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The Peyote Case: A Return to Reynolds

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THE PEYOTE CASE: A RETURN TO *REYNOLDS*

I. INTRODUCTION

The Supreme Court's April 17, 1990 decision in *Employment Division, Department of Human Resources v. Smith*,[1] denying the constitutional right of Native American church members to use peyote as a sacrament, has been decried as "deplorable,"[2] "radical,"[3] an exercise in "pure legal adventurism," "a sweeping repudiation of nearly a century of humane and enlightened legal precedent," and "an affront . . . to our society's hard-won pluralism."[4]

The Court unequivocally rejected the slowly eroding "compelling interest" requirement for governmental interference with religious practices laid down by the Warren Court in the early 1960's, calling it a "constitutional anomaly"[5] that "contradicts both constitutional tradition and common sense."[6] In its place, the Court offered "leaving accommodation [of religious rights] to the political process," brushing aside the admittedly probable disadvantage to minority religions as an "unavoidable consequence of democratic government."[7] In *Smith*, the Court regressed to pre-Warren Court interpretations of the free exercise clause.[8] In so doing, it gutted the free exercise clause, leaving no protection for the religious practices of minority religions.

This Comment briefly sketches the evolution of the Court's interpretation of the free exercise clause as a background against which to focus the significance of the Court's regression from established precedent. It also examines the profound, perplexing implications of the Court's conclusions and the means by which Justice Scalia, author of the majority opinion, erects a smoke screen to hide those implications.

II. PRIOR INTERPRETATIONS OF THE FREE EXERCISE CLAUSE

The first Supreme Court case interpreting the free exercise clause, *Reynolds v. United States*,[9] upheld a Mormon's conviction under a federal law prohibiting polygamy. The Court held that while the free exercise clause prevented government interference with religious *belief and opinion*, it did not prevent government interference with religious *practices*.[10]

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1. 110 S. Ct. 1595 (1990).
2. "Peyote Decision Threatens Religious Liberty of All Americans Says Jewish Organization," PR Newswire, April 20, 1990.
3. The National Law Journal, June 18, 1990, at 13 (quoting Judge Stephen Reinhardt, 9th Cir.).
4. L.A. Times, Apr. 19, 1990, Part B (Metro), at 6, col. 1 (Home Edition).
5. 110 S. Ct. at 1603.
6. *Id.* at 1604.
7. *Id.* at 1606.
8. U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."
9. 98 U.S. 145 (1879).
10. *Id.* at 166.

This "belief/action" distinction has been widely criticized and discredited as divesting the free exercise clause of any function and meaning because the constitutional guarantee of free expression includes protection of religious belief and opinion.[11] It survived for several decades, however, proving an impossible obstacle to free exercise claims.[12]

Next followed an era in which the only victorious free exercise claims were those in which the free speech aspects of the claims were considered.[13] Two cases, both involving the right of Jehovah's Witnesses' children to abstain from saluting the flag at school, bring this principle into relief. In the first case, *Minersville School District v. Gobitis*,[14] the Court upheld the state's expulsion of Jehovah's Witnesses' children from public school for refusing to salute the flag, never mentioning the free speech issues involved. The Court held that the free exercise guarantee did not relieve a citizen from his duty to obey a generally applicable law[15] and that courts were not competent to provide an exemption because of religious beliefs where the legislature had not seen fit to do so. As long as the government's ends were legitimate (in this case, promoting national unity), the means would be left to legislative discretion.[16]

In contrast, three years later in *West Virginia State Board of Education v. Barnette*,[17] the Court considered the same claims in the context of free speech as well as free exercise, rejected the reasoning of *Gobitis* and held that requiring children to salute the flag in order to receive the benefits of public education infringed first amendment liberties.[18] The Court stated that "individual freedom of mind"[19] was to be preferred over "officially disciplined uniformity"[20] and that freedoms of speech and worship could not be infringed on the "slender grounds"[21] that the legislature may have had a "rational basis"[22] for adopting certain restrictions. In *Barnette*, the Court presaged its later strict scrutiny of free exercise claims, saying that freedoms of speech, press, assembly *and religion* could be restricted only to prevent "grave and immediate danger to interests which the State may lawfully protect."[23]

11. *See, e.g.*, Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 938 (1989); Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309 (1981); Tribe, *Church and State in the Constitution*, in GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS 37-38 (D. Kelley ed. 1982).

