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Equal Protection for Substantive Religious Freedom

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CASE COMMENT

EQUAL PROTECTION FOR SUBSTANTIVE RELIGIOUS FREEDOM*

Respondents were dismissed from positions as drug rehabilitation counselors because they ingested peyote for sacramental purposes during a Native American Church ceremony.[1] They were subsequently denied unemployment benefits when the state Employment Division (petitioner) determined that their discharge was due to work-related "misconduct."[2] The Oregon Court of Appeals reversed, holding that the denial of benefits was a violation of respondents' First Amendment right to free exercise of their religion.[3] On appeal, the Oregon Supreme Court upheld the payment of benefits, reasoning that the purpose of the "misconduct" provision of the statute governing unemployment compensation was not to enforce the state's criminal code, but rather to preserve the financial stability of the compensation fund.[4] The Oregon court held that the denial of benefits imposed a significant burden on the respondents' religious freedom, and the state's financial interest was not sufficiently compelling to justify penalizing religiously motivated conduct.[5] Petitioner appealed to the United States Supreme Court, maintaining that the illegality of respondents' conduct was relevant to their constitutional claim.[6] The Court vacated the judgment and remanded to the Oregon court to determine the legality of religious use of peyote under either statutory exemption or case law.[7] On remand, the Oregon court found that a number of other states and the federal government provide exceptions for religiously motivat-

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1. Employment Div. v. Smith, 494 U.S. 872, 874 (1990). The supervisor had advised respondent (Smith) that he would be permitted to attend the religious ceremony but should he participate, respondent would lose his job. Smith v. Employment Div., 721 P.2d 445, 446 (Or. 1986).

2. *Smith*, 494 U.S. at 874. Respondents' employer, the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT), required as a matter of policy that its counselors abstain completely from using alcohol or nonprescription drugs. Employment Div. v. Smith, 485 U.S. 660, 662 n.3 (1988). In this footnote, the Court cites to ADAPT's policy statement regarding employment conditions: "Use of an illegal drug or use of prescription drugs in a nonprescribed manner is grounds for immediate termination from employment." *Id.*

3. *Smith*, 494 U.S. at 874.

4. *Smith*, 721 P.2d at 450-51.

5. *Id.* at 450.

6. *Smith*, 485 U.S. at 662.

7. *Id.* at 673-74. The Court stated that it would be erroneous to hold that the respondents' conduct is entitled to the "same measure of federal constitutional protection regardless of its criminality." *Id.*

ed use of peyote,[8] but that the Oregon statute "makes no exception for the sacramental use of peyote."[9] However, the court also reaffirmed its holding that the First Amendment prevented the state from enforcing its prohibitions against peyote use by members of the Native American Church.[10] The United States Supreme Court again granted certiorari and HELD, because the use of peyote was prohibited under state law, and because that prohibition is constitutional, the state may deny unemployment compensation to persons whose dismissal results from use of the drug without violating the Free Exercise Clause of the First Amendment.[11]

The Bill of Rights declares: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[12] Yet many laws do limit the free exercise of religion by prohibiting some conduct required by the religion or requiring some conduct proscribed by the religion.[13] The challenge for the Court has been to decide when religious free exercise has been restricted, what standard of review to apply, and how to balance competing claims of government requirements with individual religious freedom.[14]

In the first free exercise challenge, *Reynolds v. United States*,[15] the Court began its inquiry by attempting to define what religious freedom has been guaranteed.[16] The case involved a member of the Church of Jesus Christ of Latter-Day Saints (Mormons) who was charged with violating criminal laws against polygamy.[17] The Mormon church at that time not only condoned but encouraged polygamy.[18] The petitioner therefore urged that members should be exempt from the statute because polygamy was part of

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8. Smith v. Employment Div., 763 P.2d 146, 148-49 (Or. 1988). The Oregon court noted that the legislative history of the federal Drug Abuse Control amendments (on which the state statutes are based) indicates Congress expressly approved the exemption of the sacramental use of peyote in the Native American Church. *Id.* The court also cited a California case which extensively detailed the history and ceremony of the peyote rite and the beneficial effects the religion has shown on curbing alcohol and drug abuse among its practitioners. *Id.* (citing People v. Woody, 394 P.2d 813 (Cal. 1964)).

