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The Religious Freedom Restoration Act of 1993: Restoring Religious Freedom after the Destruction of the Free Exercise Clause

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NOTES

THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993: RESTORING RELIGIOUS FREEDOM AFTER THE DESTRUCTION OF THE FREE EXERCISE CLAUSE

I. INTRODUCTION

Religion occupies a revered and intensely personal place in the lives of individuals—most Americans believe in God or some supreme being. The Founding Fathers of this Nation recognized the importance of religious belief and guaranteed to every citizen the fundamental right of religious freedom by including an express guarantee in the First Amendment.[1] In 1990, the United States Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*[2] drastically changed the scope of religious liberty enjoyed by the citizens of the United States for over 200 years. In *Smith II*, a private drug rehabilitation organization discharged two Native American Indian employees because they ingested peyote, a hallucinogenic drug, for religious purposes at a ceremony of their Native American church.[3] The State of Oregon subsequently denied the Native

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1. 139 CONG. REC. S14,353-01 (daily ed. Oct. 26, 1993). 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.

2. 494 U.S. 872 (1990) (5-4 decision) [hereinafter *Smith II*]. The opinion of the Court was written by Justice Scalia, who was joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy. *See infra* notes 115-32 and accompanying text. Justice O'Connor concurred in the judgment on different grounds. *See infra* notes 133-56 and accompanying text. Justices Brennan, Marshall, and Blackmun dissented. *See infra* notes 157-63 and accompanying text.

3. *Smith II*, 494 U.S. at 874. "Oregon law prohibits the knowing or intentional possession of a 'controlled substance' unless . . . prescribed by a medical practitioner." *Id.*; OR. REV. STAT. § 475.992(4) (1987 & Supp. 1994). The law specifically prohibits the use of the drug peyote, a hallucinogen derived from the plant *Lophophora williamsii Lemaire*. *Smith II*, 494 U.S. at 874; OR. ADMIN. R. 855-80-021 (1986). *But see* OR. REV. STAT. § 475.992(5) (1987 & Supp. 1994) (legalizing the use of peyote in association with certain religious practices). As noted by the California Supreme Court in *People v. Woody*,

> [t]he 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

Americans unemployment compensation because their discharge resulted from work-related misconduct.[4] In rejecting the Native Americans' claim for a religious exemption from the Oregon law, the United States Supreme Court held that the Free Exercise Clause of the First Amendment to the United States Constitution[5] does not prohibit the state from banning the sacramental use of peyote.[6] The Court reasoned that Oregon law banning the use of peyote and other controlled substances is not specifically directed at burdening specific religious practices.[7] Before the *Smith II* decision, the government could not make or enforce any law that burdened the free exercise of a sincere religious belief unless it was the least restrictive means of accomplishing a compelling state interest.[8] The *Smith II* Court, however, abandoned the compelling state interest test, holding that a neutral and generally applicable law need not be supported by a compelling state interest even though it impinges on religious practices.[9] The Court stated that the Free Exercise Clause does not relieve an individual from complying with a valid law of general applicability even though his religion requires conduct that the law prohibits.[10] The majority declared that the

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chewing the buttons or drinking a derivative tea, peyote produces several types of hallucinations, depending primarily upon the user. In most subjects it causes extraordinary vision marked by bright and kaleidoscopic colors, geometric patterns, or scenes involving humans or animals. In others it engenders hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia. Beyond its hallucinatory effect, peyote renders for most users a heightened sense of comprehension; it fosters a feeling of friendliness toward other persons.

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

4. *Smith II*, 494 U.S. at 874; see *infra* notes 101-03 for a discussion of why the use of peyote at a religious ceremony outside of work constituted work-related misconduct.

5. The Free Exercise Clause embodied in the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion.]" U.S. CONST. amend. I. Embraced by the protection of the Fourteenth Amendment, this constitutional guarantee prevents states, as well as the federal government, from abridging the free exercise of religion. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

6. *Smith II*, 494 U.S. at 876-90.

7. *Id.* at 878-82.

8. The "compelling state interest" test was enunciated in *Sherbert v. Verner*, 374 U.S. 398 (1963). The test parallels the strict scrutiny test, first enunciated in *Korematsu v. United States*, 323 U.S. 214 (1944), that courts employ in equal protection challenges to analyze suspect classifications. See *infra* note 68 for a discussion of the standard of strict scrutiny.

9. *Smith II*, 494 U.S. at 878-79 ("[A]n individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.").

10. *Id.* at 879; *see also* United States v. Lee, 455 U.S. 252 (1982) (holding that the imposition of social security taxes is not a burden on free exercise of religion of persons who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds); Braunfeld v. Brown, 366 U.S. 599 (1961) (holding that a Sunday closing law did not burden free exercise of religion but merely made the practice of religion more expensive); Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that child labor laws prohibiting children from dispensing religious literature did not burden free exercise of religion); Minersville Sch.

political processes must make the appropriate religious accommodations because it is not the Court's duty to determine the importance of religious beliefs.[11]

In a legislative effort to correct the *Smith II* decision, Congress passed the Religious Freedom Restoration Act of 1993.[12] The Act once again subjects any law that substantially burdens the free exercise of religion to the most rigid scrutiny,[13] thus reinstating the "compelling interest" test enunciated in *Sherbert v. Verner*.[14] The remaining issue is whether this political attempt to restore pre-*Smith II* religious accommodation will prove effective.

Section II of this Note traces the history of the First Amendment's guarantee of religious freedom and its common law evolution.[15] Section III of this Note examines the *Smith II* decision and the concurring and dissenting opinions in the case.[16] Section IV analyzes the impact the Court's decision has on the scope of the protection afforded by the Free Exercise Clause.[17] Section V analyzes the Religious Freedom Restoration Act of 1993 and the role the Act will play in restoring the religious freedom individuals enjoyed prior to *Smith II*.[18] This Note concludes that the Act will survive challenges that Congress overstepped its constitutional authority to legislate on the subject of religion and will prove to be an effective means of restoring the guarantee of religious freedom the Founding Fathers fought so hard to safeguard.[19]

Dist., Bd. of Educ. v. Gobitis, 310 U.S. 586, 594 (1940), *overruled by* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."); Reynolds v. United States, 98 U.S. 145, 166-67 (1878) (holding that law prohibiting polygamy did not impede a Morman's free exercise of religion because to "excuse his practices to the contrary because of his religious belief . . . would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself").

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

12. Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (1993)). See *infra* note 200 for the full text of the Religious Freedom Restoration Act of 1993.

13. *See infra* note 68.

14. *See infra* notes 62-70 and accompanying text.

15. *See infra* notes 20-93 and accompanying text.

16. *See infra* notes 94-163 and accompanying text.

17. *See infra* notes 164-97 and accompanying text.

18. *See infra* notes 198-268 and accompanying text.

19. *See infra* notes 217-68 and accompanying text.

II. HISTORY AND EVOLUTION OF THE FREE EXERCISE OF RELIGION

A. *The First Amendment Guarantee*

The Constitution, as drafted in 1787 and ratified by the states in 1788, contained no explicit protection of religious freedom.[20] Centuries of religious persecution, which ultimately culminated in the founding of the United States of America, led to an express guarantee of religious freedom in the Bill of Rights.[21] Prompted by the widely accepted views of James Madison and Thomas Jefferson, the Bill of Rights included the First Amendment to guard against the repetition of bitter religious struggles by prohibiting the establishment of a state religion and by securing to every person the right to freely exercise his or her faith.[22]

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20. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1473 (1990). The Constitution, however, contains two provisions recognizing a slight degree of religious accommodation. Article VI states that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI, cl. 3. Articles I, II, and VI allow executive, legislative, and judicial officers to support the Constitution by an "affirmation" instead of an oath, recognizing that some religious sects, such as the Quakers and Mennonites, refused to swear to oaths based upon the directive "swear not at all" contained in the book of Matthew 5:35 of the Holy Bible. McConnell, *supra*, at 1475 (quoting *Matthew* 5:35). Article I requires that the Senate "shall be on Oath or Affirmation" when trying impeachments. U.S. CONST. art. I, § 3, cl. 6. Article II provides that "[b]efore he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation:- 'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.' " U.S. CONST. art. II, § 1, cl. 8. Article VI provides that "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." U.S. CONST. art. VI, cl. 3. The Framers included these subtle provisions to prevent discrimination against certain religions thereby making the government "more religiously inclusive." McConnell, *supra*, at 1474.

21. *See* Minersville Sch. Dist., Bd. of Educ. v. Gobitis, 310 U.S. 586, 593 (1940), *overruled by* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). "Centuries of strife over the erection of particular dogmas as exclusive or all-comprehending faiths led to the inclusion of a guarantee for religious freedom in the Bill of Rights." *Id.*; *see also* Everson v. Board of Educ., 330 U.S. 1, 8-9 (1947). "The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." *Id.*

22. James Madison, in his *Memorial and Remonstrance Against Religious Assessments*, stated that civil government did not have jurisdiction over either religion or the duty owed to one's Creator, arguing that "true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; [and] that the best interest of a society required that the minds of men always be wholly free." JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* THE COMPLETE MADISON: HIS BASIC WRITINGS 302, 302-03 (Saul Padover ed. 1953). Thomas Jefferson, in an address to the Baptist Association of Danbury, Connecticut stated that "religion is a matter which lies solely between man and his god; that he owes account to noneother for his faith or his worship; that the legislative powers of the government reach action only, and not opinions." Letter from Thomas Jefferson (Jan. 1, 1802), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 281, 281-82 (A. Bergh ed. 1905).

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[23] This constitutional provision contains two distinct clauses that overlap in certain situations but which are not coextensive.[24] First, the Religion Clause prohibits the government from establishing a state religion or favoring one religion over another.[25] Second, the Religion

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23. U.S. CONST. amend. I.

24. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-2, at 815 (1976).

25. The Establishment Clause of the First Amendment provides that:

> [n]either 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 to 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 Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between church and state.'

Everson, 330 U.S. at 15-16.

The Court's decision in *Everson* incorporated the Establishment Clause into the Fourteenth Amendment and, thus, made the Clause applicable to the states. *Id.* (upholding a New Jersey law that reimbursed parents for money spent to transport their children to parochial schools by public buses). In the years after *Everson*, the Court articulated a three-pronged standard against which to assess Establishment Clause attacks. Lemon v. Kurtzman, 403 U.S. 602 (1971). First, to survive an Establishment Clause challenge, an activity or law must have a secular legislative purpose. Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963). Second, the activity or law must have a primary effect that neither advances nor inhibits religion. *Id.* Finally, the activity or law must not foster excessive governmental entanglement with religion. Walz v. Tax Comm'n, 397 U.S. 664 (1970). The *Walz* "entanglement" test was formally combined with the *Schempp* "purpose" and "effect" tests to form the three-pronged Establishment Clause standard articulated in *Lemon*. *See Lemon*, 403 U.S. at 619. The *Lemon* Court also suggested the possibility of a fourth "divisiveness" prong, stating that "[o]rdinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Id.* at 619. Although the Rehnquist Court has called into question the viability of the *Lemon* test, the Court indicated that it is not yet ready to invalidate the test. Lee v. Weisman, 112 S. Ct. 2649, 2655 (interim ed. 1992) ("[W]e do not accept the invitation . . . to reconsider our decision in Lemon v. Kurtzman.").

In its most recent Establishment Clause case, Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (interim ed. 1994), the Court did not apply the *Lemon* test to evaluate the establishment claim. Instead, Justice Souter, writing for the majority, applied the principles from the Court's decision in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), to invalidate a New York statute that created a separate school district within a religious community. *Kiryas Joel*, 114 S. Ct. at 2487-92. Four Justices argued for a reconsideration of the *Lemon* test. Justice O'Connor urged the Court to "slide away from Lemon's unitary approach" to Establishment Clause jurisprudence because of its inability to effectively cover different religious claims. *Id.* at 2500 (O'Connor, J., concurring in part and in judgment). Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued that the useful life of *Lemon* had passed. *Id.* at 2515 (Scalia, J., dissenting). Four members of the Court thus revealed that, given an appropriate case in the future, they are ready to discard the landmark *Lemon* test.

