CONSTITUTIONAL LAW—FIRST AMENDMENT—INGESTION OF ILLEGAL DRUGS FOR RELIGIOUS PURPOSES IS NOT PROTECTED BY THE CONSTITUTION—*Employment Division, Department of Human Resources v. Smith*, 110 S. Ct. 1595 (1990).

The first amendment to the United States Constitution states in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[1] The interpretation of this seemingly clear mandate has been shrouded in confusion regarding the scope of government intrusion, or burden, on an individual's religious practice pursuant to sincerely held religious beliefs.[2] In fashioning a jurisprudential rationale to evaluate free exercise questions, the United States Supreme Court has usually required the state to justify its infringement on the free exercise of religion by providing a compelling justification.[3] In some instances, the Court has held that the restrictions upon individual conduct do not fall within the protection of the first amendment.[4] As a consequence, a claim of

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[1] U.S. CONST. amend. I.

[2] *See* Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

The definition of *burden* for the purpose of this note will be: the state's onerous infringement upon the individual's religious practice. *See id.* at 935. Lupu focuses on the "character" of the *burden* in his article. The free exercise boundary can be either restrictive or expansive. *Id.* at 934-35. Professor Lupu asserts:

> The concept of burden is thus emerging as crucial in free exercise law. It serves as the latest in a series of gatekeeper doctrines, which function to increase the likelihood of failure at the prima facie stage, and thereby to reduce the number of claims that must be afforded the searching inquiry demanded by the free exercise clause. . . . [T]he law that has emerged thus far creates an intolerable risk of discrimination against unconventional religious practices and beliefs, and threatens to narrow the protection of religious liberty overall.

Id. at 935-36 (footnotes omitted).

[3] *Id.* at 933-34. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) (state's refusal to award unemployment compensation benefits to appellant violated the free exercise clause of the first amendment); United States v. Lee, 455 U.S. 252, 257-58 (1982) (the state may justify a limitation on religious liberty by showing it is essential to accomplish an overriding governmental interest); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981) (state's denial of unemployment compensation benefits to petitioner violated his first amendment right to free exercise of religion); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (the state's interest is not totally free from a balancing process when it impinges on the free exercise clause); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (denial by state of appellant's unemployment compensation benefits because of her refusal to violate her religious beliefs imposes an unconstitutional burden on the free exercise of religion). *See infra* notes 63-92 and accompanying text.

[4] *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 447

constitutional protection would not necessarily trigger the more traditional strict standard of review associated with free exercise challenges which require the state to demonstrate a compelling interest.[5] Moreover, the Court will show more deference to the state's compelling interest when that particular state statutory scheme maintains a close nexus to a criminal statute of general application.[6]

Recently, the United States Supreme Court in *Employment Division, Department of Human Resources v. Smith* (Smith II),[7] found the *burden* on the individual less significant when the free exercise of religion involved a breach of criminal laws and a concomitant denial of state benefits.[8] The Court held that a state can constitutionally prohibit the use of peyote for religious purposes and could, therefore, refuse to grant unemployment benefits to a person discharged for such conduct.[9] The decision illustrated how the Court has drifted away from well-established principles of first amendment protection.[10] The Court, in the guise of deferring to a state criminal statute, has established a new standard by eliminating the traditional standard which required the balancing of a state's compelling interest against the *burden* on the individual's practice of religion.[11]

Alfred Smith, a member of the Native American Church, was a drug counselor at a private drug rehabilitation center in Oregon.[12] In March of 1984, he was fired from his job when he par-

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(1988) (free exercise of religion did not bar government construction of road on public lands even though area was historically used for specific purpose of religious rituals of Native American tribes); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) (reading requirements in Tennessee public schools held not to violate free exercise rights of parents).

5 Nelson, *Native American Religious Freedom and the Peyote Sacrament: The Precarious Balance between the State Interests and the Free Exercise Clause*, 31 ARIZ. L. REV. 423, 430 (1989).

6 *See* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 334 (1969). The author stated:

> The purpose of almost any law can be traced back to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue. To measure an individual interest directly against one of these rarified values inevitably makes the individual interest appear the less significant.

Id. at 330-31.

7 110 S. Ct. 1595 (1990).

8 *Id.*

9 *Id.* at 1606.

10 *Id.* at 1611 (O'Connor, J., concurring).

11 *Id.*

12 Smith v. Employment Div., Dep't of Human Resources, 301 Or. 209, 211, 721 P.2d 445, 446 (1986). Specifically, Smith was identified as a Klamath Indian. *Id.*

ticipated in a religious ceremony at which he ingested the hallucinogenic drug peyote.[13] Prior to ingesting the drug, Smith had discussed his intentions with his employer, the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT).[14] The employer informed Smith that ADAPT would not excuse Smith's ingestion of peyote, even as a religious practice.[15] Smith's employer specifically warned him that he would be fired if he proceeded with his plans.[16] Subsequently, Smith ingested a small amount of peyote at a Native American Church religious ceremony.[17] After informing his employer of his religious conduct, Smith was immediately discharged.[18] When Smith applied to the Employment Division, Department of Human Resources of Oregon, he was denied unemployment compensation benefits because the state agency determined that he had been discharged for "work-related misconduct."[19]

At Smith's request, a hearing was held before the Employ-

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13 *Smith II*, 110 S. Ct. at 1597. Prior congressional intent had identified peyote as a drug which was entitled to first amendment protection when used in Native American Church ceremonies. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

14 *Smith*, 301 Or. at 211, 721 P.2d at 445-46. Smith's employer specifically required that its counselors refrain from using mind-altering drugs and alcohol. *Id.*, 721 P.2d at 446. ADAPT's written policy listed use of such substances as cause for termination. *Id.* Peyote qualified as a mind-altering drug which was listed in ADAPT's employment manual. *Id.*

15 *Id.* ADAPT issued a memorandum which stated in part:

> In keeping with our drug-free philosophy of treatment, and our belief in the disease concept of alcoholism, and the associated complex issues involved in both alcoholism and drug addiction, we require the following of our employees: (1) Use of an illegal drug or use of prescription drugs in a non-prescribed manner is grounds for immediate termination from employment.

Id. at 211-12, 721 P.2d at 446.

16 *Id.* at 212, 721 P.2d at 446.

