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The Illusory Enforcement of First Amendment Freedom: Employment Division, Department of Human Resources v. Smith and the Abandonment of the Compelling Governmental Interest Test

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The Illusory Enforcement of First Amendment Freedom: *Employment Division, Department of Human Resources v. Smith* and the Abandonment of the Compelling Governmental Interest Test

The first amendment to the United States Constitution prohibits governmental interference with the free exercise of religion: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."[1] The right to free exercise of religion is fundamental, but not without limitation. Although the government cannot make laws that prohibit or infringe on religious *belief*, it can, within limits, make laws that regulate general conduct, even if that conduct springs from religious belief.[2] The traditional test for determining the constitutionality of a governmental regulation limiting a fundamental right is whether the government can show an interest sufficiently compelling to justify an infringement on the right.[3] For example, courts often hold that a state's interest in the health, safety, and welfare of its citizens is a compelling state interest that justifies infringement on free exercise rights. Several state and federal circuit courts have weighed this state interest against the interest of certain religious groups in the sacramental use of illegal drugs.[4] The United States Supreme Court recently faced this issue in *Employment Division, Department of Human Resources v. Smith*.[5]

The *Smith* Court, however, avoided having to balance the individual's right to religious freedom against the state's compelling interest, holding that the compelling state interest test[6] should no longer be used to determine whether a law of general applicability[7] violates the United States Constitution. The Supreme Court held that religious conduct in violation of a criminal regulation

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1. U.S. CONST. amend. I.

2. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

3. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963); *infra* notes 78-89 and accompanying text.

4. *See* People v. Woody, 61 Cal. 2d 716, 723, 394 P.2d 813, 821-22, 40 Cal. Rptr. 69, 77-78 (1964) (right to sacramental use of peyote by Native Americans outweighs state interest in protecting Native American community from the deleterious effects of drugs and in drug enforcement); Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1459 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct 1926 (1990) (state interest outweighs right to continual use of marijuana by members of the Ethiopian Zion Coptic Church); Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415, 418 (9th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973) (use of peyote by members of the Church of the Awakening outweighs state interest in protecting the health of Native Americans).

5. 110 S. Ct. 1595 (1990).

6. The Supreme Court early applied the compelling state interest test, in form if not in name, in Reynolds v. United States, 98 U.S. 145 (1878). In *Reynolds*, members of the Mormon Church were indicted for bigamy under a Utah statute (Utah was a territory at that time). The Mormon Church, however, required its male members to practice polygamy. The Court held that the state's interest in protecting the institution of marriage was greater than the religious infringement on Mormons who practiced polygamy.

7. A law of general applicability is a law that is directed towards all citizens of a state, as opposed to a law specifically directed at a narrower group of citizens. For example, the statute in *Smith* that prohibited the use of peyote by the general citizenry is a law of general application. In contrast, a law that bans certain activity (*i.e.*, participating in the sacramental use of bread and wine) only when engaged in for religious reasons or because of the religious beliefs it displays is directed at a narrow group of citizens, and is thus unconstitutional. *See Smith*, 110 S. Ct. at 1599.

of general applicability is not protected by the first amendment. In doing so, the Court abandoned a mechanism that effectively protected religious freedom from unjustified interference by the government. Further, the Court replaced this mechanism with an inadequate test that leaves religious conduct vulnerable to state law-making bodies.

This Note examines the precedent that has developed and that successfully applied the compelling state interest test. It then analyzes the *Smith* decision and the majority's reasons for rejecting the test. The Note asserts that the Court in *Smith* had no sound basis for rejecting the compelling state interest test. The Note concludes by reviewing potential ramifications the decision may have on religious freedom.

Respondents in *Smith*, members of the Native American Church, worked as counselors for ADAPT, a chemical dependency service. As a condition of employment, ADAPT prohibited the use of drugs and alcohol by its employees and reserved the right to terminate any employee who violated the ban. At a Native American religious ceremony, respondents ingested a small amount of peyote, a hallucinogenic drug.[8] ADAPT discharged respondents because of this episode.[9] The Oregon Department of Human Resources denied respondents' applications for unemployment compensation because their discharges were based on work-related "misconduct."[10] At a state hearing that Smith requested, the referee found that the state's interest in upholding the integrity of the unemployment compensation fund was not compelling enough to justify interference with respondents' right to the free exercise of religion and that respondents were entitled to unemployment benefits.[11] The Oregon Employment Appeals Board

8. For a description of the Native American religious ceremony and the use of peyote, see *infra* notes 149-56 and accompanying text.

