Land & Water Law Review

Volume 26
Issue 1 *Special Focus: Wyoming Centennial -- 100 Years of State Law*

Article 13

1991

Constitutional Law - The Hollow Promise of the Free Exercise Clause: Denying the Right of Peyote Use in the Native American Church - Employment Division, Department of Human Resources of Oregon v. Smith

Diana D. Stithem

CONSTITUTIONAL LAW—The "Hollow Promise" of the Free Exercise Clause: Denying the Right of Peyote Use in the Native American Church. *Employment Division, Department of Human Resources of Oregon v. Smith*, 110 S. Ct. 1595 (1990).

Alfred Smith and Galen Black were employed as substance abuse counselors by the Douglas County, Oregon, Council on Alcohol and Drug Abuse Prevention and Treatment, a non-profit corporation known as ADAPT.[1] ADAPT had a strict policy requiring all employees to abstain from illegal drugs.[2] Failure to conform to this policy was grounds for immediate termination of employment. During a September 1983 Native American Church spiritual ceremony Galen Black ingested a small amount of peyote.[3] Alfred Smith ingested a small amount of peyote during a similar ceremony in March 1984.[4] ADAPT terminated both for violating its no-drug policy.[5]

Oregon's Employment Division of the State's Department of Human Resources denied both Smith and Black unemployment benefits because each had been discharged for employee misconduct.[6] Following refereed hearings, both were determined eligible to receive benefits.[7] The State Employment Appeals Board (EAB) reversed, and denied unemployment benefits.[8] In separate decisions, the Oregon

---

1. Employment Div., Oregon Dep't of Human Resources v. Smith, 485 U.S. 660, 662 (1988) [hereinafter *Smith I*].

2. *Id.* at 662. ADAPT's policy statement on drug usage provided: " 'In keeping with our drug-free philosophy of treatment. . .and associated complex issues involved in both alcoholism and drug addiction, we require the following of our employees: 1. Use of an illegal drug or use of prescription drugs in a nonprescribed manner is grounds for immediate termination from employment.' " *Id.* at 662 n.3.

3. Black v. Employment Div., Dep't of Human Resources, 301 Or. 221, 223, 721 P.2d 451, 452 (1986). Members of the Native American Church believe peyote is blessed with powers to heal the body, the mind, and the spirit. Peyote is their teacher of the way to spiritual life; it teaches living in balance and harmony with the forces of creation. Brief Amici Curiae Association on American Indian Affairs, in support of Respondents, at 5, 6, Employment Div., Oregon Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990) (No. 88-1213).

The peyote religious ceremony centers around the ingestion of peyote. Participants sing and pray throughout the ten- to twelve-hour ceremony. "[W]ith the use of this holy herb one can communicate directly with God, without the medium of a priest." S. BRITO, THE WAY OF A PEYOTE ROADMAN 14 (1989).

4. Smith v. Employment Div., Dep't of Human Resources, 301 Or. 209, 212, 721 P.2d 445, 446 (1986).

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

6. *Id.* at 663 n.5.

7. *Id.* Decisions affecting initial approval or denial of unemployment benefits are made by an Assistant Director for Employment of the Employment Division. Applicants denied benefits can request a hearing before a referee. Black's referee ruled that while Black had used poor judgment in using peyote, he was not guilty of misconduct. Smith's referee agreed that his conduct was religiously motivated and therefore the first amendment prohibited denial of unemployment benefits. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Oregon, in support of Respondents, at 7-8, 12, Employment Div. v. Smith, 110 S. Ct. 1595 (1990) (No. 88-1213).

8. *Smith I*, 485 U.S. at 663. The State Employment Appeals Board (EAB) re-

Court of Appeals held that if peyote ingestion was a religious act, then the denial of unemployment compensation was an unconstitutional intrusion on the first amendment right to the free exercise of religion.[9] On appeal, the Oregon Supreme Court affirmed, ruling that the denial of unemployment benefits under these circumstances was a significant burden on the free exercise of religion.[10] Both Smith and Black were therefore entitled to receive unemployment benefits.[11]

The United States Supreme Court granted certiorari and combined the Smith and Black cases.[12] In *Employment Division v. Smith* (*Smith I*), the Court ruled that the lawfulness of the conduct precipitating an employment discharge was a critical factor in determining the constitutionality of a denial of unemployment compensation.[13] Because the Oregon Supreme Court had not ruled on the legality of peyote ingestion for sincerely held religious reasons, the Court remanded the case to the Oregon court for a determination of peyote's legality in religious circumstances.[14] The Supreme Court of Oregon verified that Oregon law prohibited even the religious use of peyote, but reiterated its belief that the denial of unemployment benefits was unconstitutional.[15]

In a second decision, the United States Supreme Court ruled in *Smith v. Employment Division* (*Smith II*), that the free exercise clause does not obligate a state to exempt sacramental peyote from the operation of its drug laws.[16] Thus, where unemployment benefits are denied for worker misconduct, and that worker misconduct is illegal, the free exercise clause will not necessarily require a state to pay unemployment benefits.[17]

This casenote examines the *Smith II* holding: first, vis-a-vis free exercise precedent in the area of unemployment compensation, and second, as it affects members of the Native American Church and other non-traditional, religious practitioners. It concludes that the Su-

---

viewed and reversed both referees' decisions. The EAB ruled that the State had shown the compelling state interest of the proscription of illegal drugs and that denial of benefits should stand. Because the referee did not reach the first amendment in Black's hearing, the EAB simply reversed the finding on misconduct. *Id.* at 663 n.5.

