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The Free Exercise Clause Gets a Costly Workout in *Employment Division, Department of Human Resources of Oregon v. Smith*

I. INTRODUCTION

The use of peyote by members of the Native American Church is one of the most controversial manifestations of religious conduct in this country. Peyote, a hallucinogenic drug derived from a cactus plant, has been used by North American Indians in religious ceremonies for over four hundred years.[1] The federal government considers mescaline, the active ingredient in peyote, to be a dangerous narcotic and a controlled substance.[2] Thus, there is a conflict between secular drug enforcement laws which prohibit the possession and use of peyote, and the religious laws of North American Indians, which require peyote use in religious ceremonies.

This conflict recently reached the Supreme Court of the United States in *Employment Division, Department of Human Resources of Oregon v. Smith*.[3] Smith was employed as a treatment counselor in a drug rehabilitation facility. As a condition of employment, Smith was required to abstain from using drugs in order to preserve his credibility as a role model. However, Smith was also an active member of the Native American Church, which uses peyote in its religious ceremonies.[4] As a result, Smith was fired by his employer and subsequently denied unemployment compensation benefits.[5] Smith was never arrested, prosecuted, or convicted of violating any criminal drug statute. Nevertheless, the Supreme Court believed that this case presented an opportunity to evaluate whether the free exercise clause requires states to exempt religiously inspired peyote use from their criminal drug laws.[6]

After a six-year journey through the Oregon State Court of Appeals and two hearings before the Oregon Supreme Court, the case

1. People v. Woody, 61 Cal. 2d 716, 720, 394 P.2d 813, 817, 40 Cal. Rptr. 69, 73 (1964).
2. 21 U.S.C. § 812, Sched. I (c) (11) & (12) (1988).
3. 110 S. Ct. 1595, *reh'g denied*, 110 S. Ct. 2605 (1990) [hereinafter *Smith II*].
4. *Id.* at 1597.
5. *Id.* at 1598.
6. *Id.* at 1599.

was ultimately resolved in favor of the Oregon employment division. However, the significance of the *Smith* case reaches far beyond the use of peyote in religious ceremonies. In denying Smith's claim, the Court lowered the level of review applied to laws which have an impact upon religious conduct. Prior to *Smith*, the Court applied a strict scrutiny test to laws which affected the free exercise of religion. However, the Court's new rule applies only minimal scrutiny to general welfare laws which burden religious freedom.

This Note examines *Smith*'s six-year history, and provides an analysis and comparison of the two Supreme Court decisions in the case. Part II explores the ways in which courts have interpreted the free exercise clause, focusing on cases which deal with employment and peyote issues.[7] Part III explains *Smith*'s factual background and follows its extensive procedural history leading up to the first hearing before the Court [*Smith I*].[8] Part IV explains the *Smith I* Court's decision to remand the case for a clarification of Oregon law before deciding the first amendment issue,[9] and analyzes the Oregon Supreme Court's response to the remand.[10] Part V examines the Court's most recent *Smith* opinion [*Smith II*] and explains the important interaction between the opinions issued by the United States Supreme Court and the Oregon Supreme Court.[11] Part VI explores the impact of the *Smith* decisions by re-examining prior free exercise cases and predicting how courts and legislators are likely to deal with free exercise rights in the future.[12]

II. HISTORICAL BACKGROUND

A. History of the Free Exercise Clause

The first amendment provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[13] While the establishment clause essentially prohibits the government from affirmatively endorsing any religious institutions,[14] the free exercise clause restricts the government's ability to negatively impact the religiously motivated beliefs and acts of individuals.[15] Together, these two clauses are intended to place the gov-

7. *See infra* notes 13-110 and accompanying text.
8. *See infra* notes 111-45 and accompanying text.
9. *See infra* notes 146-69 and accompanying text.
10. *See infra* notes 170-87 and accompanying text.
11. *See infra* notes 188-337 and accompanying text.
12. *See infra* notes 338-55 and accompanying text.
13. U.S. CONST. amend I. The free exercise clause was first held applicable to the states in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
14. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 673 (1984).
15. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 402 (1963).

ernment in a neutral corner with regard to religious matters.[16]

Attempts to decipher the intentions of the Framers of the Constitution in enacting the free exercise clause often yield inconclusive and ambiguous conclusions.[17] One reason for this result is that prior to the adoption of the religion clauses, the delegates of the ratifying states held widely diverging views regarding the appropriate relationship between religion and government.[18] Additionally, the Framers could not have envisioned the diversity and complexity of today's religious issues. In any event, the origins of the free exercise clause are of questionable significance because "[no] Supreme Court opinion—majority, concurring, or dissenting—has ever grounded its interpretation of the free exercise clause in its historical meaning."[19] Since the Court places relatively little emphasis on the original intent of the Framers, the precedents established by the Court are of primary significance in analyzing free exercise claims. Consequently, one must look primarily at Supreme Court decisions for specific guidance in this sensitive area.

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16. *See, e.g.*, Gillette v. United States, 401 U.S. 437, 448-49 (1971).

17. However, numerous commentators have examined the subject. For discussions of colonial experiences influencing the religion clauses and the original intent of the ratifying delegates, see Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986); Hoskins, *The Original Separation of the Church and State in America*, 2 J.L. & RELIGION 221 (1984); Marshall, *Unprecedential Analysis and Original Intent*, 27 WM. & MARY L. REV. 925 (1986); Smith, *Getting Off on the Wrong Foot and Back On Again: a Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and A Critique of the* Reynolds *and* Everson *Decisions*, 20 WAKE FOREST L. REV. 569 (1984); McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3 (2nd ed. 1988) (citing commentaries).

18. Virginians such as Thomas Jefferson and James Madison envisioned a complete separation of church and state and were primarily responsible for the inclusion of the religion clauses in the first amendment. *Kurland, supra* note 17, at 853-54, 859. Representatives from states with close ties to a church ratified the religion clauses primarily to prevent the federal government from interfering with their preferred religions. 3 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 21.2, at 342 (1986) [hereinafter TREATISE]. These states were "no more tolerant of minority religious practices than the Mother country whose persecution they had escaped." *Kurland, supra* note 17, at 852. Another school of thought favored imposing an affirmative burden on the state to encourage all religions for the moral welfare of society. M. HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965).

19. McConnell, *supra* note 17, at 1413. However, the Court frequently analyzes the historical background of the first amendment in the context of establishment clause issues. *Id.*

1. The Evolving Level of Review

The scope of the free exercise clause was first tested in 1879 in *Reynolds v. United States*.[20] In *Reynolds*, the defendant was charged with polygamy, a crime in the Utah Territory and by act of Congress.[21] Reynolds argued that, as a member of the Mormon Church, it was his duty to practice polygamy, and thus his conduct was protected by the free exercise clause.[22] The Court noted that although the free exercise clause provides absolute protection for religious beliefs, not all religiously motivated conduct is protected.[23] In rejecting Reynold's claim, the Court's level of review most closely resembled minimal scrutiny, as evidenced by the statement that "it is within the *legitimate* scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion."[24] The Court devoted a substantial portion of its analysis to explaining why the government had an important interest in promoting monogamous marriages. This suggests that the compelling state interest test could have been satisfied if it had been applied.[25]

After *Reynolds*, in addition to consistently upholding polygamy laws in the face of free exercise claims,[26] the Court applied minimal

20. 98 U.S. 145 (1878).

21. *Id.* at 161.

22. *Id.* at 161-62.

23. The absolute protection of religious beliefs was first recognized in *Reynolds v. United States* when the court stated: "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166. This doctrine has been reaffirmed in almost every Supreme Court free exercise case.

24. *Id.* (emphasis added). This language is indicative of minimal scrutiny because, under a rational basis review, the Court's query is limited to determining whether the law at issue is rationally related to a *legitimate* state interest. A legitimate state interest is any broad social goal intended to promote the general welfare of the state. Legitimate state interests are those which "promote the health, peace, morals, education, and good order of the people, and [which] . . . increase the industries of the State, develop its resources, and add to its wealth and prosperity." Barbier v. Connolly, 113 U.S. 27, 31 (1885). Under this level of review, the Court will uphold a law if it can find any conceivable rational relationship to a legitimate state interest. *See, e.g.*, L. TRIBE, *supra* note 17, § 16-2, at 1439-43.

25. The *Reynolds* Court referred to marriage as a "*most important feature* of social life. . . . *Upon it society may be said to be built*, and out of its fruits spring social relations and social obligations and duties, with which government is *necessarily* required to deal." *Reynolds*, 98 U.S. at 165 (emphasis added). This language suggests that the state had a "compelling interest" in regulating marriage. The Court also suggested that because of the ripple effect which polygamy has on the fabric of society, a complete prohibition against polygamy would be the least restrictive means of accomplishing its compelling interest. *Id.* at 165-66. Thus, the compelling state interest test, if applied, could have been satisfied.

26. *See* Cleveland v. United States, 329 U.S. 14 (1946) (Mormon crossing state line with his wives violated federal law prohibiting interstate transportation of women for "immoral purposes"); Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (upholding confiscation of property and dissolution of church which practiced polygamy); Davis v. Beason, 133 U.S. 333 (1890) (statute requiring persons

scrutiny under a rational basis level of review to uphold a wide variety of laws which had an impact upon the free exercise of religion. For instance, in *Prince v. Massachusetts*[27] the Court considered the claim of a Jehovah's Witness who maintained that a labor law which prohibited her child from distributing religious solicitation materials violated their free exercise rights.[28] In denying the parent's claim, the Court proclaimed that "[i]t is sufficient to show . . . that *the state has a wide range of power* for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction."[29] The *Prince* Court's deference to legislative authority was a reflection of the minimal scrutiny under which the free exercise claim was analyzed.[30]

During the 1940s and 1950s, the Court applied heightened scrutiny to laws which had an impact upon the free exercise of religion only if the laws also implicated other first amendment concerns.[31] For example, in *Cantwell v.Connecticut*[32] the Court was faced with a statute which expressly regulated religious solicitations. In striking down the statute, the Court attributed the claimant with both free speech and free exercise.[33] And in *West Virginia Board of Educa-*

registering to vote to renounce membership with any religious order advocating polygamy was constitutionally permissible). Some commentators attribute the Court's tough stand against polygamy on the nation's anti-Mormon sentiment in the late nineteenth century. *See* L. TRIBE, *supra* note 17, § 14-13, at 1271; P. KURLAND, RELIGION AND THE LAW 114 n.25 (1962).

27. 321 U.S. 158 (1944).

28. *Id.* at 159.

29. *Id.* at 167 (emphasis added).

30. *See* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), *rev'd*, 319 U.S. 624 (1943) (deference to legislative determination that the pledge of allegiance achieved legitimate secular goals).

31. *See* Kunz v. New York, 340 U.S. 290 (1951) (highly discretionary permit requirement as condition for conducting public gospel services struck down as a prior restraint of free speech); Marsh v. Alabama, 326 U.S. 501 (1946) (regulation banning religious solicitation in company-owned town is contrary to first amendment guarantees of free speech, press and religion); Follett v. Town of McCormick, 321 U.S. 73 (1944) (ordinance taxing agents who sell books to religious solicitors invalid as a violation of first amendment guarantees); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (same); Martin v. City of Struthers, 319 U.S. 141 (1943) (ordinance forbidding distribution of religious publications without permit struck down on free speech, press and religion grounds); Jamison v. Texas, 318 U.S. 413 (1943) (same). *See also* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right of parents to enroll their children in private religious schools in place of attendance at public schools upheld on both free exercise and fundamental right grounds).

32. 310 U.S. 296 (1940).

33. *Id.* at 307.

tion v. Barnette,[34] a Jehovah's Witness group objected to the school forcing three children to pledge allegiance to the flag because the pledge violated their belief in God's supremacy. Once again, the Court struck down the rule based on both free speech and free exercise grounds.[35] Interestingly, the *Barnette* Court used language which, for the first time, indicated that free exercise claims merited a higher level of review.[36] However, prior to 1960, laws which had an impact solely on free exercise rights received only minimal scrutiny. Consequently, free exercise claimants who were unable to characterize their religious objections as hybrids involving multiple first amendment violations were generally unsuccessful.[37]

The first major step in elevating the level of review in free exercise cases occurred in *Braunfeld v. Brown*.[38] In *Braunfeld*, the state of Pennsylvania enacted a law which required certain retail stores to be closed on Sunday.[39] The purported neutral purpose of the law was to provide a uniform day of rest.[40] A group of Orthodox Jewish

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34. 319 U.S. 624 (1943).

35. Although the Court devoted substantial analysis to the impact of a compulsory flag salute on religious beliefs, the Court's final holding was not based solely on free exercise grounds. The Court stated that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. *Barnette* is generally regarded by legal commentators as both a free speech and free religion case. *See, e.g.*, L. TRIBE, *supra* note 17, §§ 12-4, at 804, 14-3, at 1165 (discussing *Barnette* in both free speech and free religion contexts respectively).

36. The court declared that "[the freedom of worship is] susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." *Barnette*, 319 U.S. at 639.

37. "As of 1960, no case in the Supreme Court had resulted in the overturning of police power regulations solely on the basis that they had coercive effect on the free exercise of religion." TREATISE, *supra* note 18, § 21.7, at 399. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941) (parade licensing scheme that was neutrally enacted and applied upheld despite free exercise challenge by a Jehovah's Witness group); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934) (compulsory military classes in university upheld against claimant's religious and conscientious objections to war).

38. 366 U.S. 599 (1961).

39. *Id.* at 600.

40. Although the origin of a uniform day of rest on Sunday is rooted in Christianity, the Court rejected the argument that the law conflicted with the establishment clause by simply citing to a case decided on the same day as *Braunfeld* which addressed the same Sunday closing laws. *Id.* at 601 (citing Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961)).

Generally, in cases of conflict between the two religion clauses, the free exercise clause has priority over the establishment clause. *See*, L. TRIBE, *supra* note 17, § 14-8, at 1201-04. Thus, the establishment clause argument has not fared well in free exercise jurisprudence. The inherent conflict between the establishment clause and the free exercise clause has inspired a wealth of legal commentary. *See Symposium: The Tension Between the free exercise clause and the establishment clause of the First Amendment*, 47 OHIO ST. L.J. 289 (1986); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Evans, *Contradictory Demands on the First Amendment Religion Clauses: Having it Both Ways*, 30 J. CHURCH & ST. 463 (1988); Garvey, *Freedom and Equality in the Religion Clauses*, 1981

merchants objected to the law because it effectively limited them to five business days per week since they had to close their stores on Saturday, the Jewish Sabbath day.[41] Since the Sunday closing law was enacted for a neutral purpose, it did not impose any *direct* burden on the group's religious practices. However, the Court was willing to look beyond the religious neutrality of the statute and consider the *indirect* burden of being limited to five business days per week.[42] For the first time, the Court acknowledged that religiously neutral laws can prohibit the free exercise of religion just as effectively as laws targeted at religious conduct. By considering both direct and indirect burdens, the Court signaled that religious neutrality by itself, would no longer be sufficient to uphold a law which had an impact on the free exercise of religion. This decision broadened the scope of the free exercise clause by treating all laws, not merely those expressly targeting religious conduct, as within its purview.