17 *Id.*

18 *Id.* ADAPT asked Smith to enter its rehabilitation program, but Smith declined, asserting that there was no need to do so. *Id.*

19 *Id.* The Oregon unemployment benefits statute allowed a claimant to be disqualified for benefits if the claimant committed a felony in connection with work. *Id.* The Employment Division conceded that an illegal act, by itself, was not a basis for disqualification from benefits. *Id.* Additionally, the court noted that OR. REV. STAT. § 657.176(c) (1987) provides:

> If the authorized representative designated by the assistant director finds an individual was discharged for misconduct because of the *individual's commission of a felony or theft in connection with the individual's work*, all benefit rights based on wages earned prior to the date of the discharge shall be canceled if the individual's employer notifies the assistant director of the discharge . . . and:

ment Division.[20] The referee found that although Smith had committed a dischargeable offense, it was not enough to disqualify him from receiving unemployment benefits.[21] The referee decided that Smith's discharge resulted from his religious practices and that the state's only interest was to minimize the detrimental impact on the state unemployment trust fund that would result if Smith were to receive unemployment compensation.[22] The referee concluded that this pecuniary interest should not bar a claimant's freedom of religious choice.[23] Subsequently, the referee's decision to allow unemployment compensation was reversed by the Employment Appeals Board [Board].[24] The Board held that the state's interest was in prohibiting the use of drugs and not in alleviating the burden on the state's Unemployment Compensation Trust Fund.[25]

The Oregon Court of Appeals reversed the decision of the Board.[26] The case was remanded to the Board to determine whether ingestion of peyote constitutes a religious act.[27] The Oregon Supreme Court upheld the decision of the court of appeals, but stated that it was not necessary to remand the case to determine the claimant's religious interest in using peyote.[28]

(a) The individual has admitted commission of the felony or theft to an authorized representative of the assistant director, or
(b) The individual has signed a written admission of such act and such written admission has been presented to an authorized representative of the assistant director, or
(c) Such act has resulted in a conviction by a court of competent jurisdiction.

Smith, 301 Or. at 219 n.3, 721 P.2d at 450-51 n.3 (quoting OR. REV. STAT. § 657.176(3) (1987)) (emphasis added). The Supreme Court of Oregon held that the above statute was not applicable to claimant Smith and that the issue of legality over ingestion of peyote outside of work was not pertinent to the case. *Id.* at 219-20, 721 P.2d at 450-51.

20 *Id.*

21 *Id.*

22 *Id.* The state unemployment trust fund managed the state monies collected and disbursed for unemployment claims granted to state citizens. *Id.*

23 *Id.* The referee used a balancing test, weighing the state's financial gain against the burden upon the free exercise of religion. *Id.*

24 *Id.*

25 *Id.*

26 Smith v. Employment Div., 75 Or. App. 764, 709 P.2d 246 (1985). The appellate court, sitting en banc, reviewed the Employment Appeals Board's denial of the state unemployment benefits. *Id.* Also before the court was Black v. Employment Division, 75 Or. App. 735, 707 P.2d 1274 (1985). The Smith appeal was heard in tandem with the appeal of Galen Black, a co-counselor at ADAPT who also ingested peyote and was fired for work-related misconduct. *Id.* at 737-38, 707 P.2d at 1276.

27 *Id.* at 743, 707 P.2d at 1279.

28 Smith v. Employment Div., Dep't of Human Resources, 301 Or. 209, 220, 721

The Oregon Supreme Court found that Smith's religious beliefs were sincerely held, and that ingesting peyote was a sacrament of the Native American Church.[29] Specifically, the court concluded that Smith was entitled to unemployment compensation benefits because the state's financial interest in the unemployment fund was not compelling when weighed against the claimant's first amendment rights.[30]

On appeal,[31] the United States Supreme Court confronted the issue of whether the use of peyote for religious reasons was protected by the United States Constitution from the criminal laws of the state.[32] The Court remanded the case to the Oregon Supreme Court in order to determine the status of the religious practice in Oregon.[33]

Consequently, the Oregon Supreme Court addressed the is-

P.2d 445, 451 (1986). In affirming the Employment Division's initial determination, the Oregon Supreme Court relied on Sherbert v. Verner, 374 U.S. 398 (1963), and Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981). *Id.* at 217-20, 721 P.2d at 449-51. The court emphasized that the Supreme Court used a balancing test in both cases. *Id.* at 217, 721 P.2d at 449. The court acknowledged that a person claiming that their free exercise of religion is being infringed upon must show how the law substantially burdens his rights under the first amendment. *Id.* The court, however, stressed that the state must justify that its prohibition on the claimant's religious activity is the least "restrictive means of achieving a 'compelling' state interest." *Id.* (citing Sherbert v. Verner, 374 U.S. 398, 403 (1963)). The court explained that unless the state could establish a compelling interest, the claimant would be constitutionally entitled to an exception to any state law restriction. *Id.* at 217-18, 721 P.2d at 449. *See infra* notes 63-69, 77-81 and accompanying text.

29 *Id.* at 218, 721 P.2d at 450. The court specifically dismissed the Employment Appeals Board's focus on the criminal nature of the drug use. *Id.* at 219, 721 P.2d at 450-51. The Oregon Supreme Court reasoned that although possession of peyote was a crime under OR. REV. STAT. § 475.992(4) (1987) and OR. ADMIN. R. 855-80-020 (1987), "[t]he state's interest in denying unemployment benefits to a claimant discharged for religiously motivated misconduct must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote." *Id.*, 721 P.2d at 450.

30 *Id.* at 219-20, 721 P.2d at 450-51.

31 *Employment Div., Dep't of Human Resources v. Smith*, 485 U.S. 660 (1989) (*Smith I*).

32 *Id.* at 672.

33 *Id.* at 673-74. Justice Stevens noted that the Oregon criminal statutes prohibited possession of peyote but not use of the drug. *Id.* at 672 (citing OR. REV. STAT. § 475.992(4) (1987)). The Justice wanted further clarification as to whether the statute could be construed to allow or forbid the ceremonial use of peyote. *Id.* at 673. He therefore narrowed his question to the legality of the religious use of peyote under Oregon state law. *Id.* Justice Stevens articulated that the Oregon Supreme Court's opinions noted that other states have used case law to establish exemptions for the religious use of peyote. *Id.* at 673. Justice Stevens warned that the Oregon Supreme Court was in error if it believed that Smith's religious conduct

sue of whether the criminal law of the state was relevant to the denial of unemployment benefits.[34] The court determined that the Oregon statute did not make any exception for the use of peyote for religious reasons,[35] but reaffirmed its holding that Smith should be entitled to unemployment compensation benefits.[36] The Oregon Supreme Court concluded that although its statute did not include an exception for sacramental use of peyote, the first amendment would not permit state authorities to prosecute bona fide use and possession of peyote in the Native American Church.[37] Subsequently, the United States Supreme

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was to be accorded the same level of constitutional protection as non-criminal conduct. *Id.* at 673-74.