9. Smith v. Employment Div., 75 Or. App. 764, 709 P.2d 246 (1985); Black v. Employment Div., 75 Or. App. 735, 707 P.2d 1274 (1985).

10. Smith v. Employment Div., 301 Or. 209, 217, 721 P.2d 445, 450 (1986); Black v. Employment Div., 301 Or. 221, 225, 721 P.2d 451, 453 (1986).

11. Smith v. Employment Div., 301 Or. at 220, 721 P.2d at 451; Black v. Employment Div., 301 Or. at 225, 721 P.2d at 453.

12. Smith v. Employment Div., 480 U.S. 916 (1987).

13. *Smith I*, 485 U.S. at 672-73.

14. *Id.* at 673. The United States Supreme Court warned that "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.* at 672.

15. Smith v. Employment Div., 307 Or. 68, 73, 763 P.2d 146, 148 (1988).

16. Smith v. Employment Div., 110 S. Ct. 1595, 1606 (1990) [hereinafter *Smith II*].

17. *Id.* at 1606.

preme Court has thoroughly sapped the vitality of the freedom of exercise precedent established by *Sherbert v. Verner*, by giving deference to any religious-neutral legislation, no matter what the effects might be on a particular religion, no matter how negligible the state's purpose.[18]

BACKGROUND

The first amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[19] The establishment clause limits what the government may do to enhance any of the sects, while the free exercise clause prohibits the government from unduly burdening religious beliefs and practices.[20] In effect, the free exercise clause forces courts to ask how much nonconformity must be tolerated for the sake of religious liberty.[21]

The Freedom of Belief, Freedom of Practice Dichotomy

The first major case interpreting the free exercise clause was *Reynolds v. United States*.[22] George Reynolds, believing he must follow the Mormon practice of polygamy or face eternal damnation, claimed that the free exercise clause protected his plural marriage.[23] The Supreme Court refused to recognize his claim, stating that polygamy was repugnant to western societal norms, and therefore not constitutionally protected.[24] The *Reynolds* decision recognized a dichotomy between religious beliefs and religious practices, or actions.[25] The Court's ruling prohibited legislative power over mere opinion, but left the legislature free to reach actions which opposed social duties or the good order of society.[26] Chief Justice Waite, writing for the Court,

---

18. 374 U.S. 398 (1963); *see infra* text accompanying notes 35-59 for a discussion of the *Sherbert* ruling.

19. U.S. CONST., amend. I.

20. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . .Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa." Reynolds v. United States, 98 U.S. 145, 164 (1878).

See infra notes 37, 40, 45, 58, and accompanying text.

21. F. LEE, WALL OF CONTROVERSY: CHURCH-STATE CONFLICT IN AMERICA 3 (1988). Lee is referring to Utah Supreme Court Justice Dallin Oaks' analysis of the religion clauses. *Id.* at 4. For examples of religious exercises that do not conform to societal norms, see generally J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW § 17.9 (3d ed. 1986).

22. 98 U.S. 145 (1878).

23. *Id.* at 161.

24. *Id.* at 165.

25. *Id.* at 164.

26. *Id.* Tribe argues that a more plausible dichotomy may be between (1) government measures that force an individual's choice between adherence to religious duties and receipt of governmental benefits (or avoidance of a government burden like prose-

warned that allowing protection of anything beyond religious belief would "make the professed doctrines of religious belief superior to the law of the land, and in effect. . .permit every citizen to become a law unto himself."[27]

For almost a century *Reynolds* sanctioned limitations on religious practices.[28] During the 1940's, however, the Court sustained religious exercise claims when joined with freedom of speech or freedom of press claims. *Cantwell v. Connecticut* established that laws restricting religious practices could violate the first amendment.[29] There, the Court struck down the conviction of several Jehovah's Witnesses for unlicensed solicitation of funds during distribution of religious literature.[30] In *Cantwell*, the Court held that a reasonable interference with religious practice would be permissible, but an unreasonable interference with religious practice would "lay a forbidden burden upon the exercise of liberty protected by the Constitution."[31] The majority in *Cantwell* agreed that the freedom to believe was absolute, but the freedom to act, or to exercise that belief was not.[32] In *Cantwell* and the line of cases that followed, however, the free exercise clause was secondary to the other first amendment freedom at risk, the freedom of speech.[33]

The Unemployment Compensation Cases

In 1963, the Court shifted from its *Reynolds* position and held that religiously motivated activities were entitled to constitutional protection. *Sherbert v. Verner*, the first in a series of unemployment compensation cases, addressed a free exercise challenge to South Carolina's denial of unemployment benefits to a Seventh Day Adventist.[34]

---

cution), and (2) government measures that have only an ancillary burden on secular choice. L. TRIBE, AMERICAN CONSTITUTIONAL LAW ¶ 14-13 (2d ed. 1988).

