to their anti-peyote statutes for NAC ceremonial use include the following: ARIZ. REV. STAT. ANN. § 13-3402(B) (1989); COLO. REV. STAT. § 12-22-317(3) (1990); IOWA CODE § 204.204(8) (1989); KAN. STAT. ANN. 65-4116(c)(8) (Supp. 1990); MINN. STAT. § 152-02 Subd. 2(4)(1990); NEV. REV. STAT. ANN. § 435.541 (Michie 1989); N.M. STAT. ANN. § 30-31-6(D) (1989); S.D. CODIFIED LAWS ANN. § 34-20B-14(17) (1990); TEX. HEALTH & SAFETY CODE ANN. § 481-111(a) (Vernon 1991); WIS. STAT. § 161.115 (1989); WYO. STAT. § 35-7-1044 (1988).

In addition 12 other states link their exemption to those under the federal law, and thus, also have an exemption for the religious use of peyote by NAC members. ALASKA STAT. § 11.71.195 (1989); MISS. CODE ANN. § 41-29-111(d) (Supp. 1989); MONT. CODE ANN. § 50-32-203 (1989); N.J. REV. STAT. § 24:21-3(c) (Supp. 1990); N.C. GEN. STAT. § 90-88(d) (1989); N.D. CENT. CODE § 19-03.1-02.4 (1989); R.I. GEN. LAWS § 21-28-2.01(c) (1989); TENN. CODE ANN. § 39-17-403(d) (Supp. 1990); UTAH CODE ANN. § 58-37-3 (1990); VA. CODE ANN. § 54.1-3443(D) (1988); WASH. REV. CODE § 69-50.201(d) (1991); W.VA. CODE § 60A-2-201(d) (1984).

206. *See, e.g.*, State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); Whitehorn v. State, 561 P.2d 539 (Okla. Crim. App. 1977); *see also* Native Am. Church v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979), *aff'd mem.*, 633 F.2d 205 (2d Cir. 1980).

the religion and the burden which would be imposed by restricting that use.

2. Compelling State Interest

The second prong of the strict scrutiny test requires demonstration by the state of a compelling interest. The compelling interest analysis recognizes that vital liberties must sometimes yield to paramount state interests.[207] However, to give the compelling state interest analysis meaning, the state must clearly demonstrate what the interest is and why the interest would suffer should it be subordinated to a constitutional challenge.[208]

Three critical elements must be considered in determining whether an interest is compelling: "the importance of the secular value underlying the governmental regulation, . . . the degree of proximity and necessity that the chosen regulatory means bears to the underlying value; and . . . the impact that an exemption for religious reasons would have on the over-all regulatory program."[209] Even against the highest state interests, the Court has not consistently withdrawn free exercise protections. "[E]ducation is perhaps the most important function of state and local governments";[210] yet, in *Yoder*, the state's general interest in education was inadequate to allow infringement of the Amish faith.[211]

In *Smith I*, the Court noted that the Oregon Supreme Court had found the state's actual interest to be the financial solvency of its unemployment compensation fund.[212] However, previous decisions had determined that financial integrity was insufficient to overcome a free exercise challenge.[213] Thus, the state relied on its interest in the health

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207. Aleinkoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 987 (1987).

208. *Id.*

209. Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 329 (1969) (*quoting* Giannella, *Religious Liberty, Non-establishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1390 (1967)).

210. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

211. Wisconsin v. Yoder, 406 U.S. 205, 208 (1972).

212. *Smith I*, 485 U.S. 660, 664 n.7 (1989).

> The [state] court also concluded that the State's interest in denying benefits was not greater in this case than in *Sherbert* or *Thomas*. This conclusion rested on the premise that the Board had erroneously relied on the State's interest in proscribing the use of dangerous drugs rather than just its interest in the financial integrity of the compensation fund.

Id. at 666.

213. Brief of Amicus Curiae of the American Jewish Congress in Support of Respondents at 13, Employment Div. v. Smith, 485 U.S. 660 (No. 88-1213) (1989) (*Smith I*) [hereinafter Brief of the American Jewish Congress].

