EMPLOYMENT DIVISION v. SMITH: THE SUPREME COURT ALTERS THE STATE OF FREE EXERCISE DOCTRINE

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INTRODUCTION

In *Employment Division v. Smith*,[1] the United States Supreme Court severely limited the scope of the free exercise clause of the first amendment to the United States Constitution.[2] The Court held that the first amendment does not protect individuals from neutral laws that incidentally inhibit, or even preclude, the practice of their religion.[3] Prior to the *Smith* decision, the Supreme Court applied a strict scrutiny test to review neutral laws that inhibited the free exercise of religion.[4] The strict scrutiny test requires a government to

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1. 110 S. Ct. 1595 (1990).

2. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1603 (1990) (limiting to narrow set of circumstances applicability of Court's traditional use of strict scrutiny test to evaluate laws burdening religious practice); *see also infra* notes 212-22 and accompanying text (analyzing Court's departure from precedent).

The first amendment to the Constitution provides in part that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof* . . . ." U.S. CONST. amend. I (emphasis added). The free exercise clause is applicable to the states by incorporation into the fourteenth amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding statute prohibiting dissemination of religious literature to be violative of fourteenth amendment, which embraces liberties guaranteed by first amendment).

3. *Smith*, 110 S. Ct. at 1599-1602.

4. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141-42 (1987) (applying strict scrutiny test to strike down denial of unemployment benefits to Seventh-day Adventist fired for refusing to work on Sabbath Day); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (finding that state interest in eradicating racial discrimination in education satisfies strict scrutiny); United States v. Lee, 455 U.S. 252, 257-59 (1982) (finding public interest in maintaining tax system sufficiently compelling to override religious claim that payment of social security taxes offends religious belief); Thomas v. Review Bd., 450 U.S. 707, 718-20 (1981) (applying strict scrutiny test to strike down denial of unemployment benefits for Jehovah's Witness whose religious beliefs prevented him from manufacturing war weapons); Wisconsin v. Yoder, 406 U.S. 205, 220-29 (1972) (finding unconstitutional, as applied to Amish, mandatory school attendance law that conflicts with religious practices and beliefs despite compelling state interest in compulsory education); Gillette v. United States, 401 U.S. 437, 461-62 (1971) (finding incidental burden on religion "justified by substantial government interests" relating to military conscription); Sherbert v. Verner, 374 U.S. 398, 406-09 (1963) (finding no compelling state interest enforced in eligibility provisions of unemploy-

demonstrate that a challenged law or practice serves a compelling state interest and that the means chosen to achieve that interest are narrowly tailored.[5] *Smith* confined the application of the strict scrutiny test and held that this standard of review is inappropriate when state action incidentally or unintentionally burdens a religious practice.[6] Accordingly, the Court refused to exempt the Native American respondents, dismissed from their jobs for participating in a religious ritual involving the ingestion of peyote, from Oregon's law prohibiting peyote use.[7] In doing so, the Supreme Court effectively limited first amendment strict scrutiny to situations in which the government singles out a particular religion and intentionally limits the rights of its members.[8]

In its decision to abrogate the compelling state interest test, the Supreme Court changed the meaning of the free exercise clause. Prior to *Smith*, state governments were required to respond to their constituents' free exercise rights.[9] When a government passed a law that adversely affected a person's religious liberty, the courts strictly

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ment compensation law that justified infringement of right to religious freedom); *see also infra* notes 37-87 and accompanying text (discussing cases applying strict scrutiny test to free exercise claims). *But see* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 447-53 (1988) (refusing to apply strict scrutiny test to Native American Indian challenge to plan to build federal road through Native American religious site, because first amendment only protects coercion or prohibition of religious beliefs or practices, but not laws that only make practice of religion difficult); Bowen v. Roy, 476 U.S. 693, 699-701 (1986) (refusing to apply strict scrutiny test in case involving Native American claim that assigning daughter social security number would violate religious beliefs, because first amendment does not require government to conduct internal affairs in ways that comport with religious beliefs); *see also infra* notes 88-120 and accompanying text (discussing cases not applying strict scrutiny test because prohibition of religious beliefs was not involved).

5. *See Hobbie*, 480 U.S. at 141-42 (affirming that conditioning receipt of benefit on conduct proscribed by religious beliefs infringes upon free exercise and could be justified only by proof of compelling state interest); *Thomas*, 450 U.S. at 718 (stating that inroad on religious liberty may be justified by showing that it is least restrictive means of achieving some compelling state interest); *Yoder*, 406 U.S. at 214 (noting that for state to compel school attendance against claim that such requirement interferes with legitimate religious beliefs, state's interest must be of "sufficient magnitude to override the interest claiming protection under the Free Exercise Clause"); *Sherbert*, 374 U.S. at 406 (requiring compelling state interest to justify substantial infringement of first amendment right and noting insufficiency of showing "rational relationship to some colorable state interest").

6. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1602-06 (1990) (evaluating precedent and distinguishing *Smith*).

7. *Id.* at 1606; *see also infra* note 127 (explaining peyote ritual).

8. *See infra* notes 200-50 and accompanying text (criticizing Supreme Court for departing from established free exercise precedent in *Smith* decision).

9. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 146 (1987) (finding that state may not require employee to choose between precepts of religion and forfeiting benefits); Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981) (providing that state may not condition receipt of benefits upon conduct proscribed by religious beliefs or deny such benefit because of conduct mandated by religious beliefs); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (positing that regulation neutral on its face may, in its application, offend the requirement for governmental neutrality if it unduly burdens free exercise of religion).

scrutinized the law under the first amendment.[10] Pursuant to the ruling in *Smith*, however, if a government passes a neutral law, the law is immune from constitutional challenge, notwithstanding the law's possible devastating effects on the free exercise of religion.[11] The *Smith* decision contradicts well-established free exercise precedent and offends this nation's commitment to protect religious liberty as expressed in the first amendment of the Constitution.

Part I of this Note traces the evolution of the Supreme Court's treatment of the free exercise clause and discusses the emergence of the compelling state interest test for the adjudication of free exercise claims. Part II presents the majority, concurring, and dissenting opinions in *Employment Division v. Smith*. Part III criticizes the Court's decision as an unjustified departure from established free exercise precedent. In *Smith*, the Court mischaracterized the meaning of free exercise precedent, and, by eliminating the compelling state interest test, abandoned its assigned role as the protector of constitutional rights. Part IV addresses the implications of the *Smith* decision on future free exercise claims, and argues that members of minority religions are now without a remedy when a neutral law makes the practice of their religion impossible. This Note concludes that abandoning strict scrutiny of free exercise claims eliminates a significant safeguard of religious liberty. The removal of the state's burden to satisfy strict scrutiny will have the highly undesirable effect of generating legislative indifference toward religious beliefs.

I. BACKGROUND

Virtually all free exercise cases involve a struggle between an individual's religious conscience and the government's need to promulgate uniformly applicable laws.[12] The right to exercise religious beliefs freely is deeply ingrained in United States history.[13] The

10. *See infra* notes 37-87 and accompanying text (discussing application of strict scrutiny test to free exercise cases).

11. *See infra* notes 264-74 and accompanying text (discussing potential implications of Court's decision in *Smith*).

12. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1608 (1990) (O'Connor, J., concurring) (stating that all free exercise cases before Supreme Court concerned generally applicable laws having effect of significantly burdening religious practices); *see also infra* notes 21-125 and accompanying text (discussing Court's past treatment of free exercise claims).

13. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (stating that values underlying free exercise clause have been "zealously protected" throughout United States' history).

The Supreme Court has distinguished between the exercise of religion or religious "conduct" and religious "belief." *See Sherbert*, 374 U.S. at 402-03 (noting that although free exercise clause bars governmental regulation of religious beliefs, Supreme Court has rejected free exercise challenges to governmental regulation of overt acts prompted by those religious beliefs or principles); Braunfeld v. Brown, 366 U.S. 599, 603-04 (1961) (explaining that right to

government's need to make law is equally essential to our society. When individual rights clash with the law, courts resolve the conflict by deciding whether to accommodate religious rights, thereby allowing individual religious beliefs to constrain governmental practices, or to defer to the government, thereby allowing government to inhibit, or in some cases eliminate, the religious practice.

Supreme Court free exercise jurisprudence falls into three historical periods. First, between 1879 and approximately 1950, the Court consistently denied free exercise challenges to generally applicable, neutral laws that burdened religious conduct.[14] During this era, the

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believe is absolute, but freedom to act is not entirely free from governmental restriction). Laws proscribing particular religious beliefs are categorically unconstitutional. *See id.* at 402 (indicating that free exercise clause firmly prohibits government from regulating religious beliefs); *see also* Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (holding that government may not compel affirmation of any religious belief); Fowler v. Rhode Island, 345 U.S. 67, 69-70 (1953) (holding government may not penalize individuals or groups possessing religious views abhorrent to majority); Follett v. Town of McCormick, 321 U.S. 573, 577-78 (1944) (holding that government may not tax dissemination of religious beliefs); Murdock v. Pennsylvania, 319 U.S. 105, 108-10 (1943) (invalidating tax inhibiting dissemination of religious views).

Religious conduct, however, is subject to regulation if the motive of the legislation is not discriminatorily directed at religion. *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (striking down state statute forbidding persons to solicit money for religious cause and noting that freedom to believe is absolute, while freedom of religious conduct remains subject to regulation for protection of society); Reynolds v. United States, 98 U.S. 145, 164-66 (1879) (upholding law proscribing polygamy and finding that Congress has power to restrict actions which violate social duties or are contrary to social order).

Defining the permissible scope of regulation is the central issue in all free exercise cases involving religious conduct. *See Sherbert*, 374 U.S. at 406-09 (balancing burdens of regulation on free exercise of religion with state's interest in regulation). The principle that religious interests are not automatically subordinate to legitimate state interests, but rather the two must be balanced, is widely accepted. *See Yoder*, 406 U.S. at 215 (concluding that only interests of highest order can outweigh legitimate claims to free exercise of religion); *Cantwell*, 310 U.S. at 304 (stating that regulation of religious conduct must be exercised so as not to unduly infringe upon protected freedom). *But see Smith*, 110 S. Ct. at 1603 (ruling that neutral, generally applicable laws that incidentally burden free exercise of religion should not be subjected to strict scrutiny requiring compelling state interest).

14. *See, e.g.*, Cleveland v. United States, 329 U.S. 14, 20 (1946) (upholding conviction of Mormon polygamist under federal statute prohibiting interstate transportation of women for immoral purposes); Prince v. Massachusetts, 321 U.S. 158, 167-71 (1944) (holding that mother could be prosecuted under child labor law for using her children to distribute religious literature); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 262 (1934) (upholding public university suspension of students refusing to participate in ROTC because of religious opposition to war); Davis v. Beason, 133 U.S. 333, 342-45, 348 (1890) (upholding law that made ability to vote contingent upon pledging that one is not member of organization practicing polygamy); Reynolds v. United States, 98 U.S. 145, 164-66 (1879) (upholding criminal proscription of polygamy against free exercise challenge by Mormons); *see also* Braunfeld v. Brown, 366 U.S. 599, 605-07 (1961) (providing more recent example, where Court upheld Sunday closing law against challenge by Jewish merchants that law burdened free exercise of their religion by causing economic disadvantages if they continued to observe Sabbath on Saturday).

After the American Revolution the states attempted to resolve the conflict between religious freedom and generally applicable secular laws by granting religious exemptions to laws inhibiting free exercise. *See* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1511-13 (1990) (concluding that interpretation of free exer-

Court reasoned that while the free exercise clause of the first amendment prohibited the regulation of and discrimination against religious beliefs, it did not protect religious practices.[15] Second, during the era of the Warren Court[16] and in the early years of the Burger Court,[17] the Supreme Court required legislatures to exempt certain religious practices from generally applicable laws in the absence of a compelling state interest that justified the burden on free exercise.[18] Third, beginning in the 1980s, the Court became less willing to sustain free exercise challenges to neutral laws.[19] Although the Supreme Court did not repudiate the compelling state interest test, it often found the purported governmental interest compelling, thereby allowing regulations to incidentally burden religious practices.[20]

A. Early Free Exercise History

The Supreme Court decided the first free exercise case, *Reynolds v. United States*, in 1879.[21] In *Reynolds*, the Court upheld an anti-polygamy law as it applied to members of the Mormon Church.[22] Mormons believed that God commanded male members of the church to practice polygamy.[23] The Court reasoned that although the protective scope of the free exercise clause extended to the freedom of an individual to hold religious beliefs, Congress possessed

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cise clause as mandating religious exemptions should have been familiar to framers and ratifiers of Constitution).

15. *See Reynolds*, 98 U.S. at 164 (noting that Congress may not exert legislative power over opinion but may control practices violating social duties or subversive of good order).

16. Earl Warren was Chief Justice of the Supreme Court from 1953 to 1969.

17. Warren Burger was Chief Justice of the Supreme Court from 1969 to 1986.

18. *See* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (applying strict scrutiny test to overturn state law which impeded religious practice); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (establishing strict scrutiny test for free exercise challenges); *see also infra* notes 37-76 and accompanying text (discussing *Sherbert* and progeny).

19. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 447-53 (1988) (upholding government plan to build road through Native American sacred religious site); Bowen v. Roy, 476 U.S. 693, 699-701 (1986) (holding that free exercise clause does not compel government to exempt claimant from requirement that offends his religious beliefs).

20. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 602-04 (1983) (finding that state's interest in eradicating racial discrimination in education substantially outweighed burden that denial of tax benefits placed on exercise of religious beliefs); United States v. Lee, 455 U.S. 252, 257-59 (1982) (finding public interest in maintaining tax system sufficiently compelling to override religious claim that payment of social security taxes offended religious belief).

21. 98 U.S. 145 (1879). *See generally* Comment, *First Americans and the First Amendment: American Indians Battle for Religious Freedom*, 13 S. ILL. U.L.J. 945, 947-48 (1989) (providing overview of *Reynolds* decision).

22. Reynolds v. United States, 98 U.S. 145, 162-68 (1879).

23. *Id.* at 161. The Mormons believed the penalty for failing or refusing to practice polygamy by male members of the church would be damnation in hell. *Id.*

the legislative power to regulate religious practices.[24] To permit an individual to act in contravention of the law because of a religious belief would be tantamount to making the law subordinate to religious beliefs. This would, in effect, permit all citizens to decide for themselves whether or not to obey the law.[25] The Court found that the practice of polygamy was an offense against society.[26] Accordingly, it refused to grant the Mormons a religious exemption from anti-polygamy laws.[27]

Sixty-one years later, in *Minersville School District v. Gobitis*,[28] the Supreme Court once again subordinated religious beliefs and practices to majoritarian sentiments. The Court upheld a school board's

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24. *Id.* at 162-64 (discussing guarantees of religious freedom); *see also supra* note 13 (discussing belief/conduct distinction in free exercise doctrine).

The belief/conduct distinction is highly problematic. Belief and conduct are so closely intertwined that refusing to protect religious conduct from state regulation will often render the right to believe in religion meaningless. *See* Wisconsin v. Yoder, 406 U.S. 205, 220 (1973) (stating "belief and action cannot [always] be neatly confined in logic-tight compartments"). *See generally* Dodge, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH. L. REV. 679, 681-84 (1969) (discussing questionable results reached in free exercise cases employing belief/conduct distinction as rule of decision). Justice Brennan quoted Oliver Cromwell to illustrate the problem with the belief/conduct distinction: "As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted." McDaniel v. Paty, 435 U.S. 618, 631 n.2 (1978) (Brennan, J., concurring), *quoted in* S. HOOK, PARADOXES OF FREEDOM 23 (1962); *see also* Comment, *Free Exercise in the 1980s: A Rollback of Protection*, 24 U.S.F. L. REV. 505, 507-08 & n.20 (1990) (discussing problematic nature of belief/conduct distinction).

25. *Reynolds*, 98 U.S. at 166-67.

26. *Id.* at 164-65 (noting practice was contrary to northern and western European practice); *see also* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 48-49 (1890) (noting opinion that polygamy, the distinguishing feature of Mormon faith, is abhorrent to civilized world and repugnant to our laws); Davis v. Beason, 133 U.S. 333, 342 (1890) (stating that first amendment not intended to protect against legislation punishing acts against society). As reflected in *Beason*, *Late Corp.*, and *Reynolds*, the desire to eradicate the Mormon Church was widespread. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-13, at 1271 (2d ed. 1988) (providing brief background of what effectively amounted to religious persecution of Mormons).

The refusal of the Court in *Reynolds* to protect Mormons because of the offensiveness of their religion seems archaic when juxtaposed against the mainstream free exercise jurisprudence of the last quarter century, which forged protections of individual rights against the "tyranny of the majority." *See Sherbert*, 374 U.S. at 403, 406. In the last decade, however, the Supreme Court has hinted that in the future individual free exercise rights will be subordinated to majoritarian rule without requiring that any compelling state interest be served. *See infra* notes 78-125 and accompanying text (discussing Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988), Bowen v. Roy, 476 U.S. 693 (1986), and United States v. Lee, 455 U.S. 252 (1982) and evaluating decline in free exercise protection).