27. Reynolds v. United States, 98 U.S. at 164.

28. Davis v. Beason, 133 U.S. 333 (1890); Church of Latter Day Saints v. United States, 136 U.S. 1 (1890) (various penalties on polygamy upheld); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Zucht v. King, 260 U.S. 174 (1922) (compulsory vaccinations upheld).

29. 310 U.S. 296, 305 (1940).

30. *Id.* at 304.

31. *Id.* at 307.

32. *Id.* at 304.

33. Jamison v. Texas, 318 U.S. 413 (1943) (distribution of religious handbills); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (door to door distribution of religious literature and solicitation of contributions); Kuntz v. New York, 340 U.S. 290 (1951) (permit to hold worship meetings on the street); West Virginia v. Barnette, 319 U.S. 624 (1943) (refusal to participate in flag salute for religious reasons upheld because of the totality of the freedoms of speech, press, assembly, and worship); *see infra* note 94 and accompanying text where Justice Scalia refers to this hybrid situation. *But see* Prince v. Massachusetts, 321 U.S. 158 (1944) (the free exercise clause alone was insufficient for striking a state law which made it criminal for children to sell merchandise, including the sale of religious literature, in a public place).

34. 374 U.S. 398 (1963); *see* Thomas v. Review Bd., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1986); Frazee v. Illinois Dep't of Employment Security, 109 S. Ct. 1514 (1989).

Adell Sherbert, a practicing Seventh Day Adventist, was dismissed from her job for refusing to work on Friday evenings and Saturdays.[35] Writing for the Court, Justice Brennan concluded that "[Sherbert's] declared ineligibility for benefits derives solely from the practice of her religion [and]. . .the pressure upon her to forego that practice is unmistakable."[36] Brennan likened this burden to the burden on the free exercise of religion if a fine were imposed for her Saturday worship.[37]

The Court in *Sherbert* employed a least-restrictive-alternative, compelling state interest test similar to what it was already using in free speech cases.[38] The burden on the religious interest was balanced against the compellingness of the state interest.[39] First, Adell Sherbert's freedom to practice or exercise her religion was significantly burdened: she was forced to make a choice between receiving state benefits or acting in accordance with her beliefs.[40] Second, South Carolina had shown no compelling interest in its denial of unemployment compensation.[41] The Court noted that while South Carolina might have an interest in preventing fraud, the State failed to show an absence of any other alternative means.[42]

In 1981, the Supreme Court continued its commitment to preserving the right of free exercise of religion. In *Thomas v. Review Board*, a Jehovah's Witness was denied unemployment benefits for quitting his job after being transferred to a plant which produced parts for military tanks.[43] The Court applied the *Sherbert* balancing test and rejected Indiana's argument that the burden on Thomas was only an indirect result of otherwise neutral legislation.[44] Justice Burger, writing for the majority, noted that the burden on Thomas was substantially the same as the burden placed on Sherbert: a choice "between fidelity to religious belief or cessation of work."[45] Indiana presented two purposes for its disqualifying regulation. First, the State claimed it reduced the strain on the unemployment fund, and

---

35. Sherbert v. Verner, 374 U.S. at 399.
36. *Id.* at 404.
37. *Id.*
38. *Id.* at 407; *see* NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); *see generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW ¶ 12 (2d ed. 1988).
39. 374 U.S. at 410.
40. *Id.* at 404.
41. *Id.* at 407.
42. *Id.* In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court reaffirmed the Sherbert balancing test when it struck down a Wisconsin law requiring compulsory education for Amish children past the eighth grade. The Court concluded that the State's compulsory attendance policy undermined the Amish community and religious practices. Chief Justice Burger wrote that only a State's most important interests "and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.
43. 450 U.S. 707, 709 (1980).
44. *Id.* at 717.
45. *Id.*

second, it avoided detailed questioning by employers into the religious beliefs of job applicants.[46] The Court deemed these purposes important, but not compelling.[47] The *Sherbert* test was broadened when the *Thomas* majority ruled that even though Thomas' beliefs were philosophical and not practiced by every member of the faith, they were nevertheless rooted in religion and therefore protected by the free exercise clause.[48]

In 1986, the Court decided *Hobbie v. Unemployment Appeals Commission*, another unemployment compensation free exercise case.[49] Paula Hobbie had worked for a Florida jeweler for two and a half years before joining the Seventh Day Adventist Church. After her conversion, she refused to work Friday evenings and Saturdays, was fired, and then was denied unemployment benefits because of work-related misconduct.[50] Justice Brennan, writing for the majority, saw no "meaningful distinction among the situations of Sherbert, Thomas and Hobbie," even though Paula Hobbie converted to a religion whose tenets forbade compliance with formerly acceptable working conditions.[51] Responding to Florida's Appeals Commission argument that the less rigorous standard used in *Bowen v. Roy* was applicable, the Court concluded that only strict scrutiny would be adequate.[52] Paula Hobbie had suffered an abridgment of her free exercise rights, and the Court ruled that Florida's refusal to grant unemployment benefits violated the free exercise clause.[53]

