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Employment Division, Department of Human Resources of Oregon v. Smith: The Erosion of Religious Liberty

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We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.

Declaration of Independence (1776)[1]

The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right.

James Madison, Memorial and Remonstrance (1785)[2]

I. Introduction

Of paramount concern to the Founding Fathers in declaring themselves free from persecution, was securing to each and every "Man," unalienable fundamental rights.[3] Unfortunately, one of those rights, the constitutional right of free exercise of religion[4] has been abridged by the Supreme Court in *Employment Division, Department of Human Resources v. Smith* (*Smith II*).[5] This Note examines the nature and extent of the

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1. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

2. James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 28 app. at 63 (1947) (Rutledge, J., dissenting).

3. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

4. The First Amendment to the United States Constitution provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. In Cantwell v. Connecticut, 310 U.S. 296 (1940), the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment extended the protections of the Free Exercise Clause to the states. *Id.* at 303; *see also infra* notes 71-72 and accompanying text.

5. 494 U.S. 872 (1990). In his dissent, Justice Blackmun lamented that the *Smith II* decision "effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution. One hopes that the Court is aware of the consequences

Court's restriction and the inevitable consequences that followed.

At issue in *Smith II* was whether the Free Exercise Clause requires the granting of religious exemptions from generally applicable laws.[6] There is no dispute that the protection guaranteed by the Free Exercise Clause forbids governmental infringement of religious belief or opinion.[7] The controversy arises, however, when an individual's religiously motivated conduct conflicts with a generally applicable law.[8] As Justice O'Connor concluded in her concurring opinion: "a law that prohibits certain conduct — conduct that happens to be an act of worship for someone — manifestly does prohibit that person's free exercise of his religion."[9] The question is which interest prevails? Does the Free Exercise Clause mandate a religious exemption to the law, or does the law supersede an individual's religiously motivated conduct?

Up until the Court's *Smith II* decision, the "compelling interest test" developed by Justice Brennan in *Sherbert v. Verner*[10] answered this critical question.[11] Under *Sherbert*, if an individual could show that a law burdened the exercise of his genuine religious beliefs, the government then had to demonstrate that the law was necessary for the accomplishment of

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. . . ." *Id.* at 908 (Blackmun, J., dissenting).

6. *Id.* at 882-83.

7. *Id.*; *see also Cantwell*, 310 U.S. at 303. For a discussion of the *Cantwell* decision, see *infra* notes 66-75 and accompanying text.

8. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1411 (1990).

9. *Smith II*, 494 U.S. at 893 (O'Connor, J., concurring).

10. 374 U.S. 398 (1963); *see infra* notes 93-108 and accompanying text.

11. *See, e.g.*, Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989) (granting a Christian who refused to work on Sundays an exemption from unemployment compensation rules); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (granting a Seventh-Day Adventist a sabbath exemption from unemployment compensation rules); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (upholding a denial of religious school tax exempt status because of the university's religiously based racial discriminatory practices); United States v. Lee, 455 U.S. 252 (1982) (refusing an exemption for an Amish employer who failed to pay social security taxes); Thomas v. Review Bd., 450 U.S. 707 (1981) (granting a Jehovah's Witness, who refused an employment transfer to military tank production facility, an exemption from unemployment compensation rules); Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting Amish children from several years of compulsory state education); Gillette v. United States, 401 U.S. 437 (1971) (refusing a religious exemption for citizens only opposed to "unjust wars").

some "compelling state interest" and that the law was the least restrictive means to that end.[12] In the *Smith II* opinion, the *Sherbert* compelling interest test was held to be a "luxury" that a pluralistic society cannot afford.[13] Moreover, the court characterized the repression of minority religions as an "unavoidable consequence of democratic government . . . ."[14] The *Smith II* majority replaced the *Sherbert* balancing test with a categorical rule: "if prohibiting the exercise of religion is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[15]

Part II of this Note traces the historical development of the constitutional right to free exercise of religion and the evolution of the Supreme Court's interpretation of that right. The facts and procedural history of *Smith II* are presented in Part III, along with summaries of the majority, concurring and dissenting opinions. Part IV contrasts the *Sherbert* compelling interest test and the *Smith II* rule. This part also examines the implications and consequences that flow from the Court's abandonment of nearly thirty years of free exercise jurisprudence. Finally, this Note supports the passage of the Religious Freedom Restoration Act of 1991, which would reinstate the *Sherbert* compelling interest test.

II. Background

A. *Religious Liberty in the Colonies: A Historical Perspective*

Persecution of minority religious sects in Europe was in part the driving force behind the emigration of the early settlers to the colonies.[16] In seventeenth-century Europe, the established

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12. *Sherbert*, 374 U.S. at 403-10.

13. *Smith II*, 494 U.S. at 888.

14. *Id.* at 890. Justice Blackmun, in his dissenting opinion, stated that he did "not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty — and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance." *Id.* at 909 (Blackmun, J., dissenting).

15. *Id.* at 878; *see also id.* at 892 (O'Connor, J., concurring).

16. Everson v. Board of Educ., 330 U.S. 1, 8 (1946). According to the *Everson* majority:

The First Amendment . . . commands that a state "shall make no law respecting

religious sects had absolute power.[17] In order to maintain this supremacy and to force loyalty, these establishments imposed taxes, jail terms, physical punishment and even death.[18] These practices became manifest in the colonies,[19] and "became so commonplace as to shock freedom-loving colonials into a feeling of abhorrence."[20]

Consequently, there was an expanding movement toward religious liberty in the thirteen colonies, necessitated in part by the pluralistic nature of the colonies and the successful experience in Rhode Island of providing an atmosphere of religious unity among different sects.[21]

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an establishment of religion or prohibiting the free exercise thereof . . . ." These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity.

Id. (citations omitted); *see also* SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 70 (1902).

17. *Everson*, 330 U.S. at 8-9.

18. *Id.* at 9. For a more detailed discussion of the religious climate of Europe prior to and contemporaneous with the colonization of America, see COBB, *supra* note 16.

Justice Thomas Cooley of the Supreme Court of Michigan stated in his treatise on constitutional limitations:

> WHOEVER shall examine with care the American constitutions will find nothing more fully stated or more plainly expressed than the desire of their authors to preserve and perpetuate religious liberty, and to guard against the slightest approach towards the establishment of inequality in the civil or political rights of citizens, based upon differences of religious belief. The American people came to the work of framing their fundamental laws after centuries of religious oppression and persecution, sometimes by one party or sect and sometimes by another, had taught them the utter futility of all attempts to propagate religious opinions by the rewards, penalties, or terrors of human laws.

THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 544 (3d ed. 1874).

19. *Everson*, 330 U.S. at 9. The Church of England was established by order of the Crown in the colony of Virginia. Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815).

20. *Everson*, 330 U.S. at 11. The Court noted that:

> Madison wrote to a friend in 1774: "That diabolical, hell-conceived principle of persecution rages among some. . . . This vexes me the worst of anything whatever. There are at this time in the adjacent country not less than five or six well-meaning men in close jail for publishing their religious sentiments, which in the main are very orthodox. I have neither patience to hear, talk, or think of anything relative to this matter; for I have squabbled and scolded, abused and ridiculed, so long about it to little purpose, that I am without common patience. So I must beg you to pity me, and pray for liberty of conscience to all."

Id. at 11 n.9 (quoting I WRITINGS OF JAMES MADISON 18, 21 (Gaillard Hunt ed., 1900)).

21. Rodney K. Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amend-*

Economic forces also contributed to the increased need for religious cooperation "among the adherents of the various sects."[22] By the eighteenth century, a heightened level of cooperation and interdependence was required to maintain colonial economic autonomy largely due to the distance between the American colonies and England.[23] This economic dependency required that religious differences among the colonies be set aside.[24]

The Supreme Court, when defining the general historical purpose of the Religion Clauses of the First Amendment, has relied upon the writings of James Madison and Thomas Jefferson, generated during this period of religious tolerance in late eighteenth-century America.[25] Madison played a leading role in the historic struggle for religious liberty in Virginia.[26] In preparation for secession from England, Virginia was in the process of drafting its constitution in May 1776.[27] George Mason was responsible for drafting Virginia's Declaration of Rights, which included provisions regarding religious liberty.[28] James Madison's response to Mason's proposal was his first documented pronouncement on the subject of religious liberty.[29]

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ment and a Critique of the Reynolds *and* Everson *Decisions*, 20 WAKE FOREST L. REV. 569, 575 (1984).

22. *Id.* at 576.

23. *Id.*

24. *Id.*

25. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961); McGowan v. Maryland, 366 U.S. 420 (1961) (Frankfurter, J., separate opinion); Everson v. Board of Educ., 330 U.S. 1 (1946); Reynolds v. United States, 98 U.S. 145 (1878).

26. *Everson*, 330 U.S. at 12.

27. Smith, *supra* note 21, at 579 n.33.

28. *Id.* at 579. Mason's proposal on religious liberty provided:

> That as Religion, or the Duty we owe to our divine and omnipotent Creator, and the Manner of discharging it, can be directed only by Reason and Conviction, not by Force or Violence; and, therefore, *that all Men shou'd enjoy the fullest Toleration in the Exercise of Religion*, according to the Dictates of Conscience, unpunished and unrestrained by the Magistrate, unless *under Colour of Religion, any Man disturb the Peace, the Happiness, or Safety of Society, or of Individuals.* And that it is the mutual Duty of all, to practice Christian Forbearance, Love and Charity towards Each other.

JAMES MADISON ON RELIGIOUS LIBERTY 51 (Robert S. Alley ed., 1985) (emphasis added).

29. Smith, *supra* note 21, at 580. Madison's response provided:

> That religion, or the duty we owe our creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence, or compulsion, *all men are entitled to the full and free exercise of it according to the*

The differences in the two proposals provide insight into Madison's early stand on free exercise of religion.[30] First, Madison favored a broad, unfettered right to free exercise of religion, evinced by his language: "all men are entitled to the full and free exercise . . . ."[31] On the other hand, Mason believed that "all men should enjoy the fullest toleration of the exercise of religion . . . ."[32] Second, Madison proposed that government could intervene in matters burdening the free exercise of religion only when "under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered."[33] Mason, on the other hand, favored broader grounds for free exercise limitations: "unless under color of religion any man disturb the peace, happiness, or safety of society or individuals."[34] Although no court has gone as far as Madison's early proposal, the compelling interest test seems to have come close.[35]

The movement toward religious liberty in Virginia reached its peak in 1785 when a bill to levy a general tax supporting Christian teachers was before the Virginia Legislature.[36] James Madison led a successful fight opposing the Bill,[37] circulating his

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dictates of conscience; and therefore no man or class of men ought on account of religion be invested with particular emoluments or privileges, nor subjected to any penalties or disabilities, *unless under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered.*

Id. (emphasis modified) (citing MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 21 (1978)).