Before the rulings of the 1980s, the *Reynolds* decision may have been more appropriately relegated to a mere footnote discussing the earlier, more primitive treatment of free exercise claims. Because the Court has seemingly come full circle and returned to this primitive nineteenth-century approach to individual rights, an understanding of the Supreme Court's analysis in *Reynolds* is important to an evaluation of the Court's decision in *Employment Division v. Smith*.

27. Reynolds v. United States, 98 U.S. 145, 166-67 (1879).

28. 310 U.S. 586 (1940), *overruled* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

expulsion of young Jehovah's Witnesses who refused to salute the flag in school because they believed that saluting the flag would violate the written law of God.[29] The Court determined that the legislative decision of the school board did not violate the free exercise clause because it was not discriminatorily directed toward the students' religious beliefs.[30] It reasoned that religious convictions could not excuse a person from obeying a neutral law aimed at promoting national unity.[31] Three years later, however, the Supreme Court overruled *Minersville* in *West Virginia Board of Education v. Barnette*.[32] In doing so, the Court elevated the Bill of Rights above the majoritarian concerns that prevailed in *Reynolds* and *Minersville*.

Barnette, like *Minersville*, involved a Jehovah's Witness' free exercise challenge to a mandatory flag salute statute.[33] Brought solely on religious grounds, but decided on free speech grounds, *Barnette* upheld a student's right to refuse to salute the flag in a public school.[34] The Court's commitment in *Barnette* to protect intellectual and spiritual freedom is meaningful in the free exercise context as well as in free speech doctrine.[35] The decision represented an increased willingness on the part of the Court to accommodate religious liberty.[36] This toleration for spiritual diversity is the

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29. Minersville School Dist. v. Gobitis, 310 U.S. 586, 591-92 (1940), *overruled in* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

30. *See id.* at 594-96 (arguing that free exercise clause has never precluded legislation not directed at doctrinal loyalties of particular sect).

31. *Id.* To justify this conclusion, the Court stated that:

> [c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

Id. at 595-96.

32. 319 U.S. 624 (1943).

33. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 625-30 (1943) (providing background of free exercise challenge). For a detailed discussion of these compulsory flag salute cases, see McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997, 1015-25 (1987).

34. *Barnette*, 319 U.S. at 642. The Court in *Barnette* considered whether a ceremony involving matters of opinion and political attitude may be imposed on an individual by governmental authority. *Id.* at 635-36.

35. *Barnette*, 319 U.S. at 641. In a passage widely quoted for its eloquent statement of the preeminent stature of individual rights in America, the Court stated:

> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
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> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Id. at 642.

36. *See id.* at 636 (noting purpose of Bill of Rights was to withdraw fundamental rights from political controversy and to establish them as legal principles to be applied by courts).

ideological foundation upon which the Court based subsequent decisions that constructed constitutional safeguards for religious liberty.

B. Sherbert v. Verner—*The Court Establishes the Strict Scrutiny Test*

Eighty-five years after *Reynolds*, the Warren Court faced a free exercise claim in *Sherbert v. Verner*.[37] In *Sherbert*, the Supreme Court held that neutral laws or government conduct burdening sincere religious practices must be analyzed under a strict scrutiny test.[38] The Court thereby established a mechanism for successful free exercise challenges by requiring the government to be responsive to the needs of members of religious groups, rather than merely requiring neutrality.[39]

The strict scrutiny test, as applied in free exercise cases, requires that plaintiffs seeking exemption from a government requirement first show that their sincerely held religious beliefs conflict with, and are thus burdened by, a law or government requirement.[40] Once

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37. 374 U.S. 398 (1963).

38. Sherbert v. Verner, 374 U.S. 398, 403 (1963). The terms "strict scrutiny," "compelling state interest test," "compelling state interest/least restrictive means test," and "*Sherbert* test" are used synonymously throughout this Note to refer to the same constitutional test. Jurists who favor a more narrow interpretation of the free exercise clause question the appropriateness of granting religious exemptions to laws not specifically directed at religion. *See* McConnell, *supra* note 14, at 1418 (suggesting that free exercise clause exists only to prevent government from singling out religious practice for peculiar disability); Bork, *The Supreme Court and the Religion Clauses*, in "TURNING THE RELIGION CLAUSES ON THEIR HEADS": PROCEEDINGS OF THE NATIONAL RELIGIOUS FREEDOM CONFERENCE OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS 83, 84 (1988) (arguing that evils to be prevented are laws that intentionally restrict religious observance). *But see* Comment, *Free Exercise in the 1980s*, *supra* note 24, at 540 (arguing that *Sherbert* compelling state interest test should be expanded to provide greater protection of religious liberty); McConnell, *supra* note 14, at 1415 (positing that *Sherbert*'s interpretation of free exercise clause is in accord with historical evidence and was within contemplation of framers of Constitution as possible interpretation).

Laws designed to limit the rights of a particular religion, such as a law outlawing the worship of a particular religion's god, would not be enacted because they would clearly violate the free exercise clause. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1608 (1990) (O'Connor, J., concurring) (stating "few states would be so naive as to enact a law directly prohibiting or burdening religious practice as such"). Indeed, the vast majority of free exercise cases involve generally applicable laws that do not clearly violate the first amendment. *Id.* Advocates of strong first amendment protection of religious practices argue that the free exercise clause protects these practices against even incidental or unintended effects of government action. *See* McConnell, *supra* note 14, at 1418 (setting forth "exemption" view of free exercise clause). Under this approach, the governmental policy may be left intact, but an exemption should be granted when application of the policy burdens religious practice without adequate justification. *Id.* Additionally, indifference to, or ignorance of non-mainstream religions should also fall under strict constitutional scrutiny. *See id.* (stating that under this view, free exercise clause must prevent against "majoritarian presuppositions, ignorance, and indifference").

39. *See* Comment, *Free Exercise in the 1980s*, *supra* note 24, at 513-17 (discussing evolution of *Sherbert* balancing test).

40. *See* L. TRIBE, *supra* note 26, § 14-12, at 1242-51 (explaining that free exercise claimant must first show that state requirement burdens sincerely held religious belief). To receive first amendment protection, the plaintiff must show that the claims are sincerely rooted in

this burden is met by a plaintiff, the burden shifts to the state. The state prevails only if it demonstrates that there is a compelling interest in the requirement, and that the least restrictive means to achieve that compelling interest is implemented.[41] The least restric-

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religious belief; secular beliefs, however virtuous and admirable, will not suffice. Wisconsin v. Yoder, 406 U.S. 205, 215-19 (1972) (determining claim that traditional Amish way of life was not matter of personal preference, but one of deep religious conviction); *see also* Thomas v. Review Bd., 450 U.S. 707, 714 (1981) (finding determination of sincere religious belief difficult and delicate); *Yoder*, 406 U.S. at 215 (stating resolution of what belief or practice is entitled to constitutional protection is delicate question). The question of the sincerity of religious beliefs or practices may not be resolved by judicial perception of the adequacy, acceptability, or comprehensibility of the religious belief. *Thomas*, 450 U.S. at 714. The role of the courts is limited to determining whether the claim stems from an honest religious conviction. *Id.* at 716.

The Supreme Court has found it necessary to evaluate the sincerity of religious beliefs or practices in order to properly review free exercise claims and to ensure religious liberty. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45 (1987) (holding newly adopted religious beliefs are fully protected and rejecting timing of conversion as factor in determining whether free exercise is burdened); *Thomas*, 450 U.S. at 715-16 (noting that narrow function of Court is to determine whether claimant terminated work because of honest religious conviction); *Yoder*, 406 U.S. at 222-29, 335-36 (providing clear example of Court evaluating Amish culture to indicate objections were rooted in sincere religious beliefs).

For critiques of the sincerity requirement, see Noonan, *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713, 713-20 (examining United States v. Ballard, 322 U.S. 78 (1944), in which sincerity requirement is generally thought to have originated) and Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 385-88 (1990) (arguing that avoiding inquiry into sincerity and intensity of religious claims alone supports abandoning free exercise exemptions). For a detailed discussion of the threshold requirement that a sincerely-held religious belief must be burdened for a plaintiff to prevail in a free exercise claim, see Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947-60 (1989) (examining structure of free exercise adjudication and components of free exercise challenge).

Determining the sincerity of beliefs, however, is inherently problematic. *See id.* at 954-57 (explaining that sincerity requirement seems to be best approach for separating bona fide claims from fraudulent ones, but that sincerity determinations are fraught with various difficulties). If a court is assigned the role of delving deeply into an asserted religious belief to determine its sincerity, the court may become excessively entangled with the religion, thereby violating the establishment clause of the first amendment. *See* United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (arguing that adjudicating religious sincerity risks favoritism of one religion over another in violation of establishment clause). If courts must accept all asserted religious beliefs on their face, however, there is a danger that a person may receive first amendment protection of a personal or philosophical belief by merely stating, "My belief is religious." Arguably, a court may be forced to accept such an assertion on its face to avoid violating the establishment clause. *Id.* Although there is tension between the establishment clause and the free exercise clause, the Court has resolved this tension in favor of promoting free exercise. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45 (1987) (stating that government may, and sometimes must, accommodate religion without violating establishment clause); Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972) (noting that there is danger of violating establishment clause when granting religious exemption, but that danger cannot preclude protection of values inherent in free exercise clause).

41. *See Hobbie*, 480 U.S. at 141 (stating that infringement upon free exercise is justified only by state proving compelling interest); *Thomas*, 450 U.S. at 718 (suggesting state may justify inroad on religious liberty by showing it is least restrictive means of achieving compelling state interest); *Yoder*, 406 U.S. at 221 (requiring that state's interest be compelling before established religious practices must give way); *Sherbert*, 374 U.S. at 406 (establishing that only compelling state interest may justify substantial infringement of first amendment right). For an analysis of the compelling state interest test, see Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U.L. REV. 917, 932-78 (1988)

tive means requirement cannot be satisfied if the government can exempt the religious group from the otherwise valid law and still substantially achieve its legitimate goals.[42]

In *Sherbert*, a Seventh-day Adventist was discharged from her job in South Carolina after refusing to work on Saturdays, the Sabbath

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(analyzing and critiquing interests asserted by government in support of restricting individual rights) and McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 45-54 (1980) (applying economic analysis compelling state interest).

For arguments calling for the elimination of the strict scrutiny test in the free exercise context, see Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 CONST. COMMENTARY 147, 147-54 (1987) (arguing that Supreme Court's penchant for maintaining nominal adherence to strict review mandates that Court reformulate its free exercise analysis); Marshall, *supra* note 40, at 372 (concluding current free exercise jurisprudence disfavors exemptions); West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 596-98 (1990) (positing that compelling state interest test leads to unpredictable results). *But see* McConnell, *supra* note 14, at 1415, 1511-13 (arguing that *Sherbert*'s interpretation of free exercise clause is in accord with historical evidence and within intent of framers of Constitution); Comment, *Free Exercise in the 1980s*, *supra* note 24, at 540 (arguing for compelling state interest test to be expanded to provide greater protection of religious liberty).

In a free exercise case, the state is required to show that an important goal can only be achieved through uniform enforcement of the regulation at issue. L. TRIBE, *supra* note 26, § 14-13, at 1251. The state must demonstrate that the regulation pursues a compelling state interest. *See id.* § 14-13, at 1251-75 (tracing evolution of requirement). In *Cantwell v. Connecticut*, the Supreme Court added the least restrictive alternative requirement to further ensure religious freedom. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (noting that power to regulate must not, in attaining permissible end, unduly infringe protected freedom). The Court struck down a statute prohibiting solicitation of money or valuables to support a religious cause without a permit. *Id.* at 303. The Court reasoned that in the interest of public welfare a state may regulate the time, place, and manner of solicitation, provided that the "statute is narrowly drawn to define and punish specific conduct [that] constitute[s] a clear and present danger to a substantial interest of the state . . . ." *Id.* at 304, 311. To condition the solicitation of aid for religious causes upon a license, however, the granting of which rested on an administrative evaluation of what is a "religious cause," is to intrude upon the exercise of liberty protected by the Constitution. *Id.* at 307; *see also* Murdock v. Pennsylvania, 319 U.S. 105, 113, 116 (1943) (striking down ordinance which amounted to license tax on exercise of privilege guaranteed by Constitution and noting that ordinance was not narrowly drawn to safeguard community against solicitation); Schneider v. New Jersey, 308 U.S. 147, 160, 162 (1939) (finding regulations which abridged freedom of speech and press could have been drawn to adequately serve purpose through less drastic means).

There is no established test for scrutinizing regulations that specifically limit the rights of members of a religious group. Rather, any such regulation would be categorically overturned as violative of the free exercise clause of the first amendment. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1599 (1990) (stating free exercise clause is violated when state bans act only when it is performed for religious purpose or only because of religious belief displayed); McDaniel v. Paty, 435 U.S. 618, 627-29 (1978) (finding that government may not impose disabilities on base of religious views or status); United States v. Ballard, 322 U.S. 78, 86-88 (1944) (holding government may not punish expression of religious doctrines it deems false).

42. *See* Sherbert v. Verner, 374 U.S. 398, 406-09 (1963) (adopting compelling state interest/least restrictive means mode of analysis in free exercise context and granting exemption from unemployment compensation laws where state failed to show no less restrictive means of achieving goals); *see also* Thomas v. Review Bd., 450 U.S. 707, 718-19 (1981) (granting exemption accommodating religious practice where state failed to show intrusion on religious liberty attained by least restrictive means); Wisconsin v. Yoder, 406 U.S. 205, 219-34 (1972) (exempting Amish from mandatory school attendance law where evidence supported that accommodating religious objection would not frustrate state objectives or detract from welfare of society).

day of her faith.[43] The Employment Security Commission denied Sherbert's claim for unemployment compensation.[44] Under South Carolina law, to be eligible for unemployment benefits a claimant must not only be available for work, but, absent good cause, must accept suitable work when offered.[45] The Commission determined that Sherbert's refusal to work on Saturdays constituted a refusal to accept suitable work, and made her ineligible for benefits.[46] Justice Brennan, writing for the majority in *Sherbert*, noted that the state's denial of unemployment benefits forced Sherbert to choose between abandoning her religious beliefs and receiving benefits, or following her beliefs and forfeiting benefits.[47] The Court reasoned that imposing such a choice is as burdensome as instituting a fine for worshipping on Saturdays.[48]

The heavy burden on Sherbert's religion could only be justified by a showing that the eligibility provisions of South Carolina's unemployment benefits law served a compelling state interest.[49] The Supreme Court found, however, that the state's asserted interest in preventing fraudulent claims for unemployment benefits was insufficient to justify the burden on Sherbert's first amendment rights.[50] Furthermore, even if the state had demonstrated a compelling interest, it failed to show that there were no alternative forms of regulation available with a lesser impact on the free exercise of religion, such as an exemption provision for those people who refused to work for religious reasons.[51]

The Supreme Court applied the compelling state interest/least restrictive means test to sustain two other free exercise challenges of statutory schemes that denied unemployment benefits to individuals

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43. *Sherbert*, 374 U.S. at 399.

44. *Id.* at 399-400.

45. *See id.* at 400-01 & n.3 (providing pertinent sections of South Carolina Unemployment Compensation Act, S.C. CODE ANN. §§ 68-113 to -114 (Law. Co-op. 1962) (setting forth eligibility requirements and disqualification for benefits)). The current provisions may be found at S.C. CODE ANN. §§ 41-35-110 to -120 (Law. Co-op. 1976 & Supp. 1989).

46. *Sherbert*, 374 U.S. at 401. The Commission's findings were sustained by the Court of Common Pleas for Spartanburg County and affirmed by the South Carolina Supreme Court. *Id.* at 401. The South Carolina Supreme Court held that the state's eligibility requirements did not infringe upon any of Sherbert's constitutional liberties because the Commission's interpretations of the statute did not restrict her freedom of religion or prevent her from exercising her religious beliefs "in accordance with the dictates of her conscience." Sherbert v. Verner, 240 S.C. 286, 303-04, 125 S.E.2d 737, 746 (1962), *rev'd*, 374 U.S. 398 (1963).

47. Sherbert v. Verner, 374 U.S. 398, 404 (1963).

48. *Id.*

49. *Id.* at 406.

50. *Id.* at 407-09.