The *Braunfeld* Court was also willing to consider whether the state could accomplish its secular goals by alternative means which did not impose a burden on the group's free exercise rights.[43] To make this determination, the Court balanced the state's asserted interests against the indirect burden on the group's free exercise rights. In applying the balancing test, the court gave considerable deference to speculative arguments propounded by the state to justify the burden on the group's religious practices.[44] Consequently, the Court upheld the Sunday closing law.[45] However, the fact that the Court was willing to weigh the burdens on free exercise rights against the state's interests heralded a rise in the level of review above minimum scrutiny.

Finally, in *Sherbert v. Verner*,[46] the Court expressly held that the compelling state interest test applies to laws which have an impact on the free exercise of religion.[47] *Sherbert* involved a Seventh-Day Adventist who was discharged from her job and denied unemploy-

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SUP. CT. REV. 193; Paulesn, *The First Amendment Religion Clauses: Two Sides Of The Same Coin*, 8 CHRISTIAN LEGAL SOC'Y Q. 13 (Spr. 1987).

41. *Braunfeld*, 366 U.S. at 601-02.

42. *Id.* at 607.

43. *Id.*

44. The speculative nature of the arguments is illustrated by the Court's subjunctive responses that "enforcement problems *would be* more difficult" and "[a]dditional problems *might* also be presented" and "employers *would probably have to* . . . ." *Id.* at 608-09 (emphasis added).

45. *Id.* at 609.

46. 374 U.S. 398 (1963).

47. *Id.* at 403.

ment benefits because she refused to work on Saturday, the Sabbath day of her faith.[48] She challenged the denial of unemployment benefits as a violation of her free exercise rights.[49] The state argued that the statute which disqualified her from receiving benefits was neutrally enacted and was not intended to have an impact on religion.[50]

To analyze the free exercise claim, the *Sherbert* Court developed a two-part test. Under the first prong of the test, the Court evaluated whether the statute imposed any burden on the free exercise of religion.[51] Just as it did in *Braunfeld*, the *Sherbert* Court looked beyond the neutrality of a statute and considered both direct and indirect burdens.[52] Under the second prong of the test, the Court applied strict scrutiny to determine whether the burden on religious practices could be justified by a compelling governmental interest.[53] If the Court found a compelling state interest, it would then question whether the statute was narrowly tailored to achieve that interest through means which were the least restrictive of free exercise rights.

In applying the test, the Court first considered whether the disqualification from unemployment compensation benefits imposed any burden on the free exercise of Mrs. Sherbert's religion. The Court stressed that her religious beliefs were sincerely held, and that recognition of the Sabbath day is a central aspect of Seventh-Day Adventism.[54] Noting that the state's ruling forced Mrs. Sherbert to choose between forfeiting governmental benefits and violating a basic tenet of her religion, the Court concluded that "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[55]

Having found a constitutionally significant burden, the Court pro-

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48. *Id.* at 399-400.

49. *Id.* at 399-401.

50. *Id.* at 401. Although *Sherbert* was the first case to apply a compelling state interest test to a law which had an impact on the free exercise of religion, it was not the first case to deal with a Seventh-Day Adventist who was denied unemployment compensation benefits for refusing to work on Saturday. *Compare* Swenson v. Michigan Employment Sec. Comm'n, 340 Mich. 430, 65 N.W.2d 709 (1954) (facts nearly identical to *Sherbert's*, free exercise claim and unemployment compensation benefits upheld), *with* Kut v. Albers Super Markets, Inc., 146 Ohio St. 522, 66 N.E.2d 643 (1946), *appeal dismissed*, 329 U.S. 669, *reh'g denied*, 329 U.S. 827 (1946) (facts nearly identical to *Sherbert's* free exercise claim and unemployment compensation benefits denied).

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

52. *Id.*

53. *Id.* at 406. To support this approach, the Court reaffirmed its belief that "in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Id.* (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

54. *Id.* at 399 n.1.

55. *Id.* at 404.

ceeded to the second prong of the test. The state asserted two interests to justify the denial of unemployment compensation benefits: (1) the prevention of fraudulent claims for unemployment compensation, and (2) alleviating the burden on employers which would result if Sabbath days had to be considered when scheduling workers.[56] The Court held that neither interest was sufficiently compelling.[57] The Court reasoned that since the majority of the states which had considered this issue held such persons entitled to unemployment benefits,[58] the interests asserted by the state were speculative and unsupported. Consequently, Mrs. Sherbert was entitled to unemployment compensation benefits.[59]

Subsequent cases in the employment area followed *Sherbert*'s two-prong, compelling state interest test.[60] For example, in *Thomas v. Review Board of the Indiana Employment Security Division*,[61] the

56. *Id.* at 407.

57. *Id.*

58. Virtually every state supreme court that had faced the issue had granted unemployment benefits to persons who were unable to find suitable employment solely because of a religious prohibition against Saturday work. *Id.* at 407-08 n.7. Additionally, 22 of 28 states with administrative rulings on the issue had allowed compensation benefits to persons whose unemployment resulted from their religious objection to working on Saturdays. *Id.*

59. *Id.* at 409.

60. For cases which are analogous to *Sherbert*, and which follow the decision by allowing unemployment compensation benefits, see Murphy v. Everett, 5 Ark. App. 281, 635 S.W.2d 301 (1982); Lincoln v. True, 408 F. Supp. 22 (W.D. Ky. 1975); Dotter v. Maine Employment Sec. Comm'n, 435 A.2d 1368 (Me. 1981); Key State Bank v. Adams, 138 Mich. App. 607, 360 N.W.2d 909 (1984); St. Germain v. Adams, 117 N.H. 659, 377 A.2d 620 (1977); Marvin v. Giles, 11 Ohio App. 3d 57, 463 N.E.2d 80 (1983); DuPont v. Employment Div., 80 Ore. App. 776, 723 P.2d 1073 (1986); Monroe v. Commonwealth, Unemployment Compensation Bd. of Review, 535 A.2d 1222 (1988); Southeastern Pa. Transp. Auth. v. Commonwealth, Unemployment Compensation Bd., 54 Pa. Commw. 165, 420 A.2d 47 (1980); Nottelson v. Wisconsin Dep't of Indus., Labor & Human Relations, 94 Wis. 2d 106, 287 N.W.2d 763 (1980).

For cases distinguishing *Sherbert* and denying unemployment compensation benefits, see Haig v. Everett, 8 Ark. App. 255, 650 S.W.2d 593 (1983); Hildebrand v. Unemployment Ins. Appeals Bd., 19 Cal. 3d 765, 566 P.2d 1297, 140 Cal. Rptr. 151 (1977), *cert. denied*, 434 U.S. 1068 (1978); Martinez v. Industrial Comm'n of Colo., 618 P.2d 738 (Colo. App. 1980); Bolden v. Administrator, Unemployment Compensation Act, 40 Conn. Supp. 208, 485 A.2d 1379 (1984); Smalls v. State, 485 So. 2d 1, *review denied*, 492 So. 2d 1335 (Fla. 1985); Flynn v. Maine Employment Sec. Comm'n, 448 A.2d 905 (Me. 1982), *cert. denied*, 459 U.S. 1114 (1983); *In Re* Claim of D'Amico, 122 App. Div. 2d 472, 504 N.Y.S.2d 861 (1986); Donnelly v. Commonwealth, Unemployment Compensation Bd. of Review, 17 Pa. Commw. 39, 330 A.2d 544 (1975); DePriest v. Bible, 653 S.W.2d 721, *cert. denied*, 450 U.S. 903, *reh'g denied*, 451 U.S. 933 (1981), later proceeding 669 S.W.2d 669 (Tenn. 1980); Wilson v. Indus. Comm'n of Utah, Dep't of Employment Sec., 638 P.2d 529 (Utah 1981).

61. 450 U.S. 707, 720 (1981). *See also* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989).

Court applied strict scrutiny and held that a Jehovah's Witness did not lose unemployment benefits when his termination resulted from his refusal to work on military weapons because of his conscientious objection to war. And in *Hobbie v. Unemployment Appeals Commission of Florida*,[62] the Court was faced with facts nearly identical to those in *Sherbert*.[63] Consequently, the Court simply reaffirmed the applicability of the *Sherbert* two-prong compelling state interest test, and summarily upheld the free exercise claim.[64]

In addition to unemployment benefits claims, the *Sherbert* test has been applied to a wide variety of free exercise cases. For example, the Supreme Court has invoked the free exercise clause to exempt conscientious objectors from serving in the military,[65] and to invalidate a law which prohibited ministers from running for public office.[66] The peak of free exercise jurisprudence occurred in *Wisconsin v. Yoder*,[67] when the Court held that the state cannot compel Amish children to attend public school beyond the age of fourteen when doing so would conflict with their parents' religious beliefs.[68] In addition, various lower courts have allowed the free exercise clause to be used as a defense to various tort causes of action, including defamation, invasion of privacy, infliction of emotional distress, fraud, interference with business relationships, and false imprisonment.[69]

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62. 480 U.S. 136 (1986).

63. The claimant in *Hobbie* was a Seventh-Day Adventist who refused to work on Saturday, her Sabbath day. The only significant distinction between *Sherbert* and *Hobbie* is that Paula Hobbie had been working Saturdays for her employer for over two years before joining the Seventh-Day Adventist Church. The state argued that she was "the 'agent of change' and is therefore responsible for the consequences of the conflict between her job and her religious beliefs." *Id.* at 143. The state asserted "that it is . . . unfair for an employee to adopt religious beliefs that conflict with existing employment and expect to continue the employment without compromising those beliefs and that this 'intentional disregard of the employer's interest . . . constitutes misconduct.'" *Id.* at 143-44 (quoting Brief for Appellee Appeals Commission at 20-21). However, the Court rejected this analysis holding that "[t]he timing of Hobbie's conversion is immaterial to our determination that her free exercise rights have been burdened." *Id.* at 144. *See also infra* note 102 for a discussion of the significance of the Court's refusal to consider this distinction.

64. *Hobbie*, 480 U.S. at 141, 146.

65. *See* Gillette v. United States, 401 U.S. 437 (1971), *reh'g denied*, 402 U.S. 934 (upholding statutory exemption for persons with religious objections to all war); United States v. X, 380 U.S. 163 (1965) (same). *But see* Welsh v. United States, 398 U.S. 333 (1970) (claimant without sincere religious beliefs not exempted from military service).

66. McDaniel v. Paty, 435 U.S. 618 (1978).

67. 406 U.S. 205 (1972).

68. *Id.* at 235-36.

69. *See* Annotation, *Free Exercise of Religion Clause of First Amendment as Defense to Tort Liability*, 93 A.L.R. FED. 754 (1989).

B. The Peyote Cases

A number of cases have considered the conflict between secular drug enforcement laws which prohibit the possession and use of peyote, and religious laws of North American Indians which require peyote use in religious ceremonies.[70] State and federal courts have reached varying conclusions as to whether the free exercise clause exempts religious peyote users from the reach of drug enforcement laws. This section tracks the development of case law dealing with this issue.[71]

The earliest notable case addressing whether the free exercise clause protects the sacramental use of peyote is the Montana Supreme Court's decision in *State v. Big Sheep*.[72] In *Big Sheep*, a Crow Indian was arrested in Montana for unlawful possession of peyote.[73] The trial court devoted considerable effort to determining whether the defendant's possession and use of peyote was truly for religious purposes.[74] The Montana Supreme Court reviewed the case on a jurisdictional issue, but provided guidance to the lower court on Big Sheep's free exercise claim.[75] In the court's view, "[i]t was clearly within the power of the legislature to determine whether the practice of using peyote is inconsistent with the good order, peace, and safety of the state," or opposed to the civil authority thereof.[76] Thus, the court never seriously questioned the power of the legislature to ban the use of peyote, and consequently rejected Big Sheep's free exercise claim.

In *People v. Woody*,[77] the first major peyote case decided after

70. For literature discussing the use and history of peyote in religious ceremonies, see E. ANDERSON, PEYOTE, THE DIVINE CACTUS (1979); A. HUXLEY, THE DOORS OF PERCEPTION (1970); O. STEWART, PEYOTE RELIGION: A HISTORY (1987).

71. Peyote is not the only issue in which NAC members have raised free exercise claims. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (Indians challenged road construction through Indian burial ground on free exercise basis); Bowen v. Roy, 476 U.S. 693 (1986) (Indian unsuccessfully claimed that government's use of social security number robbed his daughter's spirit in violation of the free exercise clause); Hatch v. Goerke, 502 F.2d 1189 (10th Cir. 1974) (free exercise clause did not exempt Indian children from public school dress code which prohibited wearing long braided hair); New Rider v. Board of Educ., 480 F.2d 693 (10th Cir.), *cert. denied*, 414 U.S. 1097 (1973) (same); Teterud v. Gillman, 385 F. Supp. 153 (S.D. Iowa 1974) (free exercise clause exempted Indian from prison hair-length regulations).

72. 75 Mont. 219, 243 P. 1067 (1926).

73. *Id.* at 222, 243 P. at 1068.

74. *Id.* at 238, 243 P. at 1072-73.

75. *Id.* at 238-39, 243 P. at 1073.

76. *Id.* at 239, 243 P. at 1074.

77. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

Sherbert, the California Supreme Court took a more tolerant approach. In applying the *Sherbert* two-part test, the court first determined that a criminal prohibition of peyote use imposed a substantial burden on the free exercise rights of a Navajo Indian group.[78] In reaching this conclusion, the court considered the use, history and "centrality" of peyote in the Native American Church (NAC).[79] In applying the second prong of the *Sherbert* test, the court questioned whether the state had an interest sufficiently compelling to warrant the burden imposed on the group's free exercise rights. The state asserted a plethora of interests, including the duty to protect Indians from the deleterious effects of peyote,[80] the threat that fraudulent religious claims would inhibit the uniform enforcement of its narcotics laws,[81] and the difficulty of establishing the sincerity of religious claims.[82] The *Woody* court held none of these interests sufficiently compelling to warrant the burden imposed on the Indian group's free exercise rights.[83] As a result, the group's possession and use of peyote was constitutionally protected.[84]

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78. *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74. "To forbid the use of peyote is to remove the theological heart of peyotism." *Id.*

79. *Id.* at 720-22, 394 P.2d at 816-18, 40 Cal. Rptr. at 72-74. "Centrality" is a term of art in free exercise jurisprudence which refers to the relative traditional significance of a particular belief or act in the exercise of a religion. Centrality has arisen in free exercise cases because some courts have reasoned that there is no constitutionally significant burden on the free exercise of religion if a law has an impact on only a minor tenet of a religion. However, the *Smith II* Court determined that courts are not competent to evaluate centrality. *See infra* text accompanying notes 242-45.

80. The state asserted that the use of peyote " 'obstructs enlightenment and shackles the Indian to primitive conditions.' " *Woody*, 61 Cal. 2d at 723, 394 P.2d at 818, 40 Cal. Rptr. at 74; *see* Note, *Native American Religious Freedom and the Peyote Sacrament: The Precarious Balance Between State Interests and the Free Exercise Clause*, 31 ARIZ. L. REV. 423, 426 (1989). In a solid display of respect for Indian culture, the court summarily rejected the state's culturally arrogant argument. *Woody*, 61 Cal. 2d at 723, 394 P.2d at 818-19, 40 Cal. Rptr. at 74-75.