Clause prohibits the government from burdening an individual's free exercise of religious beliefs.[26]

Historically, three distinct principles supported the Religion Clause: voluntarism, separatism, and federalism.[27] Of these three sources, voluntarism is the most fundamental, guaranteeing freedom of conscience by safeguarding against any degree of coercion in matters of

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26. *See* Sherbert v. Verner, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* . . . ."); *see also* Torcaso v. Watkins, 367 U.S. 488 (1961) (government may not force an individual to profess an adverse belief); Fowler v. Rhode Island, 345 U.S. 67 (1953) (government may not penalize or discriminate against individuals or groups because they hold religious beliefs abhorrent to the authorities); Cantwell v. Connecticut, 310 U.S. 296 (1940).

Prior to *Smith II*, in order to establish a prima facie free exercise claim, one was required to prove three elements: sincerity, religiosity, and centrality. Ira C. Lupa, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 953-59 (1989). One who objects to a regulation or requirement on free exercise grounds must first base the objection upon a sincerely held religious belief. TRIBE, *supra* note 24, § 14-11, at 859. This element is necessary if religious accommodation is not to be used as a boundless excuse for avoiding all inconvenient legal responsibilities. *Id.* The sincerity requirement originated in *United States v. Ballard*, in which the Court, led by Justice Douglas, held that the sincerity, but not the truth of the belief, could be submitted to a jury. 322 U.S. 78 (1944), *rev'd*, Ballard v. United States, 329 U.S. 187 (1946). The *Ballard* Court stated that "[m]en may believe what they cannot prove . . . . Religious experiences which are real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law." *Id.* at 86-87. Since *Ballard*, courts have inquired into the sincerity of religious beliefs. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (determining that Amish objections to education beyond the eighth grade were rooted in sincere religious beliefs); *see also* Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975) (holding that Indian inmate of a state penitentiary could wear long braided hair in accordance with his sincerely held religious beliefs).

The belief must also be a truly religious tenet, as opposed to a purely moral or ethical one. *Yoder*, 406 U.S. at 215. In *Yoder*, the Court stated that if the Amish based their objections on a "subjective evaluation and rejection of contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis." *Id.* at 216. The Court found, however, that the Amish way of life was not merely a matter of personal preference, but one of "deep religious conviction." *Id.* Finally, the belief must be central or essential to the practices of the religion. *See, e.g.*, *id.* at 222-29, 235-36 (the Court's extensive examination of Amish culture indicates an evaluation of the degree to which the state's compulsory attendance laws would burden Amish religious beliefs and practices); *Sherbert*, 374 U.S. at 406 (majority opinion rested in part on the undisputed fact that the person seeking an exemption from the Sunday work requirement considered the religious injunction against Saturday work "a cardinal principle of her religious faith"); People v. Woody, 394 P.2d 813 (Cal. 1964) (California Supreme Court found the centrality of peyote use, as the cornerstone of the Navaho religion, dispositive in its decision to invalidate the application of state criminal statutes to Native Americans using peyote in an obviously bona fide religious ceremony). Since *Smith II*, however, the third element of "centrality" has been eliminated, leaving only the elements of sincerity and religiosity. See *infra* notes 129-30 and accompanying text for a discussion of why the Court eliminated the element of centrality.

27. William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 773 (1984).

religious belief.[28] Derived primarily from the attitude of religious toleration associated with the Pennsylvania Quakers, voluntarism represents self-autonomy.[29] Separatism, or neutrality, exemplifies the efforts of both Thomas Jefferson and James Madison,[30] reflecting their view that both religion and government operate most effectively when each remains entirely independent of the other.[31] The separation theory guarantees not only that the state remains free from religious influence, but also that religion remains free from state influence.[32] The concept of federalism, or pure state autonomy, symbolizes an attempt to keep states free of federal government interference.[33] The concerns of voluntarism, separatism, and federalism do not conflict with one another; instead, they work together in an attempt to deprive the national government of legislative authority with respect to religion.[34] Although the Establishment and Free Exercise Clauses strongly support the notion that the government, federal or state, has no place in religious affairs, the First Amendment guarantee of religious freedom has varied in scope over the last century.

B. The Evolution of the Free Exercise Clause

In response to one of the earliest challenges to government regulation on free exercise grounds, the United States Supreme Court articulated a belief/action dichotomy for evaluating free exercise claims.[35] In *Reynolds v. United States*,[36] a Mormon challenged a federal law that made bigamy a crime, claiming that it was the religious duty of male members of the Mormon church to practice polygamy.[37] Rejecting the free exercise challenge, the *Reynolds* Court interpreted the First Amendment as depriving the government of legislative power over beliefs but leaving the government free to regulate actions or conduct contrary to social order.[38] This belief/action distinction signified that, while the government could not interfere with mere religious beliefs

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28. *Id.*; *see also* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 231 (1963) ("[T]he rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of the governmental hand.").

29. Van Alstyne, *supra* note 27, at 773.

30. *See supra* note 22.

31. Van Alstyne, *supra* note 27, at 773.

32. Van Alstyne, *supra* note 27, at 777.

33. Van Alstyne, *supra* note 27, at 778.

34. Van Alstyne, *supra* note 27, at 778.

35. Reynolds v. United States, 98 U.S. 145 (1878); *cf.* GERALD GUNTHER, CONSTITUTIONAL LAW 1557 (12th ed. 1991).

36. 98 U.S. 145 (1878).

37. *Id.* at 161.

38. *Id.* at 164.

and opinions, it could regulate religious practices and conduct.[39] The Court reasoned that "[to] excuse [a man's] practices to the contrary [of law] because of his religious belief [would be] . . . to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[40] Thus, the *Reynolds* Court held that, while religious beliefs and opinions are completely free from governmental interference, religious conduct is not within the protection of the First Amendment.[41]

In *Cantwell v. Connecticut*,[42] the Supreme Court abandoned the *Reynolds* holding that religious conduct lacks First Amendment protection.[43] The *Cantwell* Court, reiterating the belief/action distinction, emphasized that the free exercise guarantee would protect the freedom to act in accordance with religious beliefs in some circumstances.[44] In abandoning *Reynolds'* limited view of the Free Exercise Clause, the *Cantwell* Court suggested that conduct, though subject to a greater degree of regulation than belief, would be protected in some cases.[45] The Court acknowledged that "[free exercise] embraces two concepts, freedom to believe and freedom to act."[46] The Court then compared the two freedoms: "The first is absolute but, in the nature of things, the second cannot be . . . for the protection of society."[47] The Court held that the freedom to act under the Free Exercise Clause, although not absolute, must be regulated without undue infringement on the protected freedom.[48]

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39. *Id.* at 166. The Court, to emphasize the "action" strand of the belief/action distinction, proffered examples of religious conduct that would not be given protection by the First Amendment.

> Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile [sic] of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

Id.

40. *Id.* at 166-67.

41. *Id.*

42. 310 U.S. 296 (1940). Cantwell, a Jehovah's Witness, violated a statute that prohibited the solicitation of religious subscriptions and contributions without a permit. *Id.* at 302. Under the statute, an administrator was given the power to determine whether the applicant's cause was a religious cause or a charitable cause. *Id.* Although the reversal of Cantwell's conviction was based largely upon free speech grounds, the Court also supported the reversal on the ground that the statute deprived Cantwell of his religious liberty guaranteed by the First Amendment. *Id.* at 305.

43. *Id.* at 304.

44. *Id.* at 303-04.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 304. The Court extended the constitutional guarantee of the Free Exercise Clause to protect against infringement by the states through the Fourteenth Amendment. *Id.* at 303.

In the *Flag Salute Cases*,[49] the Supreme Court once again confronted religious objections to governmental regulations. Jehovah's Witnesses attacked public school regulations requiring students to salute the flag.[50] The challengers insisted that command of religious scripture forbade their participation in the exercises.[51] In the first flag salute case, *Minersville School District v. Gobitis*,[52] the Court sustained the flag salute requirement and rejected the free exercise claim, stating that "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."[53] The *Gobitis* Court stated that the salute requirement was a generally applicable civic duty.[54] The Court further stated that the constitutional guarantee of religious liberty has never prohibited generally applicable regulations that are not directed at specific religious practices.[55] Three years later, however, in *West Virginia State Board of Education v. Barnette*,[56] the Court overruled its decision in *Gobitis* finding that there was no duty to salute the flag.[57] The Court could not reconcile such a duty with the guarantees of the First Amendment because "[t]he very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the

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49. *E.g.*, Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

50. *Gobitis*, 310 U.S. at 592; *Barnette*, 319 U.S. at 629.

51. *Gobitis*, 310 U.S. at 591-92; *Barnette*, 319 U.S. at 629. Jehovah's Witnesses conscientiously believe that a gesture of respect for the flag is forbidden by Chapter 20 of the Book of Exodus in the Bible which provides:

> 3. Thou shalt have no other gods before me.
>
> 4. Thou shall not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth.
>
> 5. Thou shalt not bow down thyself to them, nor serve them.

Gobitis, 310 U.S. at 592 & n.1 (quoting *Exodus* 20:3-5).

52. 310 U.S. 586 (1940).

53. *Id.* at 594-95.

54. *Id.*

55. *Id.*

56. 319 U.S. 624 (1943).

57. *Id.* A compulsory flag salute and pledge would require an individual to embrace a belief that might not be acceptable to him. *Id.* at 633-34. This is precisely what the Framers sought to prevent by the inclusion of the First Amendment guarantee of intellectual liberty. *Id.* at 633. In a widely quoted passage, Justice Jackson emphasized the place intellectual liberty holds in our constitutional scheme by saying "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

courts."[58] The Court asserted that the First Amendment will tolerate restriction only if absolutely necessary to prevent "grave and immediate danger to interests which the State may lawfully protect."[59]

Most of the Court's decisions in the first half of the 1900s, unlike *Barnette*, demonstrate the Court's skeptical view of claims that religious conduct should be exempt from general regulatory laws.[60] In the mid-1960s, however, and for most of the ensuing three decades, a consensus emerged on the Court that the religious objector could claim an exemption from a general regulation under certain circumstances.[61] The Court began to recognize this trend of religious exemptions from general laws in the 1963 case of *Sherbert v. Verner*.[62]

In *Sherbert*, an employer discharged a member of the Seventh-Day Adventist Church from employment because she would not work

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58. *Id.* at 638; *see also* Wooley v. Maynard, 430 U.S. 705 (1977) (relying heavily on *Barnette* to invalidate a law requiring a religious motto on license plates on the ground that the statute could force an individual to foster an unacceptable ideological viewpoint).

59. *Barnette*, 319 U.S. at 639.

60. *See* Braunfeld v. Brown, 366 U.S. 599 (1961). *Braunfeld* presented a free exercise challenge to a Pennsylvania Sunday closing law. *Id.* at 600. The challengers were Orthodox Jews whose religion prohibited them from working on Saturday. *Id.* at 601. They argued that the Sunday closing law placed them at an economic disadvantage, thereby infringing upon their free exercise of religion. *Id.* at 601-02. Citing *Reynolds* and *Cantwell*, the *Braunfeld* Court rejected the free exercise challenge stating that "the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions." *Id.* at 603. The Court found that the Pennsylvania law did not make any religious practices unlawful; rather, it merely regulated a secular activity that only made the practice of religious beliefs more expensive. *Id.* at 605. The *Braunfeld* Court stated: "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion . . . would radically restrict the operating latitude of the legislature." *Id.* at 606. The *Braunfeld* Court noted, however, that even an indirect burden on religion could encroach upon First Amendment rights if the purpose and effect of the law is to frustrate the observance of religion or discriminate between religions. *Id.* at 607. But where the state regulates a secular activity by means of a general law within its power, the law is constitutionally valid despite the indirect burden on religion, unless the state could accomplish its secular purpose by a means that did not impose such a burden. *Id.* Thus, the *Braunfeld* Court refused to exempt the challengers from the generally applicable law. *Id.* In a notable dissent, Justice Brennan argued that the Sunday closing law violated the Free Exercise Clause because it forced a person to choose between his religious and spiritual well-being, and his business and economic well-being. *Id.* at 611 (Brennan, J., concurring in part and dissenting in part).