12. *See*, Lupu, *supra* note 11, at 938; Pepper, *supra* note 11, at 325 & n.70; Braiterman & Kelley, *When Is Governmental Intervention Legitimate?*, in GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS, *supra* note 11, at 175.

13. *See*, Pepper, *supra* note 11, at 326-27.

14. 310 U.S. 586 (1940).

15. *Id.* at 594-95.

16. *Id.* at 597-98.

17. 319 U.S. 624 (1943).

18. *Id.* at 642.

19. *Id.* at 637.

20. *Id.*

21. *Id.* at 639.

22. *Id.*

23. *Id.*

In *Braunfeld v. Brown*[24] and more forcefully in *Sherbert v. Verner*,[25] the Warren Court implicitly rejected the *Reynolds* belief/action distinction and articulated a stricter standard for evaluating free exercise claims resulting from state action burdening religious conduct:[26] if a state action directly burdens the free exercise of religion, the state must show a compelling interest that justifies the burden and also must demonstrate that alternative non-burdensome means of accomplishing its purposes are not available.[27] In *Sherbert*, the Court held that a Seventh-Day Adventist could not be denied unemployment benefits for failure to accept work without cause because she refused jobs that required her to work on Saturday. It found that the state's interest in maintaining the integrity of the unemployment compensation fund was not compelling enough to justify the substantial infringement of the Seventh-Day Adventist's first amendment right to practice her religion.[28]

Although the results of applying the *Sherbert* standard have not always been entirely predictable or consistent,[29] the Court has used it, with minor variations,[30] for thirty years. It has been used to uphold religious claims as well as to support the state's compelling interests. In *Wisconsin v. Yoder*,[31] the Court decided that the free exercise clause mandated an exemption for the Amish from Wisconsin's requirement that children attend school through the age of 16. The Court rephrased the *Sherbert* standard in even stronger language: "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[32] The Court specifically rejected the *Reynolds* belief/action distinction, stating that "belief and action cannot be neatly confined in logic-tight compartments."[33]

A restriction of the application of the *Sherbert* standard followed the expansion of its application represented by *Yoder*. Recent decisions have narrowed the *Sherbert* standard by heightening the severity of the burden required and by focusing on whether the challenged government action "directly burdens" the free exercise of religion.[34] For example, in 1972 the *Yoder* Court unquestioningly accepted the assertion that requiring Amish children to attend school through the age of 16 (two years more than the Amish wanted) would cause the demise of the entire Old Order

24. 366 U.S. 599 (1961).

25. 374 U.S. 398 (1963).

26. *See* Lupu, *supra* note 11, at 939.

27. *Sherbert*, 374 U.S. at 402-10. This standard is referred to throughout as the "*Sherbert* standard" or "*Sherbert* test."

28. *Id.* at 407.

29. *See id.* at 417 (Stewart, J., concurring) (maintaining that the *Sherbert* decision was inconsistent with the *Braunfeld* decision, which denied Saturday Sabbatarians' free exercise claims against a state law declaring Sunday a day of rest).

30. *See* Goldman v. Weinberger, 475 U.S. 503, 529-30 (1986)(O'Connor, J., dissenting) (summary of variations of the *Sherbert* standard).

31. 406 U.S. 205 (1972).

32. *Id.* at 215.

33. *Id.* at 220.

34. *See generally* Lupu, *supra* note 11, at 942-46 (detailing the Court's recent use of the "burden" threshold).