81. *Woody*, 61 Cal. 2d at 723-26, 394 P.2d at 818-19, 40 Cal. Rptr. at 74-76.

82. *Id.* at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77. The court rejected this argument based on United States v. Ballard, 322 U.S. 78 (1944), *rev'd*, 329 U.S. 187 (1946), which held that judicial inquiry into the truth or validity of religious beliefs is foreclosed by the first amendment. Even if the state's arguments carried any legal weight, they were inapplicable in the *Woody* case because it was not disputed that the claimants' use of peyote was for sincere religious purposes. *Woody*, 61 Cal. 2d at 726-27, 394 P.2d at 820-21, 40 Cal. Rptr. at 76-77. Interestingly, on the same day the California Supreme Court upheld the religious exception in *Woody*, it also denied a religious exception for the sacramental use of peyote in a separate case based primarily on the claimant's lack of sincerity or good faith belief in the doctrines of the NAC. *See In re* Grady, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964).

83. *Woody*, 61 Cal. 2d at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77. To support its holding, the *Woody* court noted that the Arizona Supreme Court had already carved a judicial exception for the sacramental use of peyote by interpreting its peyote statute as inapplicable to members of the NAC. *Id.* at 724 n.5, 394 P.2d at 819 n.5, 40 Cal. Rptr. at 75 n.5 (citing Arizona v. Attakai, Criminal No. 4098, Coconino County, July 26, 1960).

84. *But see* Golden Eagle v. Johnson, 493 F.2d 1179 (9th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). In *Golden Eagle*, an Indian was arrested for possession of peyote.

The judicial reaction to the *Woody* decision was mixed. In *Whitehorn v. State*,[85] the Oklahoma Court of Appeals followed *Woody* by holding that a sincere belief in the practices of the NAC was a valid defense to a prosecution for possession of peyote.[86] Several other state courts have similarly granted an exemption for the sacramental use of peyote by applying *Sherbert*'s two-prong compelling state interest test.[87] Some courts have acknowledged that NAC members are exempt from criminal peyote laws, but have denied the exemption based on lack of sincere belief in Peyotism.[88] Other less tolerant courts have refused to exempt NAC members from prosecution for possession of peyote, because they perceived uniform enforcement of criminal drug laws as a compelling governmental interest.[89] For example, in *State v. Soto*,[90] the Oregon Court of Appeals, apathetic towards the interests of the NAC, upheld the defendant's criminal peyote possession conviction.

The Indian made no attempt to conceal the peyote and confidently asserted that as a member of the NAC, his possession and use of peyote was constitutionally protected. The arresting officers ignored Golden Eagle's assertions, and kept him incarcerated for thirty-one days, pending criminal prosecution. The criminal charges were eventually dropped, and Golden Eagle complained that the police's failure to ascertain the validity of his free exercise claim, the seizure of the peyote, and his ensuing thirty-one-day incarceration constituted a violation of his constitutional rights. The Ninth Circuit Court of Appeals, applying California law and accepting the validity of the *Woody* decision, held that no special pre-arrest and pre-seizure procedures are required to determine bonafide religious beliefs. *Id.* at 1186. Thus, although a NAC member cannot be criminally *prosecuted* for peyote use in California, he or she may be *arrested* and *detained* pending a judicial determination that the religious beliefs are sincerely held.

85. 561 P.2d 539 (1977).

86. *Id.* at 547.

87. *See* Toledo v. Nobel-Sysco, Inc., 651 F. Supp. 483 (D.N.M. 1986), *rev'd*, 892 F.2d 1481 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 2208 (1990); Native American Church of New York v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 205 (2d Cir. 1980); Warner v. Graham, 675 F. Supp. 1171 (D.N.D. 1987), *rev'd*, 845 F.2d 178 (8th Cir. 1988); Whitehorn v. State, 561 P.2d 539 (1977).

88. Peyote Way Church of God, Inc. v. Smith, 556 F. Supp. 632 (N.D. Tex. 1983); Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415 (9th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973).

89. In State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966), *cert. denied*, 386 U.S. 917 (1967), the defendant was convicted for possession of peyote and marijuana despite his assertion that his actions were protected by the free exercise clause. Not only did the court doubt the sincerity of the defendant's religious beliefs, but also stated that "[e]ven if he were sincere, the first amendment could not protect him." *Id.* at 603, 148 S.E.2d at 568. *See also*, Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) (declining jurisdiction to determine validity of Navajo Indian nation rule against possession of peyote); Oliver v. Udall, 306 F.2d 819 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 908 (1963) (refusing to invalidate Department of Interior's ban on peyote).

90. 21 Or. App. 794, 537 P.2d 142 (1975), *cert. denied*, 424 U.S. 955 (1976).

In 1977, a plurality of the United States Supreme Court impliedly approved of the approach taken by the *Woody* court. In *McDaniel v. Paty*,[91] Chief Justice Burger referred to the Woody case as "*illustrative* of the general nature of free exercise protections and the *delicate balancing required* by our decisions in *Sherbert v. Verner* and *Wisconsin v. Yoder*."[92] Although the Supreme Court did not review the conclusions reached in *Woody*, Justice Brennan, in his concurrence, clearly indicated that it was proper to apply the *Sherbert* two-part, compelling state interest test to the criminal peyote law evaluated in the *Woody* decision.[93]

Another repercussion of *Woody* was a flood of cases in which persons arrested for drugs, other than peyote, argued that their drug use was religiously motivated and protected by the free exercise clause. Most notably, in *Leary v. United States*,[94] Harvard professor Timothy Leary claimed that his use of marijuana and LSD was related to his devout beliefs in Hinduism.[95] The court declined to extend the free exercise exemption to Leary's recreational drug use because it questioned whether the drugs were necessary tenets of Hinduism.[96] In fact, no court has ever extended a free exercise exception for the use of marijuana, heroin, or LSD.[97]

Perhaps the most important post-*Woody* case, for purposes of analyzing the *Smith* decisions, is *Warner v. Graham*,[98] which involved facts nearly identical to those in *Smith*. The plaintiff in *Warner* was an NAC member working as a counselor in a drug rehabilitation center. The court found that her credibility as an addiction counselor was dependent upon her abstinence from drugs.[99] However, in 1984, she was arrested for possession of peyote.[100] Although the criminal

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91. 435 U.S. 618 (1977).

92. *Id.* at 628 n.8 (citations omitted, emphasis added).

93. *Id.* at 633-34 (Brennan J., concurring in judgment).

94. 383 F.2d 851 (5th Cir. 1967), *rev'd*, 395 U.S. 6 (1969); *see also* United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968) (no religious exemption for group formed merely to use and enjoy drugs).

95. *Leary*, 383 F.2d at 857.

96. *Id.* at 860. Six months after his conviction, Leary founded his own "religion," in which the followers were required to use marijuana daily and LSD weekly. This "religion" was called the League of Spiritual Development (LSD). *See* Note, *supra* note 80 at 429 n.65 (citing M. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE 62-65 (1968)).

97. Employment Div. v. Smith, 110 S. Ct. 1595, 1620 n.8 (Blackmun, J., dissenting); *see, e.g.*, Lewellyn v. State, 489 P.2d 511 (1971) (marijuana conviction upheld against free exercise claim); *see generally* Annotation, *Free Exercise of Religion as Defense to Prosecution for Narcotic or Psychedelic Drug Offense*, 35 A.L.R. 3D 939 (1971 & Supp. 1989) (reviewing cases denying exemption for prosecution for marijuana, heroin, and LSD); Noonan, *How Sincere Do You Have To Be To Be Religious?*, 1988 U. ILL. L. REV. 713 (analyzing sincerity requirement).

98. 675 F. Supp. 1171 (D.N.D. 1987).

99. *Id.* at 1175 n.1.

100. *Id.* at 1173.

charges were dropped, Warner was temporarily suspended by her employer.[101] After extensive administrative proceedings, she was eventually reinstated to other duties. She subsequently resigned and applied for unemployment compensations benefits,[102] but the Department of Human Services denied her claim.[103] Upon appeal, the Appeals Referee initially found that the Department had failed to prove that the suspension was a result of misconduct,[104] but upon future review, he ruled that "her admitted use of peyote . . . has adversely affected both her credibility and integrity and is detrimental to her employer's interest."[105]

On judicial review, the United States District Court applied *Sherbert*'s two-part, compelling state interest test to evaluate whether the suspension and denial of unemployment benefits violated Warner's free exercise rights.[106] Applying the first prong of the test, the court determined that her suspension and denial of benefits created a substantial burden on her religious practices.[107] Applying the second prong of the test, the court found that the state had a compelling interest in controlling dangerous drugs, and that the employer's refusal to reinstate Warner to her counseling duties "was appropriate in light of its *compelling interest* in the continuing viability of its drug and alcohol education program."[108] However, the court determined that suspending Warner's employment was not the least restrictive means of accomplishing these interests. Instead, Warner's employer should have offered her alternative employment in which her peyote use would not jeopardize her credibility.[109] Therefore, Warner was held not disqualified for unemployment compensation benefits during the period of her suspension.[110]

III. BACKGROUND OF THE SMITH CASES

A. Facts

Alfred Smith and Galen Black were employed as drug counselors for the Douglas County Council on Alcohol and Drug Abuse Preven-

101. *Id.*
102. *Id.* at 1174.
103. *Id.*
104. *Id.* at 1175.
105. *Id.* at 1175 n.1.
106. *Id.* at 1177.
107. *Id.*
108. *Id.* at 1178-79 (emphasis added).
109. *Id.* at 1178.
110. *Id.* at 1179.

tion and Treatment (ADAPT), a private, non-profit drug rehabilitation facility.[111] Because Smith and Black had overcome former drug and alcohol dependencies, they were well-suited to help others battle against substance abuse. As a condition of employment, ADAPT required that all counselors act as role models for its patients by abstaining from recreational drug and alcohol use, whether legal or illegal.[112]

Black first came into contact with the NAC through Smith, a sixty-four year old Klamath Indian, who was a member of the NAC,[113] and Black's co-worker at ADAPT.[114] As part of an NAC ceremony, Black ingested a small amount of peyote.[115] Although the amount of peyote he consumed was insufficient to produce any hallucinogenic reaction, ADAPT's personnel rules provided that misuse of mind-altering substances might constitute grounds for discipline.[116] After learning of Black's activities, ADAPT fired him, citing intentional violation of employer rules.[117] Some months later, after receiving warnings from ADAPT regarding peyote use, Smith informed ADAPT that he, too, intended to ingest peyote at an upcoming NAC ceremony.[118] The employer warned Smith that any use of peyote would violate his duty to abstain from drugs and that he could be fired. Smith attended the NAC ceremony and ingested a small quantity of peyote. He was promptly discharged by ADAPT upon a determination that his consumption of peyote impaired his ability to serve as a legitimate role model to recovering alcoholics and drug abusers.[119] Following their dismissals, both Black and Smith applied to the Oregon Employment Division for unemployment compensation

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111. Black v. Employment Div., 75 Or. App. 735, 737, 707 P.2d 1274, 1276 (1985), *rev'd*, 110 S. Ct. 1595 (1990); Smith v. Employment Div., 301 Or. 209, 211, 721 P.2d 445-46 (1986) [hereinafter *Smith-Oregon I.*] *cert. granted*, 480 U.S. 916 (1987), *vacated*, 485 U.S. 660 (1988), *cert. granted*, 489 U.S. 1077 (1989).

112. *Black*, 75 Or. App. at 737, 707 P.2d at 1276; *Smith Oregon I*, 301 Or. at 211, 721 P.2d at 446. Since none of the courts hearing the *Smith* case suggested that Smith's employer had banned the use of medicinal drugs, it can be inferred that Smith's employer required abstention only from illegally possessed, recreational drugs.

113. *Smith Oregon I*, 301 Or. at 211, 721 P.2d at 446.

114. *Black*, 75 Or. App. at 737, 707 P.2d at 1276. Although Black had only recently adopted the beliefs of the NAC, Smith had been a lifetime member. The Supreme Court has held this distinction to be irrelevant to the analysis of a free exercise claim. *See supra* note 63.

115. *Black*, 745 Or. App. at 737, 707 P.2d at 1276.

116. *Id.*

117. Black's action was characterized as "misconduct," which is a term of art in this case because it is the legal basis upon which the Employment Division could justifiably deny unemployment benefits to a particular applicant. The standards for misconduct are individually defined by each private employer, depending on the job's requirements. *See infra* text accompanying notes 137-45 for a complete discussion of the relevance of this term.

118. *Smith Oregon I*, 301 Or. at 212, 721 P.2d at 446.

119. *Id.*

benefits.[120]

B. Procedural History

Although Oregon's criminal drug law provides no exception for the sacramental use of peyote, Smith was never arrested, prosecuted, convicted, nor sentenced under this criminal statute. His free exercise claim was based on the state's rejection of his unemployment compensation benefits claim, which was predicated on Oregon's unemployment statutes. Nevertheless, the Supreme Court believed that the constitutionality of the criminal law was properly presented and ripe for review. However, if the constitutional issue was not properly presented, then the validity of the second *Smith* decision is questionable.[121] In order to enable the reader to evaluate whether the constitutional issue was properly presented in *Smith II*, this section will examine the administrative and state court proceedings which preceded *Smith I*, the Supreme Court's first hearing of the case.

The extensive procedural history of the *Smith* cases began when the Employment Division, in two separate decisions, respectively denied Smith's and Black's claims for unemployment compensation.[122] At an administrative hearing to review the denial of Smith's unemployment benefits, the referee held in favor of Smith, reasoning that the state interest in guaranteeing the solvency of the Unemployment Trust Fund was not threatened by granting benefits to claimants whose religious beliefs conflicted with their employment.[123] In Black's case, the referee ruled that the peyote use was merely an isolated incident of misconduct which was insufficient to warrant the denial of unemployment benefits.[124] However, in reviewing both cases together, the Employment Appeals Board (EAB) reversed them.[125] In Smith's case, the EAB was concerned about the impact on the unemployment trust fund.[126] In Black's case, the EAB focused its analysis on the willful nature of Black's misconduct and the

120. *Id.*; *Black*, 75 Or. App. at 738, 707 P.2d at 1276.

121. The doctrine of ripeness requires courts to exercise judicial restraint by declining to decide issues not properly presented by the facts of the case. If a court is presented with merely the bare bones of an unenforced statute, then it should require a more complete factual record before deciding whether the statute passes constitutional muster. *See generally* TREATISE, *supra* note 18, § 2.13(d), at 115-19.

122. *Black*, 75 Or. App. at 738, 707 P.2d at 1276; *Smith Oregon I*, 301 Or. at 212, 721 P.2d at 446.

123. *Smith Oregon I*, 301 Or. at 212, 721 P.2d at 446.

124. *Black*, 75 Or. App. at 738, 707 P.2d at 1276.