In a dissenting opinion, Justice Brennan opined that the Oregon Supreme Court had been very clear in its refusal to have the unemployment statutes used as a substitute for the criminal law statute. *Id.* at 676-77 (Brennan, J., dissenting). The dissent stressed that the Oregon Supreme Court clearly found the state interest to be only financial and not compelling. *Id.* The Justice also found that there was no legislative intent found to justify the use of "the unemployment statute to reinforce criminal drug-abuse laws." *Id.* Justice Brennan further stated that the confusion and the mixing of the unemployment and criminal statutes was "of this Court's own making." *Id.* at 677 (Brennan, J., dissenting). The dissent acknowledged that they would have upheld the Oregon Supreme Court's decision as based correctly on *Sherbert* and *Thomas*. *Id.* The dissent concluded that the Court should apply strict scrutiny when the state infringes upon fundamental rights. *Id.*

[34] Smith v. Employment Div., 307 Or. 68, 72, 763 P.2d 146, 147 (1988).

[35] *Id.* at 72-73, 763 P.2d at 148. *See* OR. REV. STAT. § 475.992(4)(a) (1987). The court noted that the state statute paralleled the State Board of Pharmacy schedule which listed peyote as a controlled substance. *Smith*, 307 Or. at 73 n.2, 763 P.2d at 148 n.2 (citing OR. ADMIN. R. § 855-80-021(3)(s) (1987)). The court observed that both were silent on any exception for the religious use of peyote. *Id.* The court, however, emphasized that "the outright prohibition of good faith religious use of peyote of adult members of the Native American Church would violate the [f]irst [a]mendment directly and as interpreted by Congress." *Id.* at 72-73, 763 P.2d at 148. The court further noted that Congress clearly intended the implementing regulations of the Drug Abuse Control Amendments of 1965, 79 Stat. 226 § 3(a) to exempt the religious use of peyote. *Id.* at 74, 763 P.2d at 149.

[36] *Id.* at 73, 763 P.2d at 148.

[37] 307 Or. at 75, 763 P.2d at 149. The court noted that other state statutes permit religious exemptions for the use of peyote. *Id.* at 73 n.2, 763 P.2d at 148 n.2 (citing ARIZ. REV. STAT. ANN. § 13-3402(B) (West Supp. 1987); COLO. REV. STAT. § 12-22-317(3) (1985); IOWA CODE ANN. § 204.204.8 (West 1987); KAN. STAT. ANN. § 65-4116(c)(8) (1985); MINN. STAT. ANN. § 152-02 Subd. 2(4) (West Supp. 1988); NEV. REV. STAT. § 453.541 (1987); N.M. STAT. ANN. § 30-31-6(D) (Supp. 1988); S.D. CODIFIED LAWS ANN. § 34-20B-14(17) (1986); TEX. STAT. ANN. 4476-15 § 4.11 (West 1976); WISC. STAT. § 161.115 (1975); WYO. STAT. 35-7-1044 (1988)). In addition, the court acknowledged that twelve other states had incorporated the federal exemption found in 21 C.F.R. § 1307.31 (1987) into their respective state statutes. *Id.* (citing ALASKA STAT. § 11.71.195 (1983); MISS. CODE ANN. § 41-29-111(d) (1981); MONT. CODE ANN. § 50-32-203 (1987); N.J. STAT. ANN. § 24:21-3(c) (West Supp. 1988); N.C. GEN. STAT. § 90-88(d) (1985); N.D. CENT. CODE § 19-03.1-02.4 (1981); R.I. GEN. LAWS § 21-28-2.01(c) (1982); Tenn. Code Ann. § 39-6-

Court granted certiorari and reversed.[38]

In *Employment Division, Department of Human Services v. Smith* (Smith II),[39] the Court held that the free exercise clause of the first amendment would not be violated by the state prohibition on the use of peyote, even if that prohibition prevented use for religious reasons.[40] Accordingly, the Court opined that the state was allowed to declare persons discharged for such use ineligible for unemployment benefits.[41]

The United States Supreme Court's first opportunity to test the scope of the free exercise clause was *Reynolds v. United States*.[42] George Reynolds, a practicing Mormon, was convicted of polygamy, a federal offense.[43] In this seminal decision, the Court held that a claimant's religious belief was not a valid justification for conduct that was a criminal violation of the law.[44] The Court further noted that while laws can be made to govern actions, laws may not be created to control religious beliefs and thoughts.[45]

In 1940, the Court reiterated the *Reynolds* "belief-action" distinction in *Cantwell v. Connecticut*.[46] Jesse Cantwell was convicted of a breach of the peace for passing out religious literature on a public street.[47] The Court reversed the conviction on the grounds that Cantwell's religious liberty and freedom of speech had been infringed upon.[48] The Court warned that a claimant did not enjoy the protection of the first amendment to exercise his religious conduct when such conduct was subject to government regulation intended for the protection of society.[49] The

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403(d) (1982); UTAH CODE ANN. § 58-37-3(3) (1986); VA. CODE ANN. § 54-524.84:1(d) (1982); WASH. REV. CODE § 69-50.201(d); W. VA. CODE 60A-2-202(d) (1984)).

38 Employment Div., Dep't of Human Resources v. Smith, 109 S. Ct. 1526 (1989).

39 110 S. Ct. 1595 (1990).

40 *Id.* at 1606.

41 *Id.*

42 98 U.S. 145 (1879).

43 *Id.* at 168.

44 *Id.* at 166-67. The Court created the first limit on the free exercise clause by distinguishing between freedom of religious belief and freedom to act on that religious belief when the conduct violated federal law. *See id.* at 166. The *Reynolds* Court protected beliefs only, and stated that actions, even religiously motivated actions, were still subject to legitimate government control. Lupu, *supra* note 2, at 938.

45 *Reynolds*, 98 U.S. at 166.

46 310 U.S. 296 (1940).

47 *Id.* at 303.

48 *Id.* at 300.

49 *Id.* at 303-04. Regarding conduct regulated by state law, the Court reasoned:

Court maintained that this restriction applied even if the individual's religious belief was sincerely held.[50]

The issue of the sincerity of the claimant's religious belief was discussed in *United States v. Ballard*.[51] The defendants in *Ballard* were convicted of conspiring to use and use of the mails to defraud.[52] The charge was based on the defendants' promotion of, and fund raising for, their religious faith-healing sect.[53] The Court posited that a jury may not make a factual determination as to the veracity of a party's religious beliefs.[54] The Court, however, stressed that the judicial protection of the sincerity of an individual's religious beliefs did not protect a person from government prosecution in areas of criminal violation.[55]

In 1961, the Court in *Braunfeld v. Brown*[56] considered the constitutionality of a Pennsylvania criminal statute which prohibited the sale of certain commodities on Sunday.[57] The appellants, members of the Orthodox Jewish faith, were required by their religious doctrine to close their businesses on Saturday.[58] In their complaint, the appellants argued that closing their businesses both days of the weekend presented a substantial economic burden.[59] The Court denied the appellants' request for an exemption from the Sunday closing laws of the state.[60] The Court reasoned that the state's secular purpose of providing workers a day of rest was valid, as measured against the financial inconvenience resulting from observance of a religious belief.[61]

"[t]hus the [first] [a]mendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Id.* (footnote omitted).