Amish church community. Thus, the Court found a severe enough burden to satisfy the threshold of the *Sherbert* test.[35] In contrast, in 1988 the Court decided against religious adherents in *Lyng v. Northwest Indian Cemetery Protective Association*.[36] That case involved a free exercise challenge to the United States Forest Service's decision to build a road across sacred Indian lands in a federally owned forest. Although the Indians had proved that the road would physically obliterate practices necessary to all of their ceremonies and rituals and would cause the demise of their religion,[37] the Court held that no legally cognizable burden on the Indians' religious practices existed because the road-building did not indirectly or directly coerce, penalize, or prohibit religious practices.[38] The government was thus not required to justify its decision to build the six-mile segment of road that two lower courts had found all but useless.[39]

The narrowed application of the *Sherbert* standard exemplified by *Lyng* and other recent decisions has caused apprehension and dismay.[40] Until *Smith*, however, the Court continued to protect religious beliefs and at least some religious practices from all but "compelling" government interference.[41]

III. THE *SMITH* CASE

A. *Facts and Procedural History*

Alfred Smith and Galen Black were counselors employed by the Douglas County Oregon Council on Alcohol and Drug Abuse Prevention and Treatment, a non-profit private drug abuse rehabilitation clinic. As a matter of policy, their employer required all counselors not to use alcohol or non-prescription drugs. Smith and Black were fired after they admitted they had ingested small amounts of peyote as a sacrament while participating in a ceremony of the Native American Church, of which both were members. Possession of peyote, a hallucinogenic drug, is a felony under Oregon law.[42]

Smith and Black applied for unemployment compensation benefits and were determined ineligible for benefits under Oregon law because they had been fired as a result of work-related misconduct.[43] They chal-

35. 406 U.S. at 212, 218.
36. 485 U.S. 439 (1988).
37. *Id.* at 467 (Brennan, J., dissenting).
38. *Id.* at 447-53.
39. *Id.* at 462-65 (Brennan, J., dissenting).
40. Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 316 (1986); Lupu, *supra* note 11, at 945-46; Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 OR. L. REV. 363 (1986).
41. *See, e.g.*, Hobbie v. Unemployment Appeals Commission, 480 U.S. 136 (1987); Jensen v. Quaring, 472 U.S. 478 (1985), *aff'g per curiam*, Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984); Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981).
42. OR. REV. STAT. §§ 161.605(2), 475.992(4)(a) (1987).
43. OR. REV. STAT. § 657.176(2)(a) (1987) ("An individual shall be disqualified from the receipt of benefits . . . if . . . the individual . . . [h]as been discharged for misconduct

lenged the rulings,[44] asserting that because their peyote use was religiously motivated, the denial of benefits burdened the free exercise of their religion.[45] After several administrative hearings and appeals, the denial of benefits was upheld in both cases.[46]

In Black's case, the Oregon Court of Appeals, applying *Sherbert*, held that the denial of benefits was a substantial burden and that the state's only interest, preventing depletion of the unemployment compensation fund, was not compelling.[47] The court specifically rejected the state's contention that its compelling interest was to prohibit illegal drug use, stating that this interest was irrelevant because the challenged state action was the denial of benefits, not criminal prosecution for drug use.[48] Smith's case was reversed and remanded for further consideration in light of the decision in Black.[49]

On appeal, the Oregon Supreme Court affirmed the lower court's analysis, reiterating that the illegality of possessing peyote was not determinative or even relevant in these cases because commission of a felony unrelated to work was not grounds for disqualification from unemployment benefits, and law enforcement was not the purpose of the unemployment compensation program.[50]

The United States Supreme Court granted certiorari[51] because it disagreed with the Oregon Supreme Court's reasoning that the criminality of peyote possession was irrelevant to the constitutional claims.[52] The Court indicated that whether Smith's and Black's peyote use would be afforded free exercise protection turned on whether religiously motivated peyote use was illegal as a matter of Oregon law. If the state had criminalized religious peyote use without offending the free exercise clause, the state would be allowed to impose the lesser burden of denying unemployment compensation benefits.[53] The Court remanded the case for a determination of whether religiously motivated peyote use was illegal under Oregon law.[54]

On remand, the Oregon court decided that the first amendment, as

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connected with work . . . ."); OR. ADMIN. R. 471-30-038(3) (1986) ("[M]isconduct is a wilful violation of the standards of behavior which an employer has the right to expect of an employee [,] . . . wilful disregard of an employer's interest, or recurring negligence which demonstrates wrongful intent . . . .").