Several state Sunday closing laws were also challenged under the Establishment Clause. *See* Gallager v. Crown Kosher Super Mkt. of Mass., 366 U.S. 617 (1961); *Braunfeld*, 366 U.S. at 599; Two Guys from Harrison-Allentown, Inc., v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961). The Court rejected the establishment claim in each of these cases because the purpose and effect of each statute was not to aid religion but to set aside a uniform day of rest and recreation, a goal that the state is empowered to accomplish. *See Gallagher*, 366 U.S. at 630; *Braunfeld*, 366 U.S. at 607; *Two Guys from Harrison-Allentown*, 366 U.S. at 598; *McGowan*, 366 U.S. at 450.

61. *See infra* notes 62-85 and accompanying text.

62. 374 U.S. 398 (1963).

on Saturday, the day of rest recognized by her faith.[63] Unable to find suitable employment that would accommodate her religious beliefs, Sherbert applied for unemployment benefits which were denied on the ground that she did not accept suitable work when offered.[64] The Court, embracing Justice Brennan's dissent in *Braunfeld*,[65] found that denying Sherbert unemployment benefits placed an indirect burden on her free exercise rights, forcing her to:

> choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand . . . [with] such a choice put[ting] the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship.[66]

The Court indicated, however, that this indirect burden would not violate the Free Exercise Clause if justified by a compelling state interest.[67]

Extending the strict scrutiny standard from equal protection challenges[68] to the realm of First Amendment rights, the *Sherbert* Court

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63. *Id.* at 399.

64. *Id.* at 400-01.

65. *See supra* note 60.

66. *Sherbert*, 374 U.S. at 404.

67. *Id.* at 406. Invoking this rigid scrutiny, the Court stated that mere rationality would not be sufficient to protect First Amendment rights because "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Id.* (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

68. Strict scrutiny, which requires that laws affecting a suspect classification such as race, alienage, or national origin must be justified by a compelling governmental interest and must be necessary to the accomplishment of a compelling government purpose, was enunciated by the Court in *Korematsu v. United States*, 323 U.S. 214 (1944) (recognizing race as suspect classification and upholding conviction for violating military order during World War II which excluded all persons of Japanese ancestry from designated West Coast areas because military feared invasion from unascertained number of loyal Japanese people living on West Coast); *see also* Palmore v. Sidoti, 466 U.S. 429 (1984) (reversing decision to divest natural mother of custody of her infant child because of her remarriage to person of different race because effects of racial prejudice that child might encounter by having step-father of different race did not justify racial classification); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (invalidating state university's special admissions program for minority applicants because classification that assists persons perceived as victims of social discrimination at expense of innocent individuals is not necessary to promote substantial state interest); *In re* Griffiths, 413 U.S. 717 (1973) (invalidating Connecticut's exclusion of resident aliens from admission to bar because state's interest in high professional standards did not justify exclusion of all aliens from practice of law); Sugarman v. Dougall, 413 U.S. 634 (1973) (invalidating New York's law providing that only American citizens could hold permanent civil service positions because state's interest in having loyal employees did not justify exclusion of aliens); Graham v. Richardson, 403 U.S. 365 (1971) (invalidating Arizona statute that imposed durational residency requirement for welfare benefits on aliens but not citizens because state's interest in favoring its own citizens over aliens in distribution of limited resources did not substantially justify classification); Loving v. Virginia, 388 U.S. 1 (1967) (striking down Virginia law prohibiting interracial marriages because state could not offer any objective, independent of racial

found no evidence of a compelling state interest in denying benefits on religious grounds.[69] The rigid standard required that any burden on the free exercise of religion, whether direct or incidental, be justified by a compelling state interest in the regulation of a subject within the state's constitutional power.[70] With this case, the strict scrutiny standard[71] became the Court's basis for review of free exercise challenges until 1990.[72]

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discrimination, to justify classification); McLaughlin v. Florida, 379 U.S. 184 (1964) (invalidating Florida criminal statute prohibiting cohabitation by interracial married couples because state failed to show any overriding statutory purpose for prohibiting cohabitation between white person and Negro).

A "compelling interest" is one that has a "clear justification . . . in the necessities of national or community life." Barnette v. West Va. State Bd. of Educ., 47 F. Supp. 251, 254 (S.D. W. Va. 1942), *aff'd*, 319 U.S. 624 (1943). A "compelling interest" prevents a "clear and present, grave and immediate" danger to public health, peace, and welfare. City of Sumner v. First Baptist Church, 639 P.2d 1358 (Wash. 1982); State *ex rel* Holcomb v. Armstrong, 239 P.2d 545 (Wash. 1952); Bolling v. Superior Ct., 133 P.2d 803 (Wash. 1943).

69. Appellee based the denial of benefits on its attempt to prevent the filing of fraudulent claims by persons fabricating religious objections to avoid Saturday work and to assist in the scheduling of necessary Saturday work. *Sherbert*, 374 U.S. at 407. The *Sherbert* Court recognized that granting an exemption could increase the possibility of fraudulent claims and could lead to the disruption of work scheduling. *Id.* The Court, however, required the appellee to demonstrate that no alternative form of regulation would accomplish its purpose without impairing First Amendment rights. *Id.*

70. *Id.* at 406.

71. *See supra* note 68.

72. *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989) (the fact that Sunday work has become a way of life does not constitute a state interest sufficiently compelling to override a legitimate free exercise claim); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (denial of benefits based upon religious objections to work is not subject to a less stringent standard of review merely because the individual was disqualified from receiving benefits for a limited time and the individual's religious beliefs changed during her employment, creating a conflict between her job and religion that had not previously existed); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (government interest in eliminating racial discrimination in education is sufficiently compelling to override claim that denial of federal income tax-exempt status on basis of racial discrimination in accordance with religious beliefs abridged free exercise of religion); United States v. Lee, 455 U.S. 252 (1982) (stating broad public interest in maintaining a sound tax system is sufficiently compelling to override a claim that payment of taxes in conflict with religious beliefs denies free exercise of religion); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981) (state interest in avoiding widespread unemployment that would result if individuals were permitted to terminate their employment for religious reasons is not sufficiently compelling to justify burden on free exercise of religion); *but see* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (construction of a road through sacred Indian land owned by the government would not coerce individuals to violate their religious beliefs or punish religious conduct, thus the state need not show a compelling governmental interest); Bowen v. Roy, 476 U.S. 693 (1986) (in the enforcement of a generally applicable regulation for the administration of government welfare programs, government is not held to the strict scrutiny standard but merely must demonstrate that the regulation is a reasonable means of achieving a legitimate state government interest); Goldman v. Weinberger, 475 U.S. 503 (1986) (stating courts need not apply compelling interest test when evaluating whether military interests justify a particular restriction on religiously motivated conduct but must give great deference to the professional judgment of military authorities).

In 1972, the Supreme Court decided one of the most important cases in the development of free exercise jurisprudence. In *Wisconsin v. Yoder*,[73] members of the Old Order Amish religion and the Conservative Amish Mennonite Church challenged a compulsory school attendance law.[74] The State of Wisconsin convicted Amish parents of violating Wisconsin's attendance law, which required parents to send their child to public or private school until the child reached the age of sixteen.[75] Believing that attendance at high school conflicted with the Amish religion and way of life, the Amish parents refused to send their children to school beyond the eighth grade.[76] The Amish strongly believed that by sending their children to public school, they would be banished from the church community, thereby endangering their own salvation and that of their children.[77]

Examining Wisconsin's interest in compulsory education, the *Yoder* Court noted that the State's interest must be balanced against First Amendment interests to insure that the right to religious freedom is not unduly burdened.[78] The Court asserted that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[79] Balancing these competing interests, the Court indicated that the Free Exercise Clause only protects claims "rooted in religious belief."[80] The evidence offered

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73. 406 U.S. 205 (1972).

74. *Id.* at 207.

75. *Id.* The Wisconsin statute provided:

> (1)(a) Unless the child has a legal excuse or has graduated from high school, any person having under his control a child who is between the ages of 7 and 16 years shall cause such child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which such child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which he becomes 16 years of age.
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> . . . . (3) This section does not apply to any child . . . exempted for good cause by the school board . . . .
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> (4) Instruction during the required period elsewhere than at school may be substituted for school attendance. Such instruction must be approved by the state superintendent as substantially equivalent to instruction given to children of like ages in the public or private schools where such children reside.

Id. at 207 n.2 (quoting WIS. STAT. § 118.15(1),(3),(4) (1969)).

76. *Yoder*, 406 U.S. at 209.

77. *Id.* The Amish way of life, centered around a strong church community isolated from the world and worldly influences, is central to their faith. *Id.* The Amish believe education beyond the eighth grade would expose their children to worldly influences and values that tend to alienate man from God. *Id.* at 210. See *id.* at 209-12 for a detailed examination of the Amish community's religious and cultural beliefs.

78. *Id.* at 214.

79. *Id.*

80. *Id.* The Free Exercise Clause would not protect beliefs that were purely philosophical and personal in nature. *Id.* at 216. To illustrate this conclusion, the *Yoder* Court contrasted the Amish with philosopher, Henry David Thoreau, stating:

by the Amish proved that the Amish values and way of life are rooted deeply in religious conviction and are not merely a matter of personal choice.[81] The *Yoder* Court accepted the State's contention that some degree of education is vitally necessary to enable citizens to successfully participate in society and to prepare individuals to be self-reliant and self-sufficient.[82] The Court, however, rejected the State's argument that the Amish community could not perform such tasks, stating that a few additional years of formal schooling would do little to serve the State's interests.[83] Applying the strict scrutiny standard established in *Sherbert*, the *Yoder* Court held that the State's interests, although strong, were insufficient to override the Amish's right to freely exercise their religion.[84] The *Yoder* decision proved important to the development of free exercise jurisprudence because the Court reaffirmed its holding in *Sherbert* that a religious exemption could be granted from a generally applicable regulation.[85]

From 1878 to 1972, the Supreme Court gave the Free Exercise Clause a wide range of interpretations. In 1878, the Court drastically restricted the constitutional protection of the Free Exercise Clause that the Founding Fathers fought so desperately to guarantee.[86] In refusing to grant a religious exemption from a general polygamy law, the *Reynolds* Court distinguished freedom of religious belief and opinion from freedom of religiously motivated conduct.[87] Although *Reynolds* enunicated the principle that religious beliefs and opinions are broadly protected by the Constitution, the case held that actions, even if motivated by religious beliefs and opinions, are subject to governmental regulation to serve legitimate secular goals.[88] The *Reynolds'* belief/action distinction reduced the Free Exercise Clause to merely a superficial commitment to protecting religious freedom.

> [I]f the Amish asserted their claims because of their subjective evaluation and rejection of contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clause.

Id.

81. *Id.*

82. *Id.* at 221-22.

83. *Id.* The Court acknowledged that the Amish community, with its rejection of worldly influences, "has been a highly successful social unit within our society, even if apart from the conventional 'mainstream' . . . . [with] productive and very law-abiding members of society." *Id.* at 222.

84. *Id.* at 230.

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

86. Reynolds v. United States, 98 U.S. 145 (1878).

87. *Id.* at 166.