50 *Id.* at 310.

51 322 U.S. 78 (1944).

52 *Id.* at 79.

53 *Id.* Specifically, the Court noted that the charge was that the defendants' formed corporations, distributed and sold literature, solicited funds and membership in their religious sect by means of false promises and representations. *Id.*

54 *Id.* at 86. The Court upheld the court of appeals' decision not to allow the jury to determine the truth or falsity of the beliefs, but to concentrate only on whether the defendants held those beliefs. *Id.* at 84.

55 *Id.* at 86. The opinion supported the use of the belief-action distinction based on the prior *Cantwell* decision. *Id.*

56 366 U.S. 599 (1961).

57 *Id.* at 600. The appellant challenged the statute on equal protection grounds of the fourteenth amendment and free exercise of religion grounds of the first amendment. *Id.* at 600-601.

58 *Id.* at 601.

59 *Id.*

60 *Id.* at 609.

61 *Id.* at 605.

The Court also held that this *burden* upon a person's religious conduct was only indirect and did not invalidate a generally applied statute.[62]

Two years later in *Sherbert v. Verner*,[63] the appellant, a Seventh-day Adventist, was fired when she refused to work on Saturday, her Sabbath.[64] Unable to find other employment because of her religious practice, appellant applied for unemployment compensation.[65] The appellant was denied benefits because she refused to accept suitable work.[66] The Court determined that this denial was a violation of the appellant's free exercise of religion, and reasoned that the state had created an unjustifiable burden.[67] Consequently, the *Sherbert* Court found that the state could not justify the denial of unemployment benefits when its effect was to force a person to choose between not working on her Sabbath and receiving state benefits.[68] In evaluating the state interest, the Court found that the state's concern for the integrity of the unemployment fund was merely financial and not compelling enough to allow a substantial infringement upon an individual's religious freedom.[69]

Nine years later, *Wisconsin v. Yoder*[70] provided an opportunity for the Court to address the issue of first amendment free exercise protection in the context of a claimant's right to refuse pub-

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62 *Id.* at 607 (emphasis added). The Court further stated:

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

Id.

63 374 U.S. 398 (1963).

64 *Id.* at 399.

65 *Id.* at 399-400.

66 *Id.* at 400-01. The South Carolina Unemployment Compensation Act provides that "to be eligible for benefits, a claimant must be able to work and . . . available for work"; further, the Act provides that a claimant is ineligible for benefits "[i]f . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer . . ." *Id.* (citing S.C. CODE § 68-113(3), § 68-114(3) (1962)). Pursuant to this statute, the appellant was disqualified from unemployment compensation due to her refusal to work on Saturday. *Id.* at 401.

67 *Id.* at 404.

68 *Id.* at 409-10.

69 *Id.* at 407-09.

70 406 U.S. 205 (1972).

lic school education for his children.[71] Respondents were members of the Old Order Amish religion and the Conservative Amish Mennonite Church.[72] They refused to send their children to the public school system after completion of the eighth grade.[73] The respondents argued that exposure to the public high school system would effectively destroy the free exercise of their religious beliefs.[74] The Court held that the Amish parents' decision was protected by the first amendment even though this conduct had violated the state's compulsory school-attendance statute.[75] In carving out an exception, the Court admitted for the first time the difficulty of relying on a "belief-action" dichotomy when analyzing a free exercise question.[76]

Less than a decade later, the Court addressed *Thomas v. Review Board of the Indiana Employment Security Division*.[77] In *Thomas*, the claimant, a Jehovah's Witness, quit his job when he was transferred to a department which produced military weapons.[78] The petitioner maintained that his religious beliefs did not allow him

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71 *Id.* at 207.

72 *Id.*

73 *Id.*

74 *Id.* at 209. The respondents were residents of Wisconsin. *Id.* at 207. WIS. STAT. § 118.15 (1969) provides in relevant part:

> (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.

Id. at 207-208 n.2 (quoting WIS. STAT. § 118.15 (1969)).

75 *Id.* at 214. The Court was persuaded by the fact that the Amish children were receiving adequate preparation for living within the Amish community. *See id.* at 216-17. Chief Justice Burger contended that "the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Id.* at 216.

76 *Id.* at 220. The Court stated:

> But to agree that religiously grounded conduct must often be subject to the broad police power of the [s]tate is not to deny that there are areas of conduct protected by the [f]ree [e]xercise [c]lause of the [f]irst [a]mendment and thus beyond the power of the [s]tate to control, even under regulations of general applicability. This case, therefore, does not become easier because respondents were convicted for their 'actions' in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments.

Id. (citations omitted).

77 450 U.S. 707 (1981).

78 *Id.* at 709.

to manufacture weaponry.[79] The Indiana Review Board denied the petitioner unemployment compensation because his voluntary termination was not based on "good cause."[80] In finding for the petitioner, the Court relied on *Sherbert*, and reasoned that Thomas was placed in the untenable position of choosing between his religious faith and accepting unemployment benefits, therefore creating a violation of his free exercise protection.[81]

More recently, the Court appeared to narrow the scope of the protection of the free exercise clause in *Bowen v. Roy*.[82] Recipients of benefits under the Aid to Families with Dependent Children program and the Food Stamp program brought suit challenging the validity of a federal statute which required participants in the program to obtain Social Security numbers.[83] In balancing the state's interest in maintaining a Social Security system against the individual's refusal to be assigned a number as a violation of religious belief, the Court upheld the state's interest.[84] Although the free exercise clause could protect the individual from certain forms of governmental compulsion, the

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79 *Id.*

80 *Id.* at 709. The Indiana Employment Security Act provides that "an individual who has voluntarily left his employment without good cause in connection with the work or who was discharged from his employment for just cause shall be ineligible for waiting period or benefit rights . . . ." *Id.* at 709-10 n.1 (quoting IND. CODE § 22-4-15-1 (Supp. 1978)). The Indiana Court of Appeals reversed, holding that the Indiana statute burdened Thomas' free exercise of his religion. *Id.* at 707. This decision was reversed by the Indiana Supreme Court. *Id.* at 714. The Indiana Supreme Court held that Thomas had quit his job based on a philosophical choice, rather than a religious conviction. *Id.* (citing *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 271 Ind. 233, 244, 391 N.E.2d 1127, 1133 (1979)). The court was concerned that Thomas' equivocating beliefs were not sufficient to provide a "good cause," that is, a conflict objectively related to work. *Id.* at 715.