44. Smith's and Black's cases advanced separately through administrative proceedings and through the Oregon courts, but were consolidated when certiorari was first granted in the United States Supreme Court in Employment Div., Dept. of Human Resources v. Smith, 482 U.S. 578 (1987).

45. Smith v. Employment Div., 307 Or. 68, 71, 763 P.2d 146, 147 (1988).

46. Employment Div., Dept. of Human Resources v. Smith, 485 U.S. 660, 663 n.5 (1988).

47. Black v. Employment Div., 75 Or. App. 735, 707 P.2d 1274 (1985).

48. *Id.* at 1280.

49. Smith v. Employment Div., 75 Or. App. 764, 709 P.2d 246 (1985).

50. Black v. Employment Div., 301 Or. 221, 225, 721 P.2d 451, 453 (1986); Smith v. Employment Div., 301 Or. 209, 218-19, 721 P.2d 445, 450 (1986).

51. Employment Div., Dept. of Human Resources v. Smith, 482 U.S. 578 (1987).

52. Employment Div., Dept. of Human Resources v. Smith, 485 U.S. 660, 661 (1988).

53. *Id.* at 670.

54. *Id.* at 674.

interpreted by Congress, mandated an exemption from the state's criminal laws for religiously motivated peyote use.[55] A second appeal to the Supreme Court resulted in the decision that is the subject of this Comment.

B. *The Majority Opinion*

The Supreme Court reversed the Oregon Supreme Court, holding that the free exercise clause did not require an exemption from Oregon's criminal laws for sacramental peyote use.[56] Joining in the majority opinion written by Justice Scalia were Chief Justice Rehnquist and Justices White, Kennedy, and Stevens.

The Court stated that while government may not control religious *belief*, it may enforce generally applicable, neutral laws that incidentally prohibit religious *conduct*.[57] The Court announced that it would not apply the *Sherbert* standard because it would produce a "private right to ignore generally applicable laws,"[58] and instead advocated reliance on the political process to protect religious freedoms.[59]

C. *Justice O'Connor's Concurring Opinion*

Justices Brennan, Marshall, and Blackmun joined Justice O'Connor in Parts I and II of her concurrence. Justice O'Connor rejected the belief/action distinction, stating that the first amendment did not make such a distinction.[60] She further contended that the first amendment did not distinguish between "neutral" laws and laws that discriminate against religion, and that the *Sherbert* standard should be applied to all laws that significantly burden religion.[61] She maintained that criminal laws, even more than civil laws, burdened the free exercise of religion and should be strictly scrutinized.[62] She argued that the first amendment's purpose was to protect religious rights by withdrawing them from the political process.[63]

In Part III of the opinion, she concluded that religious peyote use need not be exempted from criminal laws, but reached this conclusion by applying the *Sherbert* standard. She found that Oregon's criminal pro-

55. Smith v. Employment Div., Dept. of Human Resources, 307 Or. 68, 74-76, 763 P.2d 146, 149-50 (1988). In 1978, Congress passed the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1982), making it "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." *See also* H.R. Rep. No. 1308, 95th Cong., 2nd Sess. 2 (1978) ("[I]t is established Federal law that peyote is constitutionally protected when used by a bona fide religion as a sacrament.").

56. 110 S. Ct. 1595 (1990).

57. *Id.* at 1599.

58. *Id.* at 1604.

59. *Id.* at 1606.

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

61. *Id.* at 1610.

62. *Id.* at 1611.