> No doubt because the 'financial integrity' argument has been rejected by this Court several times, most recently in *Hobbie*, the State, in its later appeals, began instead to speak of the evils of peyote use and the dangers of appearing to sanction its use by accommodating the religious needs of Native American Church members.

Id.

and welfare of citizens.[214] This broad state interest encompasses three general areas: enforcement of laws; prevention of the proliferation of claims; and protection of individual safety.[215]

Generally, the claim of such broad state interests has been criticized as creating unbalance in the balancing test.[216] "[F]or the balancing test to make any sense, relatively equal levels of generality or abstraction must be chosen for each side of the balance."[217] Oregon's broadly phrased governmental interest appears to overshadow the narrow interest of two individuals' rights to unemployment compensation benefits.[218] Even allowing assertion of such a broad interest, a review of the state's claimed interests demonstrates that none is so compelling that the free exercise claim should have been subordinated.

The first general area of state interest is the enforcement of laws. In *Smith II*, Oregon asserted that a criminal law invoked an even greater state interest.[219] Interestingly, the state has never attempted to enforce criminal sanctions against either Smith or Black.[220] Even so, enforcement of criminal sanctions has never been sufficient, on its own, to withstand a free exercise challenge. As noted above, *Yoder* involved the threat of criminal sanctions, but, nevertheless, the state's interest lost to the free exercise claim.[221] Moreover, the increased coercion involved in criminal sanctions significantly adds to the burden on religious freedom. "A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it 'results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.' "[222] Criminal sanctions could conceivably tip the balance in favor of the religious objector. Therefore, the state can not rely solely

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214. Brief for Petitioners at 8, Employment Div. v. Smith, 307 Or. 68, 763 P.2d 146 (No. 88-1213) (1988) [hereinafter Brief for Petitioners]. "Any regulatory exemption would compromise, first, government's interest in the health and well-being of individual citizens. The dangers of drug use are indifferent to the motivations of the user." *Id.*

215. *Id.* at 10-11; *see infra* notes 219-245 and accompanying text.

216. *See* Clark, *supra* note 209, at 331.

217. *Id.*

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.

Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

218. *See* Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943).

219. *Smith II*, 110 S. Ct. 1595, 1598 (interim ed. 1990).

220. *Id.* at 1617.

221. *Yoder*, 406 U.S. at 227.

222. *Smith II*, 110 S. Ct. at 1610 (*quoting* Braunfeld v. Brown, 366 U.S. 599, 605 (1961)).

on enforcement of criminal laws to present a convincing compelling interest.[223]

Citing a specific interest in controlling the use of illegal drugs adds weight to the state's argument. One consideration is that a uniform regulatory scheme would be threatened by exemptions for religiously motivated drug use.[224] However, many states and the federal government have expressly rejected the argument that a generalized interest in fighting drug abuse requires the prohibition of peyote use in the context of legitimate religious ceremonies.[225]

Related to the goal of preventing drug abuse is controlling the traffic of illegal drugs. However, peyote is not a popular drug, and illegal traffic of peyote is minimal.[226] The federal government strictly controls the use of peyote by the NAC,[227] and the NAC must register with the DEA in order to purchase peyote.[228] The state of Texas, the only state where peyote is grown, also regulates the sale of peyote.[229] Thus, peyote is unlikely to create a problem in drug traffic.

The second general area of state interest is prevention of a proliferation of free exercise claims. This could occur by an increasing number of individuals joining existing churches, or by the initiation of new churches utilizing illegal substances in religious ceremonies. However, the state's fear of increased membership in the NAC due to the availability of peyote is not supported by evidence in other jurisdictions.[230] Many states and the federal government have long established

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223. *See, e.g.*, People v. Woody, 61 Cal. 2d 716, 727, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964). The California Supreme Court responded to the state's argument by stating that "the problems of enforcement here do not inherently differ from those of other situations which call for the detection of fraud." *Id.*

224. Brief for Petitioners, *supra* note 214, at 10.

> Laws regulating dangerous drugs would become a patchwork of prohibitions, exempting some people for some drugs and other people for other drugs. That result would cripple law enforcement efforts by making it difficult to distinguish legitimate from illegitimate use and trafficking and by forcing government to disprove easily invoked religious use defenses in criminal prosecutions.