81 *Id.* at 716-17. The majority opined:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Id. at 717-18.

82 476 U.S. 693 (1986).

83 *Id.* at 695. Appellees, Native American Indians, argued that this procedure would violate their religious beliefs because they believed the government's use of a unique number for their two year old child would endanger her spiritual power. *Id.* The district court allowed an exemption for the child and held that the public interest in maintaining a fraud-resistant system could be satisfied by less obtrusive methods. *Id.* at 697-98.

84 *Id.* at 712. The state's primary motive was to prevent fraud. *Id.* at 711.

Court would not extend this protection when the individual attempted to restrict the internal workings of the government.[85]

The following year in *Hobbie v. Unemployment Appeals Commission*,[86] the claimant, a Seventh-day Adventist, was discharged from her employment when she refused to work on Saturdays.[87] Subsequently, the Bureau of Unemployment Compensation denied the appellant benefits based on her misconduct at work.[88] In noting the factual similarities between *Hobbie*, *Sherbert* and *Thomas*, Justice Brennan explained that the denial of a state benefit, based on conduct dictated by religious belief, unduly burdens the free exercise of religion.[89] In contrast to the *Roy* Court's reasonable standard of review,[90] the Court applied a strict scrutiny standard.[91] Accordingly, the Court set forth that there was a violation of the free exercise clause when the state could not justify its interest as compelling.[92]

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85 *Id.* at 702. The Court returned to a *Reynolds* standard in asserting that "[n]ot all burdens on religion are unconstitutional." *Id.* (citing Reynolds v. United States, 98 U.S. 145 (1879)). The Court reiterated the narrow boundary of the free exercise clause when it stated that "[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, . . . but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.' " *Id.* (quoting United States v. Lee, 455 U.S. 252, 259 (1982) (citations omitted)).

86 480 U.S. 136 (1987).

87 *Id.* at 138.

88 *Id.* at 138-39. The Florida Unemployment statute defines misconduct as follows:

> Misconduct includes, but is not limited to the following, which shall not be construed in pari materia with each other:
>
> (a) Conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or
>
> (b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

Id. at 138 n.2 (quoting FLA. STAT. § 443.036(24) (1985)).

89 *Id.* at 141. The majority asserted that "[b]oth *Sherbert* and *Thomas* held that such infringements must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest." *Id.*

90 *Id.* The *Roy* Court opined that "the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." *Id.* (quoting Bowen v. Roy, 476 U.S. 693, 707-08 (1986)).

91 *Id.*

92 *Id.*

In *Lyng v. Northwest Indian Cemetery Protective Association*,[93] several Indian groups sought to prohibit a federal road from being built on federal land that included an area used by the Indians for private religious ceremonies.[94] The Court relied on the *Roy* Court's analysis in reasoning that the building of a roadway through Indian territory used for specific religious practices did not force the Indians to compromise their religious beliefs.[95] The Court held that the incidental effects of government programs burdening the free exercise of religion did not mandate the state to justify its actions with a compelling justification.[96]

Against this decisional background, the Supreme Court in *Employment Division, Department of Human Resources* (Smith II)[97] addressed whether the United States Constitution affords protection against the denial of unemployment benefits for the ingestion of illegal drugs for religious purposes.[98] Justice Scalia, writing for the majority, began his analysis by focusing on the issue of whether the intentional possession of peyote, a criminal offense, was equally criminal when the peyote was used for religious purposes only.[99] Justice Scalia deferred to the findings of the Oregon Supreme Court, which concluded that there was no exemption under state law for the use of peyote in a sacramental ceremony.[100] The majority, however, determined that the Oregon court erred in concluding that the prohibition against religious use of peyote was not permissible under the free exercise clause.[101]

The Court held that the determining factor was the Oregon Supreme Court's decision articulating that the conduct was crim-

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93 485 U.S. 439 (1988).

94 *Id.* at 442-43.

95 *Id.* at 448. The Court reaffirmed that the individual cannot insist the government adhere to the dictates of the individual's religious tenets. *Id.*

96 *Id.* at 450-51. The Court determined that:

> This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.

Id. The Court therefore distinguished between incidental effects, modification of claimant's conduct, and the need to meet the compelling interest.

97 110 S. Ct. 1595 (1990).

98 *Id.* at 1597.

99 *Id.* at 1597. The Oregon statute prohibits the "knowing or intentional possession of a controlled substance." *Id.* (citing OR. REV. STAT. § 475-992(4) (1987)).

100 *Id.* at 1598 (citing Smith v. Employment Div., 307 Or. 68, 72-73, 763 P.2d 146, 148 (1988)).

101 *Id.* at 1598.

inal under the state statute.[102] Additionally, the majority determined that there was no constitutional right to engage in such conduct, absent a statutory exemption for religious observance.[103] Referring to the standard set forth in *Reynolds*, the Court applied the "belief-action" standard.[104] The Court was persuaded by the possibility that many differing religious beliefs would clash with secular laws.[105] The first amendment, the Court continued, does not dispose of the obligation to comply with laws of general applicability.[106] Justice Scalia posited that the application of a neutral law was prohibited by the first amendment only when the alleged free exercise violation was coupled with another constitutional issue.[107] To the extent that this case was not a "hybrid," Justice Scalia argued, the balancing test need not be used.[108]

The Court next addressed Smith's argument that while an exemption need not automatically be granted under a criminal statute, the claim should at least be afforded analysis under the balancing test enunciated in *Sherbert*.[109] The *Sherbert* balancing test was used to invalidate unemployment benefit regulations in *Thomas* and *Hobbie*.[110] The majority, however, distinguished the *Sherbert* test on the basis that it was specifically used only for the

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102 *Id.*

103 *Id.*

104 *Id.* at 1600. The Court posited that "laws are made for the government of action, and while they cannot interfere with mere religious belief and opinion, they may with practices." *Id.* (citing Reynolds v. United States, 98 U.S. 145, 166 (1879)).

105 Justice Scalia questioned: "[c]an 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." *Id.* (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879)).

106 *See* United States v. Lee, 455 U.S. 252 (1982).

107 *Id.* at 1601. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940). The Court coined decisions involving both first amendment and other constitutional issues, as "hybrid" cases. *Smith II*, 110 S. Ct. at 1602. Justice Scalia noted that "[t]he present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right." *Id.*

108 *See id.*

109 *Id.* The *Sherbert* analysis used a balancing test to compare the burden upon the individual against the compelling interest of the state. *Id.* *See supra* notes 63-69 and accompanying text.