63. *Id.* at 1613.

hibition placed an undeniably severe burden on respondents' exercise of their religion,[64] but that the state's interest in prohibiting the peyote possession for the health and safety of its citizens was compelling.[65] Since the state could not accommodate the religious use of peyote without compromising its health and safety goals, the first amendment did not require the state to grant an exemption.[66]

D. *Justice Blackmun's Dissenting Opinion*

Joined by Justices Brennan and Marshall, Justice Blackmun contended that Justice O'Connor's characterization of the state's interest was overbroad, and that the state's precise interest in disallowing an exemption from its laws for sacramental peyote use was not sufficiently compelling to outweigh the free exercise claim.[67] He argued that the state's insistence on the importance of uniform enforcement of its criminal law was contradicted by the fact that it had not attempted to prosecute respondents for their peyote use and had not claimed to have enforced the law against other religious peyote users.[68] He also thought it significant that the state had offered no evidence that the ritual use of peyote had ever harmed anyone.[69] To the contrary, peyotism had been instrumental in helping many of its adherents overcome alcoholism, a much greater problem among Indians than peyote abuse. Thus, religious peyote use was compatible with the state's health and safety interests.[70]

IV. Analysis of the Majority Opinion

The Court returns to *Reynolds* by stating that although government may not regulate religious *belief*, it may regulate religiously motivated *conduct*, as long as the regulation is generally applicable, neutral and does not represent an attempt to intentionally burden the exercise of religion.[71] The Court imposes no requirement of necessity or even reasonableness as long as the burden on religious practices, no matter how severe, is only an incidental effect of the regulation.

As Tribe says, the distinction between beliefs and actions is shallow, because the government never attempts to interfere with beliefs, only conduct. In almost every case the issue is whether the government should be allowed to prohibit or interfere with one's conduct "*because* of one's beliefs, or *despite* one's beliefs."[72] The Court prevents only government interference with conduct "because of one's beliefs,"[73] but

64. *Id.*
65. *Id.* at 1614.
66. *Id.*
67. *Id.* at 1622 (Blackmun, J., dissenting).
68. *Id.* at 1617.
69. *Id.* at 1618.
70. *Id.* at 1619-20.
71. *Id.* at 1599-600.
72. Tribe, *supra* note 11, at 38. *See also* Braiterman & Kelley, *supra* note 12, at 175, 190.
73. Tribe, *supra* note 11, at 38.

provides no protection at all from government interference "despite one's beliefs."[74] As Justice O'Connor indicates, few legislatures would blatantly enact a law whose stated purpose was to prohibit a religious practice as such.[75] Yet this is the only kind of law that would merit first amendment scrutiny under the Court's new formulation.

Another problem with the application of this new standard is that it does not address the difficulty of distinguishing genuinely neutral laws from laws that only appear to be neutral, but whose underlying purpose is to interfere with unpopular religious practices. Just three years prior to writing the *Smith* opinion, Justice Scalia was aware of the impossibility of discerning the subjective motivation of legislators:

> The number of possible motivations, to begin with, is not binary, or indeed even finite . . . . [F]or example, a particular legislator . . . may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, . . . or he may have hoped the Governor would appreciate his vote and make a fund raising appearance for him, . . . or he may have been mad at his wife who opposed the bill, . . . or he may have accidentally voted "yes" instead of "no," or, of course, he may have had . . . a combination of some of the above and many other motivations. To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist.[76]

If discerning the real purpose or purposes behind a law is impossible, courts will rely on the state's ad hoc justifications of statutes. Rarely will a state's attorneys be incapable of formulating a believable and legitimate purpose for the statute in question other than blatant religious discrimination.[77] History shows that "legitimate" purposes have been used to justify a great deal of discrimination.[78] Intolerance of minority religions can easily be couched in terms of public health, safety, and morality.[79]

After granting government all but unlimited power to regulate religiously motivated conduct, the Court attempts to show that this power has always resided in the government. The Court inaccurately asserts that it has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[80] It supports this assertion by citing dis-

74. *Id.*

75. 110 S. Ct. at 1608.

76. Edwards v. Aguillard, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting).

77. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (rejecting the suggestion that the Court should investigate the actual purpose motivating the legislature in an equal protection context).

78. *See*, Minersville School Dist. v. Gobitis, 310 U.S. 586, 604-05 (1940) (Stone, J., dissenting).