88. *Id.*

The *Reynolds* interpretation of the Free Exercise Clause prevailed for nearly a century. *Braunfeld v. Brown*[89] and *Sherbert v. Verner*[90] focused on the inadequacy of *Reynolds'* restrictive view of the Free Exercise Clause and signaled the end of its controlling principle. Although the *Braunfeld* Court refused to recognize an exemption to a neutral law, the Court significantly widened the Free Exercise Clause's potential scope by including indirect burdens to religion within the protection of the Free Exercise Clause.[91] Two years later, *Sherbert* completed the expansion of the Free Exercise Clause and marked the beginning of the modern law of free exercise of religion by recognizing that courts can grant religious exemptions even from generally applicable laws.[92] *Braunfeld* and *Sherbert* rejected the belief/action distinction and demanded a more stringent standard of review than the secular justification standard employed in *Reynolds*. This new interpretation of free exercise provided greater potential for the Free Exercise Clause to become a source of power by which the courts could protect religious liberty against direct and indirect governmental infringement. The substantial protection to freely exercise one's religion which the United States Supreme Court had developed over the course of a century was virtually destroyed by that same Court in 1990 with its decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.[93]

III. Employment Division, Department of Human Resources of Oregon v. Smith: The Destruction of the Free Exercise Clause

The Supreme Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*[94] is undoubtedly the most important development in free exercise jurisprudence since *Wisconsin v. Yoder*.[95] *Smith II* upheld the criminal prohibition of the sacramental use of peyote, holding that a state could prohibit conduct integral to a religious belief as long as the criminal prohibition is a generally applicable neutral law.[96] The *Smith II* Court's interpretation of the Free Exercise Clause completely eradicates the Court's essential

89. 366 U.S. 599 (1961).

90. 374 U.S. 398 (1963).

91. "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." *Braunfeld*, 366 U.S. at 607.

92. *See supra* notes 62-85 and accompanying text.

93. 494 U.S. 872 (1990).

94. *Id.*

95. 406 U.S. 205 (1972).

96. *Smith II*, 494 U.S. at 879.

role as a defender of minority religions.[97] *Smith II* further marks a drastic reduction in the scope of religious liberty embraced by the First Amendment. The *Smith II* decision is in conflict with the long tradition of free exercise jurisprudence developed by the Court over the last century.[98]

A. The Factual and Legal History of Smith II

Alfred Smith and Galen Black, members of the Native American Church, both consumed a small amount of peyote during a religious ceremony.[99] At the time of the religious ceremony, Smith and Black worked for the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT), a private drug rehabilitation organization that provides treatment for alcohol and drug abusers.[100] ADAPT required its recovering counselors to abstain from the use of alcohol and non-prescription drugs.[101] When Smith and Black voluntarily informed their employer that they had ingested peyote at the religious ceremony, ADAPT fired them for violating its policy on alcohol and drug use.[102] Smith and Black applied to the Employment Division

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97. *Id.* at 902.

98. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990).

99. *See* Employment Div. v. Smith, 485 U.S. 660, 661 (1988) [hereinafter *Smith I*]. In *People v. Woody*, the California Supreme Court acknowledged the role peyote plays in the Native American Church. 394 P.2d 813, 817-18 (Cal. 1964). The court stated:

> Peyote . . . plays a central role in the ceremony and practice of the Native American Church, a religious organization of Indians. . . . [T]he theology of the church combines certain Christian teachings with the belief that peyote embodies the Holy Spirit and that those who partake of peyote enter into direct contact with God.
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> . . . .
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> Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost. On the other hand, to use peyote for nonreligious purposes is sacrilegious. Members of the church regard peyote also as a "teacher" because it induces a feeling of brotherhood with other members; indeed it enables the participant to experience the Deity. Finally, devotees treat peyote as a "protector." Much as a Catholic carries his medallion, an Indian G.I. often wears around his neck a beautifully beaded pouch containing one large peyote button.

Id.

100. *Smith I*, 485 U.S. at 662.

101. *Id.*

102. *Id.* at 663. Smith and Black, by ingesting peyote, violated ADAPT's standard of conduct which provides:

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

of the Oregon Department of Human Resources for unemployment compensation, but the agency declared Smith and Black ineligible for benefits because their use of peyote constituted work-related misconduct according to Oregon law.[103] In separate opinions, the Oregon Court of Appeals reversed the decision of the Oregon agency, holding that a denial of benefits based upon the religious use of peyote violated the Free Exercise Clause.[104] The Oregon Supreme Court affirmed the appellate court's decision.[105]

On writ of certiorari,[106] the United States Supreme Court, in a 5-3 decision,[107] vacated the judgment and remanded the case to the Oregon Supreme Court.[108] The United States Supreme Court refused to settle the free exercise claim until the Oregon Supreme Court explicitly decided whether the sacramental use of peyote was a crime in Oregon.[109] On remand, the Oregon Supreme Court held that the religious use of

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3. Any use of alcohol by recovering staff will not be allowed, and is grounds for immediate disciplinary action, up to and including termination. Use shall be defined as any ingestion of an alcoholic beverage, in any situation.

Id. at 662 n.3.

103. *Id.*; OR. REV. STAT. § 657.176(2)(a) (1987) provides that "[a]n individual shall be disqualified from the receipt of benefits . . . if . . . the individual . . . has been discharged for misconduct connected with work." Misconduct is defined as a "willful . . . violation of the standards of behavior which an employer has the right to expect of an employee. An act . . . that amount[s] to a willful . . . disregard of an employer's interest is misconduct." OR. ADMIN. R. 471-30-038(3) (1986).

104. *See* Smith v. Employment Div., 709 P.2d 246 (Or. Ct. App. 1985), *aff'd*, 721 P.2d 445 (Or. 1986), *rev'd*, *Smith II*, 494 U.S. 872 (1990); Black v. Employment Div., 707 P.2d 1274 (Or. Ct. App. 1985), *aff'd*, 721 P.2d 451 (Or. 1986), *rev'd*, *Smith II*, 494 U.S. 872 (1990).

105. Smith v. Employment Div., 721 P.2d 445 (Or. 1986), *rev'd*, *Smith II*, 494 U.S. 872 (1990); Black v. Employment Div., 721 P.2d 451 (Or. 1986), *rev'd*, *Smith II*, 494 U.S. 872 (1990).

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

107. Justice Stevens delivered the majority opinion of the Court in which Chief Justice Rehnquist and Justices White, O'Connor, and Scalia joined. *Id.* Justice Brennan, joined by Justices Marshall and Blackmun, dissented. *Id.* Justice Kennedy took no part in the consideration or decision of the case. *Id.*

108. *Smith I*, 485 U.S. at 674 (1988).

109. *Id.* at 673. The Court stated:

> Because we are uncertain about the legality of the religious use of peyote in Oregon, it is not now appropriate for us to decide whether the practice is protected by the Federal Constitution. . . . The possibility that respondents' conduct would be unprotected if it violated the State's criminal code is, however, sufficient to counsel against affirming the state court's holding that the Federal Constitution requires the award of benefits to these respondents. If the 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 (citations omitted).

peyote was, in fact, illegal.[110] The Oregeon Supreme Court, however, reaffirmed its previous holding that the governmental impediment on a sincerely held religious belief deprived Smith and Black of their right to freely exercise their religion.[111] The United States Supreme Court again granted certiorari,[112] this time to address "whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug."[113] If the First Amendment permits the criminal prohibition, the State of Oregon may deny unemployment benefits to persons dismissed for such sacramental use.[114]

B. Justice Scalia's Majority Opinion

Writing for a five Justice majority,[115] Justice Scalia reversed the decision of the Oregon Supreme Court, holding that the denial of unemployment benefits due to the use of an illegal drug during a religious ceremony did not violate the Free Exercise Clause.[116] The Court held that a generally applicable law is in harmony with the Free Exercise Clause even if it burdens an individual's religious practices.[117] Justice Scalia argued that the Court had never excused an individual from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate merely because of the individual's religious beliefs.[118] Instead, the *Smith II* Court stated that the only cases in which

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110. Smith v. Employment Div., 763 P.2d 146, 148 (Or. 1988), *rev'd*, *Smith II*, 494 U.S. 872 (1990).

111. *Id.*

112. Smith v. Employment Div., 489 U.S. 1077 (1989).

113. *Smith II*, 494 U.S. 872, 874 (1990).

114. *Id.*

115. Chief Justice Rehnquist and Justices White, Stevens, and Kennedy joined Justice Scalia. *Id.*

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

117. *Id.* at 878.

118. *Id.* at 878-79. The Court supported its position with a litany of cases. *See* United States v. Lee, 455 U.S. 252, 263 (1982) (holding that the Free Exercise Clause does not exempt an individual from his civic responsibility to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)"); Gillette v. United States, 401 U.S. 437, 461 (1971) (upholding military Selective Service System against the challenge that it violated the Free Exercise Clause by enlisting persons who opposed a particular war on religious grounds); Braunfeld v. Brown, 366 U.S. 599 (1961) (upholding Sunday closing law against claim that the law burdened the religious practice of persons whose religion mandates that they refrain from work on other days); Prince v. Massachusetts, 321 U.S. 158 (1944) (sustaining the conviction of a mother who was prosecuted under a child labor law for using her children to distribute religious literature despite her religious motivation); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594-95 (1940), *overruled by* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."); Reynolds v. United States, 98 U.S. 145, 166-67 (1878) ("Laws are made for the government of actions, and while

it held that an individual's religious conduct could be exempted from a neutral, generally applicable law involved the Free Exercise Clause in conjunction with other constitutional rights, such as freedom of speech and freedom of the press.[119] Thus, to successfully challenge a generally applicable law on free exercise grounds, another First Amendment claim must accompany the free exercise claim.[120] The Court refused to exempt Smith's conduct from the Oregon regulation because it did not present the necessary "hybrid" situation.[121]

In reversing the decision of the Oregon Supreme Court, the Court also abandoned the "compelling interest" test established in *Sherbert v. Verner*.[122] The Court stated that the *Sherbert* compelling interest test does not apply beyond the field of unemployment compensation.[123] The test is especially inapplicable in the context of a universal criminal prohibition on a particular form of conduct.[124] The Court asserted that "[t]he government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' "[125] The *Smith II* majority indicated that to make an individual's obligation to obey a law conditional upon the law's agreement with his religious beliefs contradicts both constitutional tradition and common sense when

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they cannot interfere with mere religious beliefs and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."). *But see* Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting Amish children from generally applicable mandatory school attendance law).

119. *Smith II*, 494 U.S. at 881. *See* Wooley v. Maynard, 430 U.S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs on free speech and free exercise grounds); Follet v. Town of McCormick, 321 U.S. 573 (1944) (invalidating a levied tax on the solicitation of religious materials on free speech, free press, and free exercise grounds); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (same); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (invalidating a compulsory flag salute requirement challenged by religious objectors on free speech and free exercise grounds); Cantwell v. Connecticut, 310 U.S. 296 (1940) (invalidating a licensing system for religious and charitable solicitations under which the administrator has discretion to deny a license to any cause he deemed non-religious on free speech and free exercise grounds); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (acknowledging the rights of parents to direct the education, whether secular or religious, of their children).

120. *Smith II*, 494 U.S. at 881.

121. *Id.* at 882.

122. *Id.* at 884-85. "Although . . . we have sometimes used the *Sherbert* test to analyze free exercise challenges to [criminal] laws, . . . we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges." *Id.*

123. *Id.* at 884.

124. *Id.*

125. *Id.* at 885 (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

the state's interest is not compelling.[126] The Court acknowledged that, while it could apply the compelling interest test to guarantee the "constitutional norms" of equality of treatment and the unobstructed flow of speech, extending that test to permit private individuals to ignore generally applicable laws would produce a "constitutional anomaly."[127] Thus, as long as the law that burdens religious conduct is universal and neutral, the state need not support it with a compelling interest.

Additionally, the *Smith II* Court rejected "centrality"[128] as an element of a free exercise claim.[129] Comparing the "centrality" of a religious belief in the free exercise field to the "importance" of expression in the free speech field, the Court declared that it is not the judiciary's responsibility to decide what is central to an individual's religion.[130] To make such a decision would enable the Court to help define the religion, an action clearly antithetical to the First Amendment.

In refusing to grant a religious exemption to Oregon's criminal prohibition, the Court stated that the Oregon legislature could carve out an exemption in its drug laws for the sacramental use of peyote.[131] Although leaving religious accommodation to the "political process" might place minority religions at a slight disadvantage, the Court concluded that this disadvantage was more acceptable than a situation in which each religious belief is a law unto itself or in which judges balance the social importance of laws against the importance of religious beliefs.[132] Thus, as a result of *Smith II*, an individual must rely upon

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126. *Smith II*, 494 U.S. at 885. Such a view would permit an individual, merely on account of his religious convictions, to become his own law. *Id. See also* Reynolds v. United States, 98 U.S. 145, 166-67 (1878).