110 *Id.* All three opinions struck down the unemployment regulations because the benefits only became available if the applicant agreed to work under conditions which violated claimant's religion. *See* 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). *See supra* notes 63-92 and accompanying text.

purpose of invalidating a denial of unemployment compensation.[111] Justice Scalia proffered that the Court had not used the *Sherbert* analysis outside of that narrow purpose.[112] As a result, the majority submitted that the *Sherbert* test was not applicable to securing an exemption from a generally applicable criminal law.[113] In rejecting the balancing analysis for application to generalized criminal laws,[114] the Court posited that to require the government to show a compelling interest in this instance would lead to a "constitutional anomaly," allowing a "private right to ignore generally applicable laws."[115]

Because of the diversity of our society's religious beliefs, Justice Scalia reasoned that the compelling interest test, if applied to every religious free exercise objection, might lead to anarchy.[116] The majority further determined that in order to protect this religious divergence in society, the Court "cannot afford the luxury of deeming presumptively invalid . . . every regulation of conduct that does not protect an interest of the highest order."[117] Justice Scalia listed a series of cases that would allow the religious objector to be exempted from every conceivable civic obligation.[118] The Court concluded that "[t]he [f]irst [a]mendment's protection of religious liberty does not require this."[119]

Noting that other states had validly exempted the religious use of peyote from their criminal sanctions, the Court concluded by leaving the protection of a religious belief to the legislative

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111 *Id.*

112 *Id.*

113 *Id.* Justice Scalia stated that the *Sherbert* balancing analysis was not used in either *Roy* or *Lyng*. *Id.* Consequently, there was no requirement for the state to show a compelling interest. *Id.* at 1602-03.

114 *Id.* at 1603. The Court continued 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.'" *Id.* (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)).

115 *Id.* at 1604.

116 *Id.* at 1605.

117 *Id.*

118 *Id. See, e.g.*, Susan & Tony Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (minimum wage law); United States v. Lee, 455 U.S. 252 (1982) (paying taxes); Gillette v. United States, 401 U.S. 437 (1971) (compulsory military service); Cox v. New Hampshire, 312 U.S. 569 (1941) (traffic laws). Justice O'Connor, referring to the line of cases relied upon by Justice Scalia, derided them as a "parade of horribles." *Id.* at 1612 (O'Connor, J., concurring).

119 *Id.* at 1606.

decisions of each state.[120] Justice Scalia further stated that while it was permissible for a legislature to allow the exemption, the Court was not required to elevate the religious use of illegal drugs to a constitutionally protected right.[121] Finally, the Court recognized that while the legislative process may be unfavorable to minority religious practices, this consequence is preferable over a system where "each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[122]

In a concurring opinion,[123] Justice O'Connor asserted that the Court's holding was a significant departure from previous well-settled free exercise law and was not necessary for the resolution of the issue at hand.[124] Justice O'Connor contended that the Court's opinion was overly dependent upon a single rule that was arbitrarily extracted from decades of free exercise jurisprudence.[125] The Justice argued against the majority's narrow interpretation that the incidental effect of prohibition of religion does not violate the first amendment, as long as the state statute is of general applicability.[126] The concurrence examined the majority's reasoning which rested on the generalization that if the statute was one of general application, then the Court need not apply its usual free exercise analysis.[127]

Justice O'Connor began by focusing on the first amendment decisions separating religious belief from religious conduct.[128] The Justice determined that the free exercise clause allows a presumption of protection for religious conduct that is derived from sincere religious belief because there is no clear distinction within the first amendment between religious conduct and reli-

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120 *Id. See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3402(B)(1)-(3) (1989); COLO REV. STAT. § 12-22-317(3) (1985); N.M. STAT. ANN. § 30-31-6(D) (Supp. 1989).

121 *Smith II*, 110 S. Ct. at 1606.

122 *Id.*

123 *Id.* (O'Connor, J., concurring). Justices Brennan, Marshall and Blackmun joined in parts I and II of the concurring opinion but did not concur in the judgment. *Id.*

124 *Id.* Justice O'Connor reasoned that the majority holding "[was] incompatible with our Nation's fundamental commitment to individual religious liberty." *Id.*

125 *Id.*

126 *Id.* at 1607 (O'Connor, J., concurring).

127 *Id.* Justice O'Connor explained that such a generalization was not a correct application of well established doctrine to issues wherein a religious conduct has been burdened by a generally applicable law. *Id.*

128 *Id.* at 1607-1608 (O'Connor, J., concurring). *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Cantwell v. Connecticut, 310 U.S. 296 (1940). *See also supra* notes 46-50, 70-76 and accompanying text.

gious belief.[129] The Justice took issue with the Court's interpretation of the clause as allowing government prohibition of an individual's conduct without justification, as long as the prohibition was generally applicable.[130] Justice O'Connor stressed that all of the free exercise cases involved disputes in which generally applicable laws burdened religious conduct.[131]

Justice O'Connor, however, supported the doctrine that the individual did not enjoy an absolute right to engage in conduct solely because his religious freedom had been burdened.[132] Justice O'Connor maintained that well-established jurisprudence required the state to justify its prohibition by demonstrating a compelling state interest and the utilization of narrowly tailored means to achieve that interest.[133] The concurrence posited that the compelling interest test must not be ignored because it is the critical element of protection for a liberty that holds a preferred position among other liberties within the Constitution.[134]

Justice O'Connor criticized the majority for distinguishing well-established cases such as *Cantwell* and *Yoder* as hybrid decisions.[135] The concurrence insisted that *Cantwell* and *Yoder* were within the mainstream of Supreme Court free exercise jurisprudence.[136] Additionally, Justice O'Connor rejected the majority's approach of examining the win-loss record of other first amendment plaintiffs before determining the constitutionality of Alfred Smith's claim.[137] Justice O'Connor argued that the process of applying a balancing test was essential to preserve the ability of the Court to fully examine the free exercise argument of the

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

130 *Id.*

131 *Id.* The Justice opined that the vitality of the first amendment came not from the obvious discriminatory case, which would be the unusual situation, but from the non-extreme situation, where first amendment protections must be argued when not obvious. *Id.*

132 *Id. See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); Reynolds v. United States, 98 U.S. 145 (1879).

133 *Smith II* , 110 S. Ct. at 1608 (O'Connor, J., concurring). *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 408 U.S. 136, 141 (1987); Bowen v. Roy, 476 U.S. 693, 732 (1986); United States v. Lee, 455 U.S. 252, 257-58 (1982); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981); Sherbert v. Verner, 374 U.S. 398, 403 (1963).

134 *Smith II*, 110 S. Ct. at 1609 (O'Connor, J., concurring) (citing Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

135 *Id.* Justice O'Connor stated that those cases were expressly decided on first amendment basis. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Cantwell v. Connecticut, 310 U.S. 296 (1940).