30. *See id.* at 580.

31. *Id.* at 581.

32. *Id.*

33. *Id.*; *supra* note 29. In analyzing these words, Professor Smith noted that "[a]pparently, only something of the magnitude of sedition or denial by one religious group of the liberty granted another would justify government action in religious matters." Smith, *supra* note 21, at 582.

34. *Id.*

35. *Id.* at 583; *see infra* text accompanying notes 100-04. Professor Smith noted that "the broad language in the religious guarantees of both the United States Constitution and the state constitutions would clearly permit such an expansive reading of the free exercise clause." Smith, *supra* note 21, at 583.

36. Everson v. Board of Educ., 330 U.S. 1, 11 (1947). For background material surrounding the proposal of the Bill, see COBB, *supra* note 16, at 495-97. The Bill Establishing A Provision for Teachers of the Christian Religion (1779) is reprinted as an appendix to Justice Rutledge's dissenting opinion in Everson v. Board of Educ., 330 U.S. 1, 28 app. at 72 (1947) (Rutledge, J., dissenting).

37. *Everson*, 330 U.S. at 12. At the time the Bill was introduced, James Madison was a member of the Virginia Legislature.

famous petition entitled "Memorial and Remonstrance Against Religious Assessments."[38] Mindful that "the majority may trespass on the rights of the minority,"[39] Madison continued to view free exercise of religion as an unalienable right, further suggesting an approach analogous to *Sherbert*.[40]

The Bill supporting Christian teachers was not only defeated, but Thomas Jefferson's "Bill for Establishing Religious Freedom" was adopted.[41] Enacted by the Virginia assembly in 1786, the Bill established as law that "all men shall be free to profess, and . . . maintain, their opinions in matters of religion" and that "the opinions of men are not the object of civil government, nor under its jurisdiction."[42]

Thomas Jefferson, however, espoused a strict distinction between belief and conduct.[43] According to Jefferson, beliefs should be fully protected from state control but conduct should not.[44] In his letter to the Danbury Baptist Association, Jefferson wrote "that the legislative powers of government reach actions only, and not opinions . . . . [M]an has no natural right in opposition to his social duties."[45] It was this distinction that the Su-

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38. James Madison, Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 28 app. at 63 (1947) (Rutledge, J., dissenting).

39. *Id.*

40. The Memorial and Remonstrance Against Religious Assessments states in part:

> The religion then of every man must be left to the conviction and conscience of every man; and *it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right.* It is unalienable . . . because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. We maintain therefore that in matters of Religion, *no man's right is abridged by the institution of Civil Society, and Religion is wholly exempt from its cognizance.*

Id. (emphasis added).

41. *Everson*, 330 U.S. at 12. For an account of the background and evolution of the Virginia Bill for Establishing Religious Freedom, see COBB, *supra* note 16, at 74-115, 494-99.

42. Thomas Jefferson, A Bill for Establishing Religious Freedom (June 12, 1779), *in* 2 THE PAPERS OF THOMAS JEFFERSON 545, 546 (Julian P. Boyd et al. eds., 1950).

43. McConnell, *supra* note 8, at 1451.

44. *Id.*

45. Letter from Thomas Jefferson to a committee of the Danbury Baptist Association (Jan. 1, 1802), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 332, 332 (Adrienne Koch & William Peden eds., 1944).

preme Court would later use, holding that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[46]

B. *The Free Exercise Clause of the First Amendment*

On June 8, 1789, Congressman James Madison delivered a speech before the House of Representatives.[47] Madison was concerned that the "great mass of people who opposed [the Constitution], disliked it because it did not contain effectual provisions against encroachment on particular rights . . . ."[48] Madison recommended the following amendment to protect religious liberty: "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[49]

The House adopted in principle a version proposed by Foster Ames of Massachusetts: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."[50] The Senate approved a different version: "Congress shall make no law establishing articles of faith or a mode of worship or prohibiting the free exercise of religion . . . ."[51] The House rejected the Senate's version.[52] Madison served on the conference committee which proposed the version of the Religion Clauses that was ultimately ratified in 1791.[53]

As a result, religious liberty is now protected through two

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46. Reynolds v. United States, 98 U.S. 145, 166 (1878); *see also infra* notes 61-62 and accompanying text.

47. 1 ANNALS OF CONG. 448-59 (Joseph Gales & William W. Seaton eds., 1789).

48. *Id.* at 450.

49. *Id.* at 451. The words "rights of conscience" and "free exercise of religion" had generally been used interchangeably by Congress in different versions of the Religious Clauses. McConnell, *supra* note 8, at 1488. "Free exercise of religion" was generally considered broader, encompassing actions as well as beliefs. *Id.* at 1492-94. However, "rights of conscience" was more likely to be understood as limited to opinion or belief. *Id.*

50. McConnell, *supra* note 8, at 1482. The House approval of Ames' version was devoid of any documented debate or discussion. *Id.* at 1483.

51. *Id.* at 1483-84. The Senate's approved version was likewise devoid of any documented debate or discussion. *Id.* at 1483.

52. *Id.* at 1484.

53. *Id.*

constitutional clauses, the Establishment Clause and the Free Exercise Clause: "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof."[54] Some commentators have argued that the broad language used in these constitutional guarantees would seem to justify an expansive reading of the Free Exercise Clause in line with Madison's early sentiments.[55]

C. Reynolds v. United States: *Beliefs v. Actions*

The Supreme Court's first notable interpretation of the Free Exercise Clause came in 1878 in *Reynolds v. United States*.[56] In *Reynolds*, the defendant, a member of the Church of Jesus Christ of Latter-day Saints (the Mormon Church), was convicted of taking a second wife in violation of federal law prohibiting polygamy.[57] The Mormon Church imposed a duty on its male members, "circumstances permitting, to practice polygamy."[58] In defense of his action, Reynolds argued that his free exercise rights had been violated.[59]

Chief Justice Waite, writing for the Court, refused to over-

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54. U.S. CONST. amend. I. According to Justice Black in his majority opinion in Everson v. Board of Educ., the Establishment Clause means that:

> Neither a state nor the Federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the Words of Thomas Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (citations omitted).

55. *See* Smith, *supra* note 21, at 583.

56. 98 U.S. 145 (1878); *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE 31 (1986) [hereinafter ATTORNEY GENERAL REPORT].

57. *Reynolds*, 98 U.S. at 161. Under the Morrill Act of 1862, bigamy was a crime in the territories. ATTORNEY GENERAL REPORT, *supra* note 56, at 83.

58. *Reynolds*, 98 U.S. at 161.

59. *Id.* at 161-62.

turn Reynolds' conviction on free exercise grounds.[60] The Court incorporated Thomas Jefferson's early distinction between actions and opinion into its free exercise analysis and determined that the federal polygamy prohibition was not preempted by the Free Exercise Clause.[61] Expounding on this distinction, Chief Justice Waite asserted that in accordance with the First Amendment "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[62]

Consequently, the *Reynolds* Court narrowed the scope of free exercise protection. While Congress could not restrain a person's religious beliefs or opinions, religious acts that furthered those opinions could be prohibited in furtherance of legitimate secular goals.[63] Using this basic standard the Court found that although the practice of polygamy was religiously motivated, it was offensive to the moral standards of the Union and could therefore be regulated.[64] Criminalization of religiously motivated polygamy withstood Reynolds' free exercise challenge.[65]

D. *The Early Demise of* Reynolds

The next leading free exercise case did not arise until 1940 in *Cantwell v. Connecticut*.[66] In *Cantwell*, Jehovah Witness defendants were convicted of violating a state ordinance which required a license for soliciting money for religious causes, and of common law breach of peace violation.[67] Under the ordinance, before a license could be issued, a licensing official had to determine whether or not the cause was genuinely religious.[68] The de-

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60. *Id.* at 168.

61. *Id.* at 164. The Court also quoted from Jefferson's statement to the Danbury Baptist Association about the "Wall of Separation" and expressing a belief that man "has no natural right in opposition to his social duties." *Id.*; *supra* note 45.

62. *Id.*

63. Smith, *supra* note 21, at 635.

64. *Reynolds*, 98 U.S. at 164-65.

65. *Id.* at 166-67. The *Reynolds* Court never addressed the meaning of "free exercise," but reasoned that free exercise extended to beliefs, not actions. *See* ATTORNEY GENERAL REPORT, *supra* note 56, at 83-84 n.4.

66. 310 U.S. 296 (1940); *see also* ATTORNEY GENERAL REPORT, *supra* note 56, at 85.

67. *Cantwell*, 310 U.S. at 300.

68. *Id.* at 305.

fendants had been arrested while going from house to house soliciting contributions for religious pamphlets.[69] They challenged their subsequent convictions on free exercise grounds.[70] Justice Roberts, writing for the majority, held that the ordinance deprived the defendants of their Fourteenth Amendment right to due process of law.[71] This was the first time the Court expressly extended the free exercise protections of the First Amendment to the states under the Fourteenth Amendment.[72] However, the Court refused to rely solely on the Free Exercise Clause to strike down the ordinance.[73] Additionally, the Court incorporated Justice Holmes' "clear and present danger test" from *Schenck v. United States*,[74] and held that the licensing provision was an unconstitutional infringement on free speech.[75]

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69. *Id.* at 301. The case arose when the defendants stopped two men on the street, asked and received permission to play a religious phonograph record for them. *Id.* at 302-03. The record contained material which attacked the two men's religion (Roman Catholic). *Id.* at 303. Both men were riled by the record and threatened to strike the defendants unless they went away. *Id.* The defendants promptly left. *Id.*

70. *Id.* at 300-01.

71. *Id.* at 303. The Due Process Clause of the Fourteenth Amendment provides that: "No state shall . . . deprive any person of life, liberty, or property without due process of law . . . . " U.S. CONST. amend. XIV, § 1.