In *Frazee v. Illinois*, the United States Supreme Court upheld William Frazee's right to receive unemployment benefits even though he had refused a temporary position requiring work on Sundays.[54] Frazee was not a member of any particular sect or denomination, but he claimed to be a Christian, and as a Christian, felt it was wrong to work on Sundays.[55] The Illinois State Appellate Court ruled that personal religious belief was not good cause to refuse Sunday work, and, therefore, Frazee was not entitled to unemployment benefits.[56] Justice White, writing for a unanimous Court, stated that a "sincerely held religious belief" was enough to invoke first amendment protection.[57] The Court noted that Illinois had offered no justification for the bur-

46. *Id.* at 718-19.
47. *Id.*
48. *Id.* at 715-16.
49. 480 U.S. 136 (1987).
50. *Id.* at 138.
51. *Id.* at 141, 144.
52. *Id.* at 142 n.7. The plurality in *Bowen* indicated that some neutral incidental restraints on free exercise need no compelling justification. *Id.* at 147 (Powell, J., concurring). *See infra* notes 61-68 and accompanying text. *See also* Bowen v. Roy, 476 U.S. 693, 712 (1986).
53. 480 U.S. at 146.
54. 109 S. Ct. 1514, 1515 (1989).
55. *Id.* at 1516.
56. *Id.*
57. *Id.* at 1517, 1518.

den it placed on Frazee's right to exercise his religion.[58] Citing *Sherbert*, *Thomas*, and *Hobbie*, Justice White reiterated that a state must show a compelling interest before it can override a legitimate claim to the free exercise of religion.[59]

The Native American Cases

Bowen v. Roy, decided in 1986, retreated from *Sherbert*'s stringent protection of the free exercise of religious practice.[60] *Bowen* involved a Native American who was denied assistance under the Aid to Families with Dependent Children (AFDC) program.[61] Claiming a free exercise right, Roy refused to obtain a Social Security number for his daughter, a necessary requirement for receiving AFDC assistance.[62] He argued that the number would rob his daughter of her spirit and thus violate her religious beliefs.[63] The Court interpreted Roy's claim as a religious action claim since it was the "use" of the Social Security number to which Roy objected.[64] Justice Burger stressed the distinction between individual and governmental conduct; i.e., the use of the number was by the government and not by Roy.[65]

The Court in *Bowen* reasoned that it was impossible to implement government programs without encountering some type of conflict with some religious belief.[66] Because of this inevitable, incidental conflict, and because the burden on Roy was indirect, the Court upheld the government's Social Security number requirement.[67] In doing so, the compelling interest rule was abandoned and the state's requirement was allowed to prevail although only reasonably related to its stated purpose.[68]

---

58. *Id.* at 1518.

59. *Id.* The *Frazee* decision not only continued earlier free exercise unemployment compensation precedents, but significantly expanded the protection beyond membership in an organized religion to include those with sincerely held religious beliefs, at least for those professing to be Christians. *See* Esterle, *Unemployment Compensation and the First Amendment: Freedom of Religion Under Frazee*, 23 CLEARINGHOUSE REV. 248 (1989).

60. 476 U.S. 693 (1986); *see supra* note 52. Two other free exercise cases decided in the 1980's, neither involving an unemployment compensation issue, show the Supreme Court beginning to move toward a less strict standard of review. In United States v. Lee, 455 U.S. 252 (1982), the Court held that the state's interest in collecting Social Security taxes was greater than an Amish farmer's religious objection to paying those taxes. *Id.* at 259. In Goldman v. Weinberger, 476 U.S. 503 (1986), the Court deferred to the professional judgment of the military and ruled that the free exercise clause did not protect an Orthodox Jew's right to wear a yarmulke while on active duty as an Air Force psychologist. *Id.* at 507.

61. 693 U.S. at 695.

62. *Id.*

63. *Id.* at 696.

64. *Id.* at 699.

65. *Id.* at 700-01.

66. *Id.* at 706.

67. *Id.* at 712.

68. *Id.* at 730 (O'Connor, J., concurring in part and dissenting in part). "[T]he Government meets its burden when it demonstrates that a challenged requirement for

In *Lyng v. Northwest Indian Cemetery Protective Association*, the Supreme Court appeared to continue the rational relation test and used the absence of governmental coercion as its grounds for reasonableness.[69] At issue were plans to build roads through sacred Indian sites on public lands. The Court agreed that the roads would be a burden on the American Indians' religious practices, but found no constitutional remedy for the Indians.[70] First, there had been no governmental coercion to violate any religious beliefs.[71] Nor was there any governmental penalty for practice of these beliefs, since the affected individuals were receiving rights and privileges equal to all other citizens.[72] Second, the sacred sites were on public grounds. Justice O'Connor noted that while the Indians might have some rights to the national forest, those rights did not divest the government of its right to use its own land.[73]