9. *Id.* at 148.

10. *Id.* at 150. It is conceivable that the Oregon court was attempting to carve out a judicial exemption as the California court had done in *Woody*, 394 P.2d at 813.

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

12. U.S. CONST. amend. I. The Free Exercise Clause was extended to the states by incorporation through the Fourteenth Amendment in Cantwell v. Connecticut, 310 U.S. 296 (1940). While the *Cantwell* Court did not specify a test, it indicated that the power to regulate religiously motivated action must be exercised so as not to unduly infringe the protected freedom. *Id.* at 304.

13. *Smith*, 494 U.S. at 878.

14. *See generally* Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672 (1992) (describing the Court's effort to unite on a workable approach to the Religion Clauses as an "erratic path").

15. 98 U.S. 145 (1878).

16. *Id.* at 162.

17. *Id.* at 145.

18. *Id.* at 161. Church doctrine held that it was the duty of male members to practice polygamy and that failure to do so would be punished. *Id.*

Mormon religious practice.[19] Citing to the writings of Thomas Jefferson, the Court reasoned that the government may not interfere with "mere religious belief and opinions,"[20] but was free to legislate actions which were "in violation of social duties or subversive of good order."[21] To allow an exemption in this case would grant religious doctrine a position superior to the law of the land, and "permit every citizen to become a law unto himself. Government could exist in name only in such circumstances."[22] Thus, under *Reynolds* the Free Exercise Clause provided unrestricted liberty of belief, but virtually no constitutional protection for conduct motivated by that belief.

The *Reynolds* formulation held for nearly a century, until an association of Jewish merchants challenged Sunday closing laws as a restriction of their free exercise rights.[23] In *Braunfeld v. Brown*, the merchants claimed that because their religion prohibited labor on their Sabbath, which was Saturday, and the state required them to close their shops on Sunday, they were forced to forego a full business day which was available to their competitors.[24] The state's law thus penalized them for observing the commands of their religion. Although the Court upheld the Sunday closing law and held that economic burden was not a sufficient prohibition of their free exercise rights, it also indicated a new standard of review was to be applied to free exercise challenges.[25] While applying "the most critical scrutiny" to laws which only

19. *Id.* at 161-62.

20. Id. at 162. The Court here lays a dubious foundation both for the *Reynolds* decision and for subsequent First Amendment jurisprudence. The Court acknowledged that Jefferson was out of the country, and therefore was not a participant in the ratification process of either the Constitution or the Bill of Rights. *Id.* at 163. Nonetheless, the Court accepted a letter Jefferson wrote during his presidency as an "authoritative declaration" of the scope of the First Amendment. *Id.* at 164. More appropriate sources of interpretation have been available in the legislative debates recorded in the *Annals of Congress* and in the writings of Madison as chief author and sponsor of the amendment. Jefferson's letter, with its "misleading [wall of separation] metaphor" was thus a "less than ideal source" of the Amendment's meaning. Wallace v. Jaffree, 472 U.S. 38, 91-92 (1984) (Rehnquist, J., dissenting); *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (describing the debates in the first congress, the free exercise provisions of each of the state constitutions, and contrasting Jefferson's and Madison's views of religion). However, both *Reynolds* and Jefferson's letter were adopted by the Court as precedent and as authoritative interpretation for both religion clauses. This adoption has had far reaching implications for subsequent First Amendment jurisprudence, as the Court itself has noted on several occasions. Constructing doctrine around the "wall" has contributed to the "erratic path," Glendon, *supra* note 14, and the interpretive problems described *infra* notes 79-81 and accompanying text.

21. *Reynolds*, 98 U.S. at 164. The Court expanded this reasoning in a later case involving a Mormon who was denied the right to vote because of his religion. The Court stated that the exercise of religion "must be subordinate to the criminal laws of the country" and noted that the laws of a society are "designed to secure its peace, prosperity, and the morals of its people." Davis v. Beason, 133 U.S. 333, 342-43 (1890). This holding directly contradicts the role Madison gave religion. *See infra* note 73.

22. *Reynolds*, 98 U.S. at 167.