72. *Cantwell*, 310 U.S. at 303. The Court stated that: "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." *Id.*

73. *Id.* at 307. Until 1961 the Supreme Court continued to afford free exercise protection in the context of other First Amendment rights. *See, e.g.*, Kunz v. New York, 340 U.S. 290 (1951) (invalidating the state ordinance requiring a permit to hold public worship on the streets); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (invalidating the state law requiring children to salute the flag at public schools).

74. 249 U.S. 47 (1919). Justice Holmes' "clear and present danger" test provided that: "The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52.

75. *See Cantwell*, 310 U.S. at 311. The unanimous Court reasoned that:

> Although the contents of the [phonographic] record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the [defendants'] communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.

Id.

The Court did, however, reiterate the distinction between the absolute freedom to believe, and the less than absolute freedom to act: "Thus the Amendment embraces two

The Supreme Court took a novel approach to free exercise jurisprudence in *Braunfeld v. Brown*.[76] The claimants, a group of Orthodox Jewish shop owners, brought suit to enjoin Pennsylvania's mandatory Sunday closing statute as applied to them.[77] A basic tenet of the Jewish faith required these shop owners to close their shops on Saturdays, their sabbath.[78] Prior to the enactment of the Sunday closing statute, the claimants were able to compensate for closing on Saturdays by remaining open on Sundays, a day in which they did a substantial amount of business.[79]

The Jewish shop owners attacked the statute on free exercise grounds claiming it forced them to choose between economic hardship (state mandated Sunday closing) and observance of their religion (religiously mandated Saturday closing).[80] The Court sustained the law as applied to the claimants by labeling the religious burden as "indirect."[81] The Court reasoned that an indirect burden operates less restrictively on an individual's free exercise than a law which makes "unlawful the religious practice itself."[82] The Court proclaimed that legislation which somehow put one religion at an economic disadvantage was an inevitable consequence of a "cosmopolitan nation."[83] Nevertheless, the Court held that such an effect cannot be used as an "absolute test" in determining whether legislation violates an individual's right to free exercise of religion.[84] According to

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concepts, — freedom to believe and freedom to act. The first is absolute but, . . . the second cannot be. Conduct remains subject to regulation for the protection of society." *Id.* at 303-04.

76. 366 U.S. 599 (1961); *see* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens of the Free Exercise of Religion*, 102 HARV. L. REV. 933, 940 (1989).

77. *Braunfeld*, 366 U.S. at 601.

78. *Id.* at 602.

79. *Id.* at 601.

80. *Id.* at 601-02.

81. *Id.* at 606. The Court emphasized the noncoercive nature of the statute: "[T]he statute at bar does not make unlawful any religious practices of the [the claimants]; the Sunday law simply regulates a secular activity and, as applied to [the claimants], operates so as to make the practice of their religious beliefs more expensive." *Id.* at 605.

82. *Id.* at 606. The Court stated that: "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Id.*

83. *Id.*

84. *Id.* at 606-07.

the Court, some limitation must be placed upon legislation that imposes only an indirect burden on religious observance.[85]

Thus, the Supreme Court's analysis did not end once it characterized the claimant's burden as indirect or direct. Instead, the Court then examined the state's interest in providing a Sunday closing law, whether the law had a secular purpose, and whether a less burdensome alternative could accomplish the same end.[86] After careful analysis the Court determined that the state had a legitimate secular interest in maintaining one uniform day of rest[87] and could not achieve its goal through less restrictive means.[88] The Court concluded that the state would encounter substantial enforcement problems if it created religious exemptions.[89] Consequently, the statute was upheld.[90]

Although the Court rejected the free exercise claim, its approach was a dramatic departure from *Reynolds*.[91] In effect, *Braunfeld* widened the scope of the Free Exercise Clause by placing indirect burdens within its scrutiny and requiring the

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85. The Court held that:

> If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

Id. at 607. The Court turned to *Cantwell* as support for requiring the state to employ the least restrictive means in furthering its interests:

> If the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

Id. (citing Cantwell v. Connecticut, 310 U.S. 296, 304-05 (1940)).

86. *Id.* at 606-07.

87. *Id.* at 607.

88. *Id.* at 608. The Court reasoned that:

> [T]o permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity. Although not dispositive of the issue, enforcement problems would be more difficult since there would be two or more days to police rather than one and it would be more difficult to observe whether violations were occurring.

Id.

89. *Id.* at 608-09.

90. *Id.* at 609.

91. Lupu, *supra* note 76, at 940.

state to justify them.[92]

E. Sherbert v. Verner: *Expansion of Religious Liberty Through The Compelling Interest Test*

Before *Employment Division, Department of Human Resources v. Smith (Smith II)*,[93] *Sherbert v. Verner*[94] was generally considered the leading case in the Supreme Court's modern approach to free exercise jurisprudence.[95] In *Sherbert*, a South Carolina employer discharged the claimant, a Seventh-Day Adventist, because she refused to work on Saturdays, her Sabbath.[96] Unable to find other employment because of her refusal to work on Saturdays, the claimant applied for unemployment benefits.[97] The South Carolina Employment Security Commission denied her application on the ground that she remained unemployed without "good cause."[98] The South Carolina courts affirmed, rejecting her free exercise claim.[99]

The Supreme Court reversed, recognizing that government burdens the free exercise of religion when it denies unemployment benefits to an individual because of conduct mandated by religious belief.[100] The Court's free exercise analysis consisted of a two-part balancing test. The first part centers on whether the application of the statute imposes a burden upon the free exercise of the claimant's religion.[101] If the statute imposes a burden

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92. *Id.*

93. 494 U.S. 872 (1990). For a detailed discussion of the *Smith II* majority opinion, see *infra* notes 169-84 and accompanying text.

94. 374 U.S. 398 (1963).

95. McConnell, *supra* note 8, at 1412.

96. *Sherbert*, 374 U.S. at 399. The unemployment regulation provided in pertinent part: "Conditions for eligibility for benefits. — An unemployed insured worker shall be eligible to receive benefits with respect to any week only if: . . . (3) he is able to work and is available to work . . . ." *Id.* at 400 n.3.

97. *Id.* at 399-400.

98. *Id.* at 401.

99. *Id.* The Court noted that:

> The State Supreme Court held specifically that appellant's ineligibility infringed no constitutional liberties because such a construction of the statute "places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."

Id. (citations omitted).

100. *Id.* at 410.

101. *Id.* at 403.

on the claimant's free exercise, the second part of the test calls for a consideration of whether some "compelling state interest" justifies the infringement.[102] Even if the state's interest is compelling, that interest would be outweighed if it could have been achieved through less restrictive means.[103] At the same time, the Court recognized that if religiously motivated conduct "posed some *substantial* threat to public safety, peace or order," free exercise challenges would be rejected.[104]

The Court found that even though the state had a legitimate interest in limiting unemployment benefits, that interest was not compelling when weighed against the burden on claimant's free exercise of religion.[105] According to Justice Brennan, "only the gravest abuses, endangering paramount interests give occasion for permissible limitation."[106]

Before *Smith II*, the *Sherbert* compelling interest test had been widely used by both state and federal courts when confronted with challenges to legislation that burdened religious exercise.[107]

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102. *Id.* at 403, 406.

103. *Id.* at 407.

104. *Id.* at 403 (emphasis added).

105. *Id.* at 406-08. In assessing whether the State's interest was compelling, the Court noted that:

> No such abuse or danger has been advanced in the present case. The [State] suggest[s] no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. But that possibility is not apposite here because no such objection appears to have been made before the South Carolina Supreme Court, and we are unwilling to assess the importance of an asserted state interest without views of the state court. Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the [State] now advance[s].

Id. at 407.

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

107. Federal decisions applying the compelling interest test include: Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir.), *cert. denied*, 111 S. Ct. 131 (1990) (refusing a free exercise exemption for a religious school to Fair Labor Standards Act); Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990) (holding that the maintenance of a minister's age discrimination suit against church would violate the Free Exercise Clause); Christian Gospel Church, Inc. v. City and County of San Francisco, 896 F.2d 1221 (9th Cir. 1989) (holding that the denial of a zoning variance does not violate the Free Exercise Clause); Islamic Ctr. v. Starkville, 840 F.2d 293 (5th Cir. 1988) (holding that denial of a zoning variance for a Moslem mosque violated the Free Exercise Clause); Church of God v. Amarillo Indep. School Dist., 511 F.

Moreover, the Supreme Court itself has relied on *Sherbert* on several occasions.[108] In *Wisconsin v. Yoder*,[109] Amish parents challenged Wisconsin's compulsory education law. The parents argued that allowing their children to attend high school would, among other things, "endanger their own salvation and that of their children."[110] Faced with this religious challenge to the state's compulsory school attendance law, the Court held that enforcement would "gravely endanger if not destroy the free exercise rights of the Amish religious beliefs."[111] The Court stated that in order to compel school attendance it must appear "that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[112]

In *United States v. Lee*,[113] the Court held that an Old Order Amish farmer and carpenter had to pay employer's social security taxes, and also withhold social security taxes from his Amish employees.[114] Using the *Sherbert* test the Court found that even though the payment of taxes violated Lee's religious beliefs, creating an exemption would undermine the social security system.[115]

Supp. 613 (N.D. Tex. 1981), *aff'd*, 670 F.2d 46 (5th Cir. 1982) (holding that Church of God students could not be penalized for school absences during "Holy Week").

State court decisions applying the compelling interest test include: Barlow v. Blackburn, 798 P.2d 1360 (Ariz. Ct. App. 1990) (holding no right to practice polygamy); First Covenant Church v. Seattle, 787 P.2d 1352 (Wash. 1990), *vacated*, 111 S. Ct. 1097 (1991) (holding that state landmark ordinances as applied to church violated the Free Exercise Clause); State v. Motherwell, 788 P.2d 1066 (Wash. 1990) (holding that a child abuse reporting statute as applied to religious counselors did not violate the Free Exercise Clause); Ware v. Valley Stream High Sch. Dist., 550 N.E.2d 420 (N.Y. 1989) (holding that there exists a possible free exercise right for a student to be excused from state mandated curriculum on AIDS prevention); Board of Medical Quality Assurance v. Andrews, 211 Cal. App. 3d 1346 (1989) (holding that illegal medical practices, although religiously prescribed, are not protected by the Free Exercise Clause).

108. *See supra* note 11.

109. 406 U.S. 205 (1972).

110. *Id.* at 209.

111. *Id.* at 219.

112. *Id.* at 214.

113. 455 U.S. 252 (1982).