THE PRINCIPAL CASE

In the companion cases of *Smith v. Employment Division* and *Black v. Employment Division*, the Oregon Supreme Court ruled that the denial of unemployment benefits to those practicing Native American Church members employed under circumstances where employment regulations forbade peyote ingestion was a significant burden on the free exercise of religion.[74] The Oregon court rejected the Employment Division's argument that the State's interest in prohibiting the use of dangerous drugs was sufficiently compelling to justify denying unemployment compensation. The court specifically limited the State's interest to what could be found in the unemployment compensation statutes.[75] Since the Employment Division failed to show any danger to the financial stability of its unemployment fund should Smith and Black receive benefits, the State's interest was outweighed by the burden it placed on religious practice.[76]

On appeal, the United States Supreme Court in *Smith I* distinguished *Sherbert*, *Thomas*, and *Hobbie* because they all involved legal conduct.[77] Ingesting peyote was illegal.[78] Citing *Reynolds*, where the

---

governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." *Id.* at 707-08 (opinion of Burger, C.J., writing for the Court). As Justice O'Connor pointed out, this administrative efficiency rationale is a departure from having to prove a compelling interest. *Id.* at 730 (O'Connor, J., concurring in part and dissenting in part).

69. 485 U.S. 439, 450 (1988).
70. *Id.* at 447.
71. *Id.* at 449.
72. *Id.*
73. *Id.* at 453.
74. Black v. Employment Div., 301 Or. 221, 227, 721 P.2d 451, 454 (1986); Smith v. Employment Div., 301 Or. 209, 217, 721 P.2d 445, 450 (1986).
75. Smith v. Employment Div., 721 P.2d at 451.
76. *Id.*
77. *Smith I*, 485 U.S. at 670.
78. *See infra* note 91.

Court held that a bigamist could be sent to jail despite the religious motivation for his bigamy, Justice Stevens stated that "surely a state may refuse to pay unemployment compensation to a marriage counselor who was discharged because he or she entered into a bigamous relationship."[79] From this analogy, Justice Stevens reasoned that if it was illegal to possess peyote, a state could refuse unemployment compensation to a drug counselor for ingesting the illegal drug.[80] The Court's decision, therefore, turned on the legality or illegality of peyote ingestion during religious ceremonies. *Smith I* was remanded for a determination of the legality of religious use of peyote in Oregon.[81]

In dissent, Justice Brennan maintained that a governmental burden on free exercise must be subject to strict scrutiny, and could be justified only by proof of a compelling state interest.[82] The dissent accepted the Oregon Supreme Court's ruling that the legality of the peyote ingestion was simply irrelevant.[83]

On remand, the Oregon Supreme Court confirmed that Oregon law prohibited the use of peyote.[84] *Smith II*, therefore, raised the question of whether compliance with the State's criminal law constituted a sufficient state interest to prevail over a free exercise claim.[85] Writing for the Court, Justice Scalia reviewed the dichotomy of rights protected by the free exercise clause.[86] The first right, meriting the highest level of protection, is the right to believe and profess.[87] Here, the first amendment requires exclusion of all governmental regulation.[88] But the second right involves an act, or the refusal to act, and therefore, a government has more leeway to interfere with the individual's activity. When the exercise of religion encompasses action, the Court pointed out that a state may not ban that action only as it pertains to religious practice.[89] However, where the prohibition "is not the object of the [regulation] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment

79. *Smith I*, 485 U.S. at 671.
80. *Id.*
81. *Id.* at 673. Oregon law prohibits possession of controlled substances listed on a schedule adopted by the State Pharmacy Board. "It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice. . . ." OR. REV. STAT. § 475.992(4)(a) (1985). That schedule of controlled substances includes peyote and "all parts of the plant presently classified as *Lophophorawilliamsii Lemaire*, whether growing or not, the seeds thereof, and extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture, or preparation of such plant, its seeds and extracts." OR. ADMIN. R. 855-80-021(3)(s) (1987).
82. *Smith I*, 485 U.S. at 675 (Brennan, J., dissenting).
83. *Id.* at 678.
84. Smith v. Employment Div., 307 Or. 68, 73, 763 P.2d 146, 148 (1988).
85. *Smith II*, 110 S. Ct. 1595, 1597 (1990).
86. *Id.* at 1599.
87. *Id.*
88. *Id.*
89. *Id.*

has not been offended."[90] Again relying on *Reynolds*, Justice Scalia stressed the significance of the fact that a criminal law was involved and the act precipitating the firing of Alfred Smith and Galen Black was illegal.[91]

The Court acknowledged that it has, in the past, barred application of a neutral law to religiously motivated conduct.[92] The Court listed several such instances, but noted that in each case the free exercise clause was joined with another constitutional protection.[93] This "hybrid situation" was critical; the majority could find no precedent to invalidate a neutral law that infringed solely upon religious conduct.[94]

The Court flatly rejected the *Sherbert* requirement that only a compelling governmental interest could outweigh a governmental action which substantially burdens an individual's religious practice.[95] Justice Scalia noted that the Court had lately abstained from using the *Sherbert* test for anything other than unemployment compensation cases, and then only if the conduct in question was legal.[96] Here, the Court glossed over the fact that *Smith II* was, indeed, an unemployment compensation case and dwelled instead on the illegality of peyote use.[97]