Id.

225. *See supra* notes 202-206 and accompanying text.

226. *Smith II*, 110 S. Ct. at 1620; *see also* Olsen v. DEA, 878 F.2d 1458, 1463 (1989). The DEA noted that from 1980 to 1987, it seized only 19.4 pounds of peyote, while marijuana seized during the same period was 15,302,468.7 pounds. *Id.*

227. *Smith II*, 110 S. Ct. at 1620; *see* Drug Enforcement Administration, Justice, 21 C.F.R. § 1307.31 (1989)) (distribution of peyote to Native American Church is subject to registration requirements).

228. 21 U.S.C. §§ 821, 822 (1989) (Comprehensive Drug Abuse Prevention and Control Act of 1970).

229. Distribution of peyote as allowed by the federal exemption is regulated by the Criminal Enforcement Division of the Texas Department of Public Safety under the Texas Drug Laws.

230. *Smith II*, 110 S. Ct. at 1620.

exemptions for religiously motivated peyote use, and none have experienced substantial increases in church membership.[231]

The fear that granting a religious exemption to the NAC would increase the number of churches seeking religious exemptions for drug use is a related concern.[232] However, states that have granted exemptions for the ceremonial use of peyote have not been burdened with the establishment of new drug-using churches.[233] Where claims have been presented, the circumstances of the NAC's use of peyote which render that use compatible with the state's interests are easily distinguished from those less compatible.[234] Substantial differences exist in the amount of control individual churches exert over drug use.[235] The inherent appeal of the drugs themselves are distinguishable.[236] Each factor is a valid consideration in weighing the balance between the free exercise right and the state's compelling interest.

As Justice Blackmun aptly noted in his dissent, "[t]hough the state must treat all religions equally, and not favor one over another, this obligation is fulfilled by the uniform application of the 'compelling interest' *test* to all free exercise claims, not by reaching uniform *results* as to all claims."[237] Since *Yoder* established the use of empirical data in evaluating free exercise claims, granting an exemption to religious use of peyote is not an implicit violation of the establishment clause.

The third general area of state interest is the protection of individual safety and well-being. Oregon asserted that the harmful effects of

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231. *Id.*

232. Oregon claimed that granting an exemption for the use of peyote by the NAC would not only cause an increase in the number of churches requesting exemptions for drug use, but would also create a conflict between the free exercise and the establishment clauses. "As a constitutional matter, any protection extended to Smith and Black for their religious peyote use should honor not only their claim to religious freedom, but it should honor all others on like terms. Government cannot, however, 'accommodate' their religious drug use without disserving its interest in religious neutrality." Brief for Petitioners, *supra* note 214, at 18.

233. *Smith II*, 110 S. Ct. at 1620.

234. *Id.; see also* Wisconsin v. Yoder, 406 U.S. 205, 235-36 (1972). "In light of this convincing showing, one that probably few other religious groups or sects could make, . . . it was incumbent on the State to show with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption to the Amish." *Id.*; Olsen v. DEA, 878 F.2d 1458, 1463 (1989) (rejecting an application for exemption of marijuana use by the Ethiopian Zion Coptic Church, the DEA noted that the "overwhelming difference [between marijuana and peyote use] explains why an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies, and not for a religion which espouses continual use of marijuana"); Benjamin v. Coughlin, 708 F. Supp. 570, 575 (S.D.N.Y. 1989) (refusing to allow Rastafarian prisoners an extremely complex special diet, although Jewish and Muslim prisoners' dietary needs were respected).

235. *See* Olsen v. State of Iowa, 808 F.2d 652 (8th Cir. 1986) (comparing controlled use of peyote by the NAC with the Coptic Church's continuous use of marijuana).