79. Sherbert v. Verner, 374 U.S. 398, 411 (1963) (Douglas, J., concurring). For a list of books on religious persecution perpetrated by the state, see Lupu, *supra* note 11, at 961 n.105.

80. *Smith*, 110 S. Ct. at 1600.

credited cases and by misusing and mischaracterizing precedent. For example, the Court cites *Gobitis* for the principle that "mere possession of religious convictions"[81] does not relieve the individual from obedience to a generally applicable, neutral law, and cites *Reynolds* in support of the widely discredited[82] belief/action distinction.[83] The Court fails to mention that it is reviving previously rejected interpretations of the first amendment.

The Court lists other precedents it contends stand for its new principle in which religious exemptions to generally applicable laws were denied. Again, the Court fails to mention that the exemptions were denied only after the Court had applied the *Sherbert* test and had found that the state's interest was compelling and could be served in no less burdensome way. In no case did the Court reach its result merely by finding that the laws were generally applicable, valid, and neutral.[84] By emphasizing only the results of the cases and not the principles they stand for, the Court dishonestly attempts to appear to be applying well-established precedent rather than discarding it.

The Court's assertion that it has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"[85] is plainly wrong. In *Yoder* the Court held exactly that. Relying exclusively on the free exercise clause, the *Yoder* Court specifically rejected the *Smith* Court's new rule, stating that even a facially neutral regulation may be constitutionally offensive if it burdens the free exercise of religion.[86]

Rather than acknowledging that its new rule is contrary to established precedent, the Court dismisses *Yoder* and other cases that have held generally applicable and neutral laws subject to free exercise scrutiny. The Court states that these cases were "hybrids" involving not just free exercise claims but also free speech claims or parental rights claims;[87] however, in none of the cases cited does the Court attribute its

81. *Id.*

82. *See id.* at 1607-08 (O'Connor, J., concurring) (discussing the fallacy of the *Reynolds* belief/action distinction); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("[B]elief and action cannot be neatly confined in logic-tight compartments.").

83. *Smith*, 110 S. Ct. at 1600.

84. *See id.* at 1611-12 (O'Connor, J., concurring). Specifically, in U.S. v. Lee, 455 U.S. 252, 259-60 (1982), the Amish were not exempted from the mandatory payment of Social Security taxes because of the impossibility of accommodating numerous religious exemptions while maintaining a functional social security system. In Gillette v. U.S., 401 U.S. 437, 462 (1971), the Court refused an exemption to the draft for persons who opposed a particular war on religious grounds because the burden on free exercise was not severe and was "strictly justified by substantial governmental interests . . . ." In Braunfeld v. Brown, 366 U.S. 599, 606-07 (1961), the Court determined that Jewish merchants would not be exempted from Sunday closing laws because these laws imposed only an indirect burden on religious observance and because the state's purpose for having one common day of rest would be defeated by allowing exemptions. In Prince v. Massachusetts, 321 U.S. 158, 168-70 (1944), the Court decided that the state's compelling interest in protecting children justified denying Jehovah's Witnesses an exemption from child labor laws.

85. *Smith*, 110 S. Ct. at 1600.

86. *Yoder*, 406 U.S. at 219-20.

87. *Smith*, 110 S. Ct. at 1601-02.

results to the presence of other rights. Although, as the Court states, in these cases the Court "specifically adverted to the non-free exercise principle involved,"[88] they did so only in passing. The Court appears to be asserting that if a decision could have been reached on other grounds, it has no value as precedent, or that the free exercise clause, if it has any meaning at all, is entirely subsumed within free speech and parental rights. The first assertion would render almost any decision non-precedential, while the second assertion is a judicial amendment of the Constitution.