51. *Id.* at 408-09. The Court distinguished the requirement at issue in *Sherbert* from *Braunfeld v. Brown*, where granting an exemption presented an administrative problem which would have rendered the statutory scheme unworkable. *Sherbert*, 374 U.S. at 408-09.

refusing to work because of their religious beliefs. In *Hobbie v. Unemployment Appeals Commission of Florida*,[52] the Court reversed an order by the Florida Unemployment Appeals Commission that denied benefits to a Seventh-day Adventist who refused to work on her Sabbath day.[53] Florida's unemployment compensation law prohibited payment of benefits to anyone discharged as a result of "misconduct connected with . . . work."[54] The Unemployment Commission classified Hobbie's refusal to work on Saturday as "misconduct" under the statute.[55] The Supreme Court applied the *Sherbert* test and reversed the Commission's order denying benefits to Hobbie because the refusal constituted a violation of the free exercise clause.[56]

Similarly, in *Thomas v. Review Board*,[57] Thomas, a Jehovah's Witness employed by a military supplier, quit his job after being transferred to a department that manufactured parts for military tanks. Thomas asserted that his religious beliefs prevented him from participating in the manufacture of war materials.[58] Applying a strict scrutiny analysis, the Court struck down the Indiana Employment Review Board's denial of unemployment compensation benefits to Thomas because it constituted a violation of his first amendment right to freely exercise his religion.[59] In a dissent which foreshadowed the current view of free exercise jurisprudence, Justice Rehnquist argued that a state is not required to conform general statutes designed to advance the state's secular goals to the dictates of particular religious groups.[60]

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52. 480 U.S. 136 (1987).

53. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 138-39 (1987) (providing background of Hobbie's free exercise challenge).

54. *See id.* at 138 (citing FLA. STAT. § 443.101(1)(a) (1985)). The current, unchanged statutory provision for disqualification of benefits may be found at FLA. STAT. ANN. § 443.036(26) (West Supp. 1989).

55. *See Hobbie*, 480 U.S. at 139 (citing FLA. STAT. § 443.036(24) (1985) (providing definition of "misconduct")). The current statutory provision may be found at FLA. STAT. ANN. § 443.036(26) (West Supp. 1989). The Unemployment Appeals Commission affirmed the denial of Hobbie's benefits and agreed that her refusal to work constituted "misconduct." *Hobbie*, 480 U.S. at 139. The Florida Fifth District Court of Appeals affirmed. Hobbie v. Unemployment Appeals Comm'n, 475 So. 2d 711 (Fla. Dist. Ct. App. 1985) (per curiam), *rev'd*, 480 U.S. 136 (1987).

56. *Hobbie*, 480 U.S. at 141-44, 146.

57. 450 U.S. 707 (1981).

58. Thomas v. Review Bd., 450 U.S. 707, 709-13 (1981) (providing background of Thomas' claim and state's denial of unemployment benefits).

59. *See id.* at 716-19 (applying *Sherbert* and concluding interest advanced by state was insufficiently compelling to justify burden on Thomas' religious liberty).

60. *Thomas*, 450 U.S. at 707, 723 (Rehnquist, J., dissenting); *cf.* Employment Div. v. Smith, 110 S. Ct. 1595, 1605 (1990) (stating that "we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order"). No other Justice joined Justice Rehnquist's dissent in *Thomas*. Ten years later, however, four Justices joined Justice Scalia's majority opinion in *Employment Division v. Smith* which found the *Sherbert* test inapplicable to challenges of

C. Wisconsin v. Yoder—*The Court Expands the* Sherbert *Test*

In *Wisconsin v. Yoder*,[61] the Court expanded the scope of the free exercise clause beyond the facts of *Sherbert* and applied the strict scrutiny test to a criminal law.[62] In *Yoder*, the respondents, members of the Old Order Amish religion and the Conservative Mennonite Church, were convicted of violating Wisconsin's criminal law requiring compulsory attendance in school until the age of sixteen.[63] The respondents believed that school attendance beyond the eighth grade was contrary to the Amish religion and way of life.[64] The Amish believed that sending their children to high school jeopardized their children's, as well as their own, chances for salvation.[65] Writing for the Court, Chief Justice Burger found Wisconsin's compulsory school attendance law to be a severe and inescapable burden on the Amish believers' right to freely exercise their religion.[66]

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neutral, generally applicable criminal laws which incidentally impact an individual's religion. *Smith*, 110 S. Ct. at 1602-06; *see infra* notes 126-99 and accompanying text (discussing *Smith* holding).

Justice Stevens had previously expressed opposition to the strict scrutiny doctrine. In his concurring opinion in *United States v. Lee*, Justice Stevens stated that the Constitution does not require granting exemptions for generally applicable, neutral laws. *See Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring) (arguing for adoption of different constitutional standard). Justice Stevens' disapproval of strict review under the free exercise clause rests on his belief that such review is violative of establishment clause principles. *Id.* at 263 n.2. Justice Stevens reasoned that by engaging in strict review, the Court is forced to evaluate the legitimacy of asserted religious beliefs, and thereby becomes excessively entangled with religion. *Id.*; *see supra* note 40 (discussing tension between establishment clause and free exercise clause) and *supra* note 41 (discussing requirements under strict scrutiny and noting arguments that standard should be eliminated).

61. 406 U.S. 205 (1972).

62. Wisconsin v. Yoder, 406 U.S. 205, 218-19 (1972).

63. *Id.* at 207-08 (reviewing WIS. STAT. § 118.15 (1969)).

64. *Id.* at 210-11. The Court, describing the Amish religion and way of life, stated:

> [The Amish] view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.

Id. at 211.

The Amish believe that their adolescent children should be home to learn the specific skills and attitudes, including self-reliance and a love for manual labor, necessary to live as an adult in the Amish community. *Id.* The Amish do not object to schooling through the eighth grade. *Id.* at 212. Elementary school teaches children to read, so that they may read the Bible and learn to be good farmers and citizens. *Id.* Although school attendance offers exposure to non-Amish people, the Amish do not believe that it exposes their children at this younger age to "worldly values" nor interferes with their religious development. *Id.* Higher education, on the other hand, promotes values that alienate man from God. *Id.*

65. *Yoder*, 406 U.S. at 210.

66. *Id.* at 218. Specifically, the Court stated: "Wisconsin law affirmatively compels [the respondents], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs.... [They] must either abandon belief and be assim-

The Court in *Yoder* followed *Sherbert* and ruled that it was incumbent on the state to show with particularity how an exemption to the compulsory school attendance law for the Amish would frustrate the state's interest in ensuring that its youth receive an adequate education.[67] The Court found that granting an exemption in this situation would not severely jeopardize the education of Amish children.[68] The Court explained that the informal vocational education the Amish provide their children at home prepared them for life in the insular agrarian society that is the foundation of their community.[69] High school education, in comparison, is designed to assimilate children into modern society.[70] Thus, a state may only constitutionally subject Amish children to high school education if the state has a compelling interest in imposing modern society upon the Amish.[71] Finding no such compelling state interest, the Court emphasized that "a way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."[72]

In virtually all free exercise cases since the *Sherbert* and *Yoder* decisions, the Supreme Court subjected laws burdening religious practices to strict scrutiny.[73] In each case outside the unemployment

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ilated into society at large, or be forced to migrate to some other and more tolerant region." *Id.*

67. *Id.* at 236.

68. *Id.* at 222.

69. *Id.* (citing Meyer v. Nebraska, 262 U.S. 390, 400-01 (1922) and discussing power of parents to control their children's education).

70. *See generally* Edwards v. Aguillard, 482 U.S. 578, 584 (1986) (suggesting that school environment is factor in development of impressionable young children); Board of Educ. v. Pico, 457 U.S. 853, 864 (1982) (describing school curriculum as vehicle for transmitting community values); McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) (finding school most pervasive means for promoting common destiny of our democracy).

71. Wisconsin v. Yoder, 406 U.S. 205, 222 (1972) (finding that one or two additional years of formal education will do little to serve state's interest).

72. *Id.* at 223-24. The Court implicitly asserted that the Bill of Rights generally, and the free exercise clause specifically, should be invoked as the protector of minority rights from the majoritarian political process. *See* Brief Amicus Curiae of the American Jewish Congress in Support of Respondents at 46-47, Employment Div. v. Smith, 110 S. Ct. 1595 (1990) (No. 88-1213) [hereinafter Brief of American Jewish Congress] (discussing important government interest in allowing minority faiths to flourish even at risk of disparate treatment of faiths by government). The Court's willingness to use the first amendment to protect religious liberty, however, has faded in recent years. *See infra* notes 78-125 and accompanying text (discussing decline of free exercise protection).

73. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) (applying strict scrutiny test to overturn denial of unemployment benefits to employee who refused to work on Sabbath Day of faith); United States v. Lee, 455 U.S. 252, 258-60 (1982) (finding that state satisfied burden imposed by *Sherbert* test); Thomas v. Review Bd., 450 U.S. 707, 718-20 (1981) (reversing denial of unemployment benefits under strict scrutiny analysis to employee who refused to work in weapons plant because of religious objection); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (using strict scrutiny analysis to require state to grant Amish children exemption from mandatory school attendance law); Gillette v. United States,

context, with the exception of *Wisconsin v. Yoder*,[74] the Court found that the states' interests satisfied the compelling interest/least restrictive means test.[75] Thus, although the Court did not explicitly repudiate the strict scrutiny test of *Sherbert*, it has in recent years refrained from extending constitutional protection to religious liberty.[76]

D. The Decline of First Amendment Free Exercise Protection

During the last decade, the Supreme Court was less willing to grant religious exemptions under the strict scrutiny test. Although the Court retained the test in theory, in most instances it shifted the balance in favor of the state by interpreting the states' interests broadly and the religious interests narrowly.[77] For instance, in *United States v. Lee*,[78] a 1982 decision, the Court applied the test and found the government interest sufficiently compelling to outweigh the free exercise interest.[79] The appellee in *Lee*, an Amish farmer, refused to withhold social security taxes from his employees' paychecks.[80] The farmer contended that paying social security taxes

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401 U.S. 437, 462 (1971) (finding incidental burden on religion justified by substantial government interests).

In two recent cases involving free exercise challenges to governmental practices the Court distinguished, but did not repudiate, *Sherbert*. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51 (1988) (emphasizing government coercion is necessary to trigger heightened scrutiny); Bowen v. Roy, 476 U.S. 693, 700 (1986) (stating that free exercise clause affords protection from government compulsion and does not afford individual right to dictate conduct of government). The Court noted that the free exercise clause, via the Court's application of the compelling state interest test, serves to protect individuals against direct government coercion. *Lyng*, 485 U.S. at 450-51; *Roy*, 476 U.S. at 700; *see infra* notes 89-123 and accompanying text (discussing *Roy* and *Lyng* decisions).

74. 406 U.S. 205 (1972).

75. *See* McConnell, *supra* note 14, at 1417 (considering continuing legitimacy of *Sherbert* test and stating that at least two Justices, Rehnquist and Stevens, have openly declared opposition to doctrine).

76. *Id.* at 1417 n.29 (providing list of post-1972 cases where Court rejected free exercise claims).

77. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988) (stating that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires"); Bowen v. Roy, 476 U.S. 693, 703, 711-12 (1986) (asserting that government requirement does not compel claimants to refrain from religious conduct); United States v. Lee, 455 U.S. 252, 258-60 (1982) (stating that government interest in social security system is apparent because coverage is nationwide and exemption for every religious belief would be too difficult to accommodate). *See generally* L. TRIBE, *supra* note 26, § 14-13, at 1251-75 (asserting that Court has lessened government's burden of persuasion in recent free exercise cases).

78. 455 U.S. 252 (1982).

79. United States v. Lee, 455 U.S. 252, 258-60 (1982); *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 602-04 (1983) (finding state interest in eradicating racial discrimination in education satisfies strict scrutiny); Gillette v. United States, 401 U.S. 437, 462 (1971) (finding incidental burden on religion justified by substantial government interests).

80. *Lee*, 455 U.S. at 254. Lee also failed to file quarterly social security tax returns or pay his employer's share of social security taxes. *Id.*

and accepting social security benefits conflicted with the religious belief that the Amish community should provide for its members without the help of the Social Security Administration.[81] Writing for the Court, Chief Justice Burger agreed that paying social security taxes was a genuine burden on the claimant's religious liberty.[82] Establishing a burden, however, is the beginning, not the end of the inquiry under the free exercise clause.[83] The Court found that the government's interest in a social security fund into which everyone contributes is an interest of the "highest order."[84] The Court, therefore, did not require the government to grant the Amish an exemption.[85] It would be virtually impossible to maintain the social security system if the Court granted exemptions to every religious group claiming that payment of social security taxes violated their religion.[86] The *Lee* decision began a movement away from the rigorous protection of religious liberty which characterized the free exercise cases of the preceding two decades.[87]

In *Bowen v. Roy*,[88] another case involving the social security system, a Native American challenged the government's use of a social security number to identify his daughter.[89] After speaking with a chief of the Abenaki tribe from which he descended, Roy developed the belief that the assignment of an identifying number to individuals robs them of their unique spirit and prevents them from obtaining great spiritual power.[90]

The Court reasoned that although the government's use of a social security number may have offended Roy's religious beliefs, it

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81. *Id.* at 257.

82. *Id.*

83. *Id.* The Court stated that a "balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions." *Id.* at 259.

84. *Id.* at 260. Congress exempts self-employed members of established religious sects who are conscientiously opposed to accepting benefits from payment of social security taxes. 26 U.S.C. § 1402(g)(1) (1988). When followers of a particular faith participate in commerce as a matter of choice, they may not impose the limits of their own conduct on the statutory scheme. *Lee*, 455 U.S. at 261. The Court in *Lee* stated that exempting employers like Lee from paying social security taxes imposes their religious beliefs on their employees. *Id.*

85. United States v. Lee, 455 U.S. 252, 259-61 (1982).

86. *Id.* at 259-60. The Court stated that "[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, . . . but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.' " *Id.* at 259 (citing Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

87. *See* L. TRIBE, *supra* note 26, § 14-13, at 1261 (discussing shrinking scope of free exercise clause and suggesting that Court is subjecting certain categories of law to more careful scrutiny).

88. 476 U.S. 693 (1986).

89. Bowen v. Roy, 476 U.S. 693, 695 (1986).

90. *Id.* at 696. Roy explained that "control over one's life is essential to spiritual purity and indispensable to 'becoming a holy person.' " *Id.*

did not inhibit the practice of his religion.[91] The Court interpreted Roy's claim as a demand for the government to conform its administrative affairs to his religious beliefs.[92] The Court rejected the claim, stating that although "[t]he Free Exercise Clause affords an individual protection from certain forms of government compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."[93] Thus, the Court essentially distinguished positive and negative free exercise rights.[94] A positive free exercise right enables a person to demand that the government structure its practices and laws in a way that is acceptable to his or her religious beliefs.[95] A negative right encompasses the right to be free from government practices that coerce or prohibit religious activity.[96] According to this analysis, Roy claimed a positive right and, therefore, the Court refused to extend first amendment protection to his religious beliefs.[97] The Court's decision in *Roy* suggests that the first amendment only protects the negative right.[98]

In Part III of the *Roy* opinion,[99] Chief Justice Burger proposed a "reasonable means" test to judge the constitutionality of all facially neutral and uniformly applicable requirements for the receipt of

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91. *Id.* at 699. The Court explained:

> Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The 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. . . . "[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring).

Roy, 476 U.S. at 699-700. As a result, 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.

92. Bowen v. Roy, 476 U.S. 693, 699 (1986).

93. *Id.* at 700.

94. *See generally* L. TRIBE, *supra* note 26, § 14-13, at 1262-64. Professor Tribe asserts that the Court affords higher scrutiny to rules that impose a choice between adherence to a religious belief and enjoyment of a government benefit. *Id.* at 1262. Rules that make the practice of a particular faith more costly are given less scrutiny. *Id.* at 1262-63.

95. *Roy*, 476 U.S. at 700.

96. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 458-59 (1988) (Brennan, J., dissenting) (recognizing and disagreeing with Court's distinction between two categories of claims). Justice Brennan argues that the free exercise clause protects against "any form of governmental action that frustrates or inhibits religious practice." *Id.* at 459.

97. *Roy*, 476 U.S. at 699.

98. *Id.* at 699-700 (stating free exercise clause prohibits government compulsion, but does not provide individual with right to dictate government procedures).