236. Brief of the American Jewish Congress, *supra* note 213, at 20 (citations omitted). "There is little public demand for peyote. The taste is unpleasant and often causes nausea. *Id.*

237. *Smith II*, 110 S. Ct. at 1621 (Blackmun J., dissenting).

illegal drug use do not distinguish between the religiously motivated user and the abuser.[238] Moreover, state officials claimed that without violating the privacy of the religious ceremony, the state has no means of monitoring the NAC's peyote use to assure that it is not abused.[239] However, Oregon provided no evidence that religiously motivated peyote use is harmful to the individual.[240] In fact, a substantial amount of evidence demonstrates that the NAC's peyote use is beneficial rather than harmful.[241] Peyote has been successfully used in the treatment of alcoholism and drug addiction.[242] Considering the historical problems of drug abuse and alcoholism among Native Americans,[243] religious peyote use might foster, rather than impede, the state's interest in controlling drug abuse.[244] Additionally, numerous states and the federal government have provided exemptions with no evidence of ill effects to individuals, and none has demonstrated the need for invasive monitoring of the NAC's ceremonies.[245]

In summary, to assert a compelling interest, the state must do more than merely speculate about the impact of a religious exception to its statutes on the state's compelling interest. The Court in the past has required the state to show "with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption."[246] The *Smith II* Court failed to require Oregon to show with 'particularity' how the state's interests would be "adversely affected by granting an exemption" for peyote use by members of the NAC.[247]

3. The Least Restrictive Means

When first amendment rights are implicated, previous decisions

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238. Brief for Petitioners, *supra* note 214, at 19 (citations omitted).

239. *Id.* at 20.

240. *Smith II*, 110 S. Ct. at 1618.

241. People v. Woody, 61 Cal. 2d 716, 722-23 n.3, 394 P.2d 813, 818 n.3, 40 Cal. Rptr. 69, 74 n.3 (1964). "Most anthropological authorities hold Peyotism to be a positive, rather than negative, force in the lives of its adherents." *Id.*

242. *See generally* State v. Wittingham, 19 Ariz. App. 27, 30, 504 P.2d 950, 953 (1973); *Woody*, 61 Cal. 2d at 722-23, 394 P.2d at 818, 40 Cal. Rptr. at 74 (finding that religious use of peyote has been successful in the treatment of alcoholism, and has positive therapeutic and rehabilitative effects).

243. *Smith II*, 110 S. Ct. at 1619.

244. Since religiously motivated use of peyote has been shown to decrease drug and alcohol addiction in Native American populations, it is arguable that at least some of those citizens will become more productive, thereby becoming an asset to the state rather than a burden on the state's social welfare programs.

245. *Smith II*, 110 S. Ct. at 1618. "The Native American Church's internal restrictions on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns." *Id.*

246. Wisconsin v. Yoder, 406 U.S. 205, 236 (1972).

247. *Id.*

have clearly indicated that it is not enough for the government to show an important ultimate goal.[248] The government must also show that it has chosen the least intrusive means of achieving that goal, however important.[249] Even where the government has shown that a compelling interest is at stake, it must still show that "unbending application of its regulation to the religious objector" is necessary to protect that interest.[250]

As noted above, many states and the federal government have enacted exceptions to their anti-peyote laws for the use by the NAC's members.[251] Yet there is no evidence that enforcement of generally applicable drug abuse laws has been made more difficult[252] or that those members have suffered any adverse consequences as a result of such use.[253] There is no evidence that an exemption for the religious use of peyote from state law proscriptions of dangerous drugs would substantially impair any of the above mentioned state interests. Thus, a statute criminalizing the use of peyote which does not allow an exempt sacramental use is not the least restrictive means of achieving compelling state interests.[254]

C. *The Future of the Free Exercise Clause*

1. A Constitutional Norm as a Functional Reality

When the founders created the ground rules for a society committed to the value of individual rights, they could not have envisioned that the free exercise of religion would become a luxury that democracy could not afford. It is more likely, considering the social and political biases of the time, that they intended a system which would provide for the progressive realization of a more tolerant and equitable society.[255]