9. ADAPT set forth its policy concerning drugs and alcohol use in a memorandum issued December 5, 1983. The memorandum provided: "Use of an illegal drug or use of prescription drugs in a non-prescribed manner is grounds for immediate termination from employment." Smith v. Employment Div., Dep't of Human Resources, 301 Or. 209, 211-12, 721 P.2d 445, 446 (1986), *vacated*, 485 U.S. 660, *on remand*, 307 Or. 68, 763 P.2d 146 (1988), *rev'd*, 110 S. Ct. 1595 (1990).

The ADAPT policy, however, was not at issue before the United States Supreme Court. The Oregon Supreme Court stated that "an employer may impose conditions on employment that conflict with the employee's particular religious practices or beliefs." *Id.* at 215-16, 721 P.2d at 448.

10. Oregon Revised Statutes § 657.176(2)(a) provides: "An individual shall be disqualified from the receipt of benefits . . . if the authorized representative . . . finds that the individual: (a) Has been discharged with misconduct connected with work." OR. REV. STAT. § 657.176(2)(a) (1989).

Oregon Administrative Rule 471-30-038(3) defines misconduct as "a wilful violation of the standards of behavior which an employer has the right to expect of an employee." OR. ADMIN. R. 471-30-038(3) (1987).

11. *Smith*, 301 Or. at 212, 721 P.2d at 446. "[T]here is no evidence in the hearing record to indicate that granting benefits to claimants whose unemployment is caused by adherence to religious beliefs would have any significant impact on the trust fund." *Id.*

The United States Supreme Court issued one opinion covering two cases that were decided separately in the Oregon courts. One respondent was Alfred Smith, a Native American. The other was Galen Black, who, although not Native American, was a member of the Native American Church. The lower court opinions and the referee's decisions referred to in this Note are mainly decisions involving Alfred Smith, but the reasoning on the first amendment issue in both cases is almost identical. In his recommendation concerning Galen Black, the referee found that Black's ingestion of peyote was an "isolated instance of poor judgment" and not misconduct sufficient to deny him unemployment compensation. Black v. Employment Div., Dep't of Human Resources, 301 Or. 221, 223, 721 P.2d 451, 452 (1986).

reversed, finding that the state had a compelling interest "in the proscription of illegal drugs" in addition to avoiding the burden on the state Unemployment Compensation Fund.[12] The Oregon Court of Appeals reversed the Board decision.[13] The Oregon Supreme Court affirmed the court of appeals.[14] The court held that although the denial of unemployment compensation to respondents did not violate the Oregon Constitution,[15] it did violate the federal constitution as a constraint on the free exercise of religion.[16]

In ruling for respondents, the Oregon Supreme Court applied "a balancing test that protects religiously motivated actions as well as religious beliefs."[17] The court found that the state's interest—the financial stability of the unemployment compensation fund—was not compelling enough to justify the "significant burden on Smith's religious freedom" that resulted from the denial of unemployment benefits.[18] The court rejected the court of appeals' assertion that the state's interest was the proscription of drug use.

> [T]he legality of ingesting peyote does not affect our analysis of the state's interest. . . . The Employment Division concedes that "the commission of an illegal act is not, in and of itself, grounds for disqualification from unemployment benefits. [Oregon Revised Statutes section] 657.176(3) permits disqualification only if a claimant commits a felony in connection with work. . . . [T]he legality of [claimant's] ingestion of peyote has little direct bearing on this case.[19]

The United States Supreme Court, on certiorari,[20] held that the Oregon law prohibiting use of illegal drugs[21] was relevant. The Court reasoned that if the state law, which effectively prohibited religious conduct, was constitutional, then the State legally could deny unemployment compensation to those discharged for engaging in that conduct.[22] The Court remanded the case to the Oregon Supreme Court to determine the legality of peyote use in Oregon.[23] On remand,

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12. *Smith*, 301 Or. at 212, 721 P.2d at 446. In *Black*, the Board disagreed with the referee's opinion and saw Black's use of peyote as misconduct. *See Black*, 301 Or. at 223, 721 P.2d at 452; *supra* note 11.