99. *Id.* at 701-12. Chief Justice Burger authored Parts I, II, and III of the *Roy* opinion. Only Justices Powell and Rehnquist joined Part III of the opinion. *Id.* at 694, 701-12. Justices Brennan, Marshall, Blackmun, Powell, Rehnquist, Stevens, and O'Connor joined Parts I and II.

government benefits.[100] Justice O'Connor, concurring in part and dissenting in part, vehemently attacked Chief Justice Burger's proposed "reasonable means" test.[101] Although Justice O'Connor agreed that an individual may not dictate the conduct of the Government's internal procedures, she did not agree that all governmental requirements for the receipt of benefits should be subjected to only a rational basis test.[102] Justice O'Connor argued that Chief Justice Burger's proposed test "relegates a serious First Amendment value to the barest level of minimal scrutiny."[103] She stated that the compelling interest/least restrictive means test is the standard unequivocally required by the first amendment and is expressly embraced in Court precedent.[104]

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100. *Id.* at 707-08. Chief Justice Burger argued that the government is entitled to wide latitude in its administration of welfare programs reaching millions of people. *Id.* Absent discriminatory intent, the government meets its burden if it demonstrates that the challenged law is a "reasonable means of promoting a legitimate public interest." *Id.*

It is not clear whether Chief Justice Burger was proposing that a "reasonable means" test be used to scrutinize all neutral laws challenged under the free exercise clause or whether he was proposing that laws involving the receipt of government benefits be given the more relaxed level of scrutiny. The opinion created a distinction between two types of neutral laws: those creating a direct burden, as in *Yoder*, where individuals are forced to choose between avoiding criminal prosecution and practicing their faith and those denying benefits, as in *Roy*, where the government treats all individuals alike and does not make a case-by-case inquiry into the sincerity of each religious objection. *Id.* at 707. Chief Justice Burger argued that the Court must afford greater deference to the latter type of government decision. *Id.*

On its face, Chief Justice Burger's proposal for a "reasonable means" test directly conflicts with the Court's decisions in *Sherbert*, *Thomas*, and *Hobbie*. *See* L. TRIBE, *supra* note 26, § 14-13, at 1262 n.68 (commenting upon impact of *Roy* decision). Chief Justice Burger explained, however, that in their decisions to deny unemployment benefits in *Sherbert*, *Thomas*, and *Hobbie*, the states exhibited discriminatory intent when they found the refusal to work on religious grounds not to be good cause. *Roy*, 476 U.S. at 708. Unlike the law at issue in *Roy*, the laws in those cases did not involve government neutrality, but rather government hostility toward religion. *Id.*; *see also supra* notes 37-60 and accompanying text (discussing *Sherbert*, *Thomas*, and *Hobbie*).

The majority opinion in *Roy* is dangerous to free exercise claims. The opinion insulates the stated government interest from first amendment scrutiny by characterizing it as an internal affair. As a result, the Court did not consider the effect of a social security exemption upon the government program nor the coercion of individual religious interests. *See* Comment, *Free Exercise in the 1980s*, *supra* note 24, at 523-24 (analyzing decreased scrutiny for free exercise infringement in public welfare cases). Furthermore, by characterizing the government's interest as an internal affair, the Court eliminated the need to balance the government's interest against the individual religious interest. *Id.* Affording such deference to facially neutral laws removes laws with a potentially devastating effect on religious liberty from the ambit of constitutional review. *Id.*

101. Bowen v. Roy, 476 U.S. 693, 727 (1986) (O'Connor, J., concurring in part and dissenting in part). Justices Brennan and Marshall joined Justice O'Connor's opinion.

102. *Id.* (O'Connor, J., concurring in part and dissenting in part).

103. *Id.*

104. *Id.* at 727 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor argued that the Court has consistently held that "[o]nly an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 728 (O'Connor, J., concurring in part and dissenting in part).

Four years after *Roy*, however, Justice O'Connor, writing for the majority in *Lyng v. Northwest Indian Cemetery Protection Association*,[105] implicitly eschewed the *Sherbert* test and reached a result similar to the Court's decision in *Roy*.[106] In *Lyng*, the Court refused to prohibit the federal government from harvesting timber and constructing a road through a portion of a northwestern California national forest traditionally used for religious purposes by members of three Native American tribes.[107] The Court acknowledged that disturbance of the local environment precluded the Native Americans from meaningfully practicing the traditional rituals which lead to their spiritual development.[108] The majority found, however, that the free exercise clause did not prohibit the building of the road.[109] The Court reasoned that although the first amendment proscribes the prohibition of the free exercise of religion, it does not allow individuals the right to veto government decisions incompatible with their religious beliefs or practices.[110] According to this narrow interpretation, the free exercise clause does not provide a right of relief from government activity that makes the practice of religion more difficult.[111] Instead, the Constitution only protects against government coercion or prohibition of religious conduct.[112] The Court asserted that the crucial word in the free exercise clause is "prohibit."[113] Although the challenged government action significantly interfered with the ability of Native Americans to pursue their religious beliefs, the government action did not prohibit the exer-

105. 485 U.S. 439 (1988).

106. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51 (1988). According to Justice O'Connor's reading of free exercise precedent, her opinion in *Lyng* and the Court's decision in *Roy* both adhere to the *Sherbert* doctrine. *Id.*

107. *Id.* at 441-42.

108. *Id.* at 451.

109. *Id.* at 452. Commentators have suggested that the Court exhibits a racial bias because it is more willing to uphold claims by Judeo-Christian religions, such as Jehovah's Witnesses or the Amish, than claims by less popular religions. *See, e.g.*, Comment, *Judicial Scrutiny of Native American Free Exercise Rights:* Lyng *and the Decline of the* Yoder *Doctrine*, 17 ENVTL. AFF. 169, 171 (1989) (arguing that institutional racism causes courts to handle claims by Native Americans differently from claims by members of "Western-style" religions); 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, 424 (1989) (arguing that judiciary is reluctant to treat non-Judeo-Christian religions uniformly); Comment, *First Americans and the First Amendment*, *supra* note 21, at 954 (asserting that Court does not fully understand Native American culture and therefore does not adequately consider their free exercise right). *But see* United States v. Lee, 455 U.S. 252, 258-61 (1982) (refusing to uphold free exercise claim by Amish employer).

110. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988).

111. *Id.*

112. *Id.* at 450.

113. *Id.* at 451.

cise of those beliefs.[114] Furthermore, the government did not coerce or penalize religious conduct.[115]

Although the Court did not require the government to show a compelling interest in *Lyng*, neither did it claim to repudiate the strict scrutiny test applied in past free exercise cases.[116] Rather, the Court followed the *Roy* decision which held that a law will be judged under a strict scrutiny analysis only when it coerces individuals to act contrary to their religious beliefs.[117] The Court in *Lyng* distinguished between an individual's attempt to exact behavior from the government and an individual's request for an exemption from laws that compel one to refrain from practicing a religion.[118] Following the Court's rationale in *Lyng*, a neutral law penalizing religious conduct, such as Wisconsin's criminal law requiring the Amish to send their children to high school, should be subjected to strict scrutiny.[119] The Court would not, however, extend constitutional protection to a law that simply makes it impossible for someone to practice their religion because of the presence of a physical obstacle.[120]

Throughout the history of free exercise jurisprudence, the Supreme Court's reasoning in its opinions has varied significantly, depending upon the particular claim and the historical period in which the claim arose. In some cases, the Court afforded tremendous deference to the state,[121] while in other cases, individual rights

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114. *Id.* at 449 (discussing Bowen v. Roy, 476 U.S. 693 (1986)). The Court found *Lyng* indistinguishable from *Roy*. *Id.*

115. *Id.*

116. *See id.* at 450-53 (following analysis in *Roy* and deferring to government). The Court emphasized that while Native Americans may have rights to use the land, the government owns the land. *Id.* at 453.

117. *Id.* at 456-57 (following Bowen v. Roy, 476 U.S. 693, 707-09 (1986)). The Court stated that "the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Id.* at 452.

118. *Id.* at 451.

119. *Id.* at 450.

120. *Id.* A law penalizing religious conduct and a governmental action making the practice of religion impossible have the identical effect of severely inhibiting the free exercise of religion. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 459 (1988) (Brennan, J., dissenting) (criticizing majority's creation of categories of free exercise rights). Justice Brennan argued in the *Lyng* dissent that the Constitution does not draw a fine distinction between the types of restraints government may use, but rather that the first amendment protects individuals from any governmental action that inhibits the free exercise of religion. *Id.* (Brennan, J., dissenting). The dissent stated that both "common sense" and precedent inform us that governmental action rendering the practice of religion difficult or impossible necessarily penalizes the free exercise of that religion. Such governmental action, reasoned Justice Brennan, "tends to prevent adherence to religious belief." *Id.* at 469 (Brennan, J., dissenting).

121. *See, e.g., id.* at 452 (arguing that government could not operate if required to satisfy every citizen's religious needs); Bowen v. Roy, 476 U.S. 693, 699 (1986) (stating that govern-

received deference.[122] The Supreme Court has made it clear that an individual cannot demand that the government structure its activities to accommodate religion.[123] The Court had not ruled, however, that all neutral laws having an impact on religion, as opposed to laws that merely offend religious beliefs, are immune from first amendment protection.[124] In *Employment Division v. Smith*, a five Justice majority resolved the ambiguities attending free exercise doctrine by broadly holding that the compelling state interest test shall not be used to judge neutral laws that adversely impact religious liberty.[125]

II. EMPLOYMENT DIVISION v. SMITH

A. Facts and Procedural History

The respondents in *Employment Division v. Smith*,[126] members of the Native American Church, were discharged from their positions as drug abuse counselors after their employer discovered they had ingested peyote for sacramental purposes during a church ceremony.[127] The use of non-prescription drugs was contrary to the

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ment cannot structure its affairs to comport with religious beliefs of particular citizens); United States v. Lee, 455 U.S. 252, 261 (1982) (asserting that every person cannot be free from all burdens incident to exercising religious beliefs); Gillette v. United States, 401 U.S. 437, 461 n.23 (1971) (narrowing scope of conscientious objector's free exercise claim). *See supra* notes 75-85 and accompanying text (discussing cases in which Court found state action to satisfy compelling state interest test).

122. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987) (stating that first amendment protects free exercise rights of employees even if beliefs change after employee is hired); Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981) (discussing sincerity of claimant's religious belief and government's substantial infringement on free exercise); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (finding fundamental claim of religious freedom worthy of searching inquiry); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (asserting that rational basis deference to government will not suffice in sensitive area of first amendment rights); *see supra* notes 37-76 and accompanying text (discussing successful free exercise challenges under strict scrutiny test).

123. *Lyng*, 485 U.S. at 452; *Roy*, 476 U.S. at 699.

124. *See Lee*, 455 U.S. at 258-60 (applying compelling state interest test, but finding that state satisfied burden imposed by test); *Gillette*, 401 U.S. 437, 462 (1971) (finding incidental burden on religion justified by compelling government interest); *see supra* notes 37-87 and accompanying text (discussing scope and applicability of strict scrutiny test).

125. Employment Div. v. Smith, 110 S. Ct. 1595, 1603 (1990).

126. 110 S. Ct. 1595 (1990).

127. *Smith*, 110 S. Ct. at 1597-98. Peyote is both the God that members of the Native American Church worship and the vehicle for experiencing the "deity." People v. Woody, 61 Cal. 2d 716, 720-21, 394 P.2d 813, 816-18, 40 Cal. Rptr. 69, 72-74 (1964). *See generally* Brief of American Jewish Congress, *supra* note 72, at 14-23, 35 n.20 (discussing history of use of peyote and disparate treatment of Native Americans by Court). Anthropologists have ascertained, through discussions with members of the Church, that this Native American religion combines certain Christian teachings with the belief that peyote embodies god and that those who partake in the peyote ritual become close to the Holy Spirit. *Woody*, 61 Cal. 2d at 720-21, 394 P.2d at 817, 40 Cal. Rptr. at 730. Use of peyote outside the ritual, however, is sacrilegious. *Id.* Statutorily proscribing use of peyote by the members of the Native American

stated policy of the respondents' employer.[128] Oregon law classifies peyote as a "controlled substance," and makes intentional posses-

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Church removes the "theological heart" of the religion; without peyote, members cannot practice their religion. *Woody*, 61 Cal. 2d at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

The American Jewish Congress, in its Amicus brief for the respondents, stated:

> Peyote is more than a sacrament of the Native American religion—it is the basis of the religion itself. If the religious practice is prohibited, the religion dies. No graver danger can be imagined. It is doubtful that any other religious adherents who have sought religious exemptions from drug laws would suffer similar harm. In most other cases, the religious use of drugs is an aid to religious experience; rarely, as with peyote, is it the essence of the religion itself.

Brief of American Jewish Congress, *supra* note 72, at 5.

The sacred ceremony where members of the church ingest peyote is the cornerstone of peyotism. *Woody*, 61 Cal. 2d at 720-21, 394 P.2d at 817-18, 40 Cal. Rptr. at 72-73. In its Amicus Curiae Brief, the Association on American Indian Affairs described the ritual:

> To the members, peyote is consecrated with powers to heal body, mind and spirit. It is a teacher; it teaches the way to spiritual life through living in harmony and balance with the forces of the Creation. The rituals are an integral part of the life process. They embody a form of worship in which the sacrament Peyote is the means for communicating with the Great Spirit.

Brief Amicus Curiae of the Association on American Indian Affairs, at 5-6, Employment Div. v. Smith, 110 S. Ct. 1595 (1990) (No. 88-1213) [hereinafter Brief of Association on American Indian Affairs].

Peyote grows in small buttons on the top of the Lophophora williamsii, a small cactus found primarily in northern Mexico and the Rio Grande Valley of Texas. *Woody*, 61 Cal. 2d. at 720-21, 394 P.2d at 816-17, 40 Cal. Rptr. at 72-73. It contains mescaline, which gives peyote its hallucinogenic properties. *Id.* When swallowed, peyote causes a variety of hallucinations, depending upon the user, including heightened sensitivity or distortion of colors and sounds, heightened aesthetic appreciation, revelations of truth, and increased comprehension. *Id.* Additionally, peyote induces feelings of euphoria and engenders strong feelings of love and friendliness towards others. *Id.* Peyote, however, has a horrible, bitter taste, often causing those who ingest it to vomit immediately after chewing it. *See Smith*, 110 S. Ct. at 1619 n.7 (Blackmun, J., dissenting) (citing E. ANDERSON, PEYOTE: THE DIVINE CACTUS 161 (1980) and explaining that unpleasant side effect discourages recreational use).

During the peyote ceremony, which typically convenes at sundown on Saturday and continues until sunrise the next morning, members of the Church ingest peyote to give thanks for past good fortune and to find guidance for future conduct. *Woody*, 61 Cal. 2d at 721, 394 P.2d at 817, 40 Cal. Rptr. at 73. Although whole families attend and partake in these ceremonies, children and young women do not ingest peyote. *Id.*

Before the members depart from the ceremony at sunrise on Sunday morning, they partake in a brief prayer, and the host of the ceremony and his family serve the members breakfast. *Id.* The effects of peyote wear off by Sunday morning; those who participate in the ritual do not experience any side effects. *Id.*

A variety of tribes including Navajos from Arizona and tribes from California, Montana, Oklahoma, Wisconsin, Oregon, and Saskatchewan, Canada practice Peyotism. *Id.* While there is no recorded dogma of the Church, the rituals and beliefs among adherents are quite similar. *Id.* A 1972 estimate showed membership in the Church to be approximately 300,000. *See* Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415, 416 (9th Cir. 1972) (finding regulation distinguishing two churches using sacramental peyote arbitrary on due process grounds). Peyotism began in Mexico and has spread throughout the United States and Canada. *Woody*, 61 Cal. 2d at 720-21, 394 P.2d at 816-17, 40 Cal. Rptr. at 72-73. Legend suggests that the religious use of peyote began with the Aztecan people of central Mexico. *See* Note, *Native American Religious Freedom*, *supra* note 109, at 423-24 (describing history of peyote use by Native Americans). Spanish historical sources from 1560 refer to Peyotism among Native Americans in Mexico. *Woody*, 61 Cal. 2d at 720-21, 394 P.2d at 816-17, 40 Cal. Rptr. at 72-73. There is definitive documentation that Peyotism was well-established in the United States during the late nineteenth century. *Id.*

128. Employment Div. v. Smith, 485 U.S. 660, 662 (1988) (*Smith I*).

sion of peyote a felony.[129] The respondents, Smith and Black, applied for unemployment compensation after being fired, but the Employment Division denied their claims.[130] The Employment Division determined that Smith and Black were ineligible to receive unemployment benefits because their termination resulted from work-related misconduct.[131] The Oregon Court of Appeals reversed the denial of benefits and the Oregon Supreme Court affirmed. The Oregon Supreme Court held that the denial of unemployment benefits to people fired as a result of practicing their religion violated the free exercise clause.[132] The court found the loss of unemployment benefits to be a substantial burden on the respondents' right to freely exercise their religion.[133] The court held that the state's financial interest in denying unemployment benefits was insufficiently compelling to overcome the respondents' constitutional rights.[134]

In 1987, the United States Supreme Court first heard the *Smith* case.[135] The Employment Division argued that denial of benefits to Smith and Black was valid because peyote consumption is illegal.[136] The Court agreed and remanded the case to the Oregon Supreme Court for a determination of whether Oregon's controlled substance laws provided an exemption for the religious use of peyote.[137] The United States Supreme Court reasoned that if a state criminally prohibits certain religiously motivated conduct without

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129. OR. REV. STAT. § 475.992(4) (1987). Oregon law prohibits possession of a "controlled substance" unless the substance was obtained directly from or pursuant to a valid prescription or order of a licensed medical practitioner. *Id.* The statute defines "controlled substance" as "a drug or its immediate precursor classified in Schedules I through V under the Federal Controlled Substances Act, 21 U.S.C. sections 811 to 812 . . . ." *Id.* The Oregon State Board of Pharmacy, under its statutory authority classifies peyote as a Schedule I drug. Employment Div. v. Smith, 110 S. Ct. 1595, 1597 (1990). Persons who knowingly or intentionally possess a Schedule I substance, under Oregon law, are "guilty of a Class B felony." OR. REV. STAT. § 475.992(4)(a) (1987).