23. Braunfeld v. Brown, 366 U.S. 599 (1961).

24. *Id.* at 601-02. The statute at issue was enacted in 1959. Prior to that time the merchants had routinely opened on Sunday, doing a substantial amount of business. Braunfeld claimed that the prohibition cost him enough business that it would cause his store to fail. *Id.*

25. *Id.* at 606. Although it had not fomulated a test, the Court had previously indicated a higher

indirectly burden religious exercise would restrict the latitude of legislatures,[26] if the purpose or effect of a law is "to impede the observance of one or all religions or is to discriminate" between them, the law is unconstitutional even though the burden is only an indirect one.[27] The test which emerged from *Braunfeld* is: (1) does the law burden religion either directly or indirectly and (2) if so, can the valid secular purpose be accomplished by a less restrictive means?[28]

This standard was successfully expanded and applied to free exercise claims in a line of unemployment compensation cases, beginning with *Sherbert v. Verner*.[29] In *Sherbert*, the petitioner, a Seventh Day Adventist, was fired from her job when she refused to work on Saturday because it was her church's Sabbath.[30] She sought and was denied unemployment compensation because she refused "available work" offered to her by the unemployment office as those positions also would require her to work on Saturday.[31] The Court applied the compelling state interest test noting that: "It is basic that no showing of merely a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interest, give occasion for permissible limitation."[32] Finding no such abuse or danger, the Court held that the state could not condition the availability of benefits on the claimant's willingness to violate a cardinal principle of her religion.[33] To do so "effectively penalizes the free exercise of her constitutional liberties," and is the functional equivalent of a fine on her worship.[34]

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standard of review would be appropriate to protect "discrete and insular minorities," including religious minorities. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see also supra* note 12. *Braunfeld* was the first to define the test and apply it to a religion case. *Braunfeld*, 366 U.S. at 613 (Brennan, J., dissenting).

26. *Braunfeld*, 366 U.S. at 606.

27. *Id.* at 607.

28. *Id.*

29. 374 U.S. 398 (1963); *see also* Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981). Outside of the unemployment compensation context, the Free Exercise Clause has also been successfully used to challenge state compulsory education laws. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish children exempted from the state's compulsory education law requiring attendance through the tenth grade, which was in conflict with Amish practice of leaving the secular school system after the eighth grade).

30. *Sherbert*, 374 U.S. at 399, n.1. Petitioner's employment at the textile mill and her membership in the church predate the mill's change to a six-day work-week. The evidence presented also indicated that Sunday worshippers would not be similarly prejudiced were the mill required to change to a seven-day week in the event of a national emergency. *Id.* at 406.

31. *Id.* at 400-01.

32. *Id.* at 406.

33. *Id.* at 410.

34. *Id.* at 404, 406. The difference between *Braunfeld* and *Sherbert* may be the degree of economic disadvantage inflicted upon the respective parties by the state. Both involved a religious injunction against Saturday labor; however, the merchants in *Braunfeld* were only required to give up one day of business,

The heightened scrutiny which emerged from *Braunfeld* foreshadowed the application of compelling state interest in *Sherbert*. The two-step analysis required the individual claiming infringement to show that the law as applied burdened the free exercise of religion, and then once the burden threshold had been crossed, for the state to show a compelling interest in general application of the law.[35] Still undefined was the threshold level of burden: mere economic disadvantage was insufficient, but denial of a generally available entitlement such as unemployment compensation triggered the second part of the test. Also undefined was the weight to be given the government interest when balanced against the burden imposed.

The Court retreated from free exercise exemptions with two cases involving Native Americans who claimed that government actions infringed on their free exercise rights.[36] The second of these cases, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, challenged a logging road to be built over federal land which was also sacred worship grounds used by three Native American tribes.[37] While the *Lyng* Court found that the road and consequent logging activity would have a devastating impact on the religious practices of the tribes, it also held that government actions should not be conditioned by religious objections.[38] The burden threshold had been met, but the Court found that the effected individuals would not be coerced into violating their beliefs by the government's action.[39] Rather than define a level of government interest which would outweigh the burden, since the burden in this case was the virtual destruction of the religion, the Court substituted a coercion

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whereas Sherbert was denied both her job and unemployment compensation benefits. *Sherbert*, 374 U.S. at 399-401; *Braunfeld*, 366 U.S. at 601, 609.

35. *Sherbert*. 374 U.S. at 403, 406.