114. *Id.* at 261.

115. *Id.* at 258-60. The *Lee* Court stated that "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." *Id.* at 260. Indeed, governmental interest in collecting taxes has traditionally been found compelling when weighed against religious challenges. *See, e.g.*, Hernandez v. C.I.R., 490 U.S. 680 (1989) (rejecting

Finally, in *Bob Jones University v. United States*,[116] the claimant, a nonprofit private university, was denied tax exempt status because of its racially discriminatory admissions policy.[117] The university claimed that the denial of tax benefits burdened its right to free exercise.[118] The Supreme Court, using the *Sherbert* compelling interest test, found that the government's interest in eradicating racial discrimination was compelling, and that this interest "substantially outweigh[ed]" the purported burden the denial of tax benefits would have on the school's religious exercise.[119]

III. *Employment Division, Department of Human Resources of Oregon v. Smith*

A. *The Facts*

Employment Division, Department of Human Resources v. Smith (*Smith II*),[120] involved respondents Alfred L. Smith, a sixty-six year old Klamath Indian,[121] and Galen W. Black[122] who were both members of the Native American Church (NAC).[123]

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free exercise challenge to payment of income taxes alleged to make participation in religious activities more difficult).

116. 461 U.S. 574 (1983).

117. *Id.* at 581-82.

118. *Id.* at 582.

119. *Id.* at 603-04.

120. 494 U.S. 872 (1990).

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

122. Black is not an American Indian. The sincerity of respondents' religious beliefs, however, was not an issue before the Court. Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660, 663 (1988) (*Smith I*).

123. *Smith II*, 494 U.S. at 874. In their Amici Curiae Brief submitted on behalf of the respondents, the Association of American Indian Affairs described the origins and tenets of the Native American Church:

> The Peyote Religion, or Peyotism, is one of the oldest continuously practiced religions in the Western Hemisphere. Its roots have been documented back at least ten thousand years *before* the discovery of the North American continent, to the aboriginal people of the lower Rio Grande River in the continental United States and Mexico who were familiar with peyote and its spiritual qualities.
>
> The Native American Church ("NAC"), comprised of the national organization and numerous state and local chapters, is the contemporary embodiment of the Peyote Religion. Non-Indians [like respondent Black] are practicing members of some church chapters, but many chapters restrict membership to persons of Indian descent.

The respondents were drug and alcohol counselors, employed by Douglas County Council on Alcoholic and Drug Abuse Prevention and Treatment (ADAPT), a private, nonprofit substance abuse treatment organization.[124] To assure that its counselors were appropriate role models, ADAPT's personnel policy strictly prohibited the use of alcohol or illegal drugs by its employees.[125]

Black consumed a small quantity of peyote[126] at an NAC ceremony.[127] Convinced that he relapsed into drug abuse,

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Peyote is the central sacrament of NAC ceremonies; without peyote Church ceremonies simply could not take place. Peyote is believed to embody a spiritual deity; and the ingestion of the peyote assists participants in communicating directly with the Creator.

Brief Amici Curiae by Association on American Indian Affairs, for respondents at 7-8, Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (No. 88-1213); *see also* People v. Woody, 394 P.2d 813, 817 (Cal. 1964) (granting an exemption for NAC members from California's drug laws for religious peyote use).

124. *Smith I*, 485 U.S. at 662. The Court noted that both respondents "were qualified to be counselors, in part, because they had former drug and alcohol dependencies." *Id.*

125. *Id.* at 662 n.3. ADAPT's personnel policy provided in pertinent part:

POLICY STATEMENT

ALCOHOL AND OTHER DRUG USE BY EMPLOYEES

In keeping with our drug-free philosophy of treatment, and our belief in the disease concept of alcoholism, and associated complex issues involved in both alcoholism and drug addiction, we require the following of our employees:

1. Use of an illegal drug or use of prescription drugs in a nonprescribed manner is grounds for immediate termination from employment.

Id.

126. *Id.* at 663. In granting an exception to NAC members to California's drug laws for religious peyote use, the California Supreme Court described peyote as follows:

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

People v. Woody, 394 P.2d 813, 816-17 (Cal. 1964).

127. *Smith I*, 485 U.S. at 663. In *Woody*, Justice Tobriner of the Supreme Court of California described in general terms a typical Native American Church ceremony:

The "meeting," a ceremony marked by the sacramental use of peyote, composes the cornerstone of the peyote religion. The meeting convenes in an enclosure and continues from sundown Saturday to sunrise Sunday. To give thanks for the past good fortune or find guidance for future conduct, a member will "sponsor" a

Black's supervisor gave him a choice between "resignation, discharge or entry into an inpatient treatment program."[128] Black rejected the offer of treatment, insisting his use of peyote was not a relapse, and was subsequently discharged.[129]

In Smith's case, ADAPT's executive director, John Gardin, had warned Smith that "he could be discharged for using peyote even if the use was part of a religious ceremony."[130] Prior to the next NAC ceremony, Gardin talked to Smith about the events scheduled for that weekend.[131] Although Gardin had no objection to Smith's attendance, he warned Smith that ingestion of peyote, even though religiously motivated, would lead to his dismissal.[132] Nonetheless, that weekend Smith ingested a small quantity of peyote at the ceremony.[133] Upon returning to work on Monday, Smith told Gardin about his peyote use, refused Gardin's request to enter a treatment program, and was discharged later that day.[134] Subsequently, Smith and Black filed for unemployment benefits.[135]

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meeting and supply to those who attend both the peyote and the next mornings breakfast. . . . A meeting connotes a solemn and special occasion. Whole families attend together, although children and young women participate only by their presence. . . . At the meeting members pray, sing, and make ritual use of drum, fan, eagle bone, whistle, rattle and prayer cigarette, the symbolic emblems of their faith. The center event, of course, consists of the use of peyote in quantities sufficient to produce an hallucinatory state.

At an early but fixed stage in the ritual the members pass around a ceremonial bag of peyote buttons. Each adult may take four, the customary number, or take none. The participants chew the buttons, usually with some difficulty because of the extreme bitterness; later, at a set time in the ceremony any member may ask for more peyote; occasionally a member may take as many as four more buttons. At sunrise on Sunday the ritual ends: after a brief outdoor prayer, the host and his family serve breakfast. Then the members depart. By morning the effects of the peyote disappear; the users suffer no aftereffects.

Woody, 394 P.2d at 817.

128. Black v. Employment Div., Dep't of Human Resources, 721 P.2d 451, 452 (Or. 1986).

129. *Id.*

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

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660, 663 (1988) (*Smith I*).

B. *The State Administrative Proceedings*

The petitioner, Oregon Employment Division, denied the respondents' applications for unemployment compensation[136] on the ground that they were discharged for work related "misconduct."[137] After separate hearings at the respondents' request, the referees found that they were both entitled to benefits.[138] The referee found that Black's peyote use was not misconduct, but merely "an isolated incident of poor judgment."[139] In Smith's case the referee found that "although Smith had committed misconduct, he was not disqualified from receiving benefits" because the state's interest in preserving the unemployment compensation trust fund was outweighed by Smith's First Amendment right to freedom of religion.[140]

The Employment Appeals Board (EAB) reversed both cases.[141] As to Smith, the EAB found that the referee erroneously relied on the state's interest in the financial aspects of the trust fund, rather than the "compelling" state interest in illegal drug enforcement.[142] In Black's case, the EAB simply reversed the referee's finding of no misconduct.[143]

C. *The Oregon Court Decisions*

The Court of Appeals of Oregon, sitting *en banc*, reversed the EAB's decisions.[144] In *Black v. Employment Division*,[145] the

136. Although the Supreme Court ultimately consolidated respondents' cases in *Smith I*, the cases proceeded separately through the administrative proceedings and through the Oregon courts. *Id.* at 663 n.4.

137. *Id.* at 666 n.5.; *see also supra* note 125 and accompanying text. The Employment Division based its decision on: (1) an Oregon Statute which provided that "[a]n individual shall be disqualified from the receipt of benefits . . . if the authorized representative . . . finds that the individual has been discharged for misconduct connected with work . . . ," OR. REV. STAT. § 657.176(2)(a) (1987); and (2) an Oregon Administrative Rule which defines misconduct as "a willful violation of the standards of behavior which an employer has the right to expect of an employee," OR. ADMIN. R. 471-30-038(3) (1986). *Smith I*, 485 U.S. at 663-64.

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

139. *Id.*

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

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

142. *Id.*

143. *Id.*

144. *Id.* at 664.

majority applied the compelling interest test set forth in *Sherbert v. Verner*,[146] and concluded that the denial of unemployment benefits was an unconstitutional burden on the free exercise of religion.[147] The court found that the state's interest in the financial integrity of the trust fund was not compelling.[148] However, the court was not satisfied with the fact finding below and remanded the case to the EAB to determine the religious sincerity of Black's peyote use.[149] Smith's case was also reversed and was remanded for reconsideration in light of *Black*.[150]

The Supreme Court of Oregon affirmed, but held that the remand to the EAB was unnecessary.[151] In Black's case, the court supported its position by verifying the sincerity of the NAC and its religious use of peyote as a sacrament.[152] The court fully analyzed the constitutional issues only in Smith's case.[153]

The court recognized that: (1) the Native American Church is a bona fide religion; (2) peyote is a sacrament of the church; and (3) the claimant was a member and active participant in the religious ceremonies of the church.[154] Consequently, the court found that under the compelling interest test established in *Sherbert v. Verner*,[155] the state's interest in the economic viability of the employment compensation fund was not "compelling" when weighed against the claimants' free exercise rights.[156]

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145. 707 P.2d 1274 (Or. Ct. App. 1985).

146. 374 U.S. 398 (1963). For an explanation of the *Sherbert* compelling interest test, see *supra* text accompanying notes 100-04.

147. *Black*, 707 P.2d at 1277-78.

148. *Id.* at 1278.

149. *Id.* at 1279-80.

150. Smith v. Employment Div., Dep't of Human Resources, 709 P.2d 246 (Or. Ct. App. 1985).

151. Smith v. Employment Div., Dep't of Human Resources, 721 P.2d 445, 446 (Or. 1986). The two cases were argued together but the court filed separate opinions.

152. Black v. Employment Div., Dep't of Human Resources, 721 P.2d. 451 (Or. 1986). In *Black*, the court quoted extensively from People v. Woody, 394 P.2d 813 (Cal. 1964), to support its position. For a discussion of the *Woody* decision, see *infra* note 160.