130. *Smith*, 110 S. Ct. at 1598.

131. *Id.* The Court in *Smith I* noted that the Oregon Administrative Rules define misconduct as "a willful violation of the standards of behavior which an employer has the right to expect of an employee." *Smith I*, 485 U.S. at 664 (quoting OR. ADMIN. R. 471-30-038(3) (1987)). The Oregon Revised Statutes state that if an employee is terminated for "misconduct," unemployment compensation is not available. OR. REV. STAT. § 657.176(2)(a) (1987).

132. Smith v. Employment Div., 301 Or. 209, 217-19, 721 P.2d 445, 449-50 (1986), *reh'g denied*, 110 S. Ct. 2605 (1990).

133. *Id.* at 218, 721 P.2d at 450 (citing *Sherbert v. Verner* and *Thomas v. Review Board* to require state to demonstrate compelling interest).

134. *Id.* at 219-20, 721 P.2d at 450-51 (noting that legality of peyote is not relevant to respondent's first amendment claim).

135. Employment Div. v. Smith (*Smith I*), 485 U.S. 660 (1988).

136. *Id.* at 663 n.5.

137. *Id.* at 673-74. The Oregon Supreme Court had not decided whether the state's proscription of peyote was enforceable against the Native American Church. Whether the state allowed an exemption for religious use of peyote was, therefore, an issue of dispute between the parties. *Id.*

violating the first amendment, it may impose the lesser burden of denying benefits to persons who engage in that conduct.[138] Thus, the Court implied that the relevant issue was whether the free exercise clause required Oregon to exempt the Native American Church from the state's law criminalizing peyote possession.[139]

On remand, the Oregon Supreme Court held that the statute makes no exception for religiously inspired use of peyote.[140] The court, however, reaffirmed its previous ruling that the first amendment prohibited the state from denying unemployment benefits to Smith and Black for the religious use of peyote.[141] The United States Supreme Court again granted certiorari.[142] The issue to be addressed this time was whether the United States Constitution requires Oregon to exempt the sacramental use of peyote from its general law proscribing peyote possession.[143]

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138. *Id.* at 670.

139. *Id.* at 672-73 (declining to decide constitutionality of this issue if Oregon exempted Native American Church from law).

140. Smith v. Employment Div., 307 Or. 68, 72-73, 763 P.2d 146, 147-48 (1986), *reh'g denied*, 110 S. Ct. 2605 (1990).

141. *Id.*

142. 109 S. Ct. 1526 (1989).

143. Employment Div. v. Smith, 110 S. Ct. 1595, 1597 (1990).

The respondents argued that because there is no proof that moderate use of peyote is dangerous, there is no compelling state interest in preventing religious use of the substance. Brief for Respondents at 27, Employment Div. v. Smith, 110 S. Ct. 1595 (1990) (No. 88-1213) [hereinafter Respondents' Brief]; *see also* Oral Argument of Respondents at 36-37, Employment Div. v. Smith, 110 S. Ct. 1595 (1990) (No. 88-1213) (Anderson Reporting Co.) [hereinafter Respondents' Oral Argument] (referring to question of whether free exercise clause permits state prohibition of sacramental peyote use as issue presented in case). The respondents also stated that peyote, unlike marijuana, is not widely used or distributed. *See* Respondents' Brief, *supra*, at 28-29 (explaining that drug enforcement officials seize less than three pounds of peyote per year); *see also* Respondents' Oral Argument, *supra*, at 43 (arguing that peyote does not contribute to drug enforcement problems). Thus, the respondents claimed that granting a religious exemption for peyote would not frustrate the state's interest in controlling its use outside the religious context. Respondents' Brief, *supra*, at 36; *see also* Respondents' Oral Argument, *supra*, at 37 (stating that state has conceded that sincere religious belief exists in this case).

The petitioner argued that the state's interest was compelling. Brief for Petitioner at 11, Employment Div. v. Smith, 110 S. Ct. 1595 (1990) (No. 88-1213) [hereinafter Petitioner's Brief]; *see also* Oral Argument of Petitioner at 11-12, Employment Div. v. Smith, 110 S. Ct. 1595 (1990) (No. 88-1213) [hereinafter Petitioner's Oral Argument] (focusing on powerful and potent effects of peyote and fact that all jurisdictions regulate its use). During oral argument, petitioner argued that because peyote is an unpredictable drug and indistinguishable from other hallucinogens, the state of Oregon chose to regulate it without exemption. Petitioner's Oral Argument at 11-12. The petitioner concluded it was impossible to serve both the state's interest and accommodate the respondent's religion. Petitioner's Brief, *supra*, at 16 (concluding that accommodation is impossible because those who use peyote for religious use are not necessarily set apart from those who use it for other purposes).

Before the ruling in *Smith*, a number of state courts had addressed the issue of sacramental peyote use and its relationship to the free exercise clause. In 1926, the Montana Supreme Court held that the first amendment of the United States Constitution did not require the Montana legislature to exempt peyote use by members of the Native American Church from its law proscribing possession of peyote. State v. Big Sheep, 75 Mont. 219, 239, 243 P. 1067, 1073 (1926). The Montana Supreme Court reasoned that the free exercise clause protects

B. *The Supreme Court's Decision*

In a six-three decision, the Supreme Court held that the United States Constitution does not require states to exempt sacramental peyote use from their drug laws.[144] Only five justices, however, agreed that the strict scrutiny test should no longer apply to neutral laws that inhibit the free exercise of religion.[145] The majority opin-

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practices that are inconsistent with the good order, peace, or safety of the state. *Id.* In *State v. Soto*, the Oregon Court of Appeals prevented an application of the *Sherbert* balancing test by refusing to allow any evidence demonstrating that Soto's possession of peyote was for use in a religious ceremony. State v. Soto, 21 Or. App. 794, 799-800, 537 P.2d 142, 144 (1975).

Other courts, however, have held that sacramental peyote use is protected by the free exercise clause. The Oklahoma Court of Appeals applied the *Sherbert* balancing test and found no compelling state justification for inhibiting the rights of Native American Church members. Whitehorn v. State, 561 P.2d 539, 544-45 (Okla. Crim. App. 1977). Similarly, the California Supreme Court applied the *Sherbert* test and found that the state failed to demonstrate any harmful consequences to those who use peyote for religious purposes. People v. Woody, 61 Cal. 2d 716, 723, 394 P.2d 813, 818, 40 Cal. Rptr. 69, 74 (1964). Additionally, the court found that California's ability to enforce its peyote laws for non-religious purposes would not be frustrated by exempting religious peyote use. *Id. See generally* Note, *Native American Religious Freedom*, *supra* note 109, at 425-45 (discussing state court treatment of free exercise clause and religious use of peyote and other drugs by both Native Americans and non-Native Americans).

Congress expressed a concern for the fate of Native American religions by passing the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996 (1988). AIRFA provides in pertinent part that:

> [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, *use and possession of sacred objects*, and the *freedom to worship through ceremonies and traditional rites*.

Id. (emphasis added). Congress acknowledged that certain substances, such as peyote, "have religious significance because they are sacred, they have power, they heal, they are necessary to the exercise of the rites of the religion, they are necessary to the cultural integrity of the tribe, and, therefore, religious survival." H.R. REP. No. 1308, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1262, 1263.

AIRFA is not self-enforcing. AIRFA, 42 U.S.C. § 1996 (1988). The Act directs various federal departments, agencies, and other bodies responsible for administering relevant laws to consult with Native American religious leaders and formulate policies to determine what changes are necessary to preserve the Native American culture and protect its religious practices. *See* Comment, *Judicial Scrutiny*, *supra* note 109, at 181-84 (providing detailed discussion of AIRFA and noting that Act does not impose penalties for non-compliance and does not establish standards of judicial review of federal agency decisions).

The federal government further protects the Native American Church by exempting bona fide religious peyote use from classification as a Schedule I controlled substance. 21 C.F.R. § 1307.31 (1990). Church members engaged in the use of peyote for religious purposes, therefore, are immune from prosecution under the federal Controlled Substances Act which criminalizes, among other substances, the use and possession of peyote. 21 U.S.C. § 812(c)(12) (1988).

The Supreme Court in *Smith* did not mention AIRFA nor the exemption of the Native American Church from the federal law criminalizing peyote. Accordingly, the Court did not find that AIRFA or the federal exemption prevents states from outlawing use of peyote for sacramental purposes. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1595-1606 (1990) (failing to discuss AIRFA or exemption). *But see id.* at 1622 (Blackmun, J., dissenting) (asserting that majority's opinion makes both free exercise clause and AIRFA "an unfulfilled and hollow promise").

144. Employment Div. v. Smith, 110 S. Ct. 1595, 1602 (1990).

145. Chief Justice Rehnquist, and Justices White, Stevens, Scalia, and Kennedy joined the

ion, written by Justice Scalia, found that the "text" of the first amendment does not mandate a ruling in favor of the respondents.[146] The first amendment to the Constitution, which forbids government prohibition of the free exercise of religion, only prevents the government from intentionally punishing or compelling religious beliefs or practices.[147] To find that the first amendment protects religious interests incidentally burdened by a neutral law, reasoned the Court, carries the meaning of the first amendment beyond its intended scope.[148] The majority concluded that a society consisting of diverse religious groups cannot afford the "luxury" of granting exemptions, under the strict scrutiny test, to neutral state laws that burden the free exercise of religion.[149]

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opinion of the Court. Justice O'Connor concurred. Justices Brennan, Blackmun, and Marshall joined Parts I and II of the concurrence. *Id.* at 1597. Justice Blackmun dissented, joined by Justices Brennan and Marshall. *Id.*

146. *Id.* at 1599.

147. *Id.*

148. *Id.*

149. *Id.* at 1605. Presently, Congress is considering the Religious Freedom Restoration Act of 1990, which would codify the strict scrutiny test. *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 136 CONG. REC. D1202 (daily ed. Sept. 27, 1990).

In a recent article discussing the role of religion-based exemptions from neutral laws in United States legal history, Professor McConnell of the University of Chicago Law School argued that the framers of the Constitution believed religious exemptions were necessary to satisfy the commitment to religious pluralism among the states. McConnell, *supra* note 14, at 1515-16. He argued that James Madison contemplated religious factions as "a source of peace and stability." *Id.* at 1515 (discussing THE FEDERALIST Nos. 10 and 51 (J. Madison)). Because of the inherent checks and balances in a system with many factions, no one group, no matter how intolerant or fanatical, is capable of oppressing any other group. *Id.* This perspective, argued Professor McConnell, "is consistent with an aggressive interpretation of the free exercise clause, which protects the interests of religious minorities in conflict with the wider society and thereby encourages the proliferation of religious factions." *Id.* Accordingly, granting an exemption to the respondents in *Smith* would not be a "luxury," as the Supreme Court characterized it, but rather would be necessary to further the vision of religious pluralism upon which the first amendment, and indeed, our nation, was founded. *See id.* (extolling virtue of encouraging proliferation of number of religious groups and increasing vigor of small ones).

Conversely, in *Lyng v. Northwest Indian Cemetery Protective Association*, the Court cited THE FEDERALIST No. 10 to support its refusal to compel the federal government to accommodate the religious interests of the claimants. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988). The Court noted that THE FEDERALIST No. 10 suggests that the evils of religious factionalism are best restrained through competition among religious sects. *Id.* The Court, however, cited No. 10 after the Court's contention that "[t]he Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions." *Id.* Thus, the *Lyng* Court used THE FEDERALIST No. 10 to support a proposition, very similar to the proposition in *Smith*, that religious accommodation must be left to the political process. Employment Div. v. Smith, 110 S. Ct. 1595, 1606 (1990).

The Court in *Smith* did not replace the compelling state interest test with a rational basis test. *Id.* at 1603. As the issue in the case involved neutral, generally applicable laws, the Court did not need to articulate a rational basis test. The Court stated that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that

The Court surveyed Supreme Court free exercise jurisprudence to support its interpretation of the first amendment as having an intended limited scope. The Court cited *Reynolds v. United States*,[150] the nineteenth century decision which asserted that allowing a person to violate laws contrary to one's religious belief elevates religious belief above the law and, in effect, "permits every citizen to become a law unto himself."[151] The Court also cited *Lee*, *Lyng*, and *Roy* as examples of the Court's recent movement away from applying the strict scrutiny test.[152]

With extraordinary rigor, the majority distinguished *Smith* from each case that suggested the religious use of peyote should be exempt from generally applicable laws proscribing its use.[153] The Court noted that the compelling state interest test enunciated in *Sherbert* and applied in *Thomas* and *Hobbie* has only been used to invalidate government action in the context of unemployment compensation.[154] Although the basis of the respondents' claim in *Smith* was a request for unemployment compensation, the Court held that the *Sherbert* test did not apply because the challenged law was a criminal prohibition.[155] The majority stated that regardless of whether the Court wished to extend *Sherbert* beyond the confines of unemployment compensation, it would not apply the compelling state in-

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his religion proscribes (or prescribes).'" *Id.* at 1600. *But see* Bowen v. Roy, 476 U.S. 693, 707-08 (1986) (advocating rational basis test as standard of review for free exercise challenges to uniformly applied governmental benefits requirements).

150. 98 U.S. 145 (1879); *see supra* notes 21-27 and accompanying text (discussing *Reynolds*).

151. Employment Div. v. Smith, 110 S. Ct. 1595, 1600 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879)). The Court also cited a variety of other pre-*Sherbert* cases which upheld legislation against free exercise challenges. *Smith*, 110 S. Ct. at 1600; *see, e.g.*, Gillette v. United States, 410 U.S. 437, 461 (1971) (upholding military selective service system against challenge by persons opposing conscription on religious grounds); Braunfeld v. Brown, 366 U.S. 599, 609 (1961) (plurality opinion) (upholding Sunday closing law against claim that law burdened those who worship on Saturday); Prince v. Massachusetts, 321 U.S. 158, 171 (1944) (holding that mother can be prosecuted under child labor laws for using child to distribute religious literature).

152. *Smith*, 110 S. Ct. at 1602-03; *see supra* notes 78-120 and accompanying text (discussing *Lee*, *Lyng*, and *Roy*).

153. *Id.* at 1599-1603.

154. *Id.* at 1602; *see supra* notes 52-60 and accompanying text (discussing *Thomas* and *Hobbie*).

155. *Id.* at 1603.

The Court also distinguished *Sherbert* because of the "good cause" provision in the statute reviewed in *Sherbert*. *Id.* The Court in *Smith* reasoned that because South Carolina maintained a mechanism for exemptions, denying unemployment compensation because the claimant lacked "good cause" enabled the state to discriminate against religions it did not deem worthy of accommodation. *Id.* Using this logic, the Court distinguished *Smith* from *Sherbert*, arguing that *Sherbert* involved a direct act of religious discrimination, whereas in *Smith*, there was no discrimination, but only incidental impact. *Id.* The free exercise clause protects the former, reasoned the Court, but the first amendment's scope does not extend to neutral laws that incidentally impact religious liberty. *Id.*

terest test to require an exemption from a neutral criminal law.[156]

The Court in *Smith* also distinguished *Yoder*. In *Yoder*, the Court exempted the Amish from a generally applicable, neutral criminal law that incidentally burdened the free exercise rights of the Amish.[157] The Court found that the state's interest in requiring Amish children under the age of sixteen to attend school was not compelling, and that the state's general interest in education could have been accommodated by less restrictive means.[158] The respondents in *Smith* argued that the peyote ritual is vital to the Native American Church.[159] Thus, like the Amish in *Yoder*, the Native American Church is severely burdened by a criminal law the application of which does not affect the free exercise rights of the vast majority of people who come under its control.[160] The Court in *Smith*, however, claimed that in *Yoder*, the state was required to demonstrate a compelling interest only because the case was a "hybrid," involving not only a free exercise claim, but a free exercise claim combined with parental rights.[161] The majority opinion did not address why a free exercise claim, in order to receive protection, must be made in conjunction with another right not specifically enumerated in the Constitution.[162]

The philosophical, jurisprudential thread that ties the majority opinion together in *Smith* is adherence to the doctrine of judicial restraint.[163] The Court concluded that because the text of the Con-

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156. *Id.* The Court implied that the *Sherbert* test would no longer be applicable for review of criminal laws. *Id.* The Court, however, attacked *Sherbert* on a broader basis throughout the opinion. *See id.* at 1602-04 (describing limited applicability of *Sherbert*). The message of *Smith* is that all neutral, generally applicable laws will now be immune from any free exercise challenge. *See id.* at 1600 (maintaining that religious beliefs have never exempted individuals from "compliance with an otherwise valid law prohibiting conduct that the state is free to regulate").