36. *See* Bowen v. Roy, 476 U.S. 693 (1986) (involving a Native American who claimed that the government's use of social security numbers in administering the Aid to Families with Dependent Children (A.F.D.C.) program violated his religious belief that use of the numbers would steal his daughter's soul). The Court in *Lyng v. Northwest Indian Cemetery Protective Ass'n* builds on a line of reasoning advanced in *Roy*, which held that while the government's action might interfere significantly with the individual's religious beliefs, government need not conduct its own internal affairs to comport with the religious beliefs of its citizens. *Lyng*, 485 U.S. at 448 (citing *Roy*, 476 U.S. at 699-700). *Lyng* appears to have the greater impact, and for this reason will be the only case discussed in detail on this point.

37. 485 U.S. 439 (1988). A U.S. Forest Service environmental impact study concluded that the road would cause "serious and irreparable" damage to the Native Americans' religious practice. *Id.* at 442.

38. *Id.* at 451. Respondents also depended on the American Indian Religious Freedom Act (AIRFA), enacted in August 1978 as 42 U.S.C.S. § 1996 (Law. Co-op. 1989). With AIRFA, Congress declared that the policy of the United States was to preserve and protect Native American religious freedom, including the right to believe and exercise their religions through traditional ceremonies and rites, and to have access to sites and possession of sacred objects. 42 U.S.C.S. § 1996 (Law Co-op. 1989). The Court, however, referred to the legislative history of the Act to determine that it was policy only, and was passed with no intent to create a cause of action, judicially enforceable rights, or to confer any special religious rights on Native Americans. *Lyng*, 485 U.S. at 455. Effectively, AIRFA "has no teeth in it." *Id.*

39. *Lyng*, 485 U.S. at 453. While government may accommodate religious practices by allowing the tribes to use the land for their ceremonies, the right of religious free exercise cannot be construed to divest the government of the right to use its own land. *Id.*

test. "Incidental effects" of lawful government actions which do not penalize religion or coerce individuals to act contrary to their beliefs, even though such actions may make it more difficult to practice certain religions, do not require the government to show a compelling justification.[40]

The instant case, on the surface, would appear to be another in the line of unemployment compensation cases. Indeed, that is how the case was first presented.[41] In the alternative, it could be analyzed as a claim for a religious exemption from generally applicable statutes.[42] The respondents requested the government to consider the unique practices of the Native American Church: to outlaw the use of peyote is to destroy the practice of the church.[43] This alternative is the method the instant Court chose to follow: when remanding the case to the Oregon Supreme Court, the question to be resolved was whether the state allowed an exemption for sacramental peyote use either by statute or case law.[44] The Court reasoned that if the respondents could be held criminally liable for their conduct, then the state could impose the lesser penalty of denying unemployment benefits.[45]

While the Oregon court on remand found no statutory exemption for sacramental peyote use, it also found that the criminal provisions were irrelevant to the case at bar. The case should instead be analyzed under the unemployment compensation regulations, thus bringing it in line with *Sherbert*.[46] The instant Court, however, distinguished *Sherbert* and its progeny from the instant case by observing that the conduct at issue was not prohibited by state criminal statutes.[47] Citing to *Reynolds* among others, the instant Court stated it had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[48] The Court noted that Oregon's drug laws are not specifically targeted toward religious use, and are therefore neutral laws of general applicability. For these laws, only a rational basis test is necessary.[49]

Having confined the compelling interest test to a narrow fact situation, the instant Court then stated that prior free exercise claims have been sus-

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40. *Id.* at 450-51.
41. *Smith*, 494 U.S. at 874.
42. *Id.* at 897.
43. *Id.* at 919.
44. *Id.* at 875.
45. *Id.*
46. *Id.* at 875. Oregon had not attempted to enforce the criminal prohibition of peyote use against the respondents, nor did the petitioner rely on the criminal statutes in defending the denial of benefits in the state court. *Id.* at 909 n.2 (Blackmun, J., dissenting).
47. *Id.* at 876. Justice O'Connor's separate opinion disputes this distinction, stating that the *Sherbert* test applies in both criminal and civil cases. *Id.* at 898 (O'Connor, J., concurring in the judgment). The compulsory education statute at issue in *Yoder* provided criminal sanctions for failure to comply. *Yoder*, 406 U.S. at 206.
48. *Smith*, 494 U.S. at 878-79.
49. *Id.* at 885-87.