153. *Smith*, 721 P.2d 445 (Or. 1986).

154. *Black*, 721 P.2d at 453.

155. 374 U.S. 398 (1963).

156. *Smith*, 721 P.2d at 450-51. The court first determined that the denial of benefits did not violate the Oregon Constitution. *Id.* at 446-49. In applying the compelling interest test, the court reasoned that the state's interest in denying unemployment benefits must come from the statute under attack, the Oregon unemployment statute, and not the state criminal drug statute. Moreover, the court noted that because an illegal act

D. Smith I

The United States Supreme Court granted certiorari.[157] In *Employment Division, Department of Human Resources v. Smith (Smith I)*,[158] an opinion by Justice Stevens, the Court vacated judgment and remanded the case to the Supreme Court of Oregon for determination of whether religious use of peyote is illegal under Oregon law.[159] The Court reasoned that the Supreme Court of Oregon, in *Black*, relied on *People v. Woody*,[160] thus raising the question of whether Oregon, like California, had created an exemption to the state's drug laws for religious peyote use.[161]

The Court held that the "legality of the religious use of peyote in Oregon" would determine whether it was protected by the Constitution.[162] According to the decision in *Smith I*, *Sher-*

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in and of itself is not grounds for discharge, the legality of the respondent's peyote use was irrelevant. *Id.* at 450.

157. Employment Div., Dep't of Human Resources v. Smith, 480 U.S. 916 (1987).

158. 485 U.S. 660 (1988).

159. *Id.* at 674. Chief Justice Rehnquist and Justices White, O'Connor and Scalia joined in the majority opinion. Justices Brennan, Marshall and Blackmun dissented. Justice Kennedy took no part in the opinion.

160. 394 P.2d 813 (Cal. 1964). *Woody* involved a group of Navajo Indians who were arrested during a NAC ceremony, and subsequently convicted, for possession of peyote. *Id.* at 814. The Supreme Court of California, relying on Sherbert v. Verner, 374 U.S. 398 (1963), created an exception to the state's narcotic laws for religious use of peyote by NAC members. *Woody*, 394 P.2d at 815; *see also supra* note 127 (describing religious peyote use). The court reviewed the long history of the peyote religion and recognized that "[p]eyote constitutes in itself an object of worship; prayers are directed to it as much as prayers are devoted to the Holy Ghost." *Woody*, 394 P.2d at 817. In light of an individual's right to free exercise and the burden on his religion in applying criminal laws to the defendant, the court weighed the state's interest in criminalization, and found that "the use of peyote presents only a slight danger to the state and to the enforcement of its criminal laws . . . ." *Id.* at 817.

161. *Smith I*, 485 U.S. at 667-68. The Court stated that:

> The possibility that respondents' conduct would be unprotected if it violated the State's criminal code is, however, sufficient to counsel against affirming the state's holding that the Federal Constitution requires the award of benefits to these respondents. If the Oregon Supreme Court's holding rests on the unstated premise that respondents' conduct is entitled to the same measure of federal constitutional protection regardless of its criminality, that holding is erroneous. If, on the other hand, it rests on the unstated premise that the conduct is not unlawful in Oregon, the explanation of that premise would make it more difficult to distinguish our holdings in *Sherbert*, *Thomas*, and *Hobbie*.

Id. at 673-74.

162. *Id.* at 673.

bert and its progeny would be dispositive only if Smith's conduct had been legal.[163] Because the First Amendment protects only "legitimate" claims to the exercise of religious freedom, the Court questioned the extension of that protection to conduct validly proscribed by the State.[164] Consequently, the Court concluded that a state could deny unemployment benefits to individuals who engaged in illegal conduct which was religiously motivated.[165] The Court vacated the judgment of the Oregon Supreme Court and remanded the case for a determination of the legality of peyote use in religious ceremonies in Oregon.[166]

E. *The Remand to the Supreme Court of Oregon*

On remand, the Supreme Court of Oregon concluded that "the Oregon statute against possession of controlled substances which includes peyote makes no exception for sacramental use of peyote, but that outright prohibition of good faith religious use of peyote by adult members of the Native American Church would violate the First Amendment directly and as interpreted by Congress."[167] The court basically reaffirmed its prior holding

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163. *Id.* at 673-74.

164. *Id.* at 671.

165. *Id.* According to the Court, the First Amendment only protects " '*legitimate* claims to the free exercise of religion' . . . [and] does not extend to conduct that the state has validly proscribed." *Id.* (citing Hobbie v. Unemployment Appeal Comm'n, 480 U.S. 136, 142 (1987)). The Court implied that the free exercise analysis used in Reynolds v. United States, 98 U.S. 145 (1879), should control religiously motivated illegal conduct. *Id.* For a full discussion of the *Reynolds* decision, see *supra* notes 56-65 and accompanying text.

Professor Smith, in his critique of *Reynolds*, opined that the "*Reynolds* Court interpreted the free exercise right as a privilege. While Congress could not forbid anyone from forming religious *opinions*, religious *acts* that furthered those opinions could be withheld at the whim of the government in the interests of 'good order.' " Smith, *supra* note 21, at 635.

166. *Smith I*, 485 U.S. at 674.

167. Smith v. Employment Div., 763 P.2d 146, 148 (Or. 1988). The court cited the American Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1978), in defense of its position:

> Henceforth it 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 ceremonial and traditional rites.

Smith, 763 P.2d at 149 (citation omitted). Additionally, the court examined the report of the House Committee on Interior and Insular Affairs, H.R. REP. No. 1308, 95th Cong., 2d

that "the First Amendment entitled petitioners to unemployment compensation."[168]

F. *The United States Supreme Court Decision in* Smith II

On petition by the Employment Division Department of Human Resources of Oregon, the Supreme Court granted certiorari[169] for a second time to decide the question of whether "the Free Exercise Clause . . . permits . . . Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on the use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use."[170] The United States Supreme Court reversed the decision of the Supreme Court of Oregon and held that the Free Exercise Clause does not prevent the state from prohibiting sacramental peyote use in a bona fide NAC ceremony.[171]

Sess. 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1262, which accompanied the Act. With respect to restrictions on the use of peyote, the report concluded that "[a]lthough acts of Congress prohibit the use of peyote as a hallucinogen, it is established Federal law that peyote is constitutionally protected when used by a bona fide religion as a sacrament." *Id.* at 1263. Moreover, the court noted that twenty-three states have statutorily exempted religious peyote use by the Native American Church from criminal prosecution. *Smith*, 763 P.2d at 148 n.2.

In response to the *Smith II* decision, Oregon revised its drug prohibition in 1991 providing an affirmative defense for good faith religious use of peyote. The revised statute reads:

> (5) In any prosecution under this section for manufacture, possession or delivery of that plant of the genus Lophophora commonly known as peyote, it is an affirmative defense that the peyote is being used or is intended for use:
>
> (a) In connection with the good faith practice of a religious belief;
>
> (b) As directly associated with a religious practice; and
>
> (c) In a manner that is not dangerous to the health of the user or others who are in the proximity of the user.

OR. REV. STAT. § 475.992(5) (1991).

168. *Smith*, 763 P.2d at 148; *see supra* notes 151-56 and accompanying text.

169. Employment Div., Dep't of Human Resources v. Smith, 489 U.S. 1077 (1989).

170. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 874 (1990) (*Smith II*).

171. *Id.* at 875-90.

G. *The Majority Opinion*

Writing for the majority, Justice Scalia[172] narrowly construed the Free Exercise Clause as applied to religiously motivated conduct: "if prohibiting the exercise of religion is not the object of the [law] but merely the incidental effect of a generally applicable provision, the First Amendment has not been offended."[173] Since the Oregon statute prohibiting peyote was not specifically directed at the respondents' religious practice, the majority concluded that the principles set forth in *Reynolds v. United States* were controlling.[174] According to Justice Scalia, the Supreme Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[175]

The Court distinguished leading free exercise cases such as *Cantwell v. Connecticut*,[176] *Wisconsin v. Yoder*,[177] and *West Virginia Board of Education v. Barnette*,[178] by labeling them as "hybrid."[179] Moreover, the Court abandoned the *Sherbert* compelling interest test when faced with a religious challenge to

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172. Chief Justice Rehnquist and Justices White, Stevens, and Kennedy joined in the majority opinion. Justice O'Connor concurred in their judgment, with whom Justices Brennan, Marshall, and Blackmun joined as to Parts I and II. Justices Blackmun, Brennan, and Marshall dissented.

173. *Smith II*, 494 U.S. at 878.

174. *Id.* at 882. Justice Scalia stated that "[t]here being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls." *Id.* For a discussion of the *Reynolds* decision, see *supra* notes 56-65 and accompanying text.

175. *Smith II*, 494 U.S. at 878-79. *Contra* Wisconsin v. Yoder, 406 U.S. 205 (1972) (creating a free exercise exemption from several years of compulsory state education for Amish children).

176. 310 U.S. 296 (1940); *see supra* notes 66-75 and accompanying text.

177. 406 U.S. 205 (1972); *see supra* notes 109-12 and accompanying text.

178. 319 U.S. 624 (1943). In *Barnette*, when faced with a religious challenge to a 1941 West Virginia statute requiring compulsory participation by school children in the pledge of allegiance, the Supreme Court ruled that enforcement of the statute "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 642.

179. *Smith II*, 494 U.S. at 881-82. The Court found that each of these cases presented not only issues relative to the Free Exercise Clause, but involved the Free Exercise Clause in conjunction with such other constitutionally protected rights as freedom of speech and of the press. The Court continued by noting that the Free Exercise Clause might also be raised with the issue of freedom of association when groups form in an attempt to protect their religious practices. *Id.*

"generally applicable prohibitions."[180] The Court implied that the compelling interest test might still be valid in "hybrid" cases which involve the Free Exercise Clause in conjunction with other constitutional protections,[181] and in the narrow context of unemployment compensation cases where the conduct sought to be controlled is legal.[182] Finally, the *Smith II* majority viewed repression of minority religions as an "unavoidable consequence of democratic government"[183] and consequently denied the respondents unemployment compensation because of their religious practices.[184]

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180. *Id.* at 885. The Court stated that "[t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' — permitting him by virtue of his beliefs, 'to become a law unto himself,' — contradicts both constitutional tradition and common sense." *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145 (1878)).