127. *Smith II*, 494 U.S. at 886. Justice Scalia summarized this position as follows:

> Just as we subject to the most exacting scrutiny laws that make classification based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion. But we have held that race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause, and we have held that generally applicable laws unconcerned with regulating speech that have the *effect* of interfering with speech . . . do not thereby become subject to compelling-interest analysis under the First Amendment. Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.

Id. at n.3 (citations omitted).

128. *See supra* note 26.

129. *Smith II*, 494 U.S. at 886-87.

130. *Id.* at 887; *see also* Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

131. *Smith II*, 494 U.S. at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.").

132. *Id.*

the decision making authority of politicians to insure that religious practices are protected.

C. *Justice O'Connor's Concurrence*

Justice O'Connor concurred only in the judgment of the Court,[133] citing different grounds for affirming the decision of the Oregon Supreme Court. Justice O'Connor strongly debated the majority's reasoning, stating that it "dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with [this] Nation's fundamental commitment to individual religious liberty."[134] Moreover, Justice O'Connor disagreed with the majority's interpretation of the First Amendment that "if prohibiting the exercise of religion [is] merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[135] This narrow interpretation of the First Amendment, Justice O'Connor asserted, disregards the Court's traditional application of the free exercise doctrine to cases involving generally applicable laws that burden religious conduct.[136] Justice O'Connor argued that the words of the First Amendment do not demarcate between laws that are generally applicable and laws that directly and purposely target particular religious conduct.[137] Justice O'Connor stated, "[i]t is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns."[138] Further, Justice O'Connor insisted that the majority's interpretation of the Free Exercise Clause permits the government to prohibit conduct mandated by an individual's religious beliefs, as long as that prohibition is carried out by a generally applicable law.[139] According to Justice O'Connor, this interpretation is wholly inconsistent with the Court's long-standing precedent in the area of free exercise jurisprudence.[140] Although the majority attempted to evade this precedent by maintaining that prior cases involved a "hybrid" situation,[141] these prior cases were decided on

133. Justices Brennan, Marshall, and Blackmun joined Justice O'Connor in Parts I and II of her opinion, but did not join in the judgment. *Id.* at 891.

134. *Id.* (O'Connor, J., concurring in judgment).

135. *Id.* at 892 (quoting majority opinion).

136. *Id.* (O'Connor, J., concurring in judgment).

137. *Id.* at 894.

138. *Id.* at 893-94.

139. *Id.* at 893.

140. *Id.* at 896.

141. *See supra* notes 119-21 and accompanying text.

free exercise grounds and have become part of the foundation of the Court's free exercise jurisprudence.[142]

Justice O'Connor also renounced the majority's abandonment of the compelling interest test.[143] The compelling interest test, Justice O'Connor argued, adeptly accomplishes the First Amendment's objectives. First, the test ensures that religious freedom be an independent liberty.[144] Additionally, it guarantees that religious freedom occupy an esteemed and hallowed position in the hierarchy of individual rights.[145] Finally, the compelling interest test requires that the Court not permit encroachments upon this liberty, whether direct or indirect, unless supported by compelling governmental interests of the highest order.[146] The majority furnished no apparent reason for drastically departing from well-settled First Amendment jurisprudence. Justice O'Connor insisted that there is nothing unique or distinguishing about neutral laws of general applicability because religiously-neutral laws, like those aimed at religion, can compel a person to breach his or her religious beliefs or disobey his or her religious duties.[147] The majority suggested that the compelling interest test, as applied to generally applicable laws, would result in a "constitutional anomaly."[148] The First Amendment, however, explicitly makes freedom of religion a "constitutional norm" by its inclusion in the Bill of Rights.[149] By abandoning the compelling interest test and relegating religious accommodation to the political processes, minority religions will be denied the religious freedom guaranteed to them by the Bill of Rights.[150]

Although Justice O'Connor disagreed with the majority's reasoning, she reached the same judgment by applying well-settled free exercise principles. Justice O'Connor acknowledged that the Oregon criminal prohibition on peyote severely burdens the Native Americans' ability to freely exercise their religion because the sacramental use of peyote is an integral part of their religious practice.[151] Justice O'Connor also recognized that the State of Oregon's interest in enforc-

142. *Smith II*, 494 U.S. at 896 (O'Connor, J., concurring in judgment).
143. *Id.* at 897.
144. *Id.* at 903.
145. *Id.* at 901.
146. *Id.* at 895.
147. *Id.* at 901.
148. *Id.* at 886.
149. *Id.*
150. *Id.* at 902 (O'Connor, J., concurring in judgment). "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).
151. *Smith II*, 494 U.S. at 903 (O'Connor, J., concurring in judgment); see *supra* note 99 for a discussion of why the use of peyote is vital to the Native American religion.

ing laws that regulate the possession and use of controlled substances is compelling.[152] Applying the *Sherbert* compelling interest test, Justice O'Connor concluded that the State has a compelling interest in preventing physical harm to its citizens caused by the use of controlled substances.[153] Furthermore, the uniform application of Oregon's criminal prohibition is vital to achieve this interest.[154] Bestowing an exemption upon the Native Americans in this case would seriously handicap Oregon's compelling interest.[155] Therefore, Justice O'Connor concluded that the Free Exercise Clause did not mandate that the State of Oregon accommodate Alfred Smith's religiously motivated conduct.[156]

D. Justice Blackmun's Dissent

Writing for the dissent, Justice Blackmun also rejected the majority's restrictive approach to the Oregon law.[157] The dissent adamantly argued that the "consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion" must be applied in the interest of protecting and preserving First Amendment rights.[158] Justice Blackmun, therefore, argued that the Oregon criminal law should be sustained only if the State's reason for denying a religious exemption is justified by a "compelling interest that cannot be served by less restrictive means."[159]

The dissent agreed with Justice O'Connor's application of the *Sherbert* test and assertion that the majority's failure to apply the *Sherbert* test to the Oregon law violated the Court's traditional First Amendment jurisprudence.[160] In applying the compelling interest test, however, Justice Blackmun reached a different conclusion than Justice O'Connor. Justice Blackmun found no concrete evidence to support Justice O'Connor's argument that granting an exemption for the sacramental use of peyote would interfere with the State's interest in protecting the health and welfare of its citizens.[161] Further, the dissent

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152. *Smith II*, 494 U.S. at 904 (O'Connor, J., concurring in judgment). "Drug abuse is 'one of the greatest problems affecting the health and welfare of our population' " and thus " 'one of the most serious problems confronting our society today.' " *Id.* (quoting National Treasury Employees Union v. Von Raab, 489 U.S. 656, 668, 674 (1989)).

153. *Smith II*, 494 U.S. at 905 (O'Connor, J., concurring in judgment).

154. *Id.*

155. *Id.* at 906.

156. *Id.* at 907.

157. *Id.* (Blackmun, J., dissenting). Justices Brennan and Marshall joined Justice Blackmun. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 908.

161. *Id.* at 911. The dissent questions the State's assertion that the criminal prohibition is essential to attain a compelling interest when the State does not even attempt to enforce that

rejected the State's argument that granting an exemption for the sacramental use of peyote would thwart the State's interest in abolishing drug trafficking and would induce a flood of religious claims to generally applicable laws.[162] Thus, Justice Blackmun found that the State's theoretical interest in prohibiting the religious use of peyote was not sufficiently compelling to justify governmental interference with the Native Americans' right to freely exercise their religion.[163] Justice Blackmun voted to affirm the Oregon Supreme Court's decision and would have granted an exemption for Alfred Smith's conduct.

IV. ANALYSIS

The new majority view of the Free Exercise Clause announced in *Smith II* marks a significant departure from traditional free exercise jurisprudence, a position "contrary to the deep logic of the First Amendment."[164] *Smith II* holds that the Free Exercise Clause is not transgressed by generally applicable laws that: (1) regulate religiously motivated conduct;[165] (2) involve only the right to freely exercise one's religion;[166] and (3) punish conduct that a state has chosen to prohibit.[167] This restrictive interpretation of the Free Exercise Clause defies precedent and relegates the Free Exercise Clause to merely a superficial guarantee of religious freedom. Thus, the Free Exercise Clause is a formal constitutional provision lacking any substance.

The majority's concession that the Free Exercise Clause forbids laws aimed directly at regulating religious beliefs is a hollow admission because it is inconceivable that states would be bold enough to enact such blatantly unconstitutional legislation.[168] As Justice O'Connor stated in her concurring opinion, "if the First Amendment is to have

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prohibition. *Id.* The State of Oregon never prosecuted Alfred Smith or Galen Black for ingesting the ceremonial peyote in the derogation of the law and has not made significant attempts to enforce the prohibition against other religious peyote users. *Id.* This "symbolic" preservation of a governmental interest is insufficiently compelling to override a free exercise challenge. *Id.* Further, the State offers no evidence that the sacramental use of peyote has ever harmed anyone. *Id.* at 912. Blackmun emphasized that the Native American church places internal restrictions on its members' use of peyote, thereby diminishing the State's health and welfare concerns. *Id.* at 914. Blackmun compared these internal restrictions with the Amish way of life that supported the exemption in *Yoder* to conclude that the Native American church's spiritual code is effective in attaining the values that the Oregon drug laws are intended to foster. *Id.*

162. *Id.* at 916-17.

163. *Id.* at 921.

164. McConnell, *supra* note 98, at 1111.

165. *Smith II*, 494 U.S. at 879.

166. *Id.* at 881.

167. *Id.* at 879.

168. *Id.* at 877. As Justice O'Connor noted, "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such." *Id.* at 894 (O'Connor, J., concurring in judgment).

any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a state directly targets a religious practice."[169] This, however, is precisely the view of the Free Exercise Clause taken by the majority.

The *Smith II* majority not only empowers the government to prohibit religiously motivated action, but does so without demanding even the slightest justification. As long as the law burdening religious conduct is generally applicable, it does not offend the Free Exercise Clause according to *Smith II*.[170] This view, however, does not harmonize with the protective nature of the First Amendment because generally applicable laws cannot prevent encroachments on religious freedom.[171] There is nothing about neutral laws that saves them from unconstitutional application.

Religiously-neutral laws can force a person to violate his religious beliefs just as easily as laws aimed purposely or directly at religion.[172] Even a generally applicable law can deprive an individual of his right to freely exercise his religion. The new majority approach, however, only requires courts to examine a law if it directly and purposely targets religious conduct, thereby "relegat[ing] a serious First Amendment value to the barest level of minimum scrutiny" provided by the Equal Protection Clause.[173]

The *Smith II* majority distorts the guarantee of the Free Exercise Clause and leaves religious protection to the impulse of the political process.[174] The majority justified its decision to make the political process responsible for religious accommodation by presuming that legislative decision-makers would protect religious freedom.[175] This presumption may be accurate for protecting mainstream religions, such as the Catholic, Lutheran, Methodist, or Jewish religions. But as Justice O'Connor argued, "[t]he history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups."[176] Contrary to the majority's position, it is not feasible to counteract the burdensome effect of generally applicable laws by solely relying upon the legislature to enact specific religious

169. *Id.* at 894.

170. *Id.* at 879 (majority opinion).

171. *Id.* at 901 (O'Connor, J., concurring in judgment).

172. *Id.*

173. *Id.* at 894 (O'Connor, J., concurring in part and dissenting in part) (quoting Bowen v. Roy, 476 U.S. 693, 727 (1986)).

174. *Id.* at 890 (majority opinion).

175. *Id.* (legislatures "can be expected to be solicitous of [protections for religious practices] in its legislation").