13. 75 Or. App. 764, 709 P.2d 246 (1985), *rev'd*, 300 Or. 562, 715 P.2d 93, *modified*, 301 Or. 209, 721 P.2d 445 (1986), *vacated*, 485 U.S. 660, *on remand*, 307 Or. 68, 763 P.2d 146 (1988), *rev'd*, 110 S. Ct. 1595 (1990).

14. *Smith*, 301 Or. at 216, 721 P.2d at 448-49.

15. *Id.* The court found that the unemployment statute, Oregon Revised Statute § 657.176(2)(a) (1989), was neutral and therefore not violative of the Oregon Constitution. "The law [OR. REV. STAT. § 657.176(2)(a)] and the rule defining misconduct [OR. ADMIN. R. § 471-30-838(3)] in no way discriminate against claimant's religious practices or beliefs. If claimant's freedom of worship has been interfered with, that interference was committed by his employer, not by the unemployment statutes." *Smith*, 301 Or. at 216, 721 P.2d at 448.

16. *Smith*, 301 Or. at 217, 721 P.2d at 449.

17. *Id.* at 217, 721 P.2d at 449.

18. *Id.* at 218, 721 P.2d at 450.

19. *Id.*

20. Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660, *on remand*, 307 Or. 68, 763 P.2d 146 (1988), *rev'd*, 110 S. Ct. 1595, *on remand*, 310 Or. 376, 799 P.2d 148 (1990).

21. OR. REV. STAT. § 475.922(4)(a) (1987).

22. *Smith*, 485 U.S. at 670.

23. *Id.* at 673-74. The determination of the legality of peyote use in Oregon was significant to the Court in light of earlier cases in which the Court had held that the denial of unemployment benefits to persons who were discharged for reasons related to their religious conduct violated the

the Oregon Supreme Court found that use and possession of peyote was illegal under Oregon law, which made no exception for religious use by Native Americans. The Oregon court, however, reaffirmed its prior decision that the "First Amendment prevents enforcement of prohibitions against possession or use of peyote for religious purposes in the Native American Church . . . ."[24] The United States Supreme Court, again granting certiorari,[25] reversed the Oregon Supreme Court, holding that the denial of unemployment compensation did not violate respondents' first amendment rights to the free exercise of religion.[26]

Justice Scalia, writing for the Court, discarded the traditional "compelling state interest test." He instead asserted that the free exercise clause provides no protection to members of a religious group who violate a law of general applicability—one not specifically aimed at certain religious practices—that is constitutionally valid when applied to those who violate the law for nonreligious purposes.[27] Justice Scalia's new standard does not require the state to prove a compelling interest to justify the infringement on an individual's first amendment right. The issue before the Court was whether the Oregon statute prohibiting peyote use, even for religious reasons, was constitutional under the free exercise clause. Justice Scalia reasoned that if a state has the power to criminalize religious conduct, then that state also has the power to deny unemployment compensation for such conduct. Thus, if Oregon law prohibited the use of peyote, which it did, and the prohibition is consistent with the federal constitution, then there is no constitutional right to use peyote in Oregon, and the state is free to withhold unemployment compensation for such misconduct, despite any religious motivation for that conduct.[28] In his analysis of the right to free exercise of religion, Justice Scalia limited the absolute protection afforded by the clause to religious beliefs and declarations of those beliefs.[29] While recognizing that the exercise of religion often involves conduct, Justice Scalia rejected the proposition that religious conduct is absolutely protected by the free exercise clause.[30] Instead, he asserted that the Supreme Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."[31] Justice Scalia differentiated

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first amendment. *See* Sherbert v. Verner, 374 U.S. 398 (1963), discussed *infra* at notes 78-89; Thomas v. Review Bd., Indiana Employment Sec. Div., 450 U.S. 707 (1981), discussed *infra* at note 102 and accompanying text; Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987), discussed *infra* at note 103 and accompanying text. In these cases, the employees' conduct was perfectly legal. Thus, the *Smith* Court reasoned that the legality of the conduct engaged in is determinative of whether that conduct merits constitutional protection. *Smith*, 485 U.S. at 674.