125. *Id.* at 739, 707 P.2d at 1277; *Smith Oregon I*, 301 Or. at 212, 721 P.2d at 446.

126. *Smith*, 301 Or. at 212, 721 P.2d at 446.

illegality of ingesting peyote.[127]

On judicial review, the Oregon Court of Appeals felt that the EAB failed to consider the importance of Smith's and Black's constitutional claims to free exercise of religion.[128] Applying the *Sherbert* two-part test, the court first found that the denial of unemployment benefits substantially burdened their free exercise rights.[129] As to the second prong of the test, the court held that there was no state interest sufficiently compelling to warrant denying unemployment benefits.[130] However, the court was unable to determine whether the use of peyote by Smith and Black was truly a religious act. As a result, the court remanded the cases for further factual findings to determine the sincerity of Smith's and Black's religious assertions.[131]

The Oregon Supreme Court heard the *Smith* and *Black* cases in tandem. Although the court issued separate written opinions for each claimant,[132] the constitutional analysis appears primarily in the *Smith* opinion. First, the court considered the Oregon unemployment compensation statute which "disqualifies claimants who have been discharged for what an employer validly considers misconduct connected with the employment."[133] Since Smith did not contest his employer's right to fire him, but only contested the state's code which denied him unemployment benefits, the Court proceeded to assess the constitutionality of the Oregon Code under the Oregon Constitution.[134] The court held that the "misconduct" statute was neutrally enacted with regard to religion and that its impact on religion was merely incidental.[135] Consequently, the Oregon Supreme

127. *Black*, 75 Or. App. at 739, 707 P.2d at 1277. Oregon prohibits the possession of "controlled substances." OR. REV. STAT. § 475.992(4) (1987). "Controlled substances" are expressly defined as drugs appearing in Schedules I through V of the Federal Controlled Substances Act. 21 U.S.C. §§ 811-812 (1982).

128. *Black*, 75 Or. App. at 740, 707 P.2d at 1277-78. The court of appeals issued a full written opinion in Black's case and summarily remanded Smith's case stating simply: "Reversed and remanded for reconsideration in light of *Black v. Employment Division* . . . ." *Smith Oregon I*, 75 Or. App. 764, 709 P.2d 246 (citation omitted).

129. *Black*, 75 Or. App. at 741; 707 P.2d at 1278.

130. *Id.*

131. *Id.* at 742-43; 707 P.2d at 1278-79. "Sincerity" is another term of art in free exercise jurisprudence. It refers to whether a claimant holds sincere religious beliefs. Sincerity is considered by courts that suspect that the claimants before them do not hold good faith religious beliefs and are using religion and the Constitution as a cloak for illegal activities. *See supra* notes 89-97 and accompanying text for a discussion of free exercise claims held to be insincere.

132. *Smith Oregon I*, 301 Or. 209, 721 P.2d 445 (1986); Black v. Employment Div., 301 Or. 221, 721 P.2d 451 (1986).

133. *Smith Oregon I*, 301 Or. 214-15, 721 P.2d 448 (citing OR. REV. STAT. § 657.176(2)(a)(1987)). "An individual shall be disqualified from the receipt of benefits . . . if . . . the individual . . . [h]as been discharged for misconduct connected with work." *Id.* (quoting OR. REV. STAT. § 657.176(2)(a)).

134. *Id.* at 215; 721 P.2d at 448.

135. *Id.* at 216, 721 P.2d at 448.

Court concluded that the statute did not violate the Oregon Constitution.[136]

The court then analyzed the "misconduct" statute under the Federal Constitution by applying the *Sherbert* two-part, compelling state interest test.[137] In the first part of the test, the court held that the denial of unemployment benefits significantly burdened Smith's free exercise rights.[138] Applying the second prong of the test, the court held that the state's interest in preserving the financial integrity of the Unemployment Trust Fund was not compelling.[139] The court felt that the Employment Appeals Board's asserted interest in proscribing the use of illegal drugs was irrelevant.[140] The court believed that the state's interest in denying unemployment compensation benefits must stem from unemployment compensation statutes, not from criminal drug laws.[141] This reasoning comports with the *Warner* decision.[142] Even if peyote were legal, or if Oregon provided a religious exception, Smith's use of peyote would still constitute misconduct because he intentionally impaired his ability to perform his function as a role model to recovering drug addicts and alcoholics.

The court held similarly for Black by simply referring to its analysis in the *Smith* opinion.[143] Rather than remanding to the Court of Appeals, the court remanded both cases directly to the Employment Appeals Board, essentially ordering them to provide unemployment benefits to Smith and Black.[144] Upon the Employment Division's petition, the United States Supreme Court granted certiorari and consolidated the cases.[145]

IV. ANALYSIS OF *SMITH I*

A. The Majority Opinion

Justice Stevens, writing for the majority,[146] stipulated that legiti-

136. *Id.* at 215-16, 721 P.2d at 448-49.
137. *Id.* at 217-20, 721 P.2d at 449-51.
138. *Id.* at 215, 721 P.2d at 450.
139. *Id.* at 218-20, 721 P.2d at 450-51.
140. *Id.* at 218-19, 721 P.2d at 450.
141. *Id.* at 219, 721 P.2d at 450.
142. *See supra* text accompanying notes 98-110.
143. Black v. Employment Div., 301 Or. 221, 225, 721 P.2d 451, 453.
144. *Id.* at 227, 721 P.2d at 454; *Smith Oregon I*, 301 Or. at 220, 721 P.2d at 451.
145. 480 U.S. 916 (1987). For simplicity, the remainder of this Note refers only to Mr. Smith. However, each reference to Smith includes a reference to Mr. Black, unless otherwise noted.
146. *Smith I*, 485 U.S. 660 (1988). Justice Stevens was joined by Chief Justice

macy, centrality, and sincerity were not at issue. He observed that there was no debate as to whether the NAC was a bona fide religion, whether peyote use was an important tenet in the NAC,[147] or whether Smith was a good faith believer and member of the NAC.[148] The legal issue, according to the Court, was whether Oregon's refusal to provide unemployment compensation benefits violated Smith's free exercise rights.[149]

The majority in *Smith I* was disturbed by the state court's failure to address the significance of Oregon laws making peyote possession a felony.[150] The Court assumed that if the state could prohibit the use of peyote through its criminal laws without violating Smith's free exercise rights, then it could certainly impose the "lesser burden" of denying unemployment benefits.[151]

The *Smith I* Court recognized that this assumption conflicted with the frequently cited excerpt from *Sherbert* which states that "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[152] In order to reconcile its position, the majority stressed that, in *Sherbert* and its progeny, the acts which conflicted with the employers' interests were legal, whereas Smith's use of peyote might have been illegal.[153] Justice Stevens explained that the results in "*Sherbert*, *Thomas*, and *Hobbie* might well have been different if the employees had been discharged for engaging in criminal conduct."[154]

The problem with this reasoning is that Smith was not discharged for engaging in criminal conduct. He was discharged only for "misconduct."[155] ADAPT's concern was that Smith's use of peyote impaired his ability to serve as a role model for recovering patients. There is no indication that ADAPT was concerned about the illegality of peyote. Whether peyote was legal or not, Smith's use of it prevented him from performing his job and was the basis for his termination.

Rehnquist and Justices White, O'Connor, and Scalia. Justice Kennedy took no part in the consideration or decision of the case.

147. *Id.* at 663. The majority acknowledged the importance of peyote to North American Indian religions by reprinting a lengthy description of the NAC and its historical use of peyote which first appeared in *Woody*, the California Peyote case. *Id.* at 667-68 n.11 (Peyotism, an unfamiliar practice to most Americans, is described in *Woody*).

148. *Smith I*, 485 U.S. at 663.

149. *Smith Oregon I*, 301 Or. at 212, 721 P.2d at 446.

150. *Smith I*, 485 U.S. at 672.

151. *Id.* at 670.

152. *Id.* (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963)).

153. *Id.* at 671.

154. *Id.*

155. *See supra* notes 133-41 and accompanying text.

Moreover, Smith was not denied unemployment benefits because his conduct was illegal. The Employment Division had admitted to the Oregon Supreme Court that "the commission of an illegal act is not, in and of itself, grounds for disqualification from unemployment benefits,"[156] rather the rejection was based on an unemployment compensation statute which denies benefits to persons discharged for "misconduct," as defined by their employers.[157] Under the statute, every private employer is free to establish its own rules regarding what actions constitute misconduct.[158] Smith's employer considered any drug use by its counselors, *whether legal or illegal*, to constitute misconduct because it significantly impaired their ability to function as role models. As the Oregon Court of Appeals stated,

> [t]he fact that there is an independent set of criminal laws which made his conduct coincidentally illegal is irrelevant, because he was not terminated for breaking the law. The question is not whether the state's action can be justified by the compelling interest of protecting the health and interest of the public. The justification is not advanced, nor could it be, because the relevant state action is not a criminal charge, as in *Soto*, but the denial of unemployment benefits.[159]

In *Smith I*, Smith argued that peyote use was analogous to the "sacramental use of small quantities of alcohol in Christian religious ceremonies."[160] However, his employer had previously testified to the Oregon court that its counselors would have been similarly discharged for misconduct had they legally consumed alcohol, because any use of drugs or alcohol by a treatment counselor threatens the ability of a drug rehabilitation center to perform its function.[161] Although the consumption of alcohol is not illegal, if Smith had consumed any alcoholic beverage, including wine, he could have been discharged for misconduct and denied unemployment compensation. Similarly, if peyote were legal, Smith still would have been discharged for misconduct and denied unemployment benefits. Thus, the illegality of peyote was irrelevant in determining whether the denial of unemployment benefits was proper. Smith's use of peyote affected his credibility because his unique position as a drug counselor required that he abstain from all addictive substances. If Smith had chosen virtually any other line of work, his peyote use would not have affected his ability to perform responsibilities as a role model.

156. *Smith Oregon I*, 301 Or. 209, 219, 721 P.2d 445, 450 (1986).
157. *See supra* note 133.
158. 301 Or. at 214-15, 721 P.2d at 448.
159. Black v. Employment Div., 75 Or. App. 735, 744; 707 P.2d 1274, 1280 (1985).
160. *Smith I*, 485 U.S. at 669.
161. 301 Or. at 223, 721 P.2d at 452.

Although the illegality of peyote had no bearing on Smith's misconduct for the purposes of unemployment compensation benefits, the majority in *Smith I* nevertheless concluded that the constitutionality of Oregon's unemployment compensation code hinged on whether Smith's sacramental use of peyote was illegal in Oregon.[162] Since the court was uncertain whether Oregon provided an exception to its criminal drug law for the sacramental use of peyote, the case was remanded to the Oregon Supreme Court for a clarification of state law on this issue.[163]

B. The Dissenting Opinion

Justice Brennan felt that the Employment Division had no real interest in enforcing the state's criminal drug laws,[164] because it was apparent from the record that drug enforcement was not the intended goal of the legislature when it enacted its unemployment statutes.[165] To support his position, Justice Brennan noted that the state court had disregarded the Employment Division's asserted interest in proscribing the use of dangerous drugs. The Oregon Supreme Court was unequivocal on this point as evidenced by its statement that "[t]he 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."[166] Justice Brennan also recognized that the illegality of peyote was irrelevant to the determination of whether Smith's use of peyote constituted "misconduct" for which he could be fired and denied unemployment benefits under Oregon's employment statutes.[167] Justice Brennan resolved that the Supreme Court "may not assert on a State's behalf interests that the State does not have."[168] Since in his view the constitutional question was not properly presented, and the Employment Division failed to assert any valid interests other than those which the Court had already re-

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162. As a point of comparison, it should be noted that the district court in *Warner* considered facts which were similar to *Smith*. The *Warner* court recognized that the illegality of peyote was irrelevant in determining whether the sacramental use of peyote by a drug rehabilitation counselor constituted "misconduct" for which unemployment compensation benefits could be denied. *See supra* notes 98-110 and accompanying text. Consequently, the court refrained from evaluating the constitutionality of the criminal law which prohibited all use of peyote. The *Warner* court simply applied the *Sherbert* two-part test to evaluate whether the denial of unemployment benefits violated Warner's free exercise rights. Warner v. Graham, 675 F. Supp. 1171, 1177 (D.N.D. 1987).

163. *Smith I*, 485 U.S. at 673-74.

164. *Id.* at 678-79 (Brennan, J., dissenting).

165. *Id.* at 676-77 (Brennan, J., dissenting).

166. *Smith Oregon I*, 301 Or. 209, 219, 721 P.2d 445, 450 (1986).

167. *See supra* text accompanying notes 152-63.

168. *Smith I*, 485 U.S. at 679 (Brennan, J., dissenting).

jected in *Sherbert*, Justice Brennan concluded that the Oregon Supreme Court's decision should have been affirmed.[169]

C. On Remand to the Oregon Supreme Court

In its first *Smith* opinion, the Oregon Supreme Court considered whether its *unemployment statutes* violated either the Oregon or United States Constitutions,[170] but did not determine whether the state's criminal peyote laws violated the Oregon Constitution. Since the United States Supreme Court ruled that Smith's free exercise claim was dependent on Oregon's criminal laws, the Court remanded with instructions to the Oregon Supreme Court to determine whether Oregon provided an exception to its criminal drug laws for the sacramental use of peyote.[171]

This issue had already been addressed in *State v. Soto*,[172] Oregon's only reported criminal peyote case. In *Soto*, the Oregon Court of Appeals upheld the conviction of an Indian who had been arrested, prosecuted and sentenced under the state's criminal peyote laws.[173] The court rejected Soto's religious defense,[174] even though Soto demonstrated that his religious beliefs were authentic and sincerely held. Although *Soto* remains valid law with regard to Oregon's criminal drug laws, because it was an appellate decision, it was not binding on the Oregon Supreme Court. Moreover, the court had previously suggested in *Black v. Employment Division*[175] that *Soto* be reexamined because Congress had declared in the American Indian Religious Freedom Act that it is "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and *exercise* . . . traditional religions."[176] The *Black* judges noted that the result in *Soto* was inconsistent with the majority of western states which now provide an express exemption to their criminal drug laws for the sacramental use of peyote.[177] The Oregon Supreme Court had also recognized this trend in its first

169. *Id.*
170. *Smith Oregon I*, 301 Or. 209, 212-20, 721 P.2d 445, 446-49 (1986).
171. *Smith I*, 485 U.S. at 672.
172. State v. Soto, 21 Or. App. 794, 537 P.2d 142 (1975), *cert. denied*, 424 U.S. 955 (1976).
173. *Soto*, 21 Or. App. at 798, 537 P.2d at 144.
174. *Id.*
175. 75 Or. App. 735, 744 n.9, 707 P.2d 1274, 1280 n.9. (1985).
176. 42 U.S.C. § 1996 (1982) (emphasis added); *see also* note 299, *infra*, discussing Congress' intent to protect Indian culture and provide a national exception from federal criminal drug laws for the sacramental use of peyote.
177. *Black*, 75 Or. App. at 744 n.8, 707 P.2d at 1280 n.8.