In countering this argument, Justice O'Connor noted in her concurring opinion, that the Court's "free exercise cases have *all* concerned generally applicable laws that had the effect of significantly burdening religious practice." *Id.* at 894 (O'Connor, J., concurring) (emphasis added).

Justice Scalia further stated that:

> Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized government assessment of the reasons for relevant conduct.

Id. at 884.

181. *Id.* at 881-82.

182. *Id.* at 883-84. The Court stated that "[i]n recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all." *Id.* at 883. For cases that applied the *Sherbert* compelling interest test in the context of unemployment compensation where the conduct at issue was legal, see Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (granting a Seventh-Day Adventist a Sabbath exemption from unemployment compensation rules); Thomas v. Review Bd., 450 U.S. 707 (1981) (granting a Jehovah's Witness, who refused an employment transfer to military tank production facility, an exemption from unemployment compensation rules).

183. *Smith II*, 494 U.S. at 890.

184. *Id.* The Court noted that:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Id.

H. *Justice O'Connor's Concurrence*

Although Justice O'Connor concurred in the majority's judgment, she attacked the abandonment of the compelling interest test as "denigrate" to the purpose of the Bill of Rights.[185] Additionally, Justice O'Connor questioned the "vitality" of the Free Exercise Clause as construed by the majority — covering only the unlikely scenario in which a state directly targets a religious practice.[186] She labeled this "dramatic depart[ure] from well-settled First Amendment jurisprudence" as being "incompatible with our Nation's fundamental commitment to individual religious liberty,"[187] and urged the continued application of the *Sherbert* compelling interest test in "paradigm free exercise cases."[188]

Justice O'Connor concluded by applying the compelling interest test to the facts of the case.[189] She found that although Oregon's peyote prohibition "places a severe burden on the ability of respondents to freely exercise their religion,"[190] accommodating a religious exemption in this case would "seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens."[191]

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185. *Id.* at 903 (O'Connor, J., concurring). In reproaching the majority's abandonment of the *Sherbert* test, Justice O'Connor stated that:

> [T]he Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.

Id. at 892 (citations omitted). Justice O'Connor stated further that "[b]ecause the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must therefore be at least presumptively protected by the Free Exercise Clause." *Id.* at 893.

186. *Id.* at 894.

187. *Id.* at 891.

188. *Id.* at 901. Justice O'Connor characterized the compelling interest as "effectuat[ing] the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests 'of the highest order.'" *Id.* at 895 (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

189. *Id.* at 903-07.

190. *Id.* at 903.

191. *Id.* at 906. In balancing the compelling interest test in favor of the state, Jus-

I. *The Dissent*

The dissent, written by Justice Blackmun, agreed with Justice O'Connor's evaluation of the majority's narrow rule and her adherence to the compelling interest test.[192] The dissent took issue, however, with Justice O'Connor's broad assessment of the compelling state interest at issue.[193] Joined by Justices Brennan and Marshall, Justice Blackmun found that the competing interests must be reduced to the "same plane of generality" to avoid "distort[ing] the weighing process in the state's favor."[194] Consequently, the dissent found the state's interest to be the "enforcement of its [peyote] prohibition."[195] As such, the dissent reasoned that given Oregon's refusal to enforce this prohibition against any religious use of peyote, no compelling interest can be asserted.[196] Justice Blackmun asserted that Oregon: (1) "had not evinced any concrete interest in enforcing its drug laws against religious users of peyote"; (2) "never sought to prosecute respondents"; and (3) had "not claimed to [make] significant enforcement efforts against other religious users of peyote."[197] Thus, the dissent found the State's interest to be only symbolic and not rising to a level which would support a restriction on religious freedom.[198]

Additionally, the dissent took issue with the petitioner's other proclaimed interests.[199] First, as to the protection of its citizens from the resulting harmful effects of using peyote, the dissent noted that no evidence was offered by the petitioner to support this proposition.[200] Justice Blackmun noted that the federal government, which created an exemption for religious peyote use,[201] apparently did not find peyote inherently

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tice O'Connor was mainly concerned with the resultant physical harm of using controlled substances and the societal interest in preventing drug trafficking. *Id.*

192. *Id.* at 908-09 (Blackmun, J., dissenting).

193. *Id.* at 909-10.

194. *Id.* at 910.

195. *Id.*

196. *Id.* at 910-911.

197. *Id.* at 911.

198. *Id.*

199. *Id.* at 911-19.

200. *Id.* at 911-12.

201. Religious peyote use by NAC members is exempt from federal drug laws: The listing of peyote as a controlled substance in Schedule I does not apply to the

dangerous.[202]

Second, as to the state's interest in "abolishing drug trafficking," the dissent noted that there is "practically no illegal traffic in peyote" because it is "not a popular drug."[203] Consequently, the dissent found that the distribution of peyote for religious rituals had no correlation with the "vast and violent traffic in illegal narcotics that plagues this country."[204] Third, as to the claim that granting an exemption for religious peyote use will open the flood gates to other claims for religious drug exemptions, the dissent pointed out that "[t]his argument could be made . . . in almost any free exercise case."[205] Justice Blackmun noted that nearly half the states have "maintained an exemption for religious peyote use for many years"[206] and there is no indication that they have been overwhelmed with other religious claims.[207]

Finally, the dissent argued that if Oregon can constitutionally prosecute respondents for this "act of worship," they might be forced to leave the state for a more tolerant one.[208] According to Justice Blackmun, this "potentially devastating impact must be viewed in light of the federal policy" articulated in the American Indian Religious Freedom Act which mandates special protection for Native American religions and their ceremonies.[209]

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nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration.

Food and Drug, 21 C.F.R. § 1307.31 (1985).

202. *Smith II*, 494 U.S. at 912 (Blackmun, J., dissenting).

203. *Id.* at 916.

204. *Id.*

205. *Id.* at 916-17.

206. *Id.* at 917.

207. *Id.* Justice Blackmun also pointed out that the state would not be obligated to grant similar exemptions to other religious groups due to the unique circumstances regarding the NAC and its ceremonies. *Id.* at 917-18; *see also supra* note 127 (describing a NAC ceremony).

208. *Id.* at 920.

209. *Id.* at 920-21. The American Religious Freedom Act provides:

Henceforth it 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 ceremonial and traditional rites.

42 U.S.C. § 1996 (1978 & Supp. 1991).

IV. Analysis

A. *The Original Meaning and Stare Decisis: The Missing Ingredients*

The Supreme Court has never fully examined the historical context or original meaning of the Free Exercise Clause.[210] The Court's free exercise cases, in particular *Sherbert v. Verner*[211] and its progeny,[212] and *Employment Division, Department of Human Resources v. Smith* (*Smith II*),[213] are void of any analysis of the framers' understanding of the "free exercise of religion" at the time of the drafting and ratification of the First Amendment. Furthermore, the *Smith II* Court abandoned nearly thirty years of free exercise jurisprudence as first established in *Sherbert v. Verner*.[214]

The Free Exercise Clause commands that "Congress shall make no law . . . prohibiting the free exercise of religion."[215] The plain meaning of these words intimates the preferred position religious action and belief should have over secular concerns.[216] James Madison, a First Amendment framer in the forefront of religious liberty, intended an unfettered right to free exercise. According to Madison, only when "the preservation of equal liberty, and the existence of the State be manifestly endangered"[217] could government impose secular limitations on the free exercise of religion.[218]

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210. McConnell, *supra* note 8, at 1413. In contrast, Court interpretations of the Establishment Clause contain lengthy analyses of its original meaning and historical context. *Id. See, e.g.*, Everson v. Board of Educ., 330 U.S. 1 (1947). In his *Everson* dissent, Justice Rutledge stated that "[n]o provision of the Constitution is more closely tied to or given content by its general history than the religious clause of the First Amendment." *Id.* at 33 (Rutledge, J., dissenting).

Professor McConnell's law review article, *supra* note 8, is perhaps the first scholarly work to be primarily devoted to the historical perspective of the "free exercise of religion." He concluded that historical evidence supports the *Sherbert* interpretation of the Free Exercise Clause. McConnell, *supra* note 8, at 1415.

211. 374 U.S. 398 (1963).

212. *See supra* note 11.

213. 494 U.S. 872 (1990).

214. For a detailed discussion of the *Sherbert* approach to free exercise of religion, see *supra* notes 93-107 and accompanying text.

215. U.S. CONST. amend. I.

216. *See supra* note 55 and accompanying text.

217. JAMES MADISON ON RELIGIOUS LIBERTY 52 (Robert S. Alley ed., 1985).

218. *See supra* notes 31-40 and accompanying text.

Madison's sentiment was ignored when a member of the Mormon Church raised a free exercise challenge to the federal polygamy law in *Reynolds v. United States*.[219] This was the first time the Supreme Court was faced with a free exercise challenge to federal legislation.[220] The Court, perhaps overly concerned with upholding the federal polygamy prohibition, held that religiously motivated conduct could be prohibited in furtherance of legitimate secular goals.[221] Working without precedent, the Court decided that the law was too important to compromise.

Sherbert provided a novel approach to free exercise challenges to generally applicable laws that either interfere with religiously motivated conduct or compel conduct forbidden by religious belief.[222] Here, the Court was faced with a free exercise challenge to a less compelling piece of federal legislation: the unemployment compensation law. Recognizing, as Madison did, that religious liberty is to take a preferred position in our society, the Court struck a balance. Only when religious action threatens some compelling state interest — a threat to public safety, peace, or order — should the right to free exercise be burdened by government, as long as the regulation is the least restrictive means to further that interest.[223]

Smith II, on the other hand, sets forth a categorical rule. Regardless of the state interest involved, if religious activity of any type conflicts with a generally applicable law, the law controls and the individual's religiously motivated conduct is not to be tolerated.[224] The Court limited the use of the compelling interest test to so-called "hybrid" cases, which involve not the Free Exercise Clause alone, but free exercise in conjunction with other constitutional protections.[225] *Smith II*, contrary to both

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219. 98 U.S. 145 (1878). For a detailed discussion of the *Reynolds* decision, see *supra* notes 56-65 and accompanying text.

220. *See* ATTORNEY GENERAL REPORT, *supra* note 56, at 31.

221. *See Reynolds*, 98 U.S. at 164.

222. *See supra* notes 96-106 and accompanying text.

223. Sherbert v. Verner, 374 U.S. 398, 406-08 (1963).

224. *Smith II*, 494 U.S. at 882.