157. *See Smith*, 110 S. Ct. at 1601; *see also supra* notes 61-72 and accompanying text (discussing *Yoder*).

158. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

159. Employment Div. v. Smith, 110 S. Ct. 1595, 1613 (1990) (O'Connor, J., concurring).

160. *See id.* (noting that Oregon's prohibition on peyote presents members of Native American Church with choice between facing criminal sanctions or refraining from practice of their religion).

161. *Id.* at 1601-02. The right of parents to direct the education of their children was established in Pierce v. Society of Sisters, 268 U.S. 510 (1925). The Court also argued that *Cantwell v. Connecticut* was a "hybrid" decision involving free exercise and free speech. *Smith*, 110 S. Ct. at 1601.

162. *See id.* at 1601-02 (stating that only when free exercise has been linked with another constitutional right has first amendment barred application of generally applicable law to religiously motivated activity).

163. *See id.* at 1606 (stating that religious accommodation is role of legislature, not courts).

Judge Wallace of the United States Court of Appeals for the Ninth Circuit stated that

> [T]he overall and abstract conception of judicial restraint . . . is that to avoid usurping the policymaking role of democratically elected bodies and officials, a judge should always be hesitant to declare statutes or governmental actions unconstitu-

stitution does not compel a holding in favor of the Native American Church, the decision to grant an exemption for religious use of peyote should be left to the democratic political process, not the judiciary.[164] The Court warned that society would be "courting anarchy" if every person claiming that a law or government practice offends his or her religious beliefs were able to have the law or practice invalidated by the courts.[165] The danger of anarchy increases, reasoned the Court, as the diversity of religious consciences increases.[166]

The majority opinion in *Smith* indicated a preference for democratic majoritarian government over individual rights.[167] The Court acknowledged that minority religions will be at a "relative disadvantage" if their destinies are left to majoritarian choices.[168] The majority stated, however, that this disadvantage is an "unavoidable consequence of democratic government," and is preferable to a system in which every "conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[169] The Court reasoned that making an individual's duty to obey the law contingent upon the government demonstrating a compelling state interest would produce a "constitutional anomaly" that contradicts both constitutional tradi-

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tional and cautious to supplement or modify statutes when construing them. Courts should make as little social policy as possible consistent with deciding properly presented controversies.

Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 8 (1981).

164. *Smith*, 110 S. Ct. at 1606.

165. *Id.* at 1605. The Court argued that to presumptively invalidate all neutral laws that burden the free exercise of religion would affect every conceivable kind of civic obligation. *Id.* The Court listed an array of areas that potentially would be subjected to free exercise exemptions: compulsory military service, payment of taxes, social welfare legislation, health and safety regulations, compulsory vaccination laws, drug laws, traffic laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity among the races. *Id.* at 1605-06.

166. *Id.* at 1605. Contrary to the view of the United States Supreme Court in *Smith*, the California Supreme Court, in *People v. Woody*, found that the protection of religious groups through constitutional exemptions would enrich our culture by providing diversity and enhancing self-expression. People v. Woody, 61 Cal. 2d 716, 725-26, 394 P.2d 813, 821-22, 40 Cal. Rptr. 69, 76-77 (1964). The California court stated:

> In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan . . . .

Id.

167. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1606 (1990).

168. *Id.*

169. *Id.*

tion and common sense.[170]

C. *Justice O'Connor's Concurrence*

Justice O'Connor concurred in the result of *Smith*, reasoning that Oregon has a compelling state interest in controlling drug abuse and that a religious exemption to the law proscribing peyote would frustrate Oregon's interest.[171] Justice O'Connor, however, vehemently disagreed with the Court's abrogation of the compelling state interest test.[172] According to Justice O'Connor, the decision departs from first amendment jurisprudence and our Nation's commitment to religious freedom.[173]

While the majority meticulously examined each free exercise case applying the strict scrutiny test to find some element that distinguished it from *Smith*, Justice O'Connor examined free exercise doctrine as a whole. She found that the essence of prior freedom of religion cases reveals a commitment to the protection of religious liberty by requiring government to accommodate religious liberty wherever possible.[174] According to Justice O'Connor, the free exer-

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170. *Id.* at 1603-04. Justice O'Connor argued in the concurring opinion that "[t]here is nothing talismanic about neutral laws of general applicability" and that the strict scrutiny test should be applied because "the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a 'constitutional norm,' not an anomaly." *Id.* at 1612 (O'Connor, J., concurring). The Court turned this argument against Justice O'Connor, noting that in the area of racial discrimination, when a neutral law disproportionately disadvantages a particular race, the government is not required to justify the law or practice with a showing of a compelling state interest. *Id.* at 1604 n.3 (citing Washington v. Davis, 426 U.S. 229 (1976)). Likewise, argued the Court, neutral laws that have the effect of inhibiting free speech are not subject to first amendment strict scrutiny. *Id.* (citing Citizen Publishing Co. v. United States, 394 U.S. 131 (1969)). Although the Court's analogy is persuasive, the fact that *Smith* is in accord with a trend away from active protection of civil rights is not comforting. The Court implied that it will extend constitutional protection to civil rights only in cases where discrimination can be clearly shown. *See id.* (reviewing cases that show Court has not offered constitutional protection in civil rights area when laws have effect of interfering with constitutional rights). The vast majority of constitutional challenges, however, are brought against neutral but indifferent laws. *See id.* at 1608 (O'Connor, J., concurring) (noting that "our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice"). Rarely will a government violate civil rights with a blatantly discriminatory law. *Id.* (O'Connor, J., concurring). In the vast majority of cases where free speech, racial equality, or religious liberty are infringed, there will be no means of redress—no requirement that the government show a compelling state interest to justify a law that burdens civil rights. *See id.* (O'Connor, J., concurring) (noting that for first amendment to have any vitality, it must apply to more than merely those cases where state has directly targeted religious activity).

171. *Id.* at 1615 (O'Connor, J., concurring).

172. *Id.* at 1606 (O'Connor, J., concurring). Justices Brennan, Marshall, and Blackmun agreed with Justice O'Connor that the strict scrutiny standard should remain as the protector of religious liberty in this country. *Id.* (Brennan, J., Marshall, J., and Blackmun, J., concurring).

173. *Id.* (O'Connor, J., concurring).

174. *See id.* at 1608 (O'Connor, J., concurring) (advocating application of compelling state interest test). Justice O'Connor chastised the majority for its erroneous interpretation and recharacterization of precedent. *See id.* at 1609-10 (O'Connor, J., concurring) (stating that

cise clause requires a government to justify, under the compelling state interest test, all laws that have the effect of either coercing or prohibiting religious beliefs or practices.[175]

Justice O'Connor acknowledged that only religious beliefs receive absolute first amendment protection, but she argued that because belief and conduct are not neatly distinguishable and because the first amendment does not differentiate between belief and conduct, the Constitution presumptively protects religious conduct.[176] Any law that prohibits a particular religious practice, reasoned Justice O'Connor, necessarily inhibits the right to freely exercise one's religion.[177] Justice O'Connor argued that the majority ignored the protected status of religious conduct and baselessly eliminated the well-entrenched protector of both religious conduct and belief, the compelling state interest test.[178]

Unlike the majority, Justice O'Connor did not fear that granting religious exemptions to otherwise valid laws would result in anarchy or the opening of the floodgates of litigation.[179] She argued that

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Court eschewed principles of prior decisions by labeling them "hybrid" cases). She asserted that what the majority labeled hybrid decisions—*Yoder* and *Cantwell*—expressly relied on the free exercise clause. *Id.* at 1609 (O'Connor, J., concurring). Additionally, Justice O'Connor reminded the majority that although many free exercise cases have been resolved in favor of the government interest, the compelling state interest test was applied to afford religious interests the weight they deserve when balanced against state interests. *Id.* (O'Connor, J., concurring) (stating that mere rejection of prior free exercise claims should not call into question validity of first amendment doctrine). Justice O'Connor criticized the majority because it overruled established free exercise precedent on the basis of the "win-loss record" of past claimants, rather than on the substantive standards applied in those cases. *Id.* at 1610 (O'Connor, J., concurring).

Contrary to the majority's interpretation of recent case law, Justice O'Connor argued that recent decisions have affirmed that the compelling state interest test is entrenched in first amendment doctrine. *Id.* at 1611 (O'Connor, J., concurring). Justice O'Connor noted that the strict scrutiny test was not applied in *Roy* and *Lyng* because those cases did not involve government coercion or prohibition of conduct, but rather involved the plaintiffs' requests for the government to structure its policy in a way that was not offensive to their religious beliefs. *Id.* at 1611-12 (O'Connor, J., concurring). *Roy* and *Lyng*, therefore, did not reject the compelling state interest test. *Smith*, 110 S. Ct. at 1611 (O'Connor, J., concurring). Those cases can be distinguished from cases involving coercion or prohibition of religious conduct, such as *Smith*, *Sherbert*, or *Yoder*. *Id.* at 1611-12 (O'Connor, J., concurring). Similarly, Justice O'Connor argued that the other cases cited by the majority to support the proposition that the compelling state interest test should no longer be applied to neutral laws arose in contexts in which the government has traditionally not been required to justify the burden on a religious interest. *Id.* at 1612 (O'Connor, J., concurring); *see* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (applying reasonableness test to prison regulations infringing upon religious practices); Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (upholding Army policy prohibiting wearing head covering, even as applied to Jewish soldier's wearing of yarmulke).

175. Employment Div. v. Smith, 110 S. Ct. 1595, 1610 (1990) (O'Connor, J., concurring).

176. *Id.* at 1608 (O'Connor, J., concurring).

177. *Id.* (O'Connor, J., concurring).

178. *See id.* at 1613 (O'Connor, J., concurring) (arguing that majority's reasoning for abandoning compelling interest analysis is faulty).

179. *See id.* at 1612-13 (O'Connor, J., concurring) (noting that majority's "parade of horribles" was inadequate basis for discarding compelling interest test).

the first amendment requires a fact sensitive, case-by-case determination of whether the state's interest is compelling and whether there are less restrictive means available to achieve that interest.[180] This analytical approach is a constitutional norm, not the anomaly the Court feared.[181] Justice O'Connor further argued that accommodation of religious practices should not be left to the political process.[182] The Bill of Rights was enacted precisely to protect the free exercise of religion from the "vicissitudes of political controversy."[183]

After discussing the majority's wrongful abandonment of the compelling interest test, Justice O'Connor, in Part III of her concurring opinion, reasoned that if the test was applied in *Smith* to Oregon's criminal prohibition of peyote, Oregon would have satisfied this test.[184] She, therefore, concurred in the result but not in the reasoning reached by the majority that the Constitution does not require Oregon to exempt the sacramental use of peyote from its controlled substance laws.[185] Unlike the majority, however, Justice O'Connor balanced the state's interest in controlling the use of peyote against the respondents' free exercise interests to reach her conclusion.[186] She argued that uniform application of Oregon's criminal prohibition of peyote use is necessary to accomplish the state's goals of controlling drug abuse and protecting its citizens from the harms associated with drug use.[187]

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180. *Id.* at 1611, 1613 (O'Connor, J., concurring) (noting that courts are capable of applying free exercise precedent and balancing religious liberties against state interests).

181. *Id.* at 1612 (O'Connor, J., concurring).

182. *Id.* at 1613 (O'Connor, J., concurring) (noting that majoritarian rule has had harsh impact on unpopular or emerging religious groups such as Jehovah's Witnesses and Amish).

183. *Id.* at 1613 (O'Connor, J., concurring) (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

184. *Id.* at 1615 (O'Connor, J., concurring).

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

186. *Id.* at 1614 (O'Connor, J., concurring).

187. *Id.* at 1614-15 (O'Connor, J., concurring). Although Justice O'Connor's concurrence stressed the importance of safeguarding religious liberty, she has given broad deference to the state's asserted compelling interest in each free exercise case in which she has participated. *See supra* notes 101-20 and accompanying text (discussing Justice O'Connor's role in *Lyng* and *Roy*). The language of the *Smith* concurrence suggests a commitment to individual rights, but it must be noted that the concurring opinion in *Smith*, like the majority opinion in the case, would devastate the Native American Church. *See Smith*, 110 S. Ct. at 1606 (conceding that approach adopted in *Smith* places members of minority religious group at "relative disadvantage"); *id.* at 1615 (O'Connor, J., concurring) (voicing agreement with majority that constitutionality of law infringing upon religion should not turn on centrality of particular practices to faith). Justice O'Connor's concurrence demonstrates that even under an application of the *Sherbert* balancing test, the Court may rule against individual free exercise interests by affording little weight to the religious interests and great weight to the competing governmental interest. *See* Comment, *Free Exercise in the 1980s*, *supra* note 24, at 516 (asserting that weights assigned to each interest in balancing process "is critical to the outcome of the decision"). If the Court assesses the government's burden of granting an exemption by looking to the effect of a single exemption, then the individual interest may be meaningfully weighed

D. The Dissent

Justice Blackmun, joined by Justices Brennan and Marshall, dissented from the Court's judgment.[188] The dissent agreed with Justice O'Connor's concurring opinion that the Court should have reviewed Oregon's law proscribing peyote use among Native American Church members under the compelling state interest test.[189] The dissent argued, however, that Oregon did not satisfy this test, and that the United States Constitution requires the respondents' religious use of peyote to be exempt from criminal drug laws.[190]

Rather than weighing the state's broad interest in controlling drug abuse against the respondents' free exercise claim, the dissent argued that past precedent requires a narrow inquiry.[191] Thus, the issue in the case was whether the state's interest in preventing the religious use of peyote, rather than the state's interest in controlling drug use generally, outweighed the respondents' free exercise rights.[192]

The dissent contended that the state's interest in proscribing peyote use among the Native American Church is weak[193] and largely

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against the governmental interest. *Id.* On the other hand, if the Court balances the individual interest against the broad societal interest served by the law or governmental action in question, the Court will most likely refuse to protect the individual interest. *Id.*; *see also Smith*, 110 S. Ct. at 1617 (Blackmun, J., dissenting) (stating that state's interest should be interpreted narrowly to give meaning to free exercise rights); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 465-66 (1988) (Brennan, J., dissenting) (arguing that Court cannot justifiably interpret state interest to define away rights); *see also supra* notes 37-39 (discussing Court's application of *Sherbert* balancing test and various commentators' views regarding Court's use of balancing test).

None of the justices joined Part III of Justice O'Connor's concurrence. Five justices agreed to eliminate the compelling state interest test. *See id.* at 1602 (writing for majority, Justice Scalia, joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy, declined to apply *Sherbert* balancing test). Three justices believed that the test should be retained and that Oregon's law did not meet the strict standards of the test. *Id.* at 1616 (Blackmun, J., dissenting) (writing in dissent, Justice Blackmun, joined by Justices Brennan and Marshall, maintained that compelling state interest test is applicable and under that test, Oregon's law does not pass muster). Of the six justices who decided to reject the respondents' claims in *Smith*, only Justice O'Connor argued that the state's interest in regulating peyote use was compelling. *Id.* at 1615 (O'Connor, J., concurring). The majority did not discuss the weight of the state's specific interest in controlling drug use, but rather found that the state's general interest in structuring generally applicable laws must be immune from constitutional challenge. *Id.* at 1600.

188. Employment Div. v. Smith, 110 S. Ct. 1595, 1615 (1990) (Blackmun, J., dissenting).

189. *Id.* at 1615-16 (Blackmun, J., dissenting). *But see supra* notes 41 & 60 (discussing commentators who advocate eliminating strict scrutiny as standard of review in free exercise cases).

190. *Id.* at 1617-18 (Blackmun, J., dissenting).

191. *Id.* at 1617.

192. *Id.*

193. *See supra* note 127 and accompanying text (discussing peyote ritual as beneficial, rather than harmful activity). The dissent noted that the Church confines its peyote use to specific ceremonial occasions. *Smith*, 110 S. Ct. at 1619 (Blackmun, J., dissenting). Children do not partake in the ritual, nor do unwilling members of the Church. *Id.* at 1619 (Blackmun,

symbolic.[194] Only one reported case exists in which Oregon sought to prosecute an individual for sacramental peyote use.[195] The state's claim that it has a compelling interest in preventing religious peyote use cannot seriously withstand strict scrutiny, argued Justice Blackmun, because Oregon does not enforce the criminal prohibition of peyote against the Native American Church.[196] On the other

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J., dissenting). Anyone who uses peyote outside the religious context is seriously reprimanded. *Id.* (Blackmun, J., dissenting). Additionally, noted the dissent, Oregon presented no evidence to prove that peyote use within the Native American Church is dangerous to its members. *Id.* at 1618 (Blackmun, J., dissenting). In fact, the social support associated with membership in the Church and participation in its rituals involving peyote is a positive experience for the members that promotes brotherly love, care of family, self-reliance, and avoidance of alcohol. *Id.* at 1619 (Blackmun, J., dissenting) (citing Brief of Association on American Indian Affairs, *supra* note 127, at 33-34 (quoting Native American Church membership card)). Alcoholism, however, has had tragic effects on Native Americans. *Id.* at 1619 (Blackmun, J., dissenting). Evidence suggests a direct correlation between religious peyote use and abstinence from alcohol. *Id.* at 1620 (Blackmun, J., dissenting) (citation omitted). The dissent also argued that because the frequency of illegal trafficking of peyote is negligible, exemptions for the Native American Church would not present a law enforcement problem. *Id.* (Blackmun, J., dissenting).