Smith decision by quoting a passage from *Woody*, the leading California decision acknowledging the rights of Indians to use peyote in religious ceremonies.[178] Thus, the United States Supreme Court was justified in considering the possibility that the Oregon Supreme Court could create a judicial or state constitutional exception to its criminal drug laws for the sacramental use of peyote.[179]

However, without providing any legal analysis, or even citing *Soto*, the Oregon court summarily concluded that "the Oregon statute against possession of controlled substances, which include peyote, makes no exception for the sacramental use of peyote."[180] Additionally, rather than evaluating whether Oregon's criminal peyote law could pass *state constitutional* muster, the court proceeded to analyze whether the criminal law violated the *federal constitution*.[181] The court cited authority supporting the proposition that Congress intended to preserve and protect the Native American Indian culture and its religious beliefs.[182] In so doing, the state court found that its criminal drug laws conflicted with the federal Constitution.[183]

The United States Supreme Court, however, had never asked the Oregon court for an analysis under the federal constitution. The Court specifically ruled that "a necessary predicate to a correct evaluation of [Smith's] federal claim is an understanding of the legality of [his] conduct as a matter of *state law*."[184] Although the Supreme Court clearly requested "guidance concerning the status of the [sacramental use of peyote] as a matter of *Oregon law*,"[185] the Oregon Supreme Court neglected to evaluate whether the unconditional prohibition against peyote violated the Oregon Constitution. If the Supreme Court required an analysis of the federal constitution, it certainly would have done so itself without remanding to the state court.

Knowing that the United States Supreme Court intended to hinge Smith's claim on the legality of peyote in Oregon,[186] the Oregon

178. *Smith Oregon I*, 301 Or. 221, 225-27, 721 P.2d 451, 453-54 (quoting People v. Woody, 61 Cal. 2d 716, 720-21, 394 P.2d 813, 816-18, 40 Cal. Rptr. 69, 72-72 (1964)).

179. *Smith I*, 485 U.S. at 673.

180. Smith v. Employment Div., 307 Or. 68, 72-73, 763 P.2d 146, 148 (1988), *cert. granted*, 489 U.S. 1077 (1989), *rev'd*, 110 S. Ct. 1595 (1990) [hereinafter *Smith Oregon II*].

181. *Id.* at 73.

182. *Id.* at 74-75. Arguably, the expressed intention of Congress to protect the religions of this culture violates the establishment clause of the United States Constitution.

183. *Id.* at 75-76.

184. *Smith I*, 485 U.S. at 672 (emphasis added).

185. *Id.* (emphasis added).

186. The Court expressed its intentions on this issue clearly. The majority stated:

> A substantial number of jurisdictions have exempted the use of peyote in religious ceremonies from legislative prohibitions against the use and possession of controlled substances. If Oregon is one of those States, [Smith's] conduct

Supreme Court could have provided Smith with his unemployment benefits by simply overruling *Soto*, and thereby carving a judicial exception to the state's criminal statute in order to accommodate the sacramental use of peyote. Alternatively, the Oregon court could have held that the Oregon Constitution requires the religious exemption. However, despite the modern trend in other states to exempt sacramental peyote use from criminal drug laws, and the congressional mandate which the court so persuasively set forth, the Oregon Supreme Court failed to evaluate whether the Oregon Constitution or the criminal statute itself required the religious exception. As a result, when the case was heard once again by the United States Supreme Court, the Court could look only to the plain words of the state court's opinion which stated that Oregon provides no religious exception for the sacramental use of peyote.[187] Thus, the stage was finally set for the Supreme Court's ground-breaking decision when the Court heard the case a second time in *Smith II*.

V. ANALYSIS OF SMITH II

A. The Majority Opinion

1. General Information

Justice Scalia, writing for the majority,[188] commenced by identifying the specific Oregon criminal drug statutes subject to constitutional scrutiny.[189] He noted that upon remand, the Oregon Supreme Court had determined that Oregon does not provide a religious exception to its criminal drug laws for the sacramental use of peyote.[190] Although Smith was never arrested, prosecuted, convicted, or sentenced under the criminal peyote statute, the Court nevertheless believed that this case presented a ripe opportunity to evaluate the constitutionality of Oregon's criminal statute, rather than the employment misconduct statute under which Smith was denied

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may well be entitled to constitutional protection. On the other hand, if Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon.

Id.

187. Employment Div. v. Smith, 110 S. Ct., 1595, 1599, *reh'g denied*, 110 S. Ct. 2605 (1990).

188. Justice Scalia was joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy.

189. Employment Div. v. Smith, 110 S. Ct. 1595, *reh'g denied*, 110 S. Ct. 2605 (1990) [hereinafter *Smith II*].

190. *Id.* at 1598.

benefits.[191]

The *Smith II* majority first addressed the issue of the appropriate level of review to apply to Oregon's law criminalizing peyote.[192] Prior to *Smith II*, most free exercise challenges had been evaluated using the *Sherbert* two-part, compelling state interest test.[193] However, the majority in *Smith II* determined that the *Sherbert* test should not be applied in this case. Justice Scalia devoted his analysis to explaining why neutrally-enacted criminal laws which have an incidental impact on the free exercise of religion should not be evaluated under heightened scrutiny.[194]

2. The free exercise clause does not excuse individuals from complying with neutrally-enacted criminal laws.

The majority rejected Smith's argument that the free exercise clause requires Oregon to exempt religiously motivated peyote use from its criminal drug laws.[195] In rejecting this argument, the Court placed extensive reliance on the neutrality of Oregon's criminal drug laws.[196] Oregon's drug laws were enacted for neutral purposes: to control the distribution, possession, and use of dangerous drugs. The Court observed that the impact of the law on religion was merely incidental.[197] Smith even admitted that Oregon's criminal drug laws were constitutional with regard to persons who used peyote for non-religious reasons.[198]

To support its emphasis on the importance of religious neutrality, the majority discussed several free exercise cases in which neutrally enacted laws were upheld against free exercise challenges. For instance, in *Reynolds v. United States*,[199] once the Court determined that the state's law criminalizing polygamy served a legitimate secular purpose and was not intended to have an impact on religion, the Court's inquiry ended.[200] The government was not required to demonstrate that its statute was the least restrictive means of accomplishing a compelling state interest. Nor was it necessary to consider the more difficult questions of legitimacy, centrality, or sincerity. Religious neutrality, standing alone, was the determinative factor in the *Reynolds* decision.[201] The *Smith II* majority further supported

191. *Id.* at 1599.
192. *Id.* at 1602.
193. *See supra* notes 46-69 and accompanying text.
194. *Smith II*, 110 S. Ct. at 1603.
195. *Id.* at 1599.
196. *Id.* at 1599-1601.
197. *Id.* at 1599-1600.
198. *Id.* at 1599.
199. 98 U.S. 145 (1879).
200. *Id.* at 165-68.
201. *Id.*

it's "religious neutrality" position by citing to *Lee*, *Braunfeld* and *Gillette*, cases involving neutral statutes which were upheld against free exercise challenges.[202] The majority contended that religious neutrality was the determinative factor in all of these cases.[203]

The majority's analysis of these cases, however, can be questioned. For instance, the *Braunfeld* Court did not rest its holding exclusively on religious neutrality. That Court also weighed the state's interests against the burden on free exercise rights.[204] And in *Gillette* and *Lee*, the Government was still required to show that its laws achieved compelling interests by the least restrictive means.[205] Religious neutrality was merely one factor considered in the balancing test, helping to mitigate in favor of upholding a statute.

The *Smith II* Court also failed to note that several cases which have *upheld* free exercise claims involved neutrally enacted statutes.[206] Justice Scalia acknowledged that few of the Court's free exercise cases have involved statutes expressly targeted at religious practices.[207] Since almost all of the Court's free exercise cases have involved challenges to neutrally enacted statutes, some of which were upheld while others were struck down, it is clear that the neutrality of a statute has never been an accurate predictor of whether a

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202. *Smith II*, 110 S. Ct. at 1600.

203. *Id.*

204. *See supra* notes 38-45 and accompanying text.

205. The *Gillette* Court impliedly considered the compelling state interest test by noting that "[t]he incidental burdens felt by persons in petitioners' position are strictly justified by *substantial governmental interests*." Gillette v. United States, 401 U.S. 437, 462 (1970) (emphasis added). In *Lee*, the Court applied the *Sherbert* compelling state interest test and held that the absence of an exception to United States tax laws was essential to accomplish its overriding interest in the fiscal integrity of the social security system. United States v. Lee, 455 U.S. 252, 257-60 (1982).

206. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (Court struck down mandatory school attendance statute not intended to affect religious practices); Hobbie v. Unemployment Appeals Comm'n of Fl., 480 U.S. 136 (1987) (striking down neutrally enacted unemployment compensation statutes).

207. *Smith II*, 110 S. Ct. at 1599. Justice Scalia stated parenthetically that "no case of ours has involved the point." *Id.* To the extent that this statement is equivocal, Justice O'Connor clarified the issue in her concurrence by noting that "[o]ur free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice." *Id.* at 1608 (O'Connor, J., concurring). *But see* Cantwell v. Connecticut, 310 U.S. 296 (1940) and Torcaso v. Watkins, 367 U.S. 488 (1961). The state constitutional provision in *Torcaso* required potential public employees to take an oath which required a belief in God as a condition of employment. Not only was this a violation of both the establishment and free exercise clauses of the first amendment, but it violated the Constitution itself. Article VI reads in part: "no religious Test shall ever be required as a qualification to any office or public trust under the United States." U.S. CONST. art. VI, § 3, cl. 2.

statute could survive a free exercise challenge. However, Justice Scalia's renewed and exclusive emphasis on a statute's neutrality indicates that it was the determinative factor in the *Smith II* case.

Justice Scalia provided strong support for the majority's emphasis on religious neutrality by analyzing other cases in which the Court considered neutrally enacted laws which affect other individual rights. For example, the Court has held that laws which are racially neutral, but have a disproportionate impact on a particular racial group, do not automatically become subject to strict scrutiny.[208] Similarly, content-neutral laws which have an incidental impact on free speech are not necessarily subject to a compelling state interest analysis under the first amendment.[209] Justice Scalia felt that applying the strict scrutiny standard to neutrally enacted laws which incidentally cause a disproportionate impact on religiously motivated conduct would produce a constitutional anomaly when compared to the level of review applied to racially neutral and content-neutral laws. Taking all of these "religious neutrality" arguments into consideration, Justice Scalia determined that Oregon's peyote laws were neutrally enacted, because their adverse affect on Smith's religious practices was merely incidental to the laws' secular purpose.[210] Consequently, the *Smith II* Court further justified its decision not to use a compelling state interest test. This approach signifies a demotion of the level of review applied to religiously neutral laws which negatively impact religiously motivated conduct.

3. The compelling state interest test does not apply to free exercise claims which are not supplemented by additional constitutional protections

To further support the standard of review demotion, the majority distinguished *Smith II* from a line of "hybrid" cases which applied the compelling state interest standard to statutes which had an impact on free exercise in conjunction with other first amendment or fundamental rights.[211] In distinguishing these cases, the majority rationalized that they were decided, or could have been decided, exclusively on grounds other than the free exercise of religion.[212] For example, Justice Scalia suggested that *Wisconsin v. Yoder* could have been decided solely on the basis of the parents' fundamental rights to privacy,[213] and in *Wooley v. Maynard*,[214] the Court could

208. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).
209. *See generally* L. TRIBE, *supra* note 17, § 16.2, at 982.
210. *Smith II*, 110 S. Ct. at 1603.
211. *Id.* at 1601-02.
212. *Id.* at 1602.
213. *Id.* at 1601. The *Yoder* Court stated that, "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more

have relied exclusively on free speech principles to strike down a law that compelled the exhibition of a license plate slogan which conflicted with the challenger's religious beliefs.[215]

Of the seven cases cited by the majority to support its "hybrid" explanation, five were decided prior to *Sherbert*.[216] Since the primary issue in *Smith II* was whether the *Sherbert* two-part, compelling state interest test retained its constitutional vitality, cases decided before *Sherbert* provided questionable support for abolishing the *Sherbert* rule. Furthermore, the Court's assertion that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections"[217] is simply incorrect. *Sherbert*, *Thomas*, and *Hobbie* all involved neutral, generally applicable unemployment laws and were decided exclusively on free exercise grounds.[218] These flaws diminish the majority's "hybrid" explanation.

In order to assure that it did not intend for the present holding to affect its rulings in other constitutional areas, and to reconcile its position with some of its prior free exercise cases, the *Smith II* Court noted that Smith had not presented a hybrid constitutional claim. As a result, he could not invoke the compelling state interest test more commonly associated with other first amendment or fundamental rights.

4. Reconciliation and Limitation of *Sherbert*

Recognizing that its decision conflicted with *Sherbert*, the majority devoted substantial effort to minimizing *Sherbert*'s scope. Justice

than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's Requirements under the First Amendment." *Id.* at 1601 n.1 (quoting Wisconsin v. Yoder, 406 U.S. 205, 233 (1972)).

214. 430 U.S. 705 (1977). Interestingly, New Hampshire's brief writer in *Wooley v. Maynard* was then Attorney General David H. Souter, the latest addition to the United States Supreme Court. *Id.* at 706.

215. *Id.* The slogan in *Wooley* read: "Live Free or Die." The challengers were Jehovah's Witnesses who asserted that compulsory exhibition of the slogan offended their moral, religious, and political beliefs. *Id.* at 707. The *Wooley* Court's analysis focused solely on the expressive aspect of the slogan without any discussion of free exercise implications. *Id.* at 713-17.

216. *Smith II*, 110 S. Ct. at 1601-02.

217. *Id.* at 1601.

218. Sherbert v. Verner, 374 U.S. 398, 401 (1963); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 713 (1981); Hobbie v. Unemployment Appeals Comm'n of Fl., 480 U.S. 136, 137 (1987).

Scalia first argued that, since *Sherbert* and its progeny were decided in the context of state unemployment compensation laws, the *Sherbert* test has limited applicability outside the unemployment compensation field.[219] Next, he argued that although the *Sherbert* two-prong, compelling state interest test has been applied in limited civil contexts outside the unemployment area, it has never been applied by the Supreme Court to a criminal law.[220]

The majority's analysis is flawed in several respects. First, the Supreme Court has applied the *Sherbert* test to criminal laws, and it has exempted various free exercise claimants from the reach of those laws. For example, in In re *Jenison*,[221] the Court vacated the criminal contempt conviction of a religious objector who refused jury service.[222] And in *Wisconsin v. Yoder*, the *Sherbert* test was expressly applied by the Supreme Court to exempt Amish parents and children from a mandatory school attendance statute which carried a penalty of three-months imprisonment for violations.[223] And in *Wooley v. Maynard*, the Court exempted the free exercise claimant from a license plate law which carried a six-month jail term.[224] Furthermore, numerous state and federal courts have applied the *Sherbert* test to a variety of criminal statutes,[225] including peyote laws.[226] These cases demonstrate that the free exercise clause has been applied to invalidate criminal laws.[227]

The *Smith II* majority did not purport to overrule *Sherbert*. Rather, it merely refused to extend the *Sherbert* test to a criminal law,[228] stating that "[e]ven if we were inclined to breathe into *Sher-*

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

220. "[W]hether or not the decisions are that limited, *they at least have nothing to do with an across-the-board criminal prohibition* on a particular form of conduct." *Smith II*, 110 S. Ct. at 1603 (emphasis added).