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248. *See, e.g., id.*

249. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

250. Bowen v. Roy, 476 U.S. 693, 728 (1986).

> [R]espondents' use of peyote seems closely analogous to the sacramental use of wine by the Roman Catholic Church. During Prohibition, the Federal Government exempted such use of wine from its general ban on possession and use of alcohol. *See* National Prohibition Act, Title II, § 3, 41 Stat. 308. However compelling the Government's then general interest in prohibiting the use of alcohol may have been, it could not plausibly have asserted an interest sufficiently compelling to outweigh the Catholics' right to take communion.

Smith II, 110 S. Ct. at 1618 n.6.

251. *See supra* notes 202-206 and accompanying text.

252. *See supra* notes 226-229 and accompanying text.

253. *See supra* notes 240-245 and accompanying text.

254. A comparison of the federal exemption for peyote use by NAC members, 21 C.F.R. § 1307.31, with the National Prohibition Act, Ch. 740, Title I § 1, 49 Stat. 872 (1935) reveals a similarity between the exemptions for wine and peyote.

255. Sultan, *The Constitutional Principle of Equality and Sex-Based Differential Treatment*, 16 U. DAYTON L. REV. 21, 21 (1977).

Inherent in that system is the realization that

> the right to free religious expression embodies a precious heritage. . . . In a mass society, which presses at every point toward conformity, the protection of self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty.[256]

In the years since the birth of this nation, the constitutional norm of free exercise of religion has been evolving toward becoming a functional reality. In large part, this progress was the product of the judicial system. The transition from *Reynolds* to *Yoder* demonstrated the Court's commitment to a developing standard giving vitality to the free exercise clause.[257] Unfortunately, at a time when religious and ethnic groups are more diversified than ever, the decision in *Smith II* demonstrates a decisive break from that trend.

2. The Meaning of Free Exercise

Free exercise must be assumed to encompass both freedom of religious belief and freedom of religious activity.[258] Unquestionably, some limits must be imposed on religious activity.[259] The strict scrutiny balancing test served as a reasonable means of setting those limits.[260] The elimination in *Smith II* of the strict scrutiny standard severely limits potential free exercise challenges.[261] As a result, the free exercise clause offers protection only to religious belief and not to conduct, except in very limited circumstances.[262]

The Court also concluded that the free exercise clause only invalidates a neutral governmental regulation when accompanied by a corol-

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> The founding fathers of the United States proclaimed our national values as abstract propositions, leaving their application, their implementation, and the delimitation of their breadth to future generations. As moralists, missionaries, and political philosophers, the founding fathers sought to establish and perpetuate the best in human nature and human society. As practical politicians, aware that the art of politics is the realization of the possible, they were willing to achieve as much as circumstances permitted, secure in the satisfaction that future developments generally would be in the right direction. They fashioned that direction by placing the nation's basic principles in the Constitution which established the government that was intended to implement those values.

Id.

256. People v. Woody, 61 Cal. 2d 716, 727, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964).

257. *See supra* notes 65-121 and accompanying text.

258. *See supra* notes 79-82 and accompanying text.

259. *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). Some religiously motivated activity might so offend ethics and morals that limits must be opposed. Human or animal sacrifice could not be deemed a protected exercise of religion in this society.

260. *See supra* notes 85-88 and accompanying text.

261. *See infra* notes 281-286 and accompanying text.

262. *See supra* notes 138, 140-141, 150, 161 and accompanying text.

lary violation of another constitutional right, such as freedom of speech, freedom of the press or the implied right of parental determination.[263] However, freedom of speech implies the freedom to think or to believe.[264] Thus, there would be no need in the Bill of Rights for protecting religious thought. Since *Marbury v. Madison*[265] was decided in 1803, it has been well established that a clause with no independent meaning is a redundancy not assumed in the Constitution.[266] Thus, a basic assumption in the Court's rationale is questionable, which renders its subsequent conclusions unsound.