136 *Smith II*, 110 S. Ct. at 1609 (O'Connor, J., concurring).

137 *Id.* at 1610 (O'Connor, J., concurring).

claimant.[138] Justice O'Connor maintained that if the Court did not allow the traditional compelling interest test due to the existence of a general criminal prohibition, it was misreading the essence of the free exercise clause.[139] The Justice pointed out that a criminal prohibition was the severest burden possible on an individual and *a fortiori* required a balancing test under a free exercise analysis.[140]

The concurrence stressed the continuing applicability of the *Sherbert* compelling interest test to general criminal prohibitions which impact religious free exercise beliefs.[141] Justice O'Connor explained that historically the Court's jurisprudence did not differentiate cases by whether the conduct was prohibited by the state, but by whether the conduct prohibited by one's own religious beliefs would endanger state benefits.[142] The Justice asserted that the more consistent approach to free exercise claims had been to apply the compelling interest test in each instance in order to examine the individual merits of each case.[143]

Justice O'Connor also criticized the majority's "parade of horribles" to support its contention that the compelling interest test was not applicable in many free exercise claims.[144] Far from proving this conclusion, Justice O'Connor asserted that the Court had arrived at sensible conclusions only after carefully balancing competing interests in free exercise claims.[145]

Justice O'Connor observed that the very reason for the existence of the first amendment was to protect a minority religion from the hostility of the majority in the democratic process.[146] The concurrence chided the majority for suggesting that it would be merely an "unavoidable consequence" should the political process fail to accommodate a minority religion.[147]

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138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.* Justice O'Connor argued that once a criminal prohibition has been shown to burden a religious conduct, the Court has historically required the state to prove its regulation is essential to the "overriding governmental interest." *Id.* at 1611 (O'Connor, J., concurring). *See* United States v. Lee, 455 U.S. 252, 257-58 (1982).

143 *Smith II*, 110 S. Ct. at 1611 (O'Connor, J., concurring). It would be an error, Justice O'Connor contended, to assume the first amendment never can require the state to grant an exemption for religious conduct just because a general criminal prohibition is involved. *Id.*

144 *Id.* at 1612-13 (O'Connor, J., concurring).

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

146 *Id.*

147 *Id.* Justice O'Connor defended the use of the compelling interest test by con-

Nonetheless, after insisting upon applying historical criteria, Justice O'Connor stated that she would still have arrived at the same conclusion as the majority.[148] The concurrence reasoned that when the state's interest was balanced against the individual's interest, the state's interest in preventing harm through a controlled substance justified its uniform application of a criminal sanction.[149] Accordingly, Justice O'Connor concluded that a selective exemption was not warranted even for religiously motivated conduct.[150]

In dissent, Justice Blackmun emphasized that the Court's well-established jurisprudence required a state to show it had a compelling justification for its statutory infringement on religion.[151] The dissent agreed with Justice O'Connor's conclusion that the Court had mischaracterized precedents.[152] Justice Blackmun then stated that the mischaracterization had caused an abrupt and momentous reversal of well-established law pertaining to religious freedoms.[153] The dissent emphasized that viewing free exercise problems which necessitate strict scrutiny as a "luxury" for an ordered society, and relegating the oppression of a minority religion in a democratic society to an unfortunate consequence, is precisely antithetical to the intent of the framers of the Constitution.[154]

The dissent, unlike the majority and concurrence, focused on the facts surrounding the use of the peyote.[155] In light of these facts, Justice Blackmun concluded that, when balancing the state interest against the individual free exercise conduct, the

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cluding "[t]he compelling interest test reflects the [f]irst [a]mendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a 'luxury' is to denigrate '[t]he very purpose of a Bill of Rights.' " *Id.* (citation omitted).

148 *Id.*

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

150 *Id.* Justice O'Connor concluded that the state proved a compelling interest to regulate peyote, and therefore a religious exemption would not be compatible with that interest. *Id.* Although other states may have allowed an exemption, Justice O'Connor agreed with the majority that Oregon was not required to do the same. *Id.* at 1615 (O'Connor, J., concurring).

151 *Id.* at 1616 (Blackmun, J., dissenting). Justice Blackmun, joined by Justices Brennan and Marshall criticized the majority's description of such settled law as a "constitutional anomaly." *Id.*

152 *Id.* The dissent criticized the majority for determining that *Cantwell* and *Yoder* were hybrid cases. *Id.*

153 *Id.*

154 *Id.*

155 *Id.* at 1616-17 (Blackmun, J., dissenting).

free exercise claim should have prevailed.[156] Justice Blackmun opined that the state did not present any historic evidence of actually prosecuting religious users of peyote.[157] The dissent further reasoned that although the state ostensibly sought to protect its citizens from unlawful drugs, there was no evidence that peyote had ever harmed anyone.[158] Justice Blackman suggested that the refusal to make an exception for peyote might have more to do with a speculative fear of drug abuse rather than a rational conclusion drawn from the evidence.[159] In addition, the Justice continued that the Native American Church has strict conditions, restrictions and contexts relating to the use of peyote.[160] Further, the dissent noted that this ceremonial use has been well documented.[161]

Justice Blackmun emphasized that the federal government had specifically exempted peyote from religious use, and that the Oregon drug laws are derived from the federal model.[162] The

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156 *Id.* at 1617 (Blackmun, J., dissenting).

157 *Id.*

158 *Id.* at 1618 (Blackmun, J., dissenting).

159 *Id.* at 1617 (Blackmun, J., dissenting).

160 *Id.* at 1618-19 (Blackmun, J., dissenting).

161 *Id.* The use of peyote as a ceremonial drug was described in People v. Woody, 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964). The *Woody* opinion described the uses of peyote:

> Peyote, as we shall see, plays a central role in the ceremony and practice of the Native American Church, a religious organization of Indians . . . . As the anthropologists have ascertained through conversations with members, the 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. . . . 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. . . . The record thus establishes that the application of the statutory prohibition of the use of peyote results in a virtual inhibition of the practice of defendants' religion. To forbid the use of peyote is to remove the theological heart of Peyotism. . . . Finally, as the Attorney General likewise admits, the opinion of scientists and other experts is "that peyote . . . works no permanent deleterious injury to the Indian." Indeed, as we have noted, these experts regard the moral standards of members of the Native American Church as higher than those of Indians outside the church.

Id. at 720-23, 40 Cal. Rptr. at 73-74, 394 P.2d at 817-18.