24. Smith v. Employment Div., Dep't of Human Resources, 307 Or. 68, 76, 763 P.2d 146, 150 (1988), *rev'd*, 110 S. Ct. 1595 (1990).

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

26. Justice Scalia wrote the opinion for the Court. Justice O'Connor wrote a concurring opinion, with Justices Marshall, Brennan, and Blackmun joining in Parts I and II. Justice Blackmun dissented, joined by Justices Brennan and Marshall. *Smith*, 110 S. Ct. at 1595.

27. *Id.* at 1599.

28. *Id.* at 1598-99.

29. *Id.* at 1599 ("[F]ree exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.").

30. *Id.*

31. *Id.* at 1600 (citing United States v. Lee, 455 U.S. 252 (1982) (Social Security laws); Gillette

laws that ban only conduct engaged in for religious purposes and laws that prohibit conduct generally and only incidentally infringe on free exercise.[32] The former violate the constitution; the latter do not. Justice Scalia added that the only cases in which the Court has held that the first amendment forbids the application of a neutral law of general applicability to religious conduct involved "hybrid" situations, cases involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press."[33] Because the Oregon law prohibiting peyote use was a law of general application and because the case did not entail a constitutional issue in addition to freedom of religion, the first amendment did not bar Oregon from prohibiting the religiously motivated use of peyote by respondents.[34]

Justice O'Connor concurred in the Court's judgment, with Justices Brennan, Marshall, and Blackmun joining her in part.[35] Justice O'Connor agreed with the majority's result, but challenged the majority's rejection of the compelling state interest test.[36] She asserted that the majority could have reached the same conclusion by applying the compelling state interest test. In Justice O'Connor's view, Oregon's interest in enforcing its drug laws and preventing physical harm to its citizens is compelling enough to justify infringement on respondents' first amendment rights.[37]

Justice Blackmun dissented, joined by Justices Brennan and Marshall. Justice Blackmun, like Justice O'Connor, would have retained the compelling state interest test. He asserted that a statute infringing on religious conduct is valid only if the state can demonstrate a compelling interest and also can prove that providing an exemption for the religious conduct seriously would hinder the state's interest.[38] Justice Blackmun's application of the test, however, yields a result contrary to that of Justice O'Connor. Justice Blackmun found that the Native American Church's religious use of peyote was sufficiently controlled to allow accommodation of the practice without seriously harming the state's interest.[39] Unlike the majority, Justice Blackmun did not characterize broad application of the free exercise right as a "luxury,"[40] but rather called it an "essential

v. United States, 401 U.S. 437 (1971) (selective service laws); Braunfeld v. Brown, 366 U.S. 599 (1961) (Sunday closing laws); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor laws); Minersville School Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586 (1940) (flag salute); Reynolds v. United States, 98 U.S. 145 (1879) (polygamy laws)). All these cases support the proposition that religious conduct is not free.

32. *Smith*, 110 S. Ct. at 1600. If interference with a first amendment right "is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.*

33. *Id.* at 1601.

34. *Id.*

35. Justices Brennan, Marshall, and Blackmun did not concur in the judgment.

36. *Id.* at 1606 (O'Connor, J., concurring) ("In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty.").

37. *Id.* at 1613-14 (O'Connor, J., concurring).

38. *Id.* at 1615 (Blackmun, J., dissenting).

39. *Id.* at 1618-21 (Blackmun, J., dissenting).