At first blush, the dissent appears to advocate a usurpation of the role of state legislatures in its assertion that the state's interest is not sufficiently compelling to withstand strict scrutiny. *Id.* at 1620-21 (Blackmun, J., dissenting). The role of the judiciary is not to make legislative decisions. *See generally* U.S. CONST. art. III (vesting adjudicatory, not legislative power in judiciary). Courts, however, do not exceed their authority when they engage in strict scrutiny evaluations. *See supra* notes 37-76 and accompanying text (discussing strict scrutiny test as well-established and widely-accepted method of free exercise judicial review). The role of the Court is to decide whether assigned burdens of persuasion have been met. *See supra* notes 37-76 and accompanying text (describing process of applying strict scrutiny to religion cases). The dissent in *Smith* merely argued that the Constitution demands a state to satisfy a heavy burden when a free exercise right is implicated and that, in this case, the state did not meet its assigned burden. *Smith*, 110 S. Ct. at 1618 (Blackmun, J., dissenting).

194. *Id.* at 1617 (Blackmun, J., dissenting). Oregon argued that if it granted an exemption to the Native American Church, then a flood of other claims for religion-based exemptions would arise. *Id.* at 1620 (Blackmun, J., dissenting). The state contended that it would then be faced with the dilemma of risking violation of the establishment clause in granting exemptions to some religions but not others. *Id.* (Blackmun, J., dissenting). The dissent argued that this claim can be made in every free exercise case and that similar claims have been rejected in the past. *Id.* (Blackmun, J., dissenting). The states' obligation not to favor a particular religion is satisfied when the compelling state interest test is applied uniformly to all free exercise claims. *Id.* at 1620-21 (Blackmun, J., dissenting); *see also supra* note 40 (discussing tension between establishment clause and free exercise clauses).

195. *Smith*, 110 S. Ct. at 1617 n.3 (citing State v. Soto, 21 Ore. App. 794, 537 P.2d 142 (1975), *cert. denied*, 424 U.S. 955 (1976)). *Smith* involved a refusal to grant unemployment benefits to employees fired for violating the criminal prohibition of peyote use, rather than a prosecution for peyote use. *Id.* at 1597-98.

196. *Id.* at 1616 n.2 (Blackmun, J., dissenting). The dissent criticized the Court for granting certiorari on the state's petition and deciding the constitutionality of applying the criminal prohibition of peyote against the Native American Church. *Id.* (Blackmun, J., dissenting). The dissent noted that Oregon did not criminally enforce the law and that the Unemployment Board did not rely on the criminal prohibition of peyote when it defended its denial of unemployment benefits to respondents before the state court. *Id.* (Blackmun, J., dissenting). The dissent stated:

> It is surprising, to say the least, that this Court which so often prides itself about principles of judicial restraint and reduction of federal control over matters of state law 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.

hand, explained the dissent, members of the Native American Church cannot practice their religion without peyote.[197] Peyote embodies the deity of the Native American Church; eating the plant is an essential act of worship.[198] The dissent concluded that because of the severe impact that Oregon's criminal prohibition of the use of peyote will have on the Native American Church and the comparatively weak state interest in enforcing the prohibition against the Church, Oregon's law, as applied to religious use of peyote, violates the free exercise clause of the first amendment.[199]

III. ANALYSIS OF *SMITH*

In the decade preceding *Employment Division v. Smith*,[200] the Supreme Court ruled in favor of the state in the majority of free exercise cases it considered.[201] In a case involving coercion or prohibition of religious practices incidental to a facially neutral law, however, precedent clearly indicates that the Court should apply the strict scrutiny test espoused in *Sherbert* and *Yoder*.[202] Although, with the exception of *Yoder*, the Court found a sufficiently compelling state interest in every case not involving unemployment benefits, before *Smith* there was at least a pretense that the government was required to accommodate religious interests whenever possible.[203].

After *Smith*, however, governments are not required to consider and accommodate religious interests when passing secular legislation.[204] Regardless of the effect upon a particular religion, the gov-

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Id.

As Justice O'Connor's concurring opinion noted, the Court also reached too far in its attack on the compelling state interest test. *Id.* at 1613 (O'Connor, J., concurring). The Court, argued Justice O'Connor, could have reached its desired result under the compelling state interest test and refrained from changing the course of free exercise doctrine. *Id.* (O'Connor, J., concurring).

197. *See id.* at 1622 (Blackmun, J., dissenting) (emphasizing importance of peyote ritual); *see also supra* note 127 and accompanying text (discussing peyote ritual); *Smith*, 110 S. Ct. at 1622 (Blackmun, J., dissenting) (describing peyote ritual); People v. Woody, 61 Cal. 2d 716, 721, 394 P.2d 813, 817, 40 Cal. Rptr. 69, 73 (1964) (discussing sacramental use of peyote).

198. *Smith*, 110 S. Ct. at 1622 (Blackmun, J., dissenting). The dissent believed that, because of the prohibition against the establishment of religion, the courts should refrain from questioning whether a particular religious practice is central to a religion. The dissent noted, however, that the courts must not "turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion." *Id.* at 1621 (Blackmun, J., dissenting).

199. *Id.* at 1622 (Blackmun, J., dissenting).

200. 110 S. Ct. 1595 (1990).

201. *See supra* notes 78-124 and accompanying text (discussing decline of free exercise protection).

202. *See supra* notes 37-76 and accompanying text (discussing compelling state interest test as well-established element of free exercise jurisprudence).

203. *See supra* notes 78-87 and accompanying text (discussing cases where Court found state's interest to satisfy compelling state interest test).

204. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1600 (1990) (explaining rationale for subjugating free exercise rights to secular, neutral legislation).

ernment is free to pass any law or engage in any practice that it deems necessary, as long as its motive is not discriminatory.[205] During the decade preceding *Smith* the vitality of *Sherbert*'s compelling state interest test was cast into doubt. Now, with the ruling in *Smith*, the Supreme Court has "rolled back" protections of individual free exercise rights.[206]

The *Smith* decision is misguided in four respects. First, the Court refused to apply the strict scrutiny test established in *Sherbert v. Verner*, even though it was directly applicable to the facts and issues in *Smith*.[207] Second, the Court surreptitiously overruled *Wisconsin v. Yoder* and subordinated its substance to the result the *Smith* Court intended to reach. It maintained that *Yoder* was inapplicable because *Yoder* involved both free exercise and parental autonomy claims.[208] The Court, however, based its decision in *Yoder* solely on the free exercise clause.[209] Third, by removing itself as the protector of religious liberty, the Court ignored the mandate of free exercise precedent. Viewed together, the free exercise cases spanning the past fifty years dictate that the Court play an active role in the protection of religious liberty.[210] The Court relinquished that role in *Smith*, and essentially shirked its responsibility as the mediator between majority rights and inadequately represented minority rights. Fourth, the Court's contention that society "court[s] anarchy" when

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205. *Id.* Presumably, the government would not be able to act completely arbitrarily, but would be required to show that any law or practice is rationally related to a permissible government objective. *See supra* note 149 (noting that rational basis is inherent in generally applicable laws). Such a test does not offer any realistic first amendment protection because free exercise cases invariably involve laws with valid purposes that are only offensive to the small minority of the people affected by the laws. *See Smith*, 110 S. Ct. at 1608-12 (O'Connor, J., concurring) (rejecting use of rational basis test).

206. *Smith* is in accord with the recent trend in the courts to reverse the constitutional safeguards constructed by the Warren Court and, to a lesser degree, by the Burger Court. *See, e.g.*, Richmond v. J.A. Croson Co., 109 S. Ct. 706, 730 (1989) (striking down affirmative action program); Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3057 (1989) (limiting right to abortion established in Roe v. Wade, 410 U.S. 113 (1973)); Bowers v. Hardwick, 478 U.S. 186, 195 (1986) (holding that scope of constitutional right of privacy does not include right to practice homosexual sodomy); *see also* Chemirinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 44-45 (1989) (stating that Rehnquist Court narrowed important rights constructed during Warren Court era and that many Rehnquist decisions "will profoundly affect human lives"); Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights Vision of the Constitution*, 43 VAND. L. REV. 409, 412 (1990) (arguing that majority of Rehnquist Court seeks to "revive" federalism "from the judicial activism of the Warren Court"); Comment, *Free Exercise in the 1980s*, *supra* note 24, at 516 (arguing that in area of free exercise, Court has become increasingly deferential to the government and less protective of individual rights).

207. *See supra* notes 37-60 and accompanying text (discussing *Sherbert*).

208. Employment Div. v. Smith, 110 S. Ct. 1595, 1601 (1990).

209. *See supra* notes 61-76 and *infra* notes 223-41 and accompanying text (discussing *Yoder*).

210. *See supra* notes 21-124 and accompanying text (discussing free exercise cases since 1940).

the judiciary weighs religious interests against state interests is a baseless exaggeration.[211] Thus, the Supreme Court's decision in *Employment Division v. Smith* is a devastating abridgment of the right to freely exercise one's religion.

A. The Court Disregarded the Mandate of Sherbert v. Verner

The Supreme Court manipulated well-established free exercise precedent to reach the result in *Smith*. *Sherbert* and its progeny established the compelling state interest test as a mechanism to protect individual free exercise rights.[212] The Court, however, contrived distinctions between *Smith* and *Sherbert* and held that the compelling state interest test should not be applied to neutral laws that incidentally impact the free exercise of religion.[213] In effect, *Smith* overruled *Sherbert* and its progeny and endorsed legislative indifference to the religious liberty rights of unpopular religions.

The unequivocal message of *Sherbert* was that whenever a law burdens the free exercise of religion, it must be subjected to strict scrutiny.[214] *Smith* acknowledged that the Court has "purported to apply the *Sherbert* test" in cases that did not involve unemployment.[215] The Court reasoned, however, that since the strict scrutiny test has never been applied to invalidate a law outside the unemployment compensation context, with the exception of *Yoder*, the test should not be applied beyond that context.[216] This reasoning contradicts the meaning of *Sherbert*. The Court in *Sherbert* did not limit the scope of its holding to the facts of that case. Rather, *Sherbert* established the broad principle that the state's interest must always be balanced against the free exercise rights of the claimant.[217]

The Court in *Smith* stated that its decision to abrogate the strict

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211. *See Smith*, 110 S. Ct. at 1617-21 (Blackmun, J., dissenting) (assessing realistic affect of granting exemption for religious use of peyote); *see also infra* notes 254-63 and accompanying text (rejecting Court's slippery slope argument).

212. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141-42 (1987) (applying strict scrutiny test to strike down denial of unemployment benefits to Seventh-day Adventist terminated for refusing to work on Sabbath); Thomas v. Review Bd., 450 U.S. 707, 718 (1981) (applying strict scrutiny test to strike down denial of unemployment benefits to Jehovah's Witness whose religious beliefs prevented him from manufacturing war weapons); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (finding unconstitutional, as applied to Amish, mandatory school attendance law conflicting with Amish religious practices and beliefs); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (holding that free exercise clause requires religious exemption from unemployment compensation laws); *see also supra* notes 37-76 and accompanying text (discussing *Sherbert* and progeny).

213. Employment Div. v. Smith, 110 S. Ct. 1595, 1603 (1990).

214. *See supra* notes 37-51 and accompanying text (discussing *Sherbert*).

215. *Smith*, 110 S. Ct. at 1602.

216. *Id.* at 1602-03.

217. Sherbert v. Verner, 374 U.S. 398, 406 (1963).

scrutiny test is in "accord with the vast majority" of precedent.[218] This statement is erroneous. The only fact in accord with cases that applied the strict scrutiny test to uphold a law is that the respondents in *Smith* were unsuccessful in their action.[219] It is the legal principle that emerges from a case, however, not the result, that gives a decision precedential value in subsequent cases.[220] The principle that emerged from the cases applying the *Sherbert* test was that the free exercise of religion is a highly valued constitutional right that cannot be infringed absent a compelling justification by the state.[221] By abandoning *Sherbert*, the Court in *Smith* clearly departed from "the vast majority of precedent."[222]

B. The Court Implicitly Overruled Wisconsin v. Yoder

In addition to eviscerating *Sherbert*, the Court implicitly overruled *Wisconsin v. Yoder*.[223] The Court stated that even if it were to apply the compelling state interest test beyond denials of unemployment compensation, it would never apply the test to a criminal law.[224] As the law challenged in *Yoder* was criminal, however, that case cannot be reconciled with *Smith*, and must be seen as having been effectively overruled.[225]

In *Smith*, the majority claimed that the Supreme Court has never held that religious beliefs relieve an individual from compliance with a neutral, generally applicable law.[226] *Yoder* directly contradicts this claim. The Court in *Yoder* stated that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[227] The Court in *Smith*, overlooking the explicit message of *Yoder*, explained that it was not bound by *Yoder* because that case was a "hybrid" decision involving both a free exercise claim and the parental right to direct the education of one's children.[228]

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218. *Smith*, 110 S. Ct. at 1603.
219. *See id.* (O'Connor, J., concurring) (arguing that "win-loss" record of previous plaintiffs does not change "vitality of constitutional doctrine").
220. *See* 20 AM. JUR. 2D Courts § 183 (1965) (defining stare decisis and stating that "determination of a point of law by a court will generally be followed by a court of the same or a lower rank if a subsequent case presents the same legal problem, although different parties are involved in the subsequent case").
221. *See supra* notes 37-87 and accompanying text (discussing cases applying *Sherbert* test).
222. *See Smith*, 110 S. Ct. at 1603 (refusing to apply *Sherbert* strict scrutiny test to generally applicable criminal law).
223. 406 U.S. 205 (1972).
224. *Smith*, 110 S. Ct. at 1603.
225. *See supra* notes 61-76 and accompanying text (discussing *Yoder* decision).
226. *Smith*, 110 S. Ct. at 1600.
227. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (emphasis added).
228. *Smith*, 110 S. Ct. at 1601.

The Court's contention that an explicitly enumerated right in the Constitution must be accompanied by another right before it garners first amendment protection is unconvincing. The first amendment states that the right to freely exercise one's religious beliefs may not be abridged; it does not premise the validity of free exercise rights upon the existence of another right.

Furthermore, the Court's argument that *Yoder* was a hybrid decision is weak. While *Yoder*'s reasoning was partially based on *Pierce v. Society of Sisters*,[229] which established the right of parents to control the education of their children,[230] the Court only invoked *Pierce* to show that a state's interest in providing education is not completely free from the balancing test required when fundamental rights and interests, such as free exercise or parental rights, are burdened.[231] *Yoder* clearly acknowledged a fundamental right of parents to raise their children as they wish. It did not suggest, however, that the free exercise claim asserted by the Amish was inadequate absent this parental right.[232] If *Yoder* was a "hybrid" decision, it is the parental right that requires an attendant free exercise right in order to be protected by the Constitution, not vice versa.[233] Thus, *Smith* turned *Yoder* on its head by holding that a free exercise right must be combined with another right in order to be reviewed under the compelling state interest test.[234]

An additional reason why characterizing *Yoder* as a hybrid case fails is that the *Yoder* decision clearly and unequivocally determined that religious liberty, standing alone, deserves first amendment strict scrutiny.[235] A considerable portion of the *Yoder* decision discussed the Amish religion and the effect compulsory school attend-

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229. 268 U.S. 510 (1925).

230. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

231. *Yoder*, 406 U.S. at 232-34 (concluding that state's *parens patriae* power is not all-encompassing).

232. *Id.*

233. *See id.* This is evident in the Court's statement in *Yoder* that *Pierce* recognized that "where nothing more than the general interest of the parent in the nurture and education of his children is involved, it is beyond dispute that the State acts 'reasonably' and constitutionally in requiring education to age 16 in some public or private school meeting the standards prescribed by the State." *Id.*

234. Employment Div. v. Smith, 110 S. Ct. 1595, 1600, 1601 (1990).

Arguably, sacramental peyote use is a "hybrid" right, analogous to those asserted in *Pierce* and *Yoder*, and thus worthy of constitutional protection under the logic of the majority opinion in *Smith*. Because peyote use is the foundation of the peyote ceremony, which children attend, it can be argued that sacramental peyote use involves the rights of parents to educate their children about their religion and to introduce them to the Native American Church's faith. *See supra* note 127 (discussing peyote ritual).