3. Elimination of Guidelines

By invalidating years of precedent, *Smith II* has eradicated effective and functional guidelines for determining the future application of free exercise protections. The rule developed in *Smith II* provides that free exercise is not protected against a neutral, generally applicable statute.[267] This rule indicates that unless free speech or unemployment benefits are involved, free exercise is protected only against a law specifically directed at a religious practice.[268] Yet, prior to *Smith II*, a long line of Supreme Court cases had developed a system for evaluating free exercise claims in various factual contexts.[269] It is difficult to determine exactly where *Sherbert*, *Yoder* and their progeny now stand in the constitutional picture. The Court neither overruled, nor adequately distinguished them. In essence, it ignored them.

The Court also left undetermined other specific issues. It is unclear whether a criminal law will always override a free exercise challenge. It appears, although it was not clearly stated, that a criminal law's burden on a religious practice is now irrelevant.[270] Further, the decision in

263. *See supra* notes 144-147 and accompanying text.

264. "The right of freedom of speech and the press includes not only the right to utter or to print, but the right to . . . freedom of thought." Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (citations omitted).

265. 5 U.S. (1 Cranch) 137 (1803).

266. "Transforming the protection afforded by the Due Process Clause into a redundancy mocks those who, with care and purpose, wrote the Fourteenth Amendment." Michael H. v. Gerald D., 109 S. Ct. 2333, 2351 (interim ed. 1989) (Brennan, J., dissenting); " '[I]t cannot be presumed that any clause in the Constitution is intended to be without effect. . . . In interpreting the Constitution, 'real effect should be given to all the words it uses.' " *Griswold*, 381 U.S. at 490-91 (Goldburg, J., concurring) (*quoting* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803); Myers v. United States, 272 U.S. 52, 151 (1926)); "It cannot be presumed that any clause in the Constitution is intended to be without effect, and therefore, [a construction which negates a clause] is inadmissible, unless the words require it." *Marbury*, 5 U.S. (1 Cranch) at 174.

267. *Smith II*, 110 S. Ct. at 1597-606.

268. *See supra* notes 140, 146-148, 152, 163 and accompanying text.

269. *See supra* notes 65-121 and accompanying text.

270. In Minnesota v. Hershberger, 444 N.W.2d 282 (Minn. 1989), the Amish contested a generally applicable state law that required orange reflectors on slow-moving vehicles because the

Smith II implies that a generally applicable law that has the effect of forcing religious members to abandon either their home or their religion is constitutionally acceptable.[271]

Lower courts attempting to implement the rule expressed in *Smith II* will be faced with these unresolved problems. They have no guidelines to determine the options available to them in their decision-making processes. Thus, if the Court was bound on the course it took in *Smith II*, it would have been more practical to have specifically overruled the conflicting precedent. A definitive standard could have been developed.[272] Lower courts will now have to choose whether to apply *Smith II* or to ignore it and rely on traditional free exercise standards. The Supreme Court is capable of and responsible for more uniform application of law.

4. Judicial and Legislative Role Reversal

Denying religious practice protection against a neutral, generally applicable law has opened the door to serious infringement upon religious liberties. Minority religions are now in the precarious position of looking to majority dominated legislatures for the protection of a fundamental constitutional right.[273] Consistent application of the strict scrutiny standard would have avoided this outcome. However, the Court said that disfavoring minority religions is an unavoidable consequence of democracy.[274] Yet, first amendment protections were enacted "precisely to protect the rights of those whose religious practices are

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bright color was prohibited by their religion. However, research had shown that silver reflectors on vehicles were equally as effective as orange. Thus, the Minnesota Supreme Court concluded that there was a demonstrated burden on sincere religious practices. However, although there was a compelling state interest in vehicular safety, since the state had not employed the least restrictive means available to achieve that interest, an exemption in the statute would not compromise the state's interests. *Id.* at 289. The United States Supreme Court remanded that decision for consideration in light of *Smith II*. *Id.* at 289-90.