Justice Scalia distinguished the well established precedent of *Sherbert*, *Thomas*, and *Hobbie* because the religiously motivated conduct precipitating firing in those cases was not illegal.[98] The conduct in this case was illegal, and the Court thus bypassed the question of whether denial of peyote use during religious ceremonies created a burden on religious exercise.[99] The majority acknowledged the neutrality of Oregon's controlled substance laws and the importance to the State of those laws, and restated the Court's *Smith I* position: "[I]f a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying

---

90. *Id.* at 1600.
91. *Id.* at 1597, 1599. *See supra* notes 77-88 and accompanying text discussing *Smith I*.
92. *Id.* at 1601; *see* Cantwell v. Connecticut, 310 U.S. 296 (1940). *See supra* note 33 and accompanying text.
93. *Smith II*, 110 S. Ct. at 1601; *see supra* note 92. The Court in *Smith II* referred to several cases where a non-free exercise principle was also involved: Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. McCormick, 321 U.S. 573 (1944) (invalidating a flat tax on solicitation where applied to dissemination of religious ideas); Wolley v. Maynard, 430 U.S. 705 (1977) (invalidating compelled license plate slogan that offended religious beliefs). *Smith II*, 110 S. Ct. at 1601-02.
94. 110 S. Ct. at 1602.
95. *Id.* at 1603. "We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to [free exercise] challenges." *Id.*
96. *Id.* at 1602.
97. *Id.* at 1597, 1606.
98. *Id.* at 1602; *see supra* notes 77-78 and accompanying text.
99. *Id.* at 1598.

unemployment compensation benefits to persons who engage in that conduct."[100]

While the Court did not claim to overrule the *Sherbert* line of cases, it did devalue the compelling interest test by warning that allowing governmental interest to prevail only when compelling would create a "constitutional anomaly," permitting the religious practitioner "to become a law unto himself."[101] "Any society adopting such a system," wrote Justice Scalia, "would be courting anarchy."[102]

Justice O'Connor concurred with the Court's judgment but wrote a separate opinion, arguing that the majority departed dramatically, erroneously, and unnecessarily from "well-settled First Amendment jurisprudence."[103] Justice O'Connor felt, however, that Oregon's compelling interest, which she believed to be its war on drugs, outweighed any exemption for the religious use of peyote.[104]

Joined by Justices Brennan and Marshall, Justice Blackmun lamented in his dissent the distortion of a long history of free exercise precedent.[105] Justice Blackmun weighed the claimants' very definite interest in the free exercise of their religious practice against the "State's narrow interest in refusing to make an exception for the religious ceremonial use of peyote."[106] The dissent argued that the competing interests must be on the same plane; that is, the government's interest must relate to the specific conduct involved.[107] Here, the conduct was not "violent traffic in illegal narcotics," but the very controlled ingestion of a bitter tasting, vomit-inducing, rather unpopular illegal drug.[108] From that perspective, Justice Blackmun concluded that Oregon's interest in enforcing its criminal drug laws was not compelling enough to outweigh the right to the free exercise of Alfred Smith's and Galen Black's religion.[109]

ANALYSIS

The most obvious conclusion from *Smith II* is that neutral governmental regulations prohibiting any variety of illegal acts will not violate first amendment free exercise principles. The Court relied on

---

100. *Id.* at 1600, 1605.
101. *Id.* at 1603-04. It is not clear from Justice Scalia's remark whether he was intending a deviation from the constitutional norm, or whether he simply meant constitutional mayhem. *Id.* at 1604 n.3.
102. *Id.* at 1605.
103. *Id.* at 1606 (O'Connor, J., concurring).
104. *Id.* at 1615.
105. *Id.* at 1616 (Blackmun, J., dissenting).
106. *Id.* at 1617. *See supra* note 3.
107. *Id.* at 1620.
108. *Id.* at 1619-20. Extremely bitter, the ingestion of "peyote usually is a difficult ordeal in that nausea and other unpleasant physical manifestations occur regularly." *Id.* at 1619 n.7 (quoting E. ANDERSON, PEYOTE: THE DIVINE CACTUS 161 (1980)).
109. *Id.* at 1622.

Reynolds to justify its conclusion that religious beliefs cannot be allowed to be superior to the law of the land.[110] But the illegal act in *Reynolds* was one which had always been "odious among the northern and western nations of Europe."[111] Polygamy was a serious offense, likened to human sacrifices.[112] There were no legal forms of polygamy; peyote, on the other hand, does have legal uses and its controlled substance status has been exempted for bona fide religious ceremonial use by the federal government.[113]

The illegality of the religious conduct in this case effectively eliminated any meaningful free exercise analysis by the Court. This is unfortunate because it is seriously doubtful that there exists any positive correlation between peyote use in the Native American Church and the perpetuation of the type of illegal drug use targeted by Oregon's substance abuse and drug trafficking laws.[114] Native American Church doctrine forbids nonreligious use of peyote. It also generally advocates "brotherly love, care of family, self-reliance, and avoidance of alcohol."[115] Religious use of peyote has been viewed by sociologists as an ego-strengthening mechanism, designed, perhaps ironically, to instill the same values Oregon's drug laws are intended to foster.[116]