176. *Id.* at 902 (O'Connor, J., concurring in judgment).

exemptions in every federal, state, and local statute.[177] As the Supreme Court itself stated:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[178]

Although the First Amendment mandates that government maintain an air of neutrality towards religious groups, *Smith II* calls for legislative action that, without judicial involvement, could ignore minority religious groups.[179]

The new majority position destroys the Free Exercise Clause by distorting prior case law, an approach that can be fatal to other constitutional guarantees and to the integrity of the Court. The majority supports its position with the 1940 decision in *Minersville School District v. Gobitis*,[180] a case that refused to grant a religious exemption to a generally applicable flag salute requirement.[181] Yet, the majority failed to mention that *Gobitis* was overruled three years later by the Court's decision in *West Virginia State Board of Education v. Barnette*.[182] The *Smith II* Court also relies on *Reynolds v. United States*,[183] an 1878 decision based upon the doctrine that the Free Exercise Clause protects religious beliefs but not religious conduct.[184] The Court, however, renounced the *Reynolds* theory in 1940 with its decision in *Cantwell v. Connecticut*,[185] a case holding that the Free Exercise Clause would protect the freedom to act in accordance with religious beliefs in some circumstances.[186]

The majority further buttresses its opinion with two older cases, both decided before the formal announcement of the modern Supreme

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177. Creating such a legislative exemption to a generally applicable statute for a particular religion could give rise to Establishment Clause challenges. See *supra* note 25 for a discussion of Establishment Clause jurisprudence.

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

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

180. 310 U.S. 586 (1940), *overruled by Barnette*, 319 U.S. at 638.

181. *Id.* at 595.

182. 319 U.S. 624 (1943).

183. 98 U.S. 145 (1878).

184. *Id.* at 166-67.

185. 310 U.S. 296 (1940).

186. *Id.* at 303-04.

Court's standard of review for free exercise claims.[187] The *Smith II* majority then cites three modern cases that rejected free exercise challenges after applying the compelling interest test.[188] These cases, however, counter the reasoning in *Smith II* because each applied the *Sherbert* compelling interest test, a test that *Smith II* stated had never been applied.[189]

The *Smith II* majority neither overruled nor conformed with precedent. Instead, the Court asserted that its new approach to free exercise challenges was a product of precedent.[190] The majority's assertion that "the record of more than a century of our free exercise jurisprudence" supports its approach,[191] however, is inaccurate. The majority commits a substantial portion of its opinion to distinguishing *Smith II*, both factually and legally, from controlling precedent.[192] Justice Scalia attempts to distinguish *Smith II* from cases that applied the *Sherbert* test by concluding that the laws invalidated in those prior cases threatened free exercise rights as well as other constitutional rights.[193]

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187. Prince v. Massachusetts, 321 U.S. 158 (1944); Braunfeld v. Brown, 366 U.S. 599 (1961). *Prince* lends no support to the majority's argument because the *Prince* Court never indicated whether or not the law in question was a generally applicable criminal prohibition. Likewise, *Braunfeld* does not support the majority's position because it implies that a general law that directly interferes with religious practices is unconstitutional, a position that is contrary to the holding of *Smith II*. Thus, neither of these cases supports the reasoning in *Smith II*.

188. Hernandez v. Commissioner, 490 U.S. 680 (1989); United States v. Lee, 455 U.S. 252 (1982); Gillette v. United States, 401 U.S. 437 (1971).

189. *Smith II*, 494 U.S. 872, 884-85 (1990) ("Although . . . we have sometimes used the *Sherbert* test to analyze free exercise challenges to such laws, we have never applied the test to invalidate one.") (citations omitted).

190. *Id.* at 886 ("Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.").

191. *Id.* at 882.

192. The *Smith II* Court had difficulty differentiating a series of four cases involving unemployment compensation for unemployment caused by religious objections. *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963). These cases have been considered prime examples of religious exemptions from generally applicable laws because workers were excused from the requirement of accepting any suitable employment on the basis of religious reasons.

193. The invalidated laws implicated freedom of speech, freedom of the press, and a parent's freedom to direct the education of his child. *Smith II*, 494 U.S. at 881-82. According to the Court, "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . ." *Id.* at 881. In an attempt to distinguish *Smith II* from *Yoder*, the majority explained that *Yoder* involved free exercise rights and a parent's fundamental right to educate his children. *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 233 (1972)). The *Yoder* Court explicitly stated, however, that parents do not have the right to refuse to comply with state compulsory education laws for non-religious reasons. *Yoder*, 406 U.S. at 215-16. Thus, *Yoder* holds that parents have no right to withhold their children from school unless supported by a free exercise claim, and *Smith*

Justice Scalia stated that *Smith II* "does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right."[194] The majority's conclusion that the Free Exercise Clause itself provides protection if and only if supported by a second constitutional claim defeats the very purpose of the Free Exercise Clause and renders it virtually worthless.[195]

The *Smith II* majority concluded that the *Sherbert* compelling interest test applies only to a case that involves a denial of unemployment benefits for engaging in religious conduct that is not illegal and that involves a free exercise claim in conjunction with another constitutional claim.[196] The majority's interpretation of *Sherbert* defies thirty years of traditional free exercise jurisprudence, thereby producing a result contrary to the intent of the Framers of the First Amendment.[197]

II holds that parents have no such right if supported only by a free exercise claim. This reasoning, that individuals receive greater protection under a "hybrid" claim than they do under either part of the "hybrid" claim, indicates that the freedoms guaranteed by the Constitution are not independent freedoms, but rather freedoms that are dependent on other provisions of the Constitution.

Interestingly, *Smith II* itself might have presented the "hybrid" situation contemplated by the *Smith II* majority. Instead of a free exercise claim, Alfred Smith could have challenged Oregon's criminal prohibition on peyote under the Free Speech Clause, arguing that the law interfered with his ability to freely express his commitment to the principles of the Native American church. The Supreme Court held that burning a flag is speech within the meaning of the Free Speech Clause because it expresses an individual's political opinion. Texas v. Johnson, 491 U.S. 397, 406 (1989). The Court, in holding as such, indicated that the Free Speech Clause protected both verbal and non-verbal forms of speech. *Id.* at 407. If the non-verbal burning of a flag is protected by the First Amendment as "speech", the ingestion of peyote should also be considered a form of "speech" because it conveys an individual's religious opinion.

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

195. Applying the reasoning of *Smith II*, one lower court concluded that "[b]ecause plaintiffs have failed to establish a violation of another constitutional right, their free exercise claim alone is not sufficient to establish a cause of action." Cornerstone Bible Church v. City of Hastings, 740 F. Supp. 654, 670 (D. Minn. 1990), *aff'd in part, rev'd in part*, 948 F.2d 464 (8th Cir. 1991).

196. *Smith II*, 494 U.S. at 884.

197. McConnell, *supra* note 98, at 1121. Since *Smith II*, federal and state courts have refused to grant exemptions to generally applicable laws that burden religious practices. *See* American Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405 (9th Cir. 1991) (rejecting free exercise challenge to Immigration Reform and Control Act, which prohibits employers from hiring aliens, by Quakers whose religion requires members to welcome strangers into their midst on grounds that law is neutral and generally applicable); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) (absent evidence of the city's intent to regulate religious worship, a zoning ordinance excluding all religious organizations from engaging in church-related activities in the city's business district is properly viewed as a neutral law of generally applicability, and under *Smith II*, summary judgment on free exercise claim was appropriate); Ryan v. United States Dep't of Justice, 950 F.2d 458 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2309 (1992) (any rule neutral with respect to religion satisfies the Free Exercise Clause); Vandiver v. Hardin City Bd. of Educ., 925 F.2d 927 (6th Cir. 1991) (requiring a high school student to pass equivalency exams in order to gain credit for religious home study did not violate student's free exercise rights, absent evidence that similarly situated students from non-religious home schools were provided an exemption); Rectors, Wardens, and Members of Vestry of St. Bartholomew's

V. THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

The *Smith II* decision effectively holds laws of general applicability that burden religious practices to the lowest level of scrutiny employed by the courts—the "rational relationship" test.[198] This test requires only that a law must be rationally related to a legitimate state interest.[199] By demoting laws that burden religious practices to the low-

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Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (although landmark preservation ordinance substantially limits the options of the church to raise revenue for purposes of expanding religious activities, free exercise claims are precluded by *Smith II* because laws are neutral and generally applicable); Vigars v. Valley Christian Ctr., 805 F. Supp. 802 (N.D. Cal. 1992) (free exercise claim against Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of sex, rejected because the statute is a secular, neutral law that only incidentally impacts defendant's religious right to have a child out of wedlock); Kissinger v. Board of Trustees of Ohio State Univ., 786 F. Supp. 1308 (S.D. Ohio 1992) (educational requirement that veterinary student must perform animal surgery did not violate student's free exercise rights because requirement was neutral and generally applicable); Greater New York Health Care Facilities v. Axelrod, 770 F. Supp. 183 (S.D.N.Y. 1991) (rejecting free exercise challenge to neutral health regulations limiting service of volunteers in nursing homes despite the fact that the services represented a fulfillment of Biblical commandments to honor one's father and mother); United States v. Philadelphia Yearly Meeting of Religious Soc'y of Friends, 753 F. Supp. 1300 (E.D. Pa. 1990) (rejecting free exercise claim of tax levy on religious organization because law is neutral and generally applicable and not specifically directed at regulating religious practice); Yang v. Sturner, 750 F. Supp. 558 (D.R.I. 1990) (Rhode Island statute governing autopsies did not violate religious belief that autopsies are a mutilation of the body because the statute is neutral and generally applicable with no indication that the statute was enacted with any animus toward religious practice); *In re* Welfare of T.K., 475 N.W.2d 88 (Minn. App. 1991) (upholding the removal of two children from the family home pursuant to neutral state law permitting the removal of children determined to be in need of government protection, when the mother refused to allow them to take standardized tests due to religious beliefs even though mother taught children at home).

The reasoning of *Smith II* was sharply criticized by Justice Souter in his concurring opinion in *Church of Lukami Babalu Aye v. City of Hialeah* in June 1993. 113 S. Ct. 2217 (1993) (striking down city ordinance that prohibited the killing of animals in religious rituals while permitting the killing of animals in other circumstances). Justice Souter urged the Court to reconsider the *Smith II* rule stating:

> The extent to which the Free Exercise Clause required government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the individual to government and to God. 'Neutral, generally applicable' laws, drafted as they are from the perspective of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and government.

Id. at 2250 (Souter, J., concurring).

198. *See infra* note 199 and accompanying text.

199. When a classification is not based on "suspect" criteria, such as race, national origin, or alienage, and does not implicate a fundamental right, courts review it under the traditional equal protection test. The classification (or discrimination) is valid if it is rationally related to a legitimate (or constitutionally permissible) state interest. *See* Schweiker v. Wilson, 450 U.S. 221, 234 (1981) ("[T]he pertinent inquiry is whether the classification employed . . . advances legitimate legislative goals in a rational fashion."); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 183 (1980) (Brennan, J., dissenting) ("A legislative classification may be upheld only if it bears a rational relationship to a legitimate state purpose."); Vance v. Bradley, 440 U.S. 93, 97 (1979) ("[W]e will not overturn such a statute [that does not implicate a fundamental right or employ a suspect classification] unless the varying treatment of different groups or persons is so

est level of constitutional protection, the Court substantially jeopardizes the guarantee of free exercise of religion. The Religious Freedom Restoration Act of 1993[200] responds to the Supreme Court's decision in

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unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (per curiam) ("[T]he . . . statute clearly meets the requirements of the Equal Protection Clause, for the State's classification rationally furthers the purpose identified by the State . . . ."); New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discrimination and require only that the classification challenged be rationally related to a legitimate state interest."); Johnson v. Robinson, 415 U.S. 361, 374 (1974) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)) ("A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ."); McDonald v. Board of Election Comm. of Chicago, 394 U.S. 802, 809 (1969) ("The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal."); McGowan v. Maryland, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

Under this test, a court presumes a classification is valid and will uphold it unless the person challenging the classification proves that it is invidious, wholly arbitrary, or capricious. *See* New Orleans v. Dukes, 427 U.S. 297 (1976). Courts use this approach in testing most economic and social regulations. *See Schweiker*, 450 U.S. at 230 ("Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, areas in which the judiciary then has a duty to intervene in the democratic process, this Court properly exercises only a limited review power over Congress, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems."); Dandridge v. Williams, 397 U.S. 471, 485 (1970) ("In the area of economics and social welfare, a State does not violate the Equal Protection Clause . . . [i]f the classification has some reasonable basis."); *see also* San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