221. 375 U.S. 14 (per curiam), *vacating* 265 Minn. 96, 120 N.W. 2d 515 (1963).

222. On remand, the Minnesota Supreme Court reversed the conviction. *In re* Jenison, 267 Minn. 136, 125 N.S.2d 588 (1963).

223. The statute in question read: " 'Whoever violates this section . . . may be fined not less than $5 nor more than $50 or imprisoned not more than 3 months or both.' " Wisconsin v. Yoder, 406 U.S. 205, 208 n.2 (citing WIS. STAT. § 118.15(5) (1969)). Mr. Yoder was actually fined only $5. *Id.* at 208.

224. "Another New Hampshire statute makes it a misdemeanor to 'knowingly [obscure]' . . . the figures or letters on any number plate." Wooley v. Maynard, 430 U.S. 705, 707 (1977) (citing N.H. REV. STAT. ANN. § 262:27-c (Supp. 1975)). Mr Maynard was fined $50 and sentenced to serve six months in jail. His sentence was suspended, but he did serve a 15-day jail sentence. *Id.* at 708.

225. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989) (*Sherbert* test applied to criminal statute which prohibited cruelty to animals).

226. *See supra* notes 77-110 for cases applying the *Sherbert* test to criminal peyote laws.

227. *See also* McDaniel v. Paty, 435 U.S. 618 (1978) (Court relied on *Sherbert* to invalidate a law that prohibited ministers from serving as delegates to a constitutional convention).

228. Interestingly, refusing to apply the *Sherbert* test to a criminal peyote law signi-

bert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable *criminal law*."[229]

This criminality distinction yields two rules. First, the *Sherbert* two-prong, compelling state interest test is still applicable in unemployment compensation cases. Second, neutrally enacted criminal laws are not subject to the *Sherbert* test. However, applying these rules to *Smith II* is questionable because this *is* an unemployment compensation case, not a criminal case. Smith's claim was based on the denial of unemployment benefits under Oregon's employment statutes. Thus, it is unclear why the Court distinguishes this case from *Sherbert* on this point.

The majority also stressed that unemployment compensation programs, such as the one implicated in the *Sherbert* case, invite consideration of the particular circumstances behind an applicant's unemployment.[230] The majority stated that "where the state has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[231] Justice Scalia implied that, since criminal laws are enforceable regardless of the individual circumstances behind the criminal conduct, the state is not required to consider an individual's religious motivation when enforcing its criminal laws.

However, the fact that unemployment statutes invite consideration of the particular circumstances behind an applicant's unemployment does not fully distinguish them from criminal laws. Although criminal laws generally do not provide express exemptions for religiously motivated conduct,[232] the criminal prosecution process is laden with discretionary stages in which religious motivation can be considered.

For instance, the decision to prosecute is a discretionary function in which the appropriate prosecuting authority may consider the particular circumstances behind an individual's conduct, including his reli-

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fies a shift in the views of Justices Rehnquist and Stevens. In *McDaniel v. Paty*, Chief Justice Burger expressly acknowledged that the California Supreme Court properly applied the *Sherbert* test to a criminal peyote law in *People v. Woody*. *Id.* at 628 n.3; *see supra* notes 77-84 and accompanying text. Chief Justice Burger was joined by Justices Rehnquist and Stevens. *McDaniel*, 435 U.S. at 620.

229. *Smith II*, 110 S. Ct. 1595, 1603 (1990) (emphasis added).

230. *Id.*

231. *Id.* (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

232. One exception to this general rule is the religious exemption granted in other states for the sacramental use of peyote. *See infra* note 301 and accompanying text.

gious beliefs.[233] Furthermore, the sentencing phase of a criminal prosecution has a discretionary aspect in that a court may refuse to impose significant penalties. In making sentencing determinations, the court can consider any factor which mitigates the defendant's culpability, including religious beliefs.[234] These factors demonstrate that, like unemployment compensation laws, the criminal prosecution process invites consideration of the particular circumstances behind a person's conduct. Therefore, the fact that *Sherbert* arose in a context that lent itself to individualized government assessment of the reasons for the relevant conduct does not necessarily distinguish *Smith* from *Sherbert*.

The majority staged another attack on *Sherbert* by referring to *Bowen v. Roy*.[235] In that case, an Indian claimed that according to his religious beliefs, his daughter would be "robbed" of her religious spirit if he were forced to furnish her social security number as a condition of receiving government medical assistance for her. In rejecting the claim, Chief Justice Burger, writing for a plurality, justified the holding primarily on the basis of the law's religious neutrality.[236] The *Smith II* majority relied on Chief Justice Burger's analysis in *Bowen* in holding that religious neutrality is sufficient to avoid *Sherbert's* two-part test.

As a plurality decision joined by only two Justices,[237] *Bowen* had

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233. The discretionary nature of criminal prosecution is best demonstrated in the instant case, where the state declined to criminally prosecute Smith for his admitted use of peyote. *Smith II*, 110 S. Ct. at 1617 (Blackmun, J., dissenting).

234. *See, e.g.*, CALIFORNIA RULES OF COURT, SENTENCING RULES FOR THE SUPERIOR COURTS, Rule 423 (West 1990), which provides that "circumstances in mitigation include: (4) The defendant['s] . . . conduct was partially excusable for some other reason not amounting to a defense . . . . (7) The defendant . . . mistakenly believed his conduct was legal. (8) The defendant was motivated by a desire to provide necessities for his family or himself." *Id.* Pursuant to these sections, a trial court can consider the defendant's membership in the NAC as a factor which mitigates in favor of light sentencing.

235. 476 U.S. 693 (1986).

236. *Id.* at 701-12. Roy actually made two distinct free exercise claims. He first asserted that the government's internal use of a social security number designated for his daughter robbed her daughter's religious spirit. In rejecting this claim, the Court noted that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* at 699. The Court rationalized that "Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets." *Id.* at 700. His second objection concerned the Government's requirement that he provide the number as a condition to receiving medical assistance for his daughter. On this issue, the plurality's primary rationale for rejecting the claim was the rule's religious neutrality. *Id.* at 701-12. Thus, *Bowen v. Roy* provided strong support for the *Smith II* Court's holding.

237. Part III of Chief Justice Burger's opinion, which emphasized religious neutrality, was joined only by Justices Powell and Rehnquist. Interestingly, Justice Steven's position regarding religious neutrality in *Bowen* changed in the *Smith II* case. In *Bowen*, Justice Stevens declined to join Part III of Chief Justice Burger's opinion. *Id.*

no binding effect on the *Smith II* Court. However, *Bowen* is only one of a series of free exercise cases whose combined effect provided substantial support for the majority's limitation of the *Sherbert* rule. In *Bowen*,[238] *Lyng v. Northwest Indian Cemetery Protective Association*,[239] *Goldman v. Weinberger*,[240] and *O'Lone v. Estate of Shabazz*,[241] all decided during the four years preceding the *Smith II* decision, the Court found exceptions to the *Sherbert* rule and refused to apply the compelling state interest test. When viewed separately, each of these cases establishes an isolated exception to *Sherbert*. However, when viewed together, these cases indicate the Court's intent to limit the applicability of *Sherbert* to the unemployment compensation field. Thus, the synergistic effect of these cases provides substantial support for the majority's rejection of a strict scrutiny test for Oregon's criminal peyote laws.

Finally, the Court addressed the "centrality"[242] issue, observing that the application of the compelling state interest test should not hinge on whether a statute affects conduct that is central to the individual's religion.[243] The Court held that " 'it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds.' "[244] This issue was virtually the only point of law upon which all nine justices agreed.[245]

B. The Concurring Opinion

1. General Information

Justice O'Connor believed that the majority's failure to apply strict scrutiny contradicted the Court's established approach to free exer-

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at 694. However, in *Smith II*, Justice Stevens joined the majority which solidified the importance of religious neutrality. *Smith II*, 110 S. Ct. 1595, 1597 (1990).

238. *See supra* notes 235-37 and accompanying text.

239. 485 U.S. 439 (1988); *see supra* note 71 and accompanying text.

240. 475 U.S. 503 (1986) (traditional deference to military rules prevented an Air Force captain from wearing a yarmulke, a head-covering worn by Orthodox Jewish men).

241. 482 U.S. 342 (1987) (Court applied deferential "reasonable basis" review to a prison's refusal to modify the work schedules of inmates to permit them to attend religious services).

242. *See supra* note 79 for a discussion of "centrality."

243. *Smith II*, 110 S. Ct. at 1604.

244. *Id.* (quoting Hernandez v. Commissioner, 109 S. Ct. 2136, 2149 (1989)).

245. Justice O'Connor and the dissenters all expressly agreed with the majority that courts should refrain from evaluating the centrality of religious tenets. *Id.* at 1615 (O'Connor, J., concurring), 1621-22 (Blackmun, J., dissenting).

cise cases. She argued that the *Sherbert* compelling state interest test should have been applied to Oregon's unqualified ban on peyote.[246] In applying the test, she determined that Oregon had a compelling interest in controlling peyote, and that the state's unqualified ban was the least restrictive means of accomplishing this interest.[247] Consequently, Justice O'Connor felt that Smith's use of peyote was not protected by the first amendment.[248] Since Justice O'Connor used a different level of review than the majority, but reached the same result, she wrote separately to express her support for applying *Sherbert*'s two-part, compelling state interest test to laws which have an impact upon the free exercise of religion.

As a preliminary matter, Justice O'Connor recognized that Smith was "denied unemployment benefits because [his] sacramental use of peyote constituted work-related 'misconduct,' not because [he] violated Oregon's general criminal prohibition against possession of peyote."[249] However, since the Court's holding in *Smith I* clearly linked the unemployment compensation issue with the issue of whether the state had criminalized the conduct that led to the denial of benefits, and since the state, on remand, held that there was no exception to its criminal law for the religious use of peyote, Justice O'Connor concluded that the present case was properly before the Court.[250]

Justice O'Connor also highlighted the significance of the Oregon Supreme Court's failure to address whether the state's general prohibition against peyote violated the Oregon Constitution.[251] As discussed above, rather than evaluating its peyote laws under its state constitution as requested to do on remand, the Oregon high court only considered their federal constitutionality.[252] Justice O'Connor noted that the Oregon Supreme Court can reopen the question presented in this case by evaluating whether the Oregon Constitution requires the state to create an exception to its criminal drug laws for the sacramental use of peyote.[253]

2. The Standard of Review

To support her contention that the compelling state interest test was an appropriate level of review, Justice O'Connor focused on the plain language of the free exercise clause which provides, "Congress

246. *Id.* at 1612-13 (O'Connor, J., concurring).
247. *Id.* at 1614-15.
248. *Id.* at 1615.
249. *Id.* at 1607.
250. *Id.*
251. *Id.*
252. *See supra* notes 180-86 and accompanying text.
253. *Smith II*, 110 S. Ct. at 1607 (O'Connor, J., concurring).

shall make no law . . . prohibiting the free exercise [of religion]."[254] Since Oregon's peyote law prohibits the use of peyote, and since the free exercise of Smith's religion requires the use of peyote, Oregon's law prohibits the free exercise of religion on their face.[255] Justice O'Connor observed that Oregon's peyote law implicates the free exercise of religion regardless of whether it also affects nonreligious conduct.[256] It is of no consequence to a Native American Church member that the law also bans the recreational use of peyote. The first amendment, she argued, makes no distinction between religiously neutral laws and those which expressly target particular religious practices.[257]

Justice O'Connor noted that, although the free exercise clause provides absolute protection for religious beliefs, the freedom to act in accordance with one's religious beliefs often conflicts with important governmental concerns.[258] In order to reconcile this conflict, and in recognition of the Constitution's mandate for religious liberty, the Court has applied strict scrutiny to laws which have an impact on free exercise conduct. Under the strict scrutiny text, the state must demonstrate that its laws are the least restrictive means of accomplishing a compelling governmental interest.[259]

Justice O'Connor argued that refusing to apply the two-part, compelling state interest test conflicted with prior free exercise cases, especially *Wisconsin v. Yoder*.[260] She noted that in *Yoder*, the Court held that even regulations of general applicability are still subject to the free exercise clause.[261] Moreover, *Yoder* addressed the precise issue that was before the *Smith II* Court, and held that religiously neutral criminal laws are subject to the free exercise clause.[262]

In order to support its decision not to apply the *Sherbert* rule to Smith's free exercise claim, the majority stressed that Smith's conduct violated a criminal law, where as Sherbert's did not. Justice O'Connor objected to this distinction. In her view, "a neutral crimi-

254. *Id.*
255. *Id.* at 1608.
256. *Id.* ("A person is barred from freely exercising his religion regardless of whether the law prohibits conduct only when engaged in for religious reasons, only by members of that religion, or by all persons.").
257. *Id.*
258. *Id.*
259. *Id.* at 1608-09.
260. *Id.* at 1609.
261. *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)).
262. *Id.*

nal law prohibiting conduct that a State may legitimately regulate is, if anything, *more* burdensome than a neutral civil statute placing legitimate conditions on the award of a state benefit."[263]

Justice O'Connor also objected to the majority's characterization of *Yoder* as a "hybrid" that was decided primarily on grounds other than the free exercise clause.[264] She countered that *Yoder* was expressly decided on free exercise grounds[265] and that its compelling state interest analysis is "part of the mainstream of our free exercise jurisprudence."[266] She further noted that in the other decisions cited by the majority, the free exercise claims were rejected only after the Court had carefully weighed the competing interests. In Justice O'Connor's view, the mere fact that many free exercise claims have failed is no reason to question whether the compelling state interest test retains its constitutional vitality in the free exercise arena.

To support her position, she noted that the Court has not declined to apply the *Sherbert* two-part, compelling state interest test to recent free exercise claims.[267] Justice O'Connor noted that while the Court has rejected many free exercise claims, it has never rejected the applicability of the *Sherbert* two-part, compelling state interest test in making its determination.[268] Justice O'Connor observed that the only free exercise cases in which the compelling state interest test was not applied involved specialized contexts involving military or prison environments, in which the government has traditionally never been required to demonstrate a compelling interest.[269]

Justice O'Connor did not address the fact that the Court has repeatedly considered religious neutrality as one factor to consider in upholding a statute. Although the majority in *Smith II* extrapolated the significance of religious neutrality by deeming it to be a determinative element, it cannot be denied that several Court opinions have discussed its importance.[270] The Justice could have strengthened her position by recognizing that religious neutrality has been considered by the Court, and by explaining that it is merely one consideration which mitigates in favor of finding that a law does not violate the free exercise clause.[271]

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263. *Id.* at 1611.
264. *Id.* at 1602.
265. *Id.* at 1609 (citing *Yoder*, 406 U.S. at 219-229).
266. *Id.* at 1609-10.
267. *Id.* at 1611.
268. *Id.* at 1610.
269. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (free exercise claim rejected in light of Court's traditional deference to Congress concerning military regulations); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (compelling state interest test inapplicable to prison regulations).
270. *See, e.g.*, Bowen v. Roy, 476 U.S. 693 (1986); Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 676 (1969).
271. Both the majority and Justice O'Connor acknowledged that almost every free

Justice O'Connor objected to the majority's failure to provide any convincing justification for abandoning the compelling state interest test in free exercise cases.[272] However, the majority did not explicitly say that its holding departed from free exercise jurisprudence. Instead, it strained to rationalize its holding as being in accordance with prior free exercise cases. As a result, the majority's arguments were not phrased as justifications for abandoning the compelling state interest test. To the extent that Justice O'Connor could extract justifications, she sharply disagreed with them.