tained against generally applicable laws only in conjunction with some other claimed constitutional right such as freedom of speech, freedom of the press, or parents' rights to control their children's upbringing.[50] The instant case did not present such a "hybrid situation," there is therefore no additional claimed right for the respondents to fall back on.[51] Further, the Court states that the compelling interest test, if applied to the instant case as it is applied in other fields, would produce a "constitutional anomaly."[52] Because of the diversity of beliefs present in modern society, the Court "cannot afford the luxury" of applying a compelling interest test to every regulation of conduct.[53]

The majority determined that the protection of religious liberty under the First Amendment does not require the strict scrutiny of judicial review.[54] Since only a rational basis test is required, the Court then delegated the protection of religious freedom to the political process.[55] Overtly discriminatory laws are not permissible under the Equal Protection Clause.[56] The Court is concerned here with neutral, generally applicable laws. While not constitutionally required, statutory religious exemptions are constitutionally permissible.[57] The Court recognizes that leaving accommodation to the legislatures will place minority religions at a "relative disadvantage;" however, according to the majority, this disadvantage is preferable to judges weighing the importance of all laws against religious belief.[58]

The impact of the instant case then is not in the holding, which is consistent with the line of cases governing religiously-motivated criminal conduct,[59] but in its reasoning. The dissent describes the effect of the decision

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50. *Id.* at 881.

51. *Id.* at 882.

52. *Id.* at 886. The anomaly would be a private right to ignore generally applicable laws. *Id.*

53. *Id.* at 888.

54. *Id.* at 889. This conclusion stands contrary to the premise on which Justice Scalia based his dissent a year earlier, noting that the Constitution provides for the "discriminatory protection of freedom of religion." Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 30 (1989) (Scalia, J., dissenting).

55. *Smith*, 494 U.S. at 890.

56. *Id.* at 894. However, as at least one commentator has observed, a requirement of only equal protection-like neutrality renders the Free Exercise Clause functionally meaningless. *See, e.g.*, Stephen L. Pepper, *The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases*, 9 N. KY. L. REV. 265, 294 (1982).

57. *Smith*, 494 U.S. at 890. One commonly cited example of a legislative exemption is the one granted to the Catholic Church to use wine for Mass during the Prohibition Era. The religious use of peyote has been compared to the use of wine in the Christian communion sacrament. *Id.* at 913 n.6 (Blackmun, J., dissenting); *see also* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 50-51 (arguing that statutes are "riddled with exemptions" for a variety of secular groups and interests, failure to make similar exemptions for religion amounts to hostile indifference).

58. *Smith*, 494 U.S. at 890. This effectively abdicates the Court's traditional role of protecting minority rights from infringing majoritarian legislation. *See infra* note 76.

59. *Smith*, 494 U.S. at 891 (O'Connor, J., concurring). Justice O'Connor would arrive at the same result applying the compelling interest standard. *Id.* at 903-07.

as a "wholesale overturning of settled law concerning the Religion Clauses of our Constitution."[60] The Court has lowered the standard of review from a showing of compelling state interest to a showing only that the law is neutral and of general applicability. In effect, the Court's treatment of free exercise claims has come full circle back to *Reynolds*:[61] one may believe unrestrained by law, but the state may regulate conduct so long as it has a rational basis for doing so. This result, according to the majority, is based on the record of more than a century of First Amendment jurisprudence.[62]

However, as the dissent points out, the majority reaches this conclusion "only by mischaracterizing this Court's precedents."[63] The separate concurring opinion states that the Court has not only strained the reading of the First Amendment, but disregarded "consistent application of free exercise doctrine."[64] Commentary has been equally harsh, characterizing the Court's use of precedent as "transparently dishonest."[65] One commentator who agreed with the decision stated that the opinion showed only a "shallow understanding of free exercise jurisprudence," and that the Court's use of precedent "borders on fiction."[66] Another stated that the primary precedent relied on by the majority to support its decision "consists entirely of overruled and minority opinions."[67] These inconsistencies are thoroughly examined elsewhere.[68]

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

61. *Id.* at 881. Indeed, the majority states that *Reynolds* controls. This is a curious choice of controlling precedent since its central premise, the speech-action dichotomy, was repudiated in *Cantwell*, and the instant Court recognized that "exercise" also includes conduct. Moreover, *Reynolds* predates the test which had been applied for thirty years, and foreshadowed even earlier. *See, e.g., Cantwell*, 310 U.S. at 304; *Carolene Products*, 304 U.S. at 152 n.4.