271. *See supra* text accompanying note 100.

272. The Court implies that religious conduct is only protected under the free exercise clause when the conduct involves unemployment benefits, freedom of speech or press, or parental rights or when the law is specifically directed at a religious practice. Otherwise, no balancing of interests is required, regardless of the severity of the burden imposed on the religious adherents. This standard is unlikely to be upheld against the claims of an established, more traditional religion of the Judeo-Christian heritage. Should a state pass a generally applicable law regulating the slaughter of animals that was contrary to the Kosher tradition, it is unlikely that the law would be upheld against a Jewish religious challenge. Thus, the *Smith II* decision will encourage courts to apply the standard in a discriminatory manner or attempt to circumvent its application.

273. The Court's deference to the legislatures erodes the power of the Court which was so painfully obtained in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). "The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it." *Id.* at 177.

274. *See supra* notes 176-179 and accompanying text.

not shared by the majority and may be viewed with hostility."[275] Thus, while the political process might normally protect majority religions, unpopular minority beliefs and practices are subject to majoritarian intolerances. This may be an indication that the traditional roles of the Court and the legislature are reversing. It is distressing that this country's jurisprudence has evolved to the point that minorities might depend on the legislatures to override the ill effects of the highest court's decisions on the exercise of fundamental rights. But the outcome in *Smith II* reflects such a role reversal.

5. Potential Application and Impact of *Smith II*

The difference between the weight given the rights of majority and minority groups can be demonstrated by application of the *Smith II* decision to the Catholic ceremony of Holy Communion.[276] The ceremony of Communion is similar to the peyote ceremony. Both involve a long standing tradition requiring the use of an intoxicating substance during a religious ceremony. Like the NAC use of peyote, the Catholic use of wine under a criminal statute, as during Prohibition, unless exempted, would be a violation of a neutral, generally applicable statute. Thus, if the ceremonial use of peyote is unprotected, so could be the use of wine. Yet, it is impossible to imagine that a court or a legislature would find that the use of wine at Communion would be subject to a generally applicable ban on the use of alcohol. The difference can be found in the acceptance, familiarity and political power of the Catholic religion,[277] and the relative obscurity of the NAC.[278]

Considering the traditional notions that the legislature is dominated by the majority and that the courts are devoted to protecting the interests of minorities, it is interesting to note that a bill to protect

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275. *Smith II*, 110 S. Ct. 1595, 1613 (1990).

276. Holy Communion is an integral part of the Catholic Mass. The sacrament of Holy Communion involves members of the Church eating and drinking consecrated bread and wine. These are believed to be the body and blood of Jesus Christ. The Catholics believe that Christ, during the Last Supper, gave to the apostles (from whom it descended to modern day priests) the power to convert bread and wine into his body and blood. A. WILHELM, CHRIST AMONG US: A MODERN PRESENTATION OF THE CATHOLIC FAITH 244-57 (1975).

277. In 1980, membership in the Catholic Church in the United States constituted one quarter of the U.S. population, which created "one of the most awesome lobbying blocks on Capitol Hill." L. LADER, POLITICS, POWER, AND THE CHURCH: THE CATHOLIC CRISIS AND ITS CHALLENGE TO AMERICAN PLURALISM 1 (1987). Few Catholic dioceses release financial reports. However, one estimate predicted the assets of the Catholic Church in the United States to be over $200 billion by 1986. *Id.* Comparatively, Protestant and Jewish assets were estimated at $71 billion and $9 billion, respectively; Exxon, the largest industrial corporation in this country, held assets of only $63 billion. *Id.* at 101.