The Court then discusses its reasoning for finding that the *Sherbert* test applies only to the unemployment compensation field. It explains that even though it appears to have applied the *Sherbert* test in other settings, the Court has not *really* done so. In other settings the Court has always found the test to be satisfied.[89] Again, this assertion is inaccurate. For example, the test was applied in *McDaniel v. Paty*,[90] in which Tennessee's disqualification of ministers of religion from membership in the Legislature was found to violate a minister's free exercise rights. The law burdened a minister's right to exercise his religion by conditioning it on the surrender of his right to seek office, and Tennessee failed to demonstrate a compelling interest in excluding the ministers from the Legislature.[91] In *Larson v. Valente*,[92] the Court struck down an act requiring only those charitable organizations that received less than half of their total contributions from members to report to the state. Although the state asserted a compelling interest in protecting its citizens from abusive solicitation practices, the state had failed to show that the act was "closely fitted to further the interest."[93] In *Wooley v. Maynard*,[94] using the *Sherbert* test and finding no compelling government interest, the Court invalidated a law requiring the display of the New Hampshire state motto "Live Free or Die," a slogan offensive to respondents' religious beliefs, on license plates of passenger vehicles.

In *Smith*, the Court states that even if the *Sherbert* standard still applies in some situations, it certainly does not apply to the challenge of a criminal law.[95] But as Justice O'Connor emphasizes, the *Sherbert* standard should apply with even greater force where the free exercise of religion is criminally prohibited, because this burden is the most substantial of all the burdens a state can place on free exercise.[96] For example, in denying the Indians' free exercise challenge to the government's plan to build a road across sacred lands in *Lyng*, the Court relied on the concept that the key word in the free exercise clause was "prohibit," and

88. *Id.* at 1601 n.1.
89. *Id.* at 1602.
90. 435 U.S. 618 (1978).
91. *Id.* at 626.
92. 456 U.S. 228 (1982).
93. *Id.* at 248.
94. 430 U.S. 705 (1977).
95. 110 S. Ct. at 1603.
96. *See id.* at 1611 (O'Connor, J., concurring) (A criminal law is more burdensome than a civil statute.).

since the government had not *prohibited* the practice of religion, the government had not infringed free exercise rights.[97] In *Bowen v. Roy*,[98] Chief Justice Burger concluded that the free exercise clause was not violated by the denial of welfare benefits to an Indian father who refused to provide a social security number for his young daughter because he feared impairing her spirit. Government regulation merely requiring a choice between obtaining a government benefit and exercising religious beliefs was not a legally cognizable burden, while the threat of criminal sanctions to refrain from religious conduct would have been.[99] Even though Chief Justice Burger advocated applying rational basis review to claims for government benefits, he recognized that criminal prohibition should be more strictly scrutinized: "[T]he nature of the burden is relevant to the standard the government must meet to justify the burden."[100]

The Court explains that the *Sherbert* test is a "constitutional anomaly" because judges are incompetent to determine the centrality of the proscribed conduct to the individual's beliefs, and judges have no business contradicting a believer's assertion that certain conduct is central to his religion.[101]

This reasoning overlooks the fact that a large part of a trial court's job consists of judging credibility. Courts are capable of judging the credibility of a claimant's assertions as to the centrality of the religious practice in question without having to rule on the actual centrality of the religious practice.[102] As Professor Lupu says, any standard of review stricter than rational basis will involve the court in some value judgments, and when the courts can be trusted more than other governmental branches to make a just decision, allowing the courts to make the value judgments is justified.[103] As Justice Jackson said in *Barnette*, "[W]e act in these matters not by authority of our competence but by force of our commissions."[104]

Justice Scalia suggests that it is "horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice."[105] As Justice Brennan concludes

97. Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 451 (1988).

98. 476 U.S. 693 (1986).

99. *Id.* at 703-04.

100. *Id.* at 707.

101. *Smith*, 110 S. Ct. at 1604. The centrality of the religious conduct was not an issue in this case. It was never disputed, even by the state's attorneys, that peyote use was not crucial to the Indians' religious practices. A great majority of the courts that have decided the issue of whether peyote use is central to the religious practices of the Native American Church have decided that peyote use is fundamental to the practice of the religion. *See, e.g.*, State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973), *petition denied*, 110 Ariz. 279, 517 P.2d 1275, *cert. denied*, 417 U.S. 946 (1974); In re Grady, 61 Cal. 2d 887, 39 Cal Rptr. 912, 394 P.2d 728 (1964); People v. Woody, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964); Whitehorn v. State, 561 P.2d 539 (Okla. Crim. App., 1977).