62. *Smith*, 494 U.S. at 879.

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

64. *Id.* at 892 (O'Connor, J., concurring).

65. Laycock, *supra* note 57, at 3. To illustrate the point, Laycock quotes Justice Scalia in two opinions only 14 months apart. Citing to the *Sherbert* line, Scalia stated that "we held that the free exercise clause of the First Amendment required religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws." *Texas Monthly*, 489 U.S. at 38 (Scalia, J., dissenting). Compare the previous statement with Scalia's majority opinion in *Smith*: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate." *Smith*, 494 U.S. at 878-79.

66. William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991). Professor Marshall defends *Smith*'s rejection of free exercise exemptions because exemptions require that the courts define the values of the belief systems involved and then weigh those values against the interests of the state, but Marshall does not defend the decision itself.

67. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1125 (1990). Some of the cases to which McConnell refers include Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), overruled by West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *Reynolds*, 98 U.S. at 145 (noting that the speech-action dichotomy central to *Reynolds* was repudiated by Cantwell v. Connecticut, 310 U.S. 296 (1940)); and United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring) (attacking the majority's use of the compelling interest test). Other cases cited include two which were decided prior to the introduction of the compelling interest test.

68. *See, e.g.*, Justice O'Connor's separate opinion in *Smith* 494 U.S. at 891-901; Laycock, *supra* note

By returning to *Reynolds* as the standard, the Court makes it possible for legislative action to effectively prohibit religious exercise without providing the believer with any judicial recourse.[69] One who is barred from religiously-motivated conduct is effectively prohibited from exercising the religion itself.[70] The results are likely to fall hardest on minority beliefs with little effective voice in the political process as the majority is in a position to ensure that its beliefs will be accommodated. Lawmakers and even judges often do not know or understand the impact of laws or other government actions on minority religions.[71] The harshness of this delegation to the legislative process is revealed in the majority's reading of the text of the First Amendment: if prohibiting the exercise of religion is not the object, but "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[72]

The majority's characterization of what will offend the First Amendment ignores the plain language of the text: the language clearly makes one's free exercise of religion a preferred constitutional activity rather than an "anomaly."[73] The First Amendment makes no distinction between belief and conduct. The history of religious persecution and intolerance endured by many of the early colonists led to the inclusion of the First Amendment in the Constitution. Freedom of religion was to the founders an "essential element of liberty."[74] Mere facial neutrality is therefore insufficient protection, be-

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58, at 2-3; McConnell, *supra* note 67, at 1114-27.

69. Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 938 (1989). The *Reynolds* view of free exercise permitted no exemptions for religiously motivated action, so long as the prohibition at issue advanced a secular policy. The burden concept and compelling interest test developed when *Reynolds* proved inadequate and subsequent case law developments began to erode its principle. *See supra* notes 12, 25.

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

71. *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 *passim* (1992). Neutrality can easily cross the line to indifference, discrimination, or even hostility if religious groups have only the non-reviewable political process as protection. Many see the role of the Religion Clauses as protecting society from religion rather than the reverse as the founders intended. *See also* Glendon, *supra* note 14, at 677, 682.

72. *Smith*, 494 U.S. at 878.

73. *Id.* at 901, 902 (O'Connor, J., concurring); *see supra* note 52. The Court has traditionally been the refuge of the minority against majority oppression. Considering the place of religion in American society, where current polls indicate that the majority of people identify with some religious practice, it is curious that the Court would abdicate this judicial role. *See also* Glendon, *supra* note 14, at 673. Citing to a recent survey, Professor Glendon notes that most Americans rank free exercise of religion "exactly where the Framers of the Bill of Rights put it"—first, with freedom of speech a very close second.