200. 42 U.S.C. § 2000bb (Supp. V 1993). The Act was introduced in the 103d Congress by Senators Edward Kennedy and Orin Hatch on March 11, 1993. S REP NO 111, 103d Cong., 1st Sess. (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892. It was co-sponsored by Senators Akaka, Bennett, Bond, Boxer, Bradley, Breaux, Brown, Bumpers, Campbell, Coats, Cohen, Danforth, Daschle, DeConcini, Dodd, Dorgan, Durenberger, Exon, Feingold, Feinstein, Glenn, Graham, Gregg, Harkin, Hatfield, Inouye, Jeffords, Kassebaum, Kempthorne, Kerrey, Kerry, Kohl, Lautenberg, Levin, Lieberman, Lugar, Mack, McConnell, Metzenbaum, Milulski, Moseley-Braun, Moynihan, Murray, Nickles, Packwood, Pell, Pryor, Reid, Riegle, Rockefeller, Sarbanes, Sasser, Specter, Wellstone, and Wofford. *Id.* Congress approved the Religious Freedom Restoration Act of 1993 on November 16, 1993. *Id.*

The Religious Freedom Restoration Act of 1993 provides:

> Section 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSE
>
> (a) FINDINGS—The Congress finds that—
>
> (1) the framers of the 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 substantially burden religious exercise without compelling justification;
>
> (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

Smith II by creating a statutory prohibition against government action

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(5) the compelling interest as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) PURPOSES—The purposes of this Act are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Section 3. FREE EXERCISE OF RELIGION PROTECTED

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

(b) EXCEPTION—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

(c) JUDICIAL RELIEF—A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

Section 4. ATTORNEYS FEES

(a) JUDICIAL PROCEEDINGS—Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting "the Religious Freedom Restoration Act of 1993" before "or title VI of the Civil Rights Act of 1964."

(b) ADMINISTRATIVE PROCEEDINGS—Section 504(b)(1)(C) of title 5, United States Code, is amended—

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting "and,"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1993;" after clause (iii).

Section 5. DEFINITIONS

As used in this Act—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

Section 6. APPLICABILITY

(a) IN GENERAL—This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) RULE OF CONSTRUCTION—Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) RELIGIOUS BELIEF UNAFFECTED—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

Section 7. ESTABLISHMENT CLAUSE UNAFFECTED

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion. Granting government funding, benefits, or exemptions, to the extent permissible under the

that substantially burdens the free exercise of religion, even if the burden results from a law of general applicability. The only way the government may impinge on the freedom of religon is by demonstrating that the action is the least restrictive means of furthering a compelling government interest.[201]

A. Statutory Provisions

In passing the Religious Freedom Restoration Act of 1993, Congress reaffirmed the Founding Fathers' recognition that the free exercise of religion is an "unalienable right" of all Americans.[202] Reasserting the fundamental status of this right, Congress recognized that any type of law, whether neutral or direct, can burden an individual's right to freely exercise his religion.[203] Thus, the government cannot constitutionally burden this right without "compelling justification."[204] Congress determined that the *Smith II* decision eliminated the compelling interest test for evaluating free exercise claims previously set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*.[205] Congress further determined that it is vitally necessary to restore the compelling interest test to preserve and protect religious freedom.[206] The Act states that it is intended to restore the compelling interest test and to "guarantee its

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Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term "granting," used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

42 U.S.C. § 2000bb.

201. *Id.* § 2000bb-1.

202. *Id.* § 2000bb(2)(a)(1). Section 2(a)(1) provides that "the [F]ramers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution." *Id.*; *see also* 139 CONG. REC. S14,350 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy) ("Freedom of religion is the first right protected by the [F]irst [A]mendment. Even before freedom of speech or freedom of the press, the [F]irst [A]mendment prohibits government itself from establishing any form of state religion, or from interfering with any citizen's free exercise of religion."); *id.* at 14,353 (statement of Sen. Hatch) ("Our Nation was founded, in large part, by individuals fleeing religion persecution and seeking tolerance, safety, and protection in the exercise of their religion. Our forefathers fully understood the need to protect religious minorities. In the very [F]irst [A]mendment to the Constitution, they chose to limit the power of the Government and the will of the majority from unnecessarily burdening an individual.").

203. 42 U.S.C. § 2000bb(a)(2). This section provides that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.*

204. *Id.* § 2000bb(a)(3). This section provides that "governments should not substantially burden religious exercise without compelling justification." *Id.*

205. For a discussion of these cases see *supra* notes 62-85 and accompanying text.

206. *Id.* § 2000bb(a)(4), (5). Section 2(a)(4) provides, "in Employment Division v. Smith, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." *Id.* § 2000bb(a)(4) (citation omitted). Section (a)(5) provides that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* § 2000bb(a)(5).

application in all cases where the free exercise of religion is substantially burdened."[207]

Section 3 of the Act codifies the compelling interest test as the Supreme Court enunciated it and applied it in the thirty years prior to the *Smith II* decision.[208] The Act permits the government to place a substantial burden on the exercise of religion only if it demonstrates a compelling state interest and that the burden in question is the least restrictive means of furthering that interest.[209] Section 3 thereby returns the Court to the protective era of *Sherbert* and *Yoder*.[210] The Act permits persons whose religious exercise has been burdened substantially to assert that burden as a claim or defense in a judicial proceeding to obtain appropriate relief against a government.[211]

Section 6 addresses the Act's applicability to governmental actions.[212] The definition of governmental activity covered by the Act is all-inclusive.[213] All governmental actions that have a substantial impact on the practice of religion are subject to the restrictions of the Act. In order to violate the Act, governmental activity need not coerce an individual to violate his religious beliefs nor penalize religious activity by denying him an equal share of the rights, benefits, and privileges enjoyed by other citizens. Rather, the compelling interest test applies whenever a government law or government action to implement a law burdens a person's religious practices.[214] All such laws, whether enacted before or after the codification of the Act, are subject to the "compelling interest" test.[215] The text of the Act concludes by providing that the Act in no way infringes upon the First Amendment's prohibition on the establishment of religion.[216]

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207. *Id.* § 2000bb(b)(1).

208. *Id.* § 2000bb-1.

209. *Id.*

210. *Id.* Section 3 provides:

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

(b) EXCEPTION—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) if in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

Id.

211. *Id.* § 2000bb-1(c). Under the Act, "government" is defined as any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." *Id.* § 2000bb-2(1).

212. *Id.* § 2000bb-3(a).

213. *Id.*

214. *Id.* § 2000bb(b)(1).

215. *Id.* § 2000bb-3(a).

216. Section 7 provides that:

B. *Congressional Authority to Legislate in the Area of Religion*

The First Amendment provides that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof."[217] Believing that religion and civic government operate most effectively if each remains entirely independent of the other, the Framers included the Religion Clause in the Constitution in an effort to deprive the government of legislative authority over religious matters.[218] Yet, in an attempt to restore religious freedom, the Act specifically addresses the concept of religion, a concept that has been deemed wholly outside the reach of congressional power.[219] For the Act to be constitutional, Congress must first have the power to pass legislation specifically addressing religious activity.

In enacting the Religious Freedom Restoration Act of 1993, Congress determined that it derived its constitutional authority to legislate on the subject of religion from the Fourteenth Amendment.[220] The United States Supreme Court interpreted the Fourteenth Amendment's "fundamental concept of liberty" as "embrac[ing] the liberty guaranteed by the First Amendment."[221] Liberty includes the right to practice one's faith free of laws prohibiting the free exercise of religion.[222] Section 5 of the Fourteenth Amendment contains the express grant of legislative authority, providing that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[223] By including this broad power of enforcement, the Framers of the Consti-

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[n]othing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion. Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter.

Id. § 2000bb-4.

217. U.S. CONST. amend. I.

218. Van Alstyne, *supra* note 27, at 773-74.

219. Van Alstyne, *supra* note 27, at 773-74.

220. *See* H.R. REP. NO. 88, 103d Cong., 1st Sess. 5 (1993); S. REP. NO. 111, 103d Cong., 1st Sess. 5 (1993). The Fourteenth Amendment provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

221. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

222. *Id.*

223. U.S. CONST. amend. XIV, § 5. The Thirteenth and Fifteenth Amendments also contain this broad enforcement power clause. U.S. CONST. amends. XIII, § 2 and XV, § 2. The Court construed the Enforcement Clause of the Thirteenth Amendment as "cloth[ing] Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968). Likewise, the Court upheld the prohibition on literacy tests of the Voting Rights Act of 1965 as falling within Congress' Fifteenth Amendment enforcement power to protect the right to vote. South Carolina v. Katzenbach, 383 U.S. 301 (1966).

tution proclaimed that it is primarily the responsibility of Congress to insure that the rights guaranteed by the Fourteenth Amendment are protected.[224] The Supreme Court has interpreted Section 5 of the Fourteenth Admendment as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[225] Section 5 grants Congress "the same broad powers expressed in the Necessary and Proper Clause."[226] Section 5 further grants the legislative branch the remedial authority to provide statutory protection for a constitutional right when the Supreme Court is unwilling to assert its authority.[227] This authority, however, has limits. Congress may not: (1) create a statutory right prohibited by some other provision of the Constitution, (2) remove rights granted by the Constitution, or (3) create a right inconsistent with an objective of a constitutional provision.[228]

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224. *Katzenbach*, 383 U.S. at 325-26.

225. Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

226. *Id.* at 650. The Necessary and Proper Clause provides that Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all others Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

227. *See, e.g.*, City of Rome v. United States, 446 U.S. 156 (1980); Oregon v. Mitchell, 400 U.S. 112 (1970); South Carolina v. Katzenbach, 383 U.S. 301 (1966). In these cases, the Supreme Court held that allowing Congress to strike down state statutes and procedures by enacting the Voting Rights Act of 1965 did not deprive the judiciary of its exclusive constitutional role, but was, on the contrary, in accord with the express terms of the Fifteenth Amendment that "Congress shall have the power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2. Although the Voting Rights Act cases involved Congress' legislative authority under the Fifteenth Amendment, Congress relied on the "to enforce, by appropriate legislation, the provisions of this article" clause in enacting the Voting Rights Act to protect individuals' right to vote, a clause that is also included in the Fourteenth Amendment.

228. In *Oregon v. Mitchell*, the Court discussed congressional power under Section 5 of the Fourteenth Amendment:

> As broad as the congressional enforcement power is, it is not unlimited. Specifically, there are at least three limitations upon Congress' power to enforce the guarantees of the Civil War Amendments. First, Congress may not by legislation repeal other provisions of the Constitution. Second, the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation. Third, Congress may only 'enforce' the provisions of the amendments and may do so only by 'appropriate legislation.' Congress has no power under the enforcement sections to undercut the amendments' guarantees of personal equality and freedom from discrimination or to undermine those protections of the Bill of Rights which we have held the Fourteenth Amendment made applicable to the States.

400 U.S. at 128-29 (citations omitted). This inherent limitation on congressional power was also recognized by Justice Brennan in *Katzenbach v. Morgan* stating, "[w]e emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." 384 U.S. 641, 651 n.10.

To determine whether an exercise of legislative authority falls within Congress' express grant of remedial powers, the Supreme Court articulated a standard to test such an exercise of authority. The classic formulation of this standard was first enunciated by the Court in *McCulloch v. Maryland*.[229] Athough *McCulloch* was decided years before the ratification of the Fourteenth Amendment,[230] it laid the foundation for the Court's current standard. In upholding the congressional enactment of a law that incorporated the Bank of the United States as within the reach of Congress' necessary and proper powers, the *McCulloch* Court stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[231]

Sixty years later, the Court redefined the *McCulloch* standard in *Ex parte Virginia*,[232] thus making the standard applicable to the remedial provisions of the Thirteenth, Fourteenth, and Fifteenth Amendments.[233] In *Ex parte Virginia*, the Supreme Court was called upon to determine whether Congress had acted within its Fourteenth Amendment authority by enacting a law that prohibited the disqualification from jury service of otherwise qualified citizens solely on account of race or color.[234] Upholding the congressional enactment as "appropriate" within Congress' remedial authority, the Court stated that legislation is appropriate and within the "domain of congressional power" if it is "adapted to carry out the objects the amendments have in view, [if it] tends to enforce submission to the prohibitions they contain, and [if it] secure[s] to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion."[235] This formulation remains the standard against which the Court tests an exercise of Congress' remedial authority under the Fourteenth Amendment.[236]

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229. 17 U.S. (4 Wheat.) 316 (1819).