102. Pepper, *supra* note 40, at 328 & n.117.

103. Lupu, *supra* note 11, at 950 n.66.

104. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 640 (1943).

105. 110 S. Ct. at 1606 n.5.

in his dissenting opinion in *Lyng*, "the Court's apparent solicitude for the integrity of religious belief and its desire to forestall the possibility that courts might second-guess the claims of religious adherents leads to far greater inequities than those the Court postulates."[106] The greater inequity is that judges can no longer balance these competing interests, but must now uphold general, neutral laws, no matter how trifling, and no matter how significant the religious practices they prohibit.

Without some evaluation of the significance of the religious conduct in question, two alternatives remain, as the Court suggests.[107] Either the free exercise clause has no meaning, or religious persons are totally insulated from all state control or intervention,[108] in which case we are "courting anarchy."[109] Obviously, having limited itself to these two choices, the Court is forced to choose the lesser of two evils, and thus avoid starting courts down the "slippery slope," of allowing exemptions for religious conduct ranging from child neglect to cruelty to animals.[110]

"Slippery slope" arguments are inapposite when it is proven that other decision makers are capable of understanding and applying the doctrinal lines drawn.[111] All of the claims for exemption for religious conduct cited in Scalia's "parade of horribles" were denied by courts applying the *Sherbert* standard. Although courts consistently reached the result the Court presumably would have reached, the Court still feels the need to simplify courts' jobs so that they no longer have to deal with the inconvenience of deciding each case.

Finally, the Court proposes to leave these sensitive decisions to the political process. The scope of the state's police power includes health, safety, and morals.[112] Morality is so closely intertwined with religious beliefs that the two are almost inseparable. Thus the state, through the political process, can legislate according to majority religious beliefs and preferences.

Smith is a good example of that principle. In most mainstream religions, it is immoral to use hallucinogenic drugs such as peyote, but moral to use alcohol in moderation. According to the beliefs of Native American Church members, it is immoral to use alcohol, but moral to use peyote in moderation.[113] Experts agree that sacramental peyote use does not injure the user, and that peyotists are no more likely to become addicted to drugs than non-peyote-users.[114] That claim cannot be made about the use of alcohol. Health risks are easily quantifiable in each case. Sacramental peyote use is obviously not as harmful as alcohol con-

106. Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 475-76 (1988) (Brennan, J. dissenting).
107. *Smith*, 110 S. Ct. at 1604-05.
108. Lupu, *supra* note 11, at 952-53.
109. *Smith*, 110 S. Ct. at 1605.
110. *Id.* at 1605-06.
111. Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 372 (1985).
112. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 108 (1973) (Brennan, J., dissenting).
113. 110 S. Ct. at 1619 (Blackmun, J., dissenting).
114. People v. Woody, 61 Cal. 2d 716, 722-23 (1964).

sumption, even in moderation. Why, then, is alcohol consumption not forbidden? Because the majority no longer thinks alcohol consumption is immoral.

The government will never intentionally or even inadvertently regulate in such a way as to infringe the rights of politically powerful religious majorities. It will, however, inadvertently or even intentionally dictate the majority's moral and religious choices to the detriment of the rights of religious minorities.[115]

V. CONCLUSION

The profound question before the Court was whether the government would be allowed to impose the majority's opinions and attitudes on the individual, not just for a compelling reason but for no reason at all. The Court answered that question "yes," and entrusted the protection of the constitutional rights of unpopular religions to the very institutions that threaten them. Laws that protect a particular set of moral views while outlawing others for no compelling reason, no matter how facially "neutral" they appear to be, are discriminatory. As a consequence of the *Smith* decision, such laws no longer warrant the strict scrutiny formerly deemed essential to the protection of religious rights.

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115. Pepper, *supra* note 40, at 314.