74. *Smith*, 494 U.S. at 909 (Blackmun, J., dissenting). For discussion of the place of religion in American life both in the founders' time and currently, see generally GARRY WILLS, UNDER GOD: RELIGION AND AMERICAN POLITICS (1990) and DANIEL DREISBACH, REAL THREAT AND MERE SHADOW (1987). Many of the original colonies were established specifically to escape the religious intolerance prevalent in Europe. When the Constitution was being debated, then, most of the states recommended a provision for religious liberty be included, and two (Virginia and North Carolina) expressly conditioned their ratification upon such provision. Wills cites to Madison's *Memorial and Remonstrance*, wherein Madison defined religion as the "duty owed towards the Creator." Further, the order of that duty is "precedent, both in

cause "laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties" as readily as laws which are actually discriminatory.[75] As Justice Douglas noted in *Sherbert*, requiring a believer in a minority faith to "conform to the scruples of the majority" can suppress the minority faith under the guise of 'police' or 'health' regulations reflecting the majority's views.[76] Such constraint can cost churches their distinctive traditions and values, and eventually suppress them altogether or force their assimilation into secular society.[77]

There are any number of ways to discriminate against religious beliefs and practices through neutral, generally applicable laws.[78] A facially neutral law forbidding the use of hallucinogenic drugs, then, is valid even though its effect as applied to Native Americans is to prohibit them from practicing the central sacramental rite of their church. Shortly after *Smith*, the Court let stand a state court ruling which held that a seminary student had a contract right to a ministerial degree, even though the school had found him unfit for moral or spiritual reasons.[79] In the event of a military draft, conscientious objectors may lose exemptions which are based on religious convictions. Neutral laws forbidding employment discrimination could be used to require churches to change their hiring practices to conform with secular law rather than religious doctrine. A state could demand its teaching hospitals to instruct medical students in the abortion procedure to maintain accreditation, which would then require church supported medical schools to violate their religiously motivated pro-life convictions or shut down. The ruling has already been used in state courts in attempts to prevent churches from making changes to their buildings.[80]

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order of time and in degree of obligation, to the claims of civil society." WILLS, *supra*, at 376, *citing to* THE PAPERS OF JAMES MADISON (William T. Hutchinson ed., 1962); *see* McConnell, *supra* note 20, at 1453.

75. *Smith*, 494 U.S. at 901 (O'Connor, J., concurring).

76. *Sherbert*, 374 U.S. at 411, 412 (Douglas, J., concurring). Justice Brennan makes a similar point in a later free exercise case, remarking on both the "critical function" of the First Amendment, and the role of the Court in safeguarding religious freedom. The purpose of both is to protect the rights of adherents of minority faiths against the "quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar." Goldman v. Weinberger, 475 U.S. 503, 524 (1986) (Brennan, J., dissenting).

77. Laycock, *supra* note 57, at 56. To illustrate how the coercive effects of generally applicable laws can lead to forced assimilation, Laycock notes that the Mormon church eventually changed its doctrine to conform with the demands of secular society, but only after years of persecution and conflict. *Id.* at 29.

78. *See, e.g.*, McConnell, *supra* note 66, at 1141-44 & nn. 139-50. Professor McConnell suggests that if the Court presents a "parade of horribles" for one side of the argument, it should in fairness also present the parade for the other. The "parade" is simply the "slippery slope" argument by another name. *Id.* Justice O'Connor states in her opinion the Court has always managed to balance societal needs against requests for exemptions in the past. *Smith*, 494 U.S. at 902 (O'Connor, J., concurring).

79. Babcock v. New Orleans Baptist Theological Seminary, 554 So. 2d 90 (La. Ct. App. 1989), *cert. denied*, 498 U.S. 880 (1990).

80. Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990); First Covenant

The above list is by no means exhaustive. While few exemptions were actually granted under the *Sherbert* standard, judicial recourse for the discriminatory effects of a law was available. Free exercise cases have almost invariably involved generally applicable laws which were facially neutral but which had a discriminatory effect as applied to believers of a particular faith.[81] Requests for exemptions were often not granted either because the burden as presented by the believer did not rise to the threshold, or more often because the Court found the state's interest was sufficiently compelling to override it.[82] The difficulty with free exercise claims had been that the Court had not defined a clear standard to delineate the burden threshold nor the level of state interest necessary to outweigh the burden. After *Lyng*, the state merely had to refrain from acts which would coerce behavior contrary to one's religious beliefs.[83] Given the current Court's tendency to defer to the government, the state interest side of the equation is fairly low. The believer's burden after *Smith* is to show legislative discrimination.