The Justice first rejected any implication by the majority that the mere neutrality of a law is sufficient to warrant abandoning strict scrutiny. In her view, "laws neutral toward religion can coerce a person to violate his religious conscience . . . just as effectively as laws aimed at religion."[273] Second, in response to the majority's contention that applying the compelling state interest test to the free exercise clause is inconsistent with the Court's deferential approach towards racially neutral or speech-neutral laws,[274] Justice O'Connor argued that strict scrutiny should be applied because the free exercise of religion is a preferred constitutional activity that is explicitly safeguarded in the first clause of the first amendment.[275] Third, she simply disagreed with the majority's concern that lower court judges will have to regularly balance statutes against the importance of religious practice.[276] She felt that courts would be able to strike sensible balances between religious freedom and competing governmental concerns.[277]

Additionally, Justice O'Connor distinguished the cases referred to by the majority in support of its position which did not apply the *Sherbert* test.[278] Justice O'Connor argued that, unlike the present case, in both *Bowen v. Roy* and *Lyng v. Northwest Indian Cemetery*

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exercise case which the Court has addressed has concerned a religiously neutral law. *See supra* note 207 and accompanying text. Since some religiously neutral laws which have an impact on religion have been upheld while others have been struck down, it is clear that the religious neutrality of a law has had no correlative impact on whether it violated the free exercise clause. *See supra* note 207 and accompanying text.

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

273. *Id.*

274. *Id.* at 1614, n.3.

275. *Id.* at 1609. However, Justice O'Connor's rebuttal did not address different treatment accorded to racially neutral and speech neutral laws.

276. *Id.* at 1606 n.5.

277. *Id.* at 1613.

278. *Smith II*, 110 S. Ct. 1595, 1603 n.2 (1990) (explaining Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693, 699 (1985)).

Protective Association, the *Sherbert* test was not applicable because the cases involved free exercise claimants who were attempting to dictate how the government should conduct its internal affairs. Justice O'Connor noted that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[279] The majority attempted to place *Smith II* within the scope of those cases by characterizing Oregon's criminal drug prohibition as an internal health and safety program.[280] However, the analogy implied by the majority is attenuated. *Bowen* and *Lyng* involved the *government's behavior* with respect to its office procedures[281] and land use,[282] respectively. In contrast, Oregon's criminal drug laws were intended to affect *individual behavior* by forbidding the use of peyote. In Justice O'Connor's view, any law which affects an individual's religious freedom should be subject to the *Sherbert* compelling state interest test.[283]

The majority was also concerned that if the *Sherbert* test were applied to criminal prohibition, then courts would be faced with a flood of free exercise challenges to civic obligations of almost every conceivable kind.[284] To illustrate this point, Justice Scalia set forth a "parade of horribles" in which laws relating to such areas as child neglect, animal cruelty and environmental protection were challenged on religious grounds.[285] Since the laws at issue in these cases were all upheld, however, Justice O'Connor contended that courts are quite capable of striking "sensible balances between religious liberty and competing state interests."[286]

The Justice concluded her support for applying the compelling state interest test by criticizing the Court's apathy towards less established religions.[287] The majority acknowledged that minority religious groups are often unable to pressure legislators to accommodate their religious practices.[288] But the majority was willing to accept any disparity in the law as simply an "unavoidable consequence" of a

279. *Id.* at 1611 (O'Connor, J., concurring) (citing *Bowen*, 476 U.S. at 699).

280. *Id.*

281. *See supra* note 235-37 and accompanying text.

282. *Lyng*, 485 U.S. at 450. It was not disputed that the government's use of its land "could have devastating effects on traditional Indian religious practices." *Id.* at 451.

283. *Smith II*, 110 S. Ct. at 1607 (O'Connor, J., concurring).

284. *Id.* at 1605-06.

285. *Id.*

286. *Id.* at 1613.

287. *Id.*

288. *Id.* at 1606. However, the NAC is not a group that is unable to protect its interests through the legislative process, as evidenced by the fact that 23 states and the federal government provide an exception from criminal drug laws for the sacramental use of peyote. *See supra* note 186.

pluralistic society.[289] Justice O'Connor disagreed, reasoning that the free exercise clause was specifically intended to protect minority religions from an intolerant majority.[290] To support her position, she noted that the very purpose of the Bill of Rights was to prevent certain freedoms from being subject to political influences.[291] Thus, she concluded, in order to accommodate the widest possible toleration of religion, the first amendment requires the government to demonstrate that any law which has an impact on the free exercise of religion must be subject to the highest level of judicial scrutiny under the compelling state interest test.[292]

3. Compelling State Interest Analysis

After concluding that Smith's free exercise claim should be analyzed under *Sherbert*'s two-part, compelling state interest test, Justice O'Connor proceeded to apply the test. She argued that the first prong of the test was clearly satisfied because a criminal prohibition of peyote use imposed a substantial burden on Smith's religious practices.[293]

The Justice next considered the second prong of the test, which requires the state to demonstrate a compelling interest which cannot be accomplished by less restrictive means.[294] Justice O'Connor observed that the Court has held drug abuse to be " 'one of the greatest problems affecting the health and welfare of our population' and thus 'one of the most serious problems confronting society today.' "[295] For this reason, she concluded that Oregon does have a compelling interest in proscribing the use of peyote.[296] For Justice O'Connor, the critical question was whether exempting Smith from the statute would interfere with the state's interest in preventing harm caused by drug use. Conceding that the question was close, she nevertheless concluded that the uniform application of the law was essential to the state's goals because (1) the damage to health caused by drug use

289. *Smith II*, 110 S. Ct. at 1606.
290. *Id.* at 1613 (O'Connor, J., concurring).
291. *Id.*
292. *Id.*
293. *Id.*
294. Sherbert v. Verner, 374 U.S. 398, 406 (1963). "Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
295. *Smith II*, 110 S. Ct. at 1614 (O'Connor, J., concurring) (quoting Treasury Employees v. Von Raab, 109 S. Ct. 1384, 1395 (1989).
296. *Id.*

occurs regardless of the user's religious motivation, and (2) the societal need to prevent trafficking of controlled substances could be adversely affected by exemptions.[297]

However, Justice O'Connor did not squarely address the dissent's questions regarding whether Oregon's interest in prohibiting the religious use of peyote was truly "compelling." The dissent noted that peyote is not a popular recreational drug and comprises only a minuscule percentage of drug trafficking.[298] Justice O'Connor painted a broad stroke and was unwilling to consider the varying impacts of different drugs.[299] The dissent also questioned how Oregon could assert that its interest in proscribing peyote use is compelling when it had not even bothered to criminally prosecute Smith for the crime.[300] Justice O'Connor simply neglected to address this question. The dissent also pointed out that twenty-three states and the federal government currently exempt sacramental peyote use from criminal prosecution.[301] Justice O'Connor merely responded that other states are free to provide the exception without Oregon being *required* to do so by the first amendment.[302] She referred to Congress' Schedule I list of controlled substances, which includes peyote, to demonstrate peyote's threat to health and safety,[303] but minimized the significance of Congress' declaration that Schedule I does not apply to sacramental peyote use.[304] Justice O'Connor's failure to confront these arguments places her analysis into question.

Justice O'Connor concluded, without significant analysis, that exempting the sacramental use of peyote from criminal drug laws would significantly interfere with Oregon's drug enforcement operations.[305] In her view, uniform application of Oregon's prohibition against peyote is essential to accomplish its compelling interest in preventing drug abuse and trafficking. As a result, Oregon's unconditional prohibition against peyote was the least restrictive means of accomplishing its goals.[306] Having found that Oregon's drug laws are narrowly tailored to accomplish its compelling interest in controlling

297. *Id.*
298. *Id.* at 1620 (Blackmun, J., dissenting).
299. *Id.* at 1614-15 (O'Connor, J., concurring).
300. *Id.* at 1617 (Blackmun, J., dissenting).
301. *Id.* at 1618 n.5 (Blackmun, J., dissenting).
302. *Id.* at 1615 (O'Connor, J., concurring).
303. *Id.* at 1614.
304. *Id.* at 1615 (citing 21 C.F.R. § 1307.31 (1989)). The Federal Code provides, "The listing of peyote as a controlled substance in Schedule I does not apply to the non-drug 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." 21 C.F.R. § 1307.31; *see also* Olsen v. Drug Enforcement Admin., 1458, 1463-64 (D.C. Cir. 1989) (explaining rationale for sacramental exception).
305. *Smith II*, 110 S. Ct. at 1614 (O'Connor, J., concurring).
306. *Id.* at 1614-15.

drug abuse, Justice O'Connor concluded that Oregon's peyote laws could withstand strict scrutiny and, therefore, passed the compelling state interest test.

C. *The Dissenting Opinion*

Justice Blackmun, joined by Justices Brennan and Marshall, agreed with Justice O'Connor that *Sherbert*'s two-part, compelling state interest test should have been applied in this case. Justice Blackmun felt that the majority's opinion "mischaracterized this Court's precedents"[307] and "effectuated a wholesale overturning of settled law concerning the Religion Clauses of our Constitution."[308] Like Justice O'Connor, Justice Blackmun thought that it was beyond question that strict scrutiny should be applied to laws which have an impact upon the free exercise of religion.[309] However, the dissenters thought that Oregon's criminal drug laws failed the compelling state interest test because they did not provide an exception for the sacramental use of peyote.[310] Justice Blackmun reasoned that the state does not have a compelling interest in proscribing the religious use of peyote, and even if it did, its laws were not narrowly drafted to accomplish that goal.

Before beginning his analysis, Justice Blackmun expressed his trepidation about the procedural problems in the case. When the Oregon Supreme Court first heard the case, that court held that the illegal nature of peyote use was irrelevant to the determination of whether Smith's religious use of peyote justified the denial of unemployment benefits. The Court in *Smith I* expressly disagreed. Justice Blackmun, who joined the dissent in *Smith I*, continued to assert that the Oregon Supreme Court could still reverse the result of this case by simply concluding that the illegality of peyote is irrelevant to Oregon's unemployment benefit programs.[311] Additionally, Justice Blackmun acknowledged that the Oregon Supreme Court has yet to judge its criminal peyote laws under the Oregon Constitution.[312] Consequently, he felt that since the Oregon Supreme Court was still at liberty to reverse the result of this case by simply declaring that the state constitution requires a religious exception, the present case

307. *Id.* at 1616 (Blackmun, J., dissenting).
308. *Id.*
309. *Id.*
310. *Id.* at 1617.
311. *Id.* at 1616 n.2.
312. *Id.* (Blackmun, J., dissenting).

was not a proper exercise of judicial restraint over matters of state law.[313] Despite these procedural misgivings, Justice Blackmun reluctantly concluded that the constitutionality of Oregon's failure to provide a religious exception to its criminal drug laws was properly presented to the Court.[314]

Justice Blackmun did not agree with Justice O'Connor's concurring opinion that Oregon's drug laws could pass the compelling state interest test.[315] The real issue of the case was not the state's broad interest in fighting the "war on drugs," he contended.[316] Tracking the Court's treatment of the compelling state interest test in free exercise cases, he observed that the Court has never blindly accepted a state's "sweeping claim" of interest. Rather, the Court has demanded that the asserted state interest be properly narrowed to reflect the precise interest involved.[317] Justice Blackmun contended that in *Smith II* the state's actual interest was the narrow one of refusing to make an exception for the religious use of peyote.[318]

Justice Blackmun proceeded to compare the use of peyote to other drugs to demonstrate why providing a religious exception posed no significant threat to drug enforcement activities. First, peyote's bitter taste and propensity to induce nausea make it unpopular as a recreational drug.[319] Furthermore, there is almost no illegal traffic in peyote in the United States.[320] Additionally, the NAC regards the nonreligious use of peyote by its member as a sacrilege and imposes internal restrictions on its use.[321] According to Justice Blackmun, peyote has also been proven to be a positive force in improving the mental, physical, and spiritual lives of NAC members by promoting familial responsibility, self-reliance, and abstinence from alcohol.[322] Another factor mitigating against Oregon was the fact that twenty-three states[323] and the federal government[324] provide an exemption from criminal drug laws for the sacramental use of peyote. In Justice Blackmun's view, this supports the notion that providing the exception is not incompatible with the states' broad and concededly com-

313. *Id.*
314. *Id.*
315. *Id.* at 1617.
316. *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).
317. *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).
318. *Id.*
319. *Id.* at 1619 n.7.
320. *Id.* at 1620 (citing a Drug Enforcement Agency finding that between 1980 and 1987, only 19.4 pounds of illegally transported peyote was seized, compared to 15 million pounds of illegally transported marijuana seized).
321. *Id.* at 1618-19.
322. *Id.* at 1619-20.
323. *Id.* at 1618 n.5 (Blackmun, J. dissenting) (citing *Smith-Oregon II*, 307 Or. 68, 73 n.2, 763 P.2d 146, 148 n.2 (1988)).
324. *Id.* (citing 21 C.F.R. § 1307.31 (1989)).

pelling interest in winning the violent war against more dangerous drugs.[325]

Justice Blackmun also questioned the degree of Oregon's interest in proscribing the use of peyote when it had neglected to prosecute a criminal case against Smith's admitted use of the drug.[326] Furthermore, Oregon failed to demonstrate that it had made any significant efforts to enforce its prohibition against peyote.[327] In addition, Oregon has only one reported case on the issue, and the state failed to offer evidence regarding the extent of peyote use in Oregon. Justice Blackmun perceived the lack of legal activity concerning peyote in Oregon as strong evidence that the state's actual interest is merely the "symbolic preservation of an unenforced prohibition."[328] Since Oregon has minimal interest in enforcing the law, Justice Blackmun reasoned that it could not possibly have a compelling interest in denying a religious exception to an isolated sect of society.

Oregon had argued that granting an exception would invite a flood of bad-faith claims for religious exemptions which would hinder law enforcement efforts.[329] Justice Blackmun rejected this argument as speculative, observing that the states which provide the exception have not been confronted with a flood of spurious claims.[330] Additionally, he noted that courts have proven quite capable of ferreting out insincere religious claims. In support of this contention, Justice Blackmun set forth a line of state and federal cases in which criminal convictions for use of marijuana, hashish, and heroine were upheld against free exercise challenges.[331]

The State had also argued that granting an exception only to NAC members violates the establishment clause.[332] Justice Blackmun responded by noting that the test of whether a state has violated the establishment clause is not by reaching uniform *results* as to all

325. *Id.* at 1618.