225. *Id.*; *see, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (involving free exercise combined with parental rights); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (involving free exercise combined with freedom of speech and press).

In Society of Separationists, Inc. v. Herman, 939 F.2d 1207, *reh'g ordered*, 946 F.2d 1573 (5th Cir. 1991), the first "hybrid" case to reach the United States Court of Appeals

the Madisonian interpretation of the "free exercise of religion" and the principle of *stare decisis*, gives secular goals, regardless of their gravity, the preferred position.

The Supreme Court has left the exercise of religion unprotected. Religious believers and institutions are now limited in their ability to effectively challenge facially neutral legislation regardless of the effect it may have on their religious observance. Moreover, legislative bodies are now free to vitiate religiously motivated conduct under the guise of a generally applicable law.[226] The gravity of the *Smith II* erosion will become self-evident, not in the isolated case that reaches appellate review, but at the administrative and local level where laws will be passed and decisions rendered.

Justice O'Connor's concurrence in *Smith II* demonstrates that the majority could have reached the same result without abandoning the *Sherbert* test. She called for adherence to the *Sherbert* test, but found that Oregon's compelling interest in enforcing its drug laws outweighed Smith's right to use peyote in a

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since *Smith II*, the court protected an atheist's free exercise rights. The atheist claimant, a prospective juror, was jailed for refusing to swear to tell the truth because it included a reference to God. *Id.* at 1209. She subsequently filed suit against the judge claiming her First Amendment rights had been violated. *Id.* at 1210-11. The court held that since the claimant's refusal to take an oath involved both religion and speech, her conduct was protected by the Free Exercise Clause. *Id.* at 1216.

226. The classic example of a legislative attempt to vitiate the rights of a minority under the guise of a generally applicable law is Yick Wo v. Hopkins, 118 U.S. 356 (1886). Here, the City of San Francisco passed a facially neutral ordinance which made it unlawful to carry on laundries in buildings not made of brick or stone. *Id.* at 358. The effect of the ordinance was to drive small laundries owned by Chinese proprietors out of business, because they were located in wooden buildings. *Id.* at 362. The court held that the ordinance was unconstitutional because its application unlawfully discriminated against the Chinese proprietors. *Id.* at 374.

A case now pending in the United States District Court for the Southern District of New York demonstrates how dangerous *Smith II* could be at the local level. Leblanc-Sternberg v. Fletcher, 781 F. Supp. 261 (S.D.N.Y. 1991), presents an alleged attempt by the newly incorporated Village of Airmont, New York, to prevent Orthodox Jews from worshiping in a residential synagogue. Airmont is located within the Town of Ramapo in Rockland County, New York. The plaintiffs alleged that the purpose behind incorporating the Village was to exclude Orthodox Jewish families. The plaintiffs' claimed that Airmont, therefore, burdened their free exercise of religion and freedom of association. *Id.* at 263-64. District Court Judge Goettel declined to dismiss the plaintiffs' First Amendment claims. *Id.* at 273. In an earlier related case, five Orthodox Jewish families unsuccessfully sought to enjoin the incorporation of Airmont. Leblanc-Sternberg v. Fletcher, 763 F. Supp. 1246 (S.D.N.Y. 1991).

religious ceremony.[227] Although reasonable minds may differ with Justice O'Connor's application of the *Sherbert* test, one thing is certain: the test has worked in divergent factual situations and its retention is essential to ensure that the free exercise of religion retains its preferred position in American Society.

B. *The Application of the Compelling Interest Test*

The *Sherbert* test worked in several different contexts.[228] For example, in *Wisconsin v. Yoder*,[229] when faced with a religious challenge by Amish parents to Wisconsin's compulsory school attendance law, the Court ruled that the parental interest in the religious upbringing of children outweighed the state's interest in educating its citizens.[230] In *United States v. Lee*,[231] when faced with a religious challenge by an Amish employer to the federal social security tax laws, the Supreme Court held that "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[232] In *Bob Jones University v. United States*,[233] the Court faced a religious challenge to the denial of tax exempt status for a nonprofit school; denial was based on the school's racially discriminatory admissions policy.[234] The majority found that the government's interest in eradicating racial discrimination substantially outweighed any purported burden the denial of tax benefits placed on the school's free exercise.[235]

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227. *Smith II*, 494 U.S. at 907 (O'Connor, J., concurring).

228. *See supra* notes 11, 107.

229. 406 U.S. 205 (1972); *see supra* notes 109-12 and accompanying text.

230. 406 U.S. at 235-36.

231. 455 U.S. 252 (1982); *see supra* notes 113-15 and accompanying text.

232. 455 U.S. at 260. The governmental interest in collecting taxes has traditionally been found compelling when weighed against religious challenges. *See, e.g.*, Hernandez v. C.I.R., 490 U.S. 680 (1989) (rejecting free exercise challenge to payment of income taxes alleged to make religious activities more difficult).

Similarly, as Justice O'Connor found, the *Smith II* majority could have found the state interest in illegal drug enforcement compelling when weighed against Smith's free exercise challenge. *See Smith II*, 494 U.S. at 907 (O'Connor, J., concurring).

233. 461 U.S. 574 (1983).

234. *Id.* at 581-82.

235. *Id.* at 603-04.

C. *The Consequences of* Smith II

The consequences of the Supreme Court's *Smith II* decision are grave. Currently accepted religious exemptions, heretofore protected by the court, could now be challenged. For example: (1) a requirement that all witnesses testify as to the facts of their knowledge without exception could destroy the confidentiality of religious confessional;[236] (2) a prohibition on alcohol consumption by minors could make the Christian sacrament of communion illegal;[237] (3) a uniform regulation of meat preparation could put kosher slaughterhouses out of business;[238] and (4) a prohibition against discriminatory hiring practices could end male celibate priesthood.[239]

In the following cases where religious exemptions were court mandated, the same issues under *Smith II* would be decided quite differently. In *Church of God v. Amarillo Independent School District*,[240] student members of the Worldwide Church of God contested the right of the school system to penalize absences during their "Holy Week." A school regulation provided that zeros be entered for exams missed for each student absent from school more then twice annually for religious reasons.[241] The court, employing the compelling interest test, enjoined enforcement of the school's regulation as applied to these Church of God students.[242] If this case had arisen under *Smith II*, these students would have had to forego their Holy Week or receive zeros on missed exams.

In a later case, *Islamic Center v. Starkville*,[243] the construction of a Moslem mosque was prohibited by municipal zoning law. The court in this case, also invoking the compelling interest

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236. McConnell, *supra* note 8, at 1411-12. McConnell discusses an analogous early 19th century case, *People v. Philips*, in which a New York court ruled that the need to compel testimony regarding the return of stolen goods did not outweigh the resulting interference between priests and penitents in the Roman Catholic Church. *Id.*

237. *Id.* at 1419.

238. *Id.*

239. *Id.*

240. 511 F. Supp. 613, 615 (N.D. Tex. 1981), *aff'd*, 670 F.2d 46 (5th Cir. 1982); *see supra* note 107 and accompanying text.

241. 511 F. Supp. at 615.

242. *Id.* at 618.

243. 840 F.2d 293, 294 (5th Cir. 1988); *see supra* note 107 and accompanying text.

test, ordered the city to grant the congregation a variance.[244] Under *Smith II*, no variance need be issued to generally applicable zoning laws. Finally, in *Moody v. Cronin*,[245] a Pentecostal high school student refused to wear gym clothes her religion considered immodest. The court, invoking the compelling interest test, held that refusal to provide a religious exemption violated her constitutional right to free exercise of religion.[246] Under *Smith II*, this female student would have to choose between obeying the school regulation or obeying her religious convictions and incurring possible expulsion.

D. *The Erosion Has Begun*

The erosive effect of *Smith II* has already been demonstrated in *State v. Hershberger*.[247] Minnesota law required slow moving vehicles to display an orange-red florescent triangular emblem when operating on state public highways.[248] The appellants, members of the Old Order Amish religion, strictly adhere to the principle tenet of their religion to remain separate and apart from the modern world.[249] Accordingly, they refused to display the emblem on their horse and buggies, which resulted in appellants receiving traffic citations.[250]

The Minnesota Supreme Court, using the *Sherbert* compelling interest test, determined that although the appellants had a sincere religious belief that had been infringed upon and that Minnesota had a compelling state interest in the safety of its public highways, there was a less restrictive alternative available — using lighted red lanterns.[251] Thus, the appellants free exercise claim was upheld.[252] On appeal, the Supreme Court vacated judgment and "remanded to the Supreme Court of Minnesota for further consideration in light of [*Smith II*]."[253]

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244. 840 F.2d at 302-03.
245. 484 F. Supp. 270, 272 (C.D. Ill. 1979).
246. *Id.* at 277.
247. 444 N.W.2d 282 (Minn. 1989), *vacated*, 495 U.S. 901 (1990).
248. *Hershberger*, 444 N.W.2d at 284.
249. *Id.*
250. *Id.*
251. *Id.* at 289.
252. *Id.*
253. Minnesota v. Hershberger, 495 U.S. 901 (1990).

On remand, in what appears to be an attempt to circumvent *Smith II*, the Minnesota Supreme Court unanimously dismissed the charges on state constitutional grounds.[254] The court reasoned that because the language of the Minnesota Bill of Rights is "of distinctively stronger character than the federal counterpart . . . Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution."[255] The court's approach suggests that state courts, uncomfortable with the *Smith II* approach to free exercise, will seek other grounds for granting religious exemptions to state legislation.

Smith II is currently being applied by lower courts to restrict religious exercise. An intolerable display of the *Smith II* erosion is presented in *Yang v. Sturner*.[256] The Yangs, devoted members of the Hmong community, adhere to a religious tenet that prohibits mutilation of the body through an autopsy.[257] The Yangs' son died following an unsuccessful attempt by the hospital to rescue him after a seizure.[258] The state medical examiner performed an autopsy on the body because the hospital could not determine the cause of the seizure.[259] The autopsy was performed without the knowledge or consent of the Yangs.[260]

In the liability portion of the opinion, decided before *Smith II*, the court, relying in part on *Sherbert* and its progeny,

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254. State v. Hershberger, 462 N.W.2d 393, 399 (Minn. 1990). In Society of Jesus of New England v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990), another case decided on state constitutional grounds, the historical landmark designation of a church interior was held to unconstitutionally burden religious worship. *Society of Jesus* suggests that majority religions are not immune to the wrath of *Smith II*.