The Court has long struggled with the proper treatment of religious believers in a religiously pluralistic and predominantly secular society. The *Reynolds* Court aptly phrased its task as finding the "true distinction between

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Church v. City of Seattle, 840 P.2d 174 (Wash. 1992). Boston wanted to declare the interior of a church a historic landmark and dictate the location of the altar. Seattle attempted to prevent a church from changing the outside appearance of the church building by installing new doors. In each of these cases, the state supreme courts found a higher level of protection for the churches in the state constitutions.

81. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring). Justice O'Connor argues elsewhere that free exercise values are promoted when government lifts the burdens it has imposed on religious practice. She also states that an "accommodation" analysis would help reconcile the standards which the Court applies in Free Exercise and Establishment clause cases. Wallace v. Jaffree, 472 U.S. 38, 83 (O'Connor, J., concurring). While a "distinct jurisprudence" has developed for each clause, their original common purpose was to secure religious liberty. *Id.* at 68.

82. There have been few successful challenges under the Free Exercise Clause; the Court itself counts only the *Sherbert* line. *See* Lupu, *supra* note 69. This may be a result of the Court's somewhat inconsistent approach to religion cases and its consequent "watered down" application of the compelling interest test. *Smith*, 494 U.S. at 888. Another factor is the infrequency with which the Court accepts Free Exercise cases and its failure in those cases it does take to "coherently articulate criteria" for the exemptions it does grant. Pepper, *supra* note 57, at 302. Confusion may also be attributable to the Court's generally broad interpretation of the Establishment Clause and its relatively narrow reading of the Free Exercise Clause. These two provisions are often seen as mutually exclusive rather than complementary. *See* McConnell, *supra* note 70 *passim*. Justice Stewart recognized the problem with the Court's approach to religion cases in *Sherbert*, in which he said that the Court showed a "distressing insensitivity" to the appropriate demands of a constitutional guarantee with an approach that was "positively wooden." *Sherbert*, 374 U.S. at 413-14. He foresaw a "head-on collision" between the Court's interpretation of the two religion clauses. *Id.*

83. In an article primarily examining the *Lyng* decision and its impact on First Amendment jurisprudence, Professor Lupu makes a prescient observation which anticipates the *Smith* decision quite accurately. The law which emerged from *Lyng* "creates an intolerable risk of discrimination against unconventional religious practices and beliefs, and threatens to narrow the protection of religious liberty overall." Lupu, *supra* note 69, at 936. It is only a short step of logic after substituting coercion for the compelling interest test to revert to the rational basis standard. With such a presumption in favor of the government, there is little recourse no matter how much weight is given to the substantiality of the burden.

what properly belongs to the church and what to the state."[84] While few would seriously argue that there should be no restraints on religiously motivated conduct, as such a course would lead to anarchy, there is a clear text constitutional requirement not to prohibit the free exercise of religion. The task then for the Court has been to achieve the appropriate level of accommodation of religious beliefs without doing violence to societal norms or appearing to favor a religion, thus running afoul of the Establishment Clause. The First Amendment makes religious free exercise a specifically enumerated right, rather than a legislative grant. When one remembers the considerable role of religion in the history of the nation, and its continuing importance to many today, safeguarding the right of free exercise must extend beyond mere facial neutrality. One should not need to combine one substantive constitutional right with another to be afforded judicial protection. It is only appropriate, then, that the Court strictly scrutinize laws which have an effect of restricting religiously motivated conduct to ensure that the benefit to society outweighs the burden to religion. The Court seemed to have found an appropriate balancing test in *Sherbert* and yet began to back away from it in *Lyng*. It abandoned the effort altogether in *Smith*.[85]

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84. *Reynolds*, 98 U.S. at 163.

85. In November 1993, the Religious Freedom Restoration Act was signed into law. The Act overturned that part of *Smith* which reduced the standard of review and restored the compelling interest test. Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 16, 1993, at A18. However, the practical effect of the Act remains to be seen as the Court has been unreceptive to most free exercise claims. *See supra* notes 82-83 and accompanying text. *See also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-7, at 1194 (1988) (noting that the Court has "placed significant hurdles in the way of free exercise claimants").