326. *Id.* at 1617.

327. *Id.* While the state's failure to enforce a law against some individuals does not in itself preclude the state from enforcing it against other persons, it should be noted that selective enforcement is a trademark of religious intolerance which the free exercise clause, as well as the equal protection clause, were designed to prevent.

328. *Id.* An unenforced statute is not ripe for review. For example, in Poe v. Ullman, 367 U.S. 497 (1961), *reh'g denied*, 368 U.S. 869 (1961), the Court refused to reach the merits of a statute that was never enforced. *See generally* TREATISE, *supra* note 18, § 2.13(d), at 115-19.

329. *Smith II*, 110 S. Ct. at 1620 (Blackmun, J., dissenting).

330. *Id.*

331. *Id.* at 1620-21 n.8 (Blackmun, J., dissenting).

332. *Id.* at 1621.

claims, but by the uniform application of the "compelling state interest test to all free exercise claims."[333] He concluded that religious peyote use by the NAC, unlike many other religious groups or sects, would not interfere with the state's interest.[334]

Justice Blackmun concurred with both Justice O'Connor and the majority on the issue of centrality.[335] All nine Justices agreed that courts are not competent to evaluate which tenets are central to the practice of a particular religion because such a query would force the Court into the position of "rubber stamping" religions and would inevitably lead to implications of intolerance for minority religions.[336] Because these are the dangers which the drafters of the first amendment sought to prevent, any inquiry into centrality is contrary to one or both of the religion clauses. Thus, the Court sent a unanimous signal that such inquiries are inappropriate in free exercise jurisprudence.

VI. IMPACT

A. The Level of Review

The majority in *Smith II* devoted much of its opinion to explaining why *Sherbert*'s compelling state interest test was not applicable to Smith's free exercise claim. However, the majority did not identify or apply an alternate level of review. Without employing any constitutional test or providing any analysis, the Court simply concluded that Oregon's prohibition against peyote use is constitutional, and the denial of unemployment compensation benefits was not inconsistent with the free exercise clause.[337]

The Court's failure to identify or apply any constitutional test is disturbing in two respects. First, the Court assumed that the law was constitutional simply because it was not subject to the compelling state interest test. Second, and more importantly for constitutional considerations, future courts faced with free exercise claims have no express guidance regarding which level of review to apply to religiously neutral laws. Should courts apply mere minimal scrutiny whereby any legitimate governmental objective will be sufficient to defeat a free exercise claim? Or should courts apply an intermediate level balancing test whereby free exercise rights prevail unless the law is substantially related to the achievement of important governmental objectives?

Although the *Smith II* majority left this question unanswered, fu-

333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.* at 1621.
337. *Id.* at 1606.

ture courts must nevertheless determine which level of review to apply to religiously neutral laws. The majority in *Smith II* expressly refused to apply strict scrutiny; and if they intended to apply intermediate scrutiny, surely they would have provided some middle level analysis. By process of elimination, courts will assume that minimal scrutiny should be applied to religiously neutral laws. This assumption is consistent with prior free exercise cases in which the Court applied minimal scrutiny after rejecting the applicability of the *Sherbert* test. For example, in *Bowen v. Roy*[338] and *Goldman v. Weinburger*,[339] the Court applied minimal scrutiny after characterizing the cases as exceptions to the *Sherbert* rule. By analogy, future courts will assume that the Court's rejection of the *Sherbert* test in the *Smith II* case implies that minimal scrutiny was applied to Oregon's peyote laws, and that future free exercise challenges to religiously neutral laws should similarly be evaluated under the rational basis test.

B. Effect on Future Free Exercise Jurisprudence

Smith II will have no effect on legislation which is intended to have an impact on the free exercise of religion. If a statute declares its intent to regulate religious acts, or is expressly targeted at religious conduct as such, or uses religious motivation to describe prohibited conduct, then the statute will still be reviewed by the compelling state interest test. However, most free exercise cases have involved neutral laws which were not expressly targeted at religious conduct. Thus, the true impact of the *Smith II* decision must be evaluated by examining its effect on cases which involve religiously neutral laws.

The majority emphasized that the *Sherbert* test should still be applied to civil unemployment compensation statutes. Thus, the precedental value of the three unemployment compensation cases, *Sherbert*, *Thomas*, and *Hobbie*, is undisturbed by the *Smith II* decision. Future free exercise claimants who are discharged from their employment for engaging in religiously motivated conduct will still be entitled to have their free exercise claims evaluated under the compelling state interest test, provided that their conduct does not violate a criminal statute.

Outside of the unemployment compensation area, religiously neutral laws will no longer be evaluated under *Sherbert*'s compelling

338. 476 U.S. 693, 707-08 (1986).
339. 475 U.S. 503 (1986).

state interest test.[340] According to the majority in *Smith II*, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and *neutral* law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' "[341] Because much of free exercise jurisprudence has concerned religiously neutral laws, the scope of the free exercise clause is severely limited by the *Smith II* decision. After *Smith II*, if prohibiting the exercise of religion is not the object of a law, but merely the incidental effect of a *generally applicable* and otherwise valid provision, the first amendment is not violated.

Prior to *Smith II*, courts evaluated laws which had an impact on the free exercise of religion under the compelling state interest test, regardless of whether they were neutral with regard to religious conduct. For example, in *Walz v. Tax Commission*, the Court noted that "[e]ach value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices *or have the effect of doing so*."[342] And in *Wisconsin v. Yoder*, the Court ruled that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[343] The approach taken by the *Smith II* majority is diametrically opposed to the rules set forth in *Walz* and *Yoder*. Thus, Justice Blackmun was correct when he declared that the majority's holding was a "wholesale overturning of settled law concerning the Religion Clauses of our Constitution."[344]

In ruling that the *Sherbert* rule was inapplicable to Smith's free exercise claim, the majority emphasized that Smith's conduct violated a criminal statute, thereby limiting the applicability of its holding to criminal laws. Justice Scalia noted, "[w]hether or not the [post-*Sherbert*] decisions are that limited, they *at least* have nothing to do with an across-the-board criminal prohibition on a particular form of conduct."[345] This language establishes the minimum holding in *Smith II*: neutrally enacted criminal laws are not subject to the *Sherbert* test. At the same time, it suggests that the *Smith II* decision might be applicable only to criminal laws, and not to civil laws. Moreover,

340. In order to limit *Sherbert*, the majority suggested that it would be reluctant to apply *Sherbert* outside of the unemployment compensation field. *Smith II*, 110 S. Ct. at 1602.

341. *Id.* at 1600 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)) (emphasis added).

342. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1969) (emphasis added).

343. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

344. *Smith II*, 110 S. Ct. at 1616 (Blackmun, J., dissenting).

345. *Id.* at 1603 (emphasis added).

any language in the *Smith II* decision which extends its holding to non-criminal laws is dicta because *Smith II* presumably involved a criminal law. An extension of the *Smith II* decision may someday expand the ruling to all civil laws, but until the Court expressly declares that all neutrally enacted laws should be evaluated under minimal scrutiny, *Smith II* should probably be interpreted narrowly and applied only to criminal laws.

In recent years, the Court has created numerous exception to *Sherbert* which had begun to erode the *Sherbert* rule. *Smith II* continues that erosion by holding *Sherbert* inapplicable to neutrally enacted criminal laws. Prior to *Smith II*, states were required to demonstrate that laws which imposed any burden on religious conduct achieved a compelling state interest through means that were the least restrictive of religious liberty. This rule applied regardless of whether the burden was intended or incidental, or whether the law was civil or criminal. However, after *Smith II*, a criminal statute that has a legitimate secular goal, and whose impact on religion is merely incidental, is not subject to a compelling state interest test in a free exercise challenge. Laws which mandate or prohibit conduct under the threat of criminal sanctions will be subject only to minimal scrutiny, whereas laws which merely discourage or encourage conduct by the denial or grant of governmental benefits, without the threat of criminal penalties, will be evaluated under strict scrutiny. The irony of this approach is that laws which impose the greatest burden on religious conduct will now undergo the least judicial scrutiny, whereas laws which impose the least burden on religious conduct will now undergo the greatest judicial scrutiny.

States may still exempt religiously motivated conduct from the reach of their criminal laws. However, "to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required . . . ."[346] State courts may hold that their state constitutions require that the compelling state interest test be applied to laws which inhibit religious conduct. Additionally, courts may still create judicial exceptions which prevent criminal statutes from reaching religiously motivated conduct. However, without a compelling state interest test mandated by the Supreme Court, the pressure on lower courts to create these exceptions is limited. Because the rational basis test requires courts to give deference to legislative policy, these courts will no longer pro-

346. *Id.* at 1606.

vide an effective avenue of relief for persons whose religiously motivated conduct is proscribed by criminal laws. Instead, religious groups must look primarily to legislators for tolerance of their religious conduct. However, as the majority in *Smith II* noted, "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in . . . ."[347]

C. *Judicial Restraint*

In *Smith I*, Justice Brennan declared that

> each Term this Court discovers only after painstaking briefing and oral argument that some cases do not squarely present the issues that the Court sought to resolve. There is always the temptation to trivialize the defect and decide the novel case that we *thought* we had undertaken . . . . Here, however, the Court's belated effort to recoup sunk costs is not worth the price. Today's foray into the realm of the hypothetical will surely cost us the respect of the State Supreme Court whose words we misconstrue.[348]

And in *Smith II*, Justice Blackmun remarked that he had "grave doubts . . . as to the wisdom or propriety of deciding the constitutionality of a criminal prohibition which the State has not sought to enforce . . . ."[349] He further remarked that "[i]t is surprising, to say the least, that this Court which so often prides itself about principles of judicial restraint . . . would stretch its jurisdiction to the limit in order to reach, in this abstract setting, the constitutionality of Oregon's criminal prohibition of peyote use."[350]

Despite these trepidations, the dissenters reluctantly agreed that the constitutional issue was properly presented in *Smith II*.[351] Both the majority[352] and Justice O'Connor[353] similarly agreed. However, all nine Justices merely referred to *Smith I* to support their finding of ripeness without addressing the fact that Smith was never arrested or even threatened with criminal prosecution for his use of peyote.[354] Without any significant factual discussion of the question of ripeness, the case was evaluated in an "abstract setting," the Court's actions reflecting a cavalier attitude toward the doctrine of judicial restraint.

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347. *Id.*
348. *Smith I*, 485 U.S. 660, 679 (1988) (Brennan, J., dissenting).
349. *Smith II*, 110 S. Ct. at 1616 n.2 (Blackmun, J., dissenting).
350. *Id.* (Blackmun, J., dissenting).
351. *Id.* (Blackmun, J., dissenting).
352. *Id.* at 1599.
353. *Id.* at 1607 (O'Connor, J., concurring).
354. The majority referred to *Smith I* to support its implicit finding of justicibility. *Smith II*, 110 S. Ct. at 1598-99. Justice O'Connor referred to *Smith I* to support the broad rule that a state's power to deny unemployment benefits based on misconduct depends on whether the state has criminalized the underlying conduct. *Smith II*, 110 S. Ct. at 1606-07 (O'Connor, J., concurring). The dissent also based its finding of justicibility exclusively on *Smith I*. *Smith II*, 110 S. Ct. at 1616 n.2 (Blackmun, J., dissenting).

D. Effect on the Native American Church

Since the majority of states with significant Indian populations provide an exception from their criminal drug laws for the sacramental use of peyote, the *Smith II* decision will not have a significant impact on NAC members outside of Oregon. Since Oregon has reaffirmed its hostility towards Peyotism, NAC members will probably migrate to more tolerant states. This reaction would not be surprising because the intolerance of religion has historically led to migration by the oppressed minority. While colonial Puritans of Massachusetts had to endure a life threatening, five-month voyage across the Atlantic Ocean to escape religious persecution, NAC members in Oregon can safely trek to states such as Arizona to find political systems more tolerant of Peyotism.[355] Furthermore, since the NAC probably lacks significant political influence in Oregon, its members stand little chance of convincing the legislature to provide an exception to the state's criminal drug laws for the sacramental use of peyote. The political obstacles which the NAC will likely encounter in Oregon, together with the relative ease of relocating in other states, indicate that migration from Oregon to more tolerant states will be the short-term solution for devout NAC members. If the *Smith II* decision is limited to criminal laws, then free exercise claimants in states which provide the exception will be virtually unaffected because their use of peyote is not criminally punishable. However, until the Court acknowledges that the illegality of peyote was irrelevant in determining whether the use of peyote by a drug rehabilitation counselor constitutes misconduct for which he can be fired, then Peyotists who work at drug rehabilitation centers will not be eligible for unemployment compensation benefits.

VII. CONCLUSION

The Employment Division's persistent refusal to provide an exception to its criminal drug laws for the sacramental use of peyote typifies the 19th-century attitudes which have led to the relocation and

355. Arizona is probably the safest haven for Peyotists. The Arizona judiciary was one of the first to grant an exception for the sacramental use of peyote. Arizona v. Attakai, Criminal No. 4098, Coconino County, July 26, 1960 (*cited in* People v. Woody, 61 Cal. 2d 716, 724 n.5, 394 P.2d 813, 819 n.5, 40 Cal. Rptr. 69, 75 n.5 (1964)); *see also* State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950, *cert. denied*, 417 U.S. 948 (1973) (ruling that the *Sherbert* test requires a sacramental peyote use exception). Additionally, the Arizona legislature has statutorily exempted the sacramental use of peyote from its criminal drug laws. *See* ARIZ. REV. STAT. ANN. § 13-3402 (Supp. 1986).

oppression of Native American Indians. In a country as diverse as the United States, with ethnic groups from every corner of the globe and hundreds of religions,[356] it is sad to see such intolerance from an administrative agency. No one questions that the war on drugs is a serious national crisis. However, if the Congress of the United States and twenty-three other states have determined that providing an exception for the sacramental use of peyote conflicts with drug enforcement activities, how can the Oregon Employment Division maintain such a hostile posture towards Peyotism?

In any event, Smith's unemployment compensation claim should have been evaluated independently of the fact that his conduct was illegal. The only relevant consideration should have been whether his use of peyote constituted misconduct as defined by his employer. Because of his unique position as a drug rehabilitation counselor, Smith's use of peyote impaired his credibility and detracted from his ability to function as a legitimate role model. Thus, his actions conflicted with his employer's interests, and the employer had the right to discharge him for misconduct. By this view, the Employment Division could have denied his unemployment compensation claim based solely upon the misconduct statute.

Prior to *Smith II*, courts had effectively applied the *Sherbert* compelling state interest test to both civil and criminal laws, reaching reasonable results. However, the majority in *Smith II* decided that the *Sherbert* test should no longer apply to criminal laws. After *Smith II*, laws which create the greatest burden on religious conduct by imposing criminal sanctions will now undergo the least judicial scrutiny. As a result, religious freedom will be at the mercy of elected legislators. But as Justice Jackson once remarked:

> 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 life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[357]

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356. Braunfeld v. Brown, 366 U.S. 599, 606 (1961) (citing YEAR BOOK OF AMERICAN CHURCHES FOR 1958 257).

357. West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).