Smith II continues the Court's recent trend toward a more relaxed standard of scrutiny in religious practices cases.[117] The majority opinion abandons the well-developed precedent in free exercise-unemployment compensation cases established by *Sherbert*. Justice Scalia feared that the logical and equitable consequence of using a compelling interest test would be an across the board application: an application that would create an impossible burden on the courts, and a possible parade of horribles. He feared exemptions from civic obligations, from major criminal prosecutions, all in the name of demanding a compelling interest.[118] The *Sherbert* test has been used by the courts since 1963. Justice Scalia's parade of horribles has failed to happen.[119]

---

110. 98 U.S. 145, 166-67 (1878).

111. *Id.* at 164. Chief Justice Waite included in the Court's opinion a lengthy discussion of the history of the laws regarding polygamy and the seriousness of the offense. Conviction for polygamy in early eighteenth century Virginia was punishable by death. *Id.* at 164-66.

112. *Id.* at 166.

113. *See* Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1463 (D.C. Cir. 1989), for DEA's rationale why an accommodation can be made for religious use of peyote.

114. *Smith II*, 110 S. Ct. at 1619 (Blackmun, J., dissenting). Justice Blackmun cites anthropological and psychiatric studies to support his argument that the religious use of peyote has been helpful in combatting alcoholism and improving self-concept among Native Americans. *Id.* at 1619. Furthermore, there is basically no illegal traffic in peyote. *Id.* at 1620.

115. *Id.* at 1619.

116. *Id.*

117. *Id.* at 1602 (Scalia, J., writing for the majority).

118. *Id.* at 1605, 1606. Justice Scalia claimed the only reason "sensible balances" have been struck in instances of cries for religious exemptions is because general laws were applied in spite of those cries for exemptions. *Id.* at 1606 n.5.

119. *Id.*

When courts have been willing to weigh the burden on religious exercise against a governmental interest, truly compelling governmental interests have still been protected.[120]

The *Smith II* majority left to the political process the fate of nondiscriminatory religious practice exemptions, even though the Court acknowledged that the political process might place minority, nontraditional, religious practices at a disadvantage.[121] That disadvantage was simply an "unavoidable consequence of democratic government."[122] Justice Scalia pointed to the many states that have already made an exception to drug laws for sacramental peyote use, and remarked that Oregon is free to do the same.[123] However, the Court's ruling dictates that Oregon is not constitutionally required to do so.[124]

As Justice O'Connor noted in her concurring opinion, the first amendment was enacted to protect the rights of those whose religious practices are not part of the mainstream religions of the nation.[125] Majoritarian rule has often had a harsh impact on non-traditional or unpopular religions.[126] *Smith II* has weakened the Court's role as counter-majoritarian protectorate of minority interests, a legitimate role and one only the judicial branch can be expected to fill.[127] American Indian religious practitioners, including members of the Native American Church, undeniably belong to a politically powerless "discrete and insular minorit[y]," and thus fit footnote four of *United States v. Carolene Products Co.*[128] This minority has a claim to a fun-

---

120. *See, e.g.*, People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), where the Supreme Court of California applied the *Sherbert* compelling interest test and ruled in favor of defendants arrested during a religious ceremony. Defendants' beliefs in their peyote use were found to be honest and in good faith, and the State was found to have no legitimate compelling interest. *Id.* at 727, 394 P.2d at 821, 40 Cal. Rptr. at 77.

Other religious claims have not been successful. *See, e.g.*, Randall v. Wyrick, 441 F. Supp. 312, 316 (W.D. Mo. 1977) (a Federal District Court in Missouri assumed petitioners' religious use of marijuana, hashish, and LSD valid, but found a compelling state interest to justify the infringement); Bob Jones Univ. v. United States, 461 U.S. 574, 593, 598 (1983) (Chief Justice Burger wrote that the governmental interest in eradicating racial discrimination in education was fundamental and compelling, and therefore Bob Jones University could not continue with its racially discriminatory, albeit religiously motivated, practices and maintain its "charitable" tax exempt status).

121. 110 S. Ct. at 1606.

122. *Id.*

123. *Id.* For example, Wyoming's statute protecting religious use of peyote reads: "Nothing in this act shall be construed to prohibit the delivery, possession or use of peyote in natural form, when delivered, possessed or used for bona fide religious sacramental purposes by members of the Native American Church of Wyoming." WYO. STAT. § 35-7-1044 (1977).

124. 110 S. Ct. at 1606.

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

126. *Id.*

127. *See* H. ABRAHAM, FREEDOM AND THE COURT 11-28 (5th ed. 1988).

128. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more

damental right, and therefore deserves a more strict judicial inquiry whenever its fundamental right of free exercise is threatened.