230. The Fourteenth Amendment was ratified by the States July 9, 1868, forty-nine years after *McCulloch v. Maryland* was decided.

231. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

232. 100 U.S. 339 (1879).

233. The Civil War Amendments (XIII, XIV, and XV) were all ratified by the States by 1870, nine years before the Court decided *Ex parte Virginia*.

234. 100 U.S. at 340. The petitioner, a county court judge, was charged with violating the law because he excluded from jury selection qualified American citizens of African origin on the basis of race and color alone. *Id.*

235. *Id.* at 345-46.

236. *See* City of Rome v. United States, 446 U.S. 156, 183 (1980) (reaffirming its holding in *South Carolina v. Katzenbach* that the Voting Rights Act of 1965, enacted under Congress' remedial power of § 2 of the Fifteenth Amendment, is an appropriate means of protecting Fifteenth Amendment rights); Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding provisions of

Although the First Amendment does not contain an "enforcement powers" clause directly granting Congress the power to enforce its guarantee of religious freedom, the protection of the Fourteenth Amendment embraces the First Amendment.[237] Thus, the First Amendment extends to Congress the same broad powers of enforcement. When exercising its authority under Section 5 of the Fourteenth Amendment, Congress must, therefore, direct its enforcement power to implementing appropriate legislation that has the effect of protecting religious freedom. By implementing appropriate legislation, Congress will thereby enforce the values of the Fourteenth Amendment.

If the constitutionality of the Religious Freedom Restoration Act of 1993 is challenged on the ground that Congress has overstepped its authority by legislating on religion, the Supreme Court will find that Congress has acted within its enforcement powers. Applying the classic principles of *McCulloch v. Maryland* and *Ex Parte Virginia*, the Act is clearly an appropriate exercise of congressional authority designed to enforce and protect the values enshrined in the First and Fourteenth Amendments.[238] Congress explicitly stated that the "free exercise of religion [is] an unalienable right" that "should not [be] substantially burden[ed] without compelling justification."[239] By requiring that the government demonstrate a "compelling interest" before substantially burdening an individual's right to freely exercise his religion,[240] Congress has "plainly adapted" this legislation to furthering the aims of the First and Fourteenth Amendments.[241] The Act is designed to secure the guarantee of religious freedom of the Free Exercise Clause to all citizens so that all persons may enjoy equal protection of the laws.[242] Further, the Act is "consist[ent] with the letter and spirit of the constitution" because it seeks to reinforce and protect a liberty ex-

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Voting Rights Act Amendments of 1970 that extended the national ban on literacy tests for five years as an appropriate exercise of Congress' power to enforce the Fourteenth and Fifteenth Amendments); Katzenbach v. Morgan, 384 U.S. 641, 651-52 (1966) (sustaining § 4(e) of the Voting Rights Act of 1965, which prohibited states from denying citizens, who were educated in American schools in which the predominant language was not English, of their right to vote based upon their ability to read, write, or understand English, on the ground that the congressional enactment was "plainly adapted" to securing the rights guaranteed to citizens by the Fourteenth Amendment); South Carolina v. Katzenbach, 383 U.S. 301, 326-27 (1966) (sustaining several provisions of the Voting Rights Act of 1965 as a proper exercise of congressional power under § 2 of the Fifteenth Amendment because the Act was an appropriate means of upholding the rights guaranteed by the Fifteenth Amendment).

237. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (the Fourteenth Amendment's "fundamental concept of liberty . . . embraces the liberty guaranteed by the First Amendment").

238. *See supra* notes 229-36 and accompanying text.

239. 42 U.S.C. § 2000bb(a)(1) and (3) (1993).

240. *Id.* § 2000bb-1(b).

241. *Ex parte* Virginia, 100 U.S. 339, 346 (1879).

242. 42 U.S.C. § 2000bb(2)(a)(1).

pressly guaranteed to the citizens of the United States without expanding that liberty in derogation of the Framers' intent.[243]

By enacting the Religious Freedom Restoration Act of 1993, Congress properly acted within its remedial powers under Section 5 of the Fourteenth Amendment.[244] The Supreme Court's decision in *Smith II* failed to recognize that religious freedom may be burdened by generally applicable laws.[245] Recognizing that this decision substantially jeopardized the guarantee of religious freedom, Congress exercised its remedial authority to provide statutory protection for a constitutional right that the Supreme Court was unwilling to protect.[246] The legislative action clearly comports with the Court's interpretation of the breadth of Congress' enforcement powers.[247] Congress did not overstep its remedial authority. Congress did not create a statutory right prohibited by the Constitution nor remove a right granted by it.[248] Nor did Congress "restrict, abrogate, or dilute" a right guaranteed by the Constitution.[249] Rather, Congress merely provided appropriate statutory protection for an existing fundamental right. Because the Religious Freedom Restoration Act is designed to implement the Free Exercise Clause—to protect religious liberty and eliminate laws "prohibiting the free exercise" of religion—Congress constitutionally asserted its Fourteenth Amendment remedial power.

C. *Separation of Powers*

Although Congress constitutionally can assert its Fourteenth Amendment remedial authority to legislate in the area of religion, the question remains as to whether Congress can compel the Supreme Court to apply a specific standard of review in its evaluation of free exercise challenges. The Act expressly provides for a statutory standard of review.[250] The Act further declares that federal and state courts should apply the compelling interest test in evaluating free exercise

243. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

244. *See supra* notes 223-28 and accompanying text.

245. *See supra* notes 171-72 and accompanying text.

246. *See supra* note 227 and accompanying text.

247. *See, e.g.*, City of Rome v. United States, 446 U.S. 156 (1980); Oregon v. Mitchell, 400 U.S. 112 (1970); South Carolina v. Katzenbach, 383 U.S. 301 (1966). These three cases all hold that allowing Congress to strike down state statutes and procedures by enactment of the Voting Rights Act of 1965 did not deprive the judiciary of its exclusive constitutional role, but was, on the contrary, in accord with Congress' powers granted by the enforcement clause of the Fifteenth Amendment.

248. *Mitchell*, 400 U.S. at 128-29.

249. Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966).

250. 42 U.S.C. § 2000bb-1(b). A government may substantially burden a person's free exercise of religion only if it proves that the law is in furtherance of a compelling governmental interest and it is the least restrictive means of accomplishing that compelling interest. *Id.*

claims.[251] This seemingly mandatory standard of review, however, is likely to raise a constitutional challenge based upon the separation of powers doctrine.

The Constitution expressly provides for three distinct branches of government—legislative, executive, and judicial.[252] In providing for these three branches, the Constitution assigns to each exclusive powers, not to be transcended by the others.[253] The legislative branch is solely responsible for enacting laws that uphold the values of the Constitution, while the judicial branch is solely responsible for interpreting the meaning of the laws enacted by the legislative branch.[254] This distinction was first addressed in the landmark separation of powers case of *Marbury v. Madison*.[255] The *Marbury* Court, expounding on the roles of the legislative and judicial branches, stated:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[256]

Thus, while the Constitution grants the legislature exclusive authority to make laws, it does not place the authority to interpret the meaning of the law within the legislative domain.[257] The responsibility to interpret the law has been expressly reserved for the judicial branch of the government.[258]

Challengers are likely to argue that the Act is unconstitutional on the ground that it requires the courts to apply a specific standard of review, thus transcending congressional powers by telling the courts

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251. *Id.*

252. U.S. CONST. arts. I, II, and III.

253. Article I, § 1 states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. CONST. art. I, § 1. Article II, § 1 states that "[t]he executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. Article III, § 1 states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

254. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

255. *Id.* at 137.

256. *Id.* at 177-78.

257. *Id.*

258. *Id.*

how to interpret the Constitution.[259] If the Act is challenged, the Court will likely find it to be in accordance with the separation of powers doctrine. Although Congress has expressly stated that the government must demonstrate a compelling interest before it can substantially burden an individual's religious freedom, Congress is not attempting to legislate a judicial standard of review. Rather, Congress is merely creating a statutory prohibition on certain types of governmental action that have the effect of substantially burdening an individual's religious liberty. The courts remain free to interpret and apply this statutory prohibition.[260] Courts alone have the responsibility to determine whether or not a governmental action substantially burdens religion. Moreover, courts alone interpret whether or not an interest is compelling. Under the Act, the judicial branch still says "what the law is."[261]

D. The Effectiveness of the Religious Freedom Restoration Act of 1993

The Religious Freedom Restoration Act of 1993 reflects Congress' strong pledge to protect one of America's most treasured liberties—the right to practice one's faith without undue interference by the civic government. Many of the individuals who settled in this country fled religious persecution for the opportunity to peaceably practice their religious beliefs.[262] In turn, these individuals helped to establish a nation that is organized upon the ideal that the right to freely practice one's faith without governmental intermeddling is among the most cherished liberties of every American.[263] Until the Court's decision in *Smith II*, individuals could depend upon the judiciary to protect their sacred First Amendment right to freely exercise their religious beliefs and opinions.[264] With the advent of *Smith II*, however, individuals could no longer rely upon the judiciary for protection, but instead, had to blindly depend upon the majoritarian decision-making body for religious accommodation.[265] *Smith II* proclaimed that religious freedom was merely a "luxury," when in fact, it is one of our most valued individual liberties.[266]

The Act does not create new rights or provide special protection for any particular religion. It simply prohibits the government from

259. *See supra* notes 253-58 and accompanying text.
260. *See supra* notes 253-58 and accompanying text.
261. *Marbury*, 5 U.S. (1 Cranch) at 177.
262. Everson v. Board of Educ., 330 U.S. 1, 8-9 (1947).
263. Minersville Sch. Dist., Bd. of Educ. v. Gobits, 310 U.S. 586, 593 (1940), *overruled by* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
264. *Smith II*, 494 U.S. 872, 890 (1990).
265. *Id.*
266. *Id.* at 888.

regulating the religious practices of its citizens unless the government can demonstrate that the regulation is the least restrictive means of furthering a compelling governmental interest.[267] If the Act can survive a constitutional attack based upon the separation of powers doctrine, it will return the judiciary to the protective era of *Sherbert* and *Yoder* by recognizing religious exemptions to both neutral, generally applicable laws and laws directed at specific religious practices.[268] In reality, the Act does not guarantee that religious claimants bringing free exercise challenges will be granted an exemption. Rather, the Act merely insures that religious claimants have an opportunity to protect their religious liberty.

VI. CONCLUSION

The Religious Freedom Restoration Act of 1993 is a legislative attempt to restore the First Amendment to its proper place as one of the cornerstones of American civilization. It represents Congress' strong commitment to its constitutional duty to protect this sacred individual right. The conflict between individual rights and government interests will always exist. By restoring the requirement of governmental justification for interfering with religious practices, however, common ground can be attained to accommodate both the government's desire for an orderly society and the rights of individuals to exercise their religious beliefs without undue governmental interference. In those instances where government interests and individual rights cannot be accommodated, the government regulation must yield unless it can be justified by a compelling interest. The compelling interest test provides crucial protection for the free exercise of religion. Although this test provides the essential protection, it may be challenged as an unconstitutional assertion of legislative power in direct violation of the separation of powers doctrine. If the Act can overcome this constitutional hurdle, it will prove to be one of the most important pieces of legislation in the history of the nation.

Michelle L. Stuart

267. 42 U.S.C. § 2000bb-1.

268. *See supra* notes 62-85 and accompanying text.