278. Although the NAC keeps no records documenting membership, estimates of NAC membership range from 30,000 to 250,000 depending on the definition of 'member.' People v. Woody, 61 Cal. 2d 716, 720, 394 P.2d 813, 817, 40 Cal. Rptr. 69, 73 (1964).

religious minorities was introduced to Congress within sixty days of the *Smith II* decision.[279] The proposed Act was a direct response to *Smith II*, designed to "restore the prior legal standard of protecting the free exercise of religion unless the government can prove that application of the law to a particular person's religious practice is both necessary to further a compelling governmental interest and is the least restrictive means of advancing that interest."[280] The proposed Act reflects that the *Yoder* approach, "demanding a particularized showing that granting an exemption . . . would substantially interfere with the fulfillment of the government's compelling interest, is the preferred manner for dealing with infringements on fundamental liberties such as religion."[281]

The potential impact of *Smith II* on specific free exercise claims could be immense; future claims will be less secure as governmental agencies feel less compelled to adhere to the dictates of the free exercise clause and previously determined rights may now be subject to revision. Students might not be excused from classes for religious functions,[282] or may be required to wear gym clothes that are immodest by the standards of their religion.[283] Religious objectors might no longer be exempt from jury duty on their Sabbath.[284] Students may no longer be excused from military exercises, even though participation would violate their religious beliefs.[285] Churches may not be exempt from objectionable zoning laws.[286]

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279. H.R. 5377, 101st Cong., 2d Sess. (1990). This bill provides in pertinent part:

> (a) In General—Except as provided in subsection (b), a governmental authority may not restrict any person's free exercise of religion.
> (b) Laws of General Applicability—A governmental authority may restrict any person's free exercise of religion only if
> (1) the restriction—
> (A) is in the form of a rule of general applicability; and
> (B) does not intentionally discriminate against religion, or among religions; and
> (2) the governmental authority demonstrates that application of the restriction to the person
> (A) is essential to further a compelling governmental interest; and
> (B) is the least restrictive means of furthering that compelling governmental interest.

Id.

280. Section by Section Analysis of the Religious Liberty Restoration Act at 1, H.R. 5377, 101st Cong., 2d Sess. (1990).

281. *Id.* at 1.

282. Church of God v. Amarillo Indep. School Dist., 511 F. Supp. 613 (N.D. Tex. 1981).

283. Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979).

284. *In re* Jenison, 375 U.S. 14 (1963).

285. Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972).

286. Islamic Center v. City of Starkville, 840 F.2d 293 (5th Cir. 1988); First Covenant

Strict application of the *Smith II* standard will allow results that violate long accepted practices in this country. Such application would allow a state to enact neutral, generally applicable slaughterhouse regulations 'inadvertently' precluding the butchering of kosher meats. Accordingly, a state might lawfully choose to impose its already existing alcohol restrictions for minors against children drinking wine at Catholic services. Although it is unlikely that a state would adopt such extreme measures, logical application of the *Smith II* decision would give Jewish and Catholic adherents no recourse. Members of a minority religious group have even "less than no recourse" . . . is there something less than nothing?

V. CONCLUSION

The Supreme Court in *Smith II* presented a new rule of law for determining the status of the free exercise clause of the first amendment. A valid or neutral law that proscribes, or requires, conduct that is contrary to one's religious practice does not violate the free exercise clause, as long as that law does not violate another constitutional protection. Thus, prohibition of a religious practice is valid, as long as the law is not expressly directed at the religion. The traditional strict scrutiny balancing test developed in *Sherbert* and used for evaluating free exercise claims is relevant only to claims for unemployment compensation.

The implications of the decision are great. The effectiveness of the free exercise clause has been greatly diminished. The erosion of established principles of free exercise presents members of minority religious groups few realistic choices. In *Smith II*, inadequate application of precedent has left courts, religious objectors and states no clear guidelines for evaluating free exercise claims. Finally, the decision reverses the traditional roles of courts and legislatures, leaving minorities in the precarious position of seeking protection solely through majoritarian dominated legislatures. *Smith II* violates fundamental values and should be overruled, distinguished or ignored before the vitally important and fundamental right of free exercise of religion is destroyed.

Sharon W. Murphy

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1475 (S.D. Fla. 1989), *rev'd*, 905 F.2d 1352 (11th Cir. 1990), *rev'd*, 113 S. Ct. 2217 (1993).