255. *Hershberger*, 462 N.W.2d at 397. In discussing the language of the Minnesota Constitution, the court noted that:

> Whereas the first amendment establishes a limit on government action at the point of *prohibiting* the exercise of religion, section 16 precludes even an *infringement* on or *interference* with religious freedom. Accordingly, government actions that may not constitute an outright prohibition on religious practices (thus not violating the first amendment) could nonetheless infringe on or interfere with those practices, violating the Minnesota Constitution.

Id.

256. 728 F. Supp. 845, *withdrawn*, 750 F. Supp. 558 (D.R.I. 1990).

257. 750 F. Supp. at 558.

258. 728 F. Supp. at 846.

259. *Id.*

260. *Id.*

granted summary judgement to the Yangs.[261] Before the damages portion of the case was decided, the *Smith II* decision was rendered.[262] Judge Pettine expressed "profound regret" that he was subsequently "constrained" by *Smith II*, but nevertheless withdrew his prior decision on liability and dismissed the case with prejudice.[263]

In *Intercommunity Center for Justice and Peace v. Immigration and Naturalization Service*,[264] six Roman Catholic nuns claimed that their religious beliefs prevented them from complying with the employer verification provisions of the Immigration Reform and Control Act.[265] The nuns offered employment to people in need without regard to their immigration status.[266] The nuns claimed that the teachings of the Roman Catholic Church imposed a religious duty on them to sustain the lives of all people regardless of their immigration status.[267] Relying on *Smith II*, the court held that there was "no constitutional right implicated here . . . ."[268]

Such cases reveal the states' power, as derived from the *Smith II* decision, to burden free exercise. With states free to control religious conduct through legislation that is facially neutral, *Smith II*'s erosive effect on religious liberty is manifest. Perhaps Judge Shapiro of the United States District Court for the Eastern District of Pennsylvania summed it up best when faced with a member of the Religious Society of Friends (Quakers) who refused to pay the military portion of his income taxes:

> It is ironic that here in Pennsylvania, the woods to which [William] Penn led the Religious Society of Friends to enjoy the

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261. *Id.* at 855-57.

262. 750 F. Supp. at 558.

263. *Id.* at 560. For another free exercise case upholding state compelled autopsy under *Smith II*, see Montgomery v. County of Clinton, 743 F. Supp. 1253 (W.D. Mich. 1990) (holding that the incidental effect of state mandated autopsy on claimants' religion does not offend the First Amendment), *aff'd*, 940 F.2d 661 (6th Cir. 1991).

264. 910 F.2d 42 (2d Cir. 1990).

265. *Id.* at 43. The Immigration Reform and Control Act requires that employers verify that each of their employees is authorized to work in the United States. 8 U.S.C. § 1324a (1988).

266. 910 F.2d at 43.

267. *Id.*

268. *Id.* at 46.

> blessings of religious liberty, neither the Constitution nor its Bill of Rights protects the policy of that Society not to coerce or violate the consciences of its employees and members with respect to their religious principles, or to act as an agent for our government in doing so. More than three hundred years after their founding of Philadelphia, and almost two hundred years after the adoption of the First Amendment, it would be a "constitutional anomaly" to the Supreme Court, [*Smith II*], if the Religious Society of Friends were allowed to respect decisions of its employee-members bearing witness to their faith.[269]

E. *The Religious Freedom Restoration Act: The Erosion of* Smith II

As this Note goes to press, the Religious Freedom Restoration Act of 1991 (RFRA) is now before the House Subcommittee on Civil and Constitutional Rights.[270] RFRA has the narrow purpose of circumventing *Smith II* by restoring the *Sherbert* compelling interest test.[271] In introducing the Bill, Congressman Ste-

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269. United States v. Philadelphia Yearly Meeting of the Religious Soc'y of Friends, 753 F. Supp. 1300, 1306 (E.D. Pa. 1990).

270. H.R. 2797, 102d Cong., 1st Sess. (1991).

271. 137 CONG. REC. E2422 (daily ed. June 27, 1991) (statement of Rep. Solarz). RFRA was introduced on June 26, 1991, and was referred to the Subcommittee on Civil and Constitutional Rights on July 26, 1991. As of April 5, 1992, the number of Congressional co-sponsors to the Bill had grown to 174.

Under section 2 of the proposed Bill, the following congressional findings were made: (1) "the framers of the American Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution"; (2) "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise"; (3) "governments should not burden religious exercise without compelling justification"; (4) "in Employment Division of Oregon v. Smith the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion"; and (5) "the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder is a workable test for striking sensible balances between religious liberty and competing governmental interests." H.R. 2797, 102d Cong., 1st Sess. (1991).

The enumerated purposes of the bill are: (1) "to restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and to guarantee its application in all cases where free exercise of religion is burdened"; and (2) "to provide a claim or defense to persons whose religious exercise is burdened by government." *Id.*

Section 3 of the Bill provides in pertinent part:

SEC. 3. THE FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL.—Government shall not burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided

phen J. Solarz of New York stated that "America cannot afford to lose its first freedom — the freedom not just to believe but to act according to the dictates of one's religious faith — free from the restrictions of governmental regulation or interference."[272] Broad support for RFRA has come from Congress as well as from the religious and civil rights communities.[273] Among RFRA's supporters is the Coalition for the Free Exercise of Religion, a group of organizations with widely divergent views.[274] The breadth of RFRA's support demonstrates the degree to which the *Smith II* decision is perceived as erosive to religious liberty.

While RFRA would not dictate results in particular cases, it would require the government to justify restrictions on religiously motivated conduct. Without this Legislation, however, religious liberty is protected "only [in] the extreme and hypothetical situation in which a State directly targets a religious

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in subsection (b).

(b) EXCEPTION.—Government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is essential to further a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

Id.

272. 137 CONG. REC. E2422 (daily ed. June 27, 1991) (statement of Rep. Solarz).

273. *Id.* There has arisen, however, opposition to RFRA. These opponents, which include several conservative members of Congress, belong primarily to the "right to life" camp. Apparently, some staunch anti-abortion advocates have begun to fear that RFRA would provide a way for women to obtain an abortion even if Roe v. Wade, 410 U.S. 113 (1973), were to be overturned by the Supreme Court. Robert P. Hey, *Religious Freedom Legislation Could Snag on Abortion Controversy*, CHRISTIAN SCI. MONITOR, July 1, 1991, at 8. This fear primarily stems from the religious tenet, existing in Judaism and other faiths, that abortion is required in any pregnancy where the life of the mother is in danger. *See, e.g.*, MISHNA, Ahalos 7:1 (requiring that the fetus be sacrificed if necessary to save the mothers life); RAMBAM, YAD HA'KHAZAKA, Laws Concerning a Murder and the Preservation of Life 1:9 (permitting a fetus posing a life-threatening danger to be viewed as "in pursuit" of the mother's life and consequently subject to termination in defense of the mother). In spite of the narrow circumstances under which religiously mandated abortion might be sought, even the slightest hint of a legally prescribed abortion seems sufficient to provoke intense opposition.

274. This coalition includes the American Civil Liberties Union, the American Jewish Congress, the American Muslim Council, the Baptist Joint Committee on Public Affairs, the Christian Legal Society, the Church of Jesus Christ of Latter-day Saints, the Episcopal Church, the Evangelical Lutheran Church in America, the National Council of Churches, the People for the American Way and the National Association of Evangelicals.

practice."[275] Such a narrow interpretation of the Free Exercise Clause is antagonistic to the very nature of our Nation's historical commitment to religious freedom.[276]

V. Conclusion

For almost thirty years, strict scrutiny was the standard courts were to apply when faced with a free exercise challenge to legislation that burdened religious practice.[277] That time-tested precedent was abandoned when Justice Scalia stated that "[w]e have never held that an individual's religious beliefs excuse his compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[278] By effectively prohibiting religious challenges to generally applicable laws, the Supreme Court has condoned the repression of religious freedom.[279]

The immediate consequence of *Smith II* was to deny unemployment compensation to two Native Americans because they participated in a precisely circumscribed religious ritual, integral to the worship practices the Native American Church. In effect, the state of Oregon was allowed to deny members of the Native American Church the right to communion as historically practiced in their church. Oregon, however, was not required to provide even the slightest evidence that such denial was justified. Rather, it was sufficient that the law ultimately prohibiting such

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275. *Smith II*, 494 U.S. at 894 (O'Connor, J., concurring); *see supra* notes 185-91 and accompanying text.

276. According to Congressman Solarz:

> Religious freedom is the foundation of our way of life. This Nation has always provided a haven for refugees from religious persecution. We are Americans because those who came before us voted for freedom with their feet. My family, like many of yours, came to America to worship freely. Even today, Jews from the Soviet Union, Buddhists from Southeast Asia, Catholics from Northern Ireland, Bahais from Iran, and many more willingly renounce their homelands and risk their lives for the luxury of religious freedom.
>
> The Court's grievous and shortsighted error must not be permitted to stand unchallenged. That is why 41 of my colleagues and I have introduced the Religious Freedom Restoration Act. This legislation will simply restore the legal standard for protecting religious freedom that worked so well for more than a generation.

137 CONG. REC. E2422 (daily ed. June 27, 1991) (statement of Rep. Solarz).

277. *See supra* notes 93-119 and accompanying text.

278. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 878-79 (1990) (*Smith II*).

279. *See id.* at 890.

religious worship was facially neutral.

Laws infringing upon religious exercise should be subject to the highest degree of scrutiny, particularly a law that has the effect of *banning* certain integral aspects of religious practice. Historically, our Nation has fought to preserve religious freedom. The *Smith II* majority has seriously abridged the fundamental right to free exercise of religion without providing an adequate explanation. One can only speculate, as Justice Blackmun did in his dissent, as to the "evils" the majority was seeking to avoid.[280] One can, however, identify the "evils" embraced by this decision.[281] In supporting the Religious Freedom Restoration Act,[282] we can restore the "luxury"[283] — the unalienable right of free exercise of religion — the Founding Fathers held so dear.

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280. *See id.* at 908 (Blackmun, J., dissenting).

281. *See supra* notes 236-46 and accompanying text.

282. *See supra* notes 270-76 and accompanying text.

283. *See supra* notes 13-14 and accompanying text.

* The author would like to dedicate this note to the memory of his father, Charles Zilberfein, who was forced to endure religious persecution in Nazi-occupied Poland.