162 *Smith II*, 110 S. Ct. at 1618 (Blackmun, J., dissenting). 21 C.F.R. § 1307.31 (1989) provides that :[t]he listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so us-

dissent posited that congruent values were fostered by both the state drug-abuse programs and the Native American Church.[163] In effect, Justice Blackmun reasoned that the Native American Church not only forbade use of the peyote outside of the sacramental ceremony, but that the Church's doctrine and ceremony actually enhanced self-reliance, alcohol abstention, and adherence to family values.[164]

The problem of drug trafficking would ordinarily seem to be a reasonable cause for refusal of an exemption, but Justice Blackmun stated that he could not find any evidentiary support for the state's argument that the religious use of peyote would promote the sale of drugs.[165] Justice Blackmun instead found that peyote was not a popular drug and reasoned that there was no nexus between its use in settled religious ceremony and the current problem of illegal drugs within the country.[166]

The dissent questioned the state's argument that if it extended an exception for the use of peyote in the Native American Church, it would be besieged by a flood of claims for other religious exemptions.[167] Disregarding the state's argument, Justice Blackmun noted that when other states did permit use of peyote for religious purposes, they had not been overwhelmed with such claims.[168]

The dissent reminded the Court that the sincerity of the claimant's religious beliefs had never been contested by the Court or by the state in the proceedings.[169] Although the Justice conceded that the Court was correct in not investigating whether the practice of using peyote for sacramental use was "central" to the Native American religion, the Justice deemed it important for the Court to preserve its ability to appreciate how severely a minority religion would be impacted by the state's prohibition.[170] The dissent emphasized that the use of peyote was central to the

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ing peyote are exempt from registration." *Id.* at 1618 n.5 (citing 21 C.F.R. § 1307.31 (1989)).

163 *Smith II*, 110 S. Ct. at 1619 (Blackmun, J., dissenting).

164 *Id.*

165 *Id.* at 1620 (Blackmun, J., dissenting).

166 *Id.* The drug is bitter tasting, and often produces nausea and vomiting. *Id.* at 1619, n.7 (Blackmun, J., dissenting).

167 *Id.* at 1620 (Blackmun, J., dissenting).

168 *Id.* at 1620-21 (Blackmun, J., dissenting). Justice Blackmun asserted that there would be no obligation by the state to grant similar exemptions to every religious group that requested one. *Id.*

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

170 *Id.*

practice of the Native American Church's religion.[171] The Justice noted that for the Native American practitioner, peyote was the embodiment of his god, and ingesting it was a worshipful act.[172] The dissent posited that the state could not justify its denial of unemployment benefits to Smith absent a compelling reason.[173] Justice Blackmun concluded that in the instant case, the state had not sufficiently justified its reasons as compelling.[174]

Historically, first amendment rights for the free exercise of religion have generated different standards for belief and for the embodiment of those beliefs in conduct.[175] The decisions of the Court on free exercise issues have produced doctrines ranging from narrow to broad interpretations, but a constant has been the reluctance to accede to exemptions from laws in fear that the floodgate of requests would overwhelm the ability of government to function.[176] When *Smith II* reached the Court, the doctrines propounded during the past 100 years collided with the additional complexity of the use of a hallucinogenic drug as an aspect of the free exercise clause.[177]

In *Smith II*, the Court has invidiously charted new territory in the field of free exercise of religion while rejecting the implication that it has radically departed from prior jurisprudence. Justice Scalia did not overtly overturn or reverse prior decisions. Yet, as the concurrence and dissent argue, the Court's prior jurisprudence has been substantially disregarded.

Justice Scalia has effectively removed the compelling interest balancing test when the Court evaluates a first amendment free exercise question. The majority has declared that when there is a generally applicable law which invokes criminal sanctions and the claimant is caught between following the state law or violating his religious beliefs, the court will defer to the state statute. This deference frees the state from the requirement of showing a compelling interest to justify its regulations. Therefore, the state is

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171 *Id.*

172 *Id.* The dissent stated that "[w]ithout peyote, they could not enact the essential ritual of their religion." *Id.*

173 *Id.* at 1623 (Blackmun, J., dissenting).

174 *Id.*

175 Clark, *supra* note 6, at 327. The commentator analyzed that there does not exist any clear jurisprudential guideline to explain when religious practice can be regulated by the state. *Id.*

176 Lupu, *supra* note 2, at 947-48. Lupu contends that the Court will undoubtedly adhere to a "restrictive doctrine at the threshold of claims." *Id.* at 948.

177 *Smith II*, 110 S. Ct. at 1597.

given significantly wider latitude, requiring only that it show that the law is reasonable.

The *Smith II* decision has dangerously shifted the threshold for the protection of the religious objector. The narrow interpretation used in this decision portends a lesser protection under the first amendment. As Justice O'Connor's concurrence stated, the Court does not apply "usual free exercise jurisprudence," and in not doing so, creates an entirely new standard for free exercise claims.[178]

Free exercise cases, by their very nature, have presented a challenge to the Court. Beliefs alone have been easy to protect. Conduct, on the other hand, may conflict with existing regulation, giving rise to a requirement that the state demonstrate a compelling interest in enforcing such regulation. By virtue of elevating a criminal law of general application to a level which relieves the state of that responsibility, Justice Scalia and the majority have worked a fundamental change in the free exercise arena.

By consigning *Sherbert* as applying solely to employment benefit situations, the majority has dealt a severe blow to the strict scrutiny standards enunciated in *Sherbert*. Justice Scalia has casually used the added layer of a generally applicable criminal statute to justify a deference to the state. In so doing, the majority has ignored the fact that all prior religious exercise cases also involved criminal sanctions. Under those decisions, the Court held that the compelling interest of the state must be established to afford the claimant his due protection under first amendment guarantees. To circumvent the balancing process is to overturn the most important concept of the Supreme Court as the last bastion of religious protection. The majority could have reached the same conclusion using the strict scrutiny standard instead of sidestepping *Sherbert*.

In addition, the majority may have been influenced by an undercurrent of desperation concerning the plague of drugs in the nation and felt obligated to defer to a statute prohibiting use of a controlled substance, even in a closely controlled religious ceremony. If this is indicative of the Court's philosophical agenda, it portends an erosion of *stare decisis* in an area of well-settled law.

The impact of the decision may not be understood nor felt in

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178 *Id.* at 1607 (O'Connor, J., concurring). The concurrence criticized the majority opinion's distinction between a generally applicable law and a law specifically aimed at religion as beyond the intention of the first amendment. *Id.*

the immediate future. Nonetheless, the direction that the Court has taken is extremely important for all future free exercise decisions. The vitality of the process of constitutional protection, as exemplified by the compelling state interest test, has been curtailed under this new approach. Thus, the first amendment protections concerning religious conduct have become "an unfulfilled and hollow promise."[179]

Gloria L. Buxbaum

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[179] *Id.* at 1622 (Blackmun, J., dissenting).