The Native American Church has lost three free exercise clause cases in the country's highest court in the past five years. None of the decisions were reached by weighing the burden on the religious practitioner against the state's interest, and the latter two were not even allowed a reasonable relationship analysis.[129] One explanation for these losses is that the Court has simply become insensitive to minority values.[130] Another explanation is that the judicial system has tried to impose the values, traditions, and cultures of Judeo-Christian doctrine onto American Indian religions.[131] Because American Indian religions are less dogmatic, it is difficult for a court to recognize what constitutes a true burden.[132] Spiritual and natural phenomena such as specific sites, natural hallucinogens, and religious spirits are themselves so intertwined in Native American dogma that interference with one aspect becomes a basic and fundamental interference with the entire religious practice.[133]

Finally, as the Court continues to sidestep *Sherbert* and the requirement that a compelling state interest be shown where religious exercise has been burdened, other non-traditional religions may suffer as well. Concern that this may happen has already been expressed: amicus briefs were filed in *Smith II* by two non-Native American groups, the Council on Religious Freedom and the American Jewish Council.[134]

---

searching judicial inquiry." *Id.* Estimates made in 1989 by officials of the Native American Church put its membership in excess of 100,000 (hardly a religious majority). Brief Amici Curiae Association on American Indian Affairs, in support of Respondents, at 5, Employment Div. v. Smith, 110 S. Ct. 1595 (1990) (No. 88-1213).

129. *See supra* notes 69-109 and accompanying text.

130. *Smith II*, 110 S. Ct. at 1622 (Blackmun, J., dissenting).

131. During Prohibition wine and peyote were exempt from the Volstead Act. Service of wine to minors during the Catholic Communion Services has not been prohibited, nor have general underage liquor laws been used to prevent such service. Failure to exclude peyote for religious ceremonies demonstrated "an almost incomprehensible intolerance of native American Indian practices. . . ." Brief of Council on Religious Freedom as Amicus Curiae in Support of Respondents, at 2, Employment Div. v. Smith, 110 S. Ct. 1595 (1990) (No. 88-1213).

132. Dogmatic theology systematically orders the creeds and doctrines formulated within the body of the church. W. REESE, DICTIONARY OF PHILOSOPHY AND RELIGION 135 (1980). Native American religions are not structured in this fashion.

133. Note, *Unjustified Interference of American Indian Religious Rights:* Lyng v. Northwest Indian Cemetery Protective Association, 22 CREIGHTON L. REV. 313, 325-26 (1988); *see also* Comment, *First Americans and the First Amendment: American Indians Battle for Religious Freedom*, 13 S. ILL. U.L.J. 945, 965 (1989).

134. Brief of Council on Religious Freedom as Amicus Curiae in Support of Respondents, Employment Div. v. Smith, 110 S. Ct. 1595 (1990) (No. 88-1213); Brief of Amicus Curiae of the American Jewish Congress in Support of Respondents, Employment Div. v. Smith, 110 S. Ct. 1595 (1990) (No. 88-1213). While the Jewish faith has a long history in the United States, their orthodox religious practices set them apart from mainstream, traditional Americana norms. WORLD RELIGIONS 402-11 (G. Parrinder, ed., 1983).

The Jewish faith has already seen the Court refuse to allow the wearing of a yarmulke by a military psychologist. That case did not involve a combat situation, yet the Court simply deferred to military regulation.[135] As eastern religions become more popular in the United States, other religious garments might just as easily be disallowed in the name of administrative efficiency. The Friends, a religious society traditionally espousing pacifism, have already expressed concern over the *Smith II* ruling, fearing burdens on their own beliefs and actions as the courts feel free to move away from compelling interest requirements.[136]

CONCLUSION

By applying the precedent established by *Sherbert* and its progeny, the United States Supreme Court in *Smith II* might have insured that first amendment protection for American Indian religious practitioners equals the protection granted to traditional Christian religious practice in this country.[137] Instead, the Court allowed this case to further limit the free exercise clause. General, religious-neutral legislation has been given a free hand, whatever its effects might be on nontraditional religions.[138]

Native Americans undeniably belong to a politically powerless "discrete and insular minorit[y]."[139] Members of the Native American Church have a claim to a fundamental right and deserve a stricter judicial inquiry whenever their fundamental rights of free exercise are threatened. While other minority religious groups have reason to be concerned about what might follow from *Smith II*, the Native American Church has suffered immediately: peyote is the Church's sacrament, its embodiment of God.[140] As Justice Blackmun concluded in his dissent, without a scrupulously applied free exercise analysis of the religious claims of Native Americans, however unorthodox, the first amendment "will offer to Native Americans merely an unfulfilled and hollow promise"[141] of freedom to exercise their religion.

DIANA D. STITHEM

135. Goldman v. Weinberger, 475 U.S. 503 (1986); *see supra* note 60.
136. Los Angeles Times, June 9, 1990, at F13, col. 5.
137. *See supra* notes 54-59 and accompanying discussion of *Frazee* in text.
138. 110 S. Ct. 1595, 1622 (1990) (Blackmun, J., dissenting).
139. *Carolene Prods.*, 304 U.S. at 152-53 n.4.
140. *See supra* note 3.
141. 110 S. Ct. 1595, 1622 (Blackmun, J., dissenting).