235. Wisconsin v. Yoder, 406 U.S. 205, 214-15, 221 (1972) (citing *Sherbert* rule as applicable).

ance has on the religious beliefs of the Amish.[236] Throughout the entire opinion, the Court exalted the value of religious liberty. The Court stated that where free exercise rights are jeopardized, it could not accept the claim that a state's interest in its compulsory education system is paramount to the established religious practices of the Amish.[237] The addition of the parental right, while adding weight to the free exercise side of the balance, was not necessary to tip the balance in favor of the Amish.

While both *Smith* and *Sherbert* involved the denial of unemployment benefits, the basis for the denial in *Smith*, said the Court, was the violation of a criminal law not a refusal to work, as in *Sherbert*.[238] Thus, the *Smith* Court found *Sherbert* inapplicable. *Yoder*, however, also involved a criminal prohibition and the Court required Wisconsin to justify its law with a showing of a compelling state interest served by narrowly tailored means.[239] The Court in *Smith*, therefore, ignored *Yoder*'s mandate that even a generally applicable criminal law must be subjected to strict scrutiny analysis if it incidentally burdens an individual's right to freely exercise his or her religion.[240]

Although the Court did not explicitly overrule *Yoder*, it assigned the case a new meaning—one which the Court in *Yoder* did not intend. Now that the Court has supplanted the message of *Yoder* with its misguided interpretation, a state may enforce generally applicable laws that criminalize religious conduct, as long as the law does not impair any rights in addition to the individual's free exercise rights. Given the recent trend in the Supreme Court toward denying protection of rights not specifically enumerated in the Constitution,[241] it is unlikely that the Court will uphold any "hybrid" challenges in the future because the Court is unlikely to find another right upon which to hang free exercise rights.

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236. *See id.* at 215-19 (concluding that negative impact on Amish society would be inescapable if Court failed to exempt them from state's compulsory school attendance law).

237. *Id.* at 221.

238. Employment Div. v. Smith, 110 S. Ct. 1595, 1603 (1990).

239. *See Yoder*, 406 U.S. at 207 n.2 (providing text of Wisconsin's compulsory school attendance statute).

240. *Smith*, 110 S. Ct. at 1601 (distinguishing Wisconsin v. Yoder, 406 U.S. 205, 214 (1972)).

241. *See* Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3057-58 (1989) (limiting right of abortion and thus limiting scope of implied right of privacy); Bowers v. Hardwick, 478 U.S. 186, 195 (1986) (holding that scope of constitutional right of privacy does not include right to practice homosexual sodomy and stating that Court is "nearest to illegitimacy" when it expands scope of rights not specifically enumerated in text of Constitution); *see also* Gerhardt, *supra* note 206, at 420-21 & nn.48-49 (arguing that implied fundamental right of privacy generally, and privacy right to abortion specifically, established during Warren and Burger Courts, are at "brink of extinction"); Note, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215, 224-25 (discussing Courts' contraction of right to privacy since mid-1970s).

C. The Court Ignored the Essence of Past Free Exercise Cases

The Supreme Court erred in *Smith* by ignoring the essence of past free exercise decisions. Standing alone, each free exercise case applying the compelling state interest test contained an element distinguishable from *Smith*. Yet, when viewed as a whole, the body of free exercise case law unequivocally holds that the first amendment requires courts to strictly scrutinize all laws that have the effect of inhibiting the free exercise of religion.[242]

The Court did not apply or interpret precedent to reach its decision in *Smith*; rather it dissected each prior free exercise case to make it appear as if those cases mandated the *Smith* ruling.[243] Free exercise precedent, however, is greater than the sum of each individual case. It is true that *Sherbert* involved only unemployment compensation[244] and *Yoder* involved both a free exercise claim and a claim of parental rights.[245] In addition, it is true that the strict scrutiny test, when applied, has often resulted in a decision favoring the government.[246] It is also true that the Court has not found the first amendment applicable in cases where a plaintiff seeks to constrain the government's internal procedures.[247] No free exercise case, however, has suggested that the Court should remove itself from its assigned constitutional role as the protector of the Constitution when the government passes a law insensitive to the free exercise rights of members of a religious group. The Court in *Smith* abandoned the nation's commitment to protect the right to freely exercise one's religion in favor of an easily applicable, broadly sweeping rule that is patently unresponsive to the needs of religions whose interests are not adequately represented in legislatures.

The first amendment protects religious liberty from governmental restraint that is either intentional or incidental to a neutral law or practice.[248] The respondents in *Smith*, however, were not afforded this constitutional protection. The Court's decision to abrogate the

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242. *See supra* notes 37-87 and accompanying text (discussing free exercise precedent applying strict scrutiny).

243. *See Smith*, 110 S. Ct. at 1599-1603.

244. Sherbert v. Verner, 374 U.S. 398, 399-400 (1963).

245. Wisconsin v. Yoder, 406 U.S. 205, 210-11 (1972).

246. *See supra* note 20 (citing free exercise cases where Court found law to satisfy strict scrutiny test).

247. *See supra* note 18 (citing cases where Court found that free exercise clause does not encompass right to dictate government procedure).

248. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141-42 (1987) (rejecting argument which would end inquiry at initial question of facial neutrality); Thomas v. Review Bd., 450 U.S. 707, 718 (1981) (holding that state's denial of unemployment benefits was unconstitutional); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (rejecting claim that state's interest must always take precedence); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (renouncing automatic deference to government in this "sensitive constitutional area").

compelling state interest test and narrow the scope of the free exercise clause to only direct religious discrimination deprived the respondents' of their constitutional right to exercise their religion.[249] In addition, to the extent that Oregon makes the practices of the Native American Church impossible, the decision contravenes this nation's commitment to the protection and preservation of Native American culture.[250]

D. Application of the Compelling State Interest Test Will Not Result in Anarchy

The Court in *Smith* posited a "slippery slope" argument to support its decision, explaining that our system would be "courting anarchy" if all laws that burden the free exercise of religion were open to constitutional challenge.[251] The majority reasoned that the first amendment does not require courts to balance every free exercise claim against the importance of government's laws.[252] The Court stated that it is "horrible to contemplate" federal courts being regularly called upon to balance free exercise claims against state interests.[253]

The Court's argument, however, is unsound because it exaggerates the frequency with which courts would be asked to invoke the *Sherbert* balancing test. Before a court will make the compelling state interest inquiry, a plaintiff must make a threshold determination that the asserted religious belief is sincerely held.[254] There is no realistic possibility that courts will be barraged with free exercise claims and forced to conduct full evidentiary hearings to balance the competing interests whenever someone is arrested or offended by a particular law.[255] If there is no burden on a sincere religious belief or practice, the claim will be dismissed before a court would have to apply the *Sherbert* balancing test.[256]

It is true that judicial determination of the sincerity of a person's

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249. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1600, 1603 (1990) (refusing to apply strict scrutiny test to law severely inhibiting respondents' religion).

250. *See supra* note 143 (discussing Congress' codification of the nation's commitment to protect Native Americans in American Indian Religious Freedom Act and discussing federal exemption of Native American Church from federal law proscribing peyote use and possession).

251. *Smith*, 110 S. Ct. at 1605.

252. *Id.*

253. *Id.* at 1606 n.5.

254. *See supra* note 40 and accompanying text (discussing requirement that claimant show burden upon sincere religious belief).

255. *See* Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 303-06 (1985) (rejecting claim for religious exemption from Fair Labor Standards Act, reasoning that, at minimum, claimants must show burden upon religion).

256. *See id.* (finding no merit in petitioners' free exercise claims).

religious beliefs may present an establishment clause problem because it forces courts to become entangled with religion. The Supreme Court, however, has determined that obedience to the establishment clause should not work to preclude protection of the values inherent in the free exercise clause.[257] Furthermore, the entanglement resulting from a sincerity determination is minimal. Free exercise claimants must only demonstrate that they did not manufacture a religious belief for the purpose of defending the criminal charge against them.[258] This burden may be met with extrinsic evidence regarding the claimants' past conduct, statements, and demeanor.[259] The Court would not be required to delve into the legitimacy of the religious beliefs; it need only be satisfied that the claimants sincerely hold their religious beliefs.[260] The claimants should only be held to a prima facie standard of proving sincerity, however, in order to prevent the inquiry from becoming an inquisition.[261]

Because false free exercise claims would be screened out, under the strict scrutiny test courts would only be called upon to conduct the test when a sincere religious belief is inhibited by a law or government practice. Even if those remaining religious claims regularly occupy the courts' time, courts must give these matters their attention because of the fundamental constitutional rights at stake.[262] A crowded court docket is not sufficient justification for refusing to protect constitutional rights.[263] By immunizing all neutral laws bur-

257. *See supra* note 40 (discussing cases employing sincerity requirement despite establishment clause problems and noting that Court has resolved tension between establishment clause and free exercise clause in favor of free exercise).

258. *See* FED. R. CIV. P. 11 (requiring all pleadings to be made in good faith); *see also* Lupu, *supra* note 40, at 954 (suggesting that sincerity requirement is similar to good faith requirement in many other areas of law).

259. Lupu, *supra* note 40, at 954.

260. *See* Thomas v. Review Bd., 450 U.S. 707, 714, 716 (1981) (stating that sincerity inquiry may only consider whether conduct is based on "honest" religious conviction, but not on how "acceptable, logical, consistent, or comprehensible" the religious belief appears to court). *But see* United States v. Ballard, 322 U.S 78, 92-95 (1944) (Jackson, J., dissenting) (expressing concern that juries will tend to judge legitimacy of asserted belief rather than sincerity of religious belief).

261. *See* Lupu, *supra* note 40, at 954 (warning that inquiry into sincerity of religious belief cannot completely escape "distinctly bad aroma of an inquisition"). Professor Lupu argues that while the sincerity requirement appears to be a good solution to the problem of separating genuine free exercise claims from manufactured ones, the sincerity requirement has many weaknesses. *Id.* Lupu notes that the more eccentric the religious claim, the more likely the decisionmaker will conclude that "no one could really believe this." *Id.* Thus, members of unusual religions who are most susceptible to legislative indifference toward their religious convictions are the least likely to receive judicial protection from laws proscribing their religious conduct. *Id.*

262. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1611 (1990) (O'Connor, J., concurring) (arguing that Constitution requires case-by-case determination).

263. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (plurality opinion)

dening freedom of religion from first amendment challenge, the Supreme Court in *Smith* endorsed, and indeed encouraged, governmental indifference to first amendment free exercise rights.

IV. THE IMPLICATIONS OF *SMITH*

The *Smith* decision precludes the success of all future free exercise challenges to laws, not specifically directed at religious interests, that incidentally burden religion. For example, a federal or state criminal law requiring that all circumcisions of male infants be performed by a licensed physician would be upheld under the *Smith* rationale if challenged by Jews, whose religious traditions require that circumcisions be performed by a Rabbi during a religious ceremony called a bris. If the law applies to all families, and is not motivated by religious prejudice, regardless of whether there is a compelling state interest and whether or not an exemption for Jews would frustrate the state's interest, the law may be upheld under *Smith*.

Similarly, a law categorically proscribing the consumption of alcohol by minors, in any setting, private or public, religious or nonreligious, in the presence of guardians or not, would not withstand a challenge by the Catholic Church, or any other religion, that regards the consumption of wine as an integral part of religious ceremonies involving both minors and adults. A government may, in defense of such a law, argue that alcohol consumption is dangerous, especially to minors, and that it would be impossible to enforce such a law if exemptions were granted. Applying the logic of *Smith*, the law would be upheld, regardless of the potentially devastating impact on religions that place special significance on the sacramental consumption of wine.[264] The strict scrutiny test is necessary to ensure that when legislatures structure their general laws, they do not unjustifiably inhibit or preclude the practice of religion.[265]

It is unlikely, however, that the *Smith* reasoning would be applied to uphold laws affecting mainstream religions, such as Judaism and Catholicism. Because members of these religions are adequately

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(ruling that administrative convenience "is not a shibboleth, the mere recitation of which dictates constitutionality"); Stanley v. Illinois, 405 U.S. 645, 656 (1972) (stating that "Constitution recognizes higher values than speed and efficiency"); Reed v. Reed, 404 U.S. 71, 76-77 (1971) (holding that probate code preferring men over women for appointment as administrator of decedents' estates violates equal protection clause of fourteenth amendment when justification for statute is elimination of need for hearing on merits).

264. Religious or sacramental use of wine was exempted from the 1919 federal prohibition of the right to drink alcohol. *See* 27 U.S.C. § 16 (1988) (enumerating provisions of Prohibition Act which was made inoperative by U.S. CONST. amend. XXI).

265. *See supra* note 248 and accompanying text (discussing cases where Supreme Court invalidated unconstitutional intrusions by legislatures into religious practice).

represented in this country, legislatures are more sensitive to the effect that their laws may have on these mainstream religions.[266] If, in the future, a law burdening the free exercise of a widely practiced religion were challenged, it is likely that the Court would distinguish *Smith* and require the state to grant an exemption to the religious interest involved.[267]

The Court in *Smith* implicitly diminished the value of the respondents' religion and other religions that are not widely practiced.[268] The Court is unwilling to extend protection to less prevalent religions and is unwilling to require states to accommodate them.[269] Thus, it has embraced, reinforced, and constitutionalized the indifference that a legislature may show toward minority religious interests.[270]

Consequently, the Court created a catch-22 for minority religions. It stated that mainstream religions do not need judicial protection because their interests are protected in the legislature,[271] while holding that minority religions are not entitled to the Court's protection.[272] Those religions that need first amendment protection, precisely because they are in the minority, will not receive first amendment protection because the Court has determined that society cannot afford the governmental burdens that would result from providing religious exemptions.[273] The framers of the Constitution did not explicitly enshrine the free exercise clause in the Bill of Rights to have it rendered powerless by the judiciary.[274] Neverthe-

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266. *See* Comment, *Judicial Scrutiny*, *supra* note 109, at 171 (arguing that institutional racism causes courts to handle claims by Native Americans differently from claims by members of "Western-style" religions); *see also supra* note 264 (noting that sacramental use of wine was exempted from prohibition of alcohol).

267. *See* Comment, *Judicial Scrutiny*, *supra* note 109, at 171 (arguing that institutional racism causes courts to handle claims by Native Americans differently from claims by members of "Western-style" religions); Note, *Native American*, *supra* note 109, at 424 (arguing that judiciary is reluctant to treat Judeo-Christian and non-Judeo-Christian religions uniformly). *But see generally* Kamenshine, *supra* note 41, at 153-54 (advocating abandonment of strict scrutiny in all religion cases involving neutral laws); Marshall, *supra* note 40, at 386-400 (calling for elimination of strict scrutiny test in all free exercise cases involving neutral laws).

268. Employment Div. v. Smith, 110 S. Ct. 1595, 1606 (1990).

269. *Id.*

270. *Id.*

271. *Id.* The Court stated that "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." *Id.*

272. *See id.* at 1603 (finding scope of first amendment does not include neutral laws that incidentally preclude certain religious practices).

273. *Id.* at 1605.

274. McConnell, *supra* note 14, at 1415 (arguing that framers of Constitution viewed exemptions as constitutionally permissible means for protecting religious liberty). *But see* Reynolds v. United States, 98 U.S. 147, 164-67 (1878) (asserting that framers intended free exercise clause to apply only to belief in religion, not religious conduct); Comment, *The Religion Clauses and Compelled Religious Divorces: A Study of Marital and Constitutional Separations*, 80

less, the *Smith* Court has rendered the free exercise clause impotent.

CONCLUSION

The Supreme Court's decision in *Employment Division v. Smith* contravenes past free exercise cases and conflicts with this nation's commitment to religious liberty. Prior to *Smith*, the Court required governments to justify a neutral law inhibiting the free exercise of religion by showing that the law uses the least restrictive means to achieve a compelling state interest. The Court abandoned the compelling state interest test in *Smith*, thereby eliminating an important safeguard of religious liberty. The Court's decision effectively allowed Oregon to criminalize the practice of the respondents' religion. The implications of the decision, however, extend far beyond the fate of the Native American respondents in *Smith*. By refusing to require the government to provide a compelling justification for a neutral law that makes the practice of religion difficult or impossible, the United States Supreme Court sends a message to state legislatures that they are free to ignore the needs of all minority religions.

NW. U.L. REV. 204, 212-13 (1985) (stating that historical evidence suggests that framers of Constitution may only have intended free exercise clause to protect freedom to believe in religion, thereby precluding courts' use of strict scrutiny test to protect freedom to act religiously); *see also* Abington School Dist. v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring) (stating that historical record of framers' intent regarding religion clauses is ambiguous, and searching for true intent of framers is "futile and misdirected"); Marshall, *Unprecedented Analysis and Original Intent*, 27 WM. & MARY L. REV. 925, 925 (1986) (arguing that neither historical understanding or text of Constitution can provide definitive resolution to free exercise cases).