40. The Court stated:

element of liberty."[41]

The central issue in the *Smith* decision is the validity of the compelling state interest test as applied to free exercise claims. The test, as it has developed through precedent, is divisible into three parts: 1) whether the law infringes on an individual's first amendment rights; 2) whether the state can demonstrate a compelling interest to justify the infringement; and 3) whether the religious conduct that violates the state's law can be accommodated without seriously harming the state's interest. At the first stage, courts may emphasize the Constitution's preferred treatment of the first amendment right to free exercise of religion and the framers' intent that the Free Exercise Clause protect minority religions from persecution.[42] The second part of the test recognizes that this protection is qualified.[43] The state can prohibit religious conduct that poses a "substantial threat to public safety, peace or order."[44] If the religious conduct is not of this type, however, and the court determines that the state's regulation has infringed on the individual's free exercise right, the state must have a compelling interest to justify the infringement.[45] The burden of proving a compelling state interest is on the state.[46] To demonstrate a "compelling" interest, the state must meet a very exacting standard: " '[only] the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' "[47] If the state meets its burden, the court may move to the third stage of the compelling

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> [P]recisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, . . . every regulation of conduct that does not protect an interest of the highest order.

Id. at 1605 (citations omitted).

41. *Id.* at 1616 (Blackmun, J., dissenting).

> The distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a "luxury" that a well-ordered society cannot afford, and the repression of minority religions is an "unavoidable consequence of democratic society." I do not believe the Founders thought their dearly bought freedom from religious persecution a "luxury" . . . and they could not have thought religious intolerance "unavoidable," for they drafted the Religion Clauses precisely in order to avoid that intolerance.

Id. (Blackmun, J., dissenting).

42. *See id.* at 1612 (O'Connor, J., concurring) ("As the language of the Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity."); Reynolds v. United States, 98 U.S. 145, 162-64 (1878) (historical background on the first amendment and the framers' intent).

43. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940); *see infra* notes 53-67 and accompanying text.

44. Sherbert v. Verner, 374 U.S. 398, 403 (1963).

45. *Id.*

46. *See* Wisconsin v. Yoder, 406 U.S. 205, 235-36 (1972). This would seem to lend support to Justice O'Connor's argument that sincere religious conduct should be "presumptively protected by the Free Exercise Clause." *Smith*, 110 S. Ct. at 1608 (O'Connor, J., concurring). It is arguable that because the burden of proof is on the state, the state is actually "rebutting the presumption" that religiously motivated conduct is protected by the Free Exercise Clause.

47. Sherbert, 374 U.S. at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)); *see also* Braunfeld v. Brown, 366 U.S. 599, 612 (1961) (Brennan, J., concurring and dissenting) (" 'Freedoms of speech and of press, of assembly, and of worship may not be infringed on . . . slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.' " (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943))).

state interest test and ask whether the state can accommodate the conduct of the religious group without unduly interfering with the achievement of the state's goal.[48] To answer this question, the court must narrow the scope of the state's interest properly.

The compelling state interest test grew out of the Court's recognition that, while the right to free exercise of religion is essential and is worthy of protection from infringement, the state has the power to regulate the conduct of its citizens. In *Reynolds v. United States*,[49] the Court weighed the right of Mormons to practice polygamy against the state's interest in protecting the sanctity of marriage.[50] The Court upheld the prohibition of polygamy because of the practice's grave implications on state interests.[51] *Reynolds* involved a statute of general applicability that prohibited conduct mandated by the Mormon faith. The Court, however, found the prohibition was justified, not because it was a generally applicable law, but because polygamy seriously would injure the state's interest in family and marriage.[52]

In *Cantwell v. Connecticut*,[53] the Court applied the compelling state interest test to hold unconstitutional another statute that infringed on first amendment rights. In *Cantwell*, petitioner, a Jehovah's witness, was convicted of breaching the peace, a common-law offense, and violating a Connecticut statute prohibiting solicitation without certification from the secretary of the state public welfare council.[54] The Supreme Court reversed petitioner's conviction, holding that the conviction for a common-law offense violated petitioner's constitutional rights to free exercise of religion and freedom of speech.[55] The Court also held that the Connecticut statute violated petitioner's religious and free speech rights because the right to solicit aid for religious causes depended on the secretary's prior determination that the cause was a valid religious one. The Court found that such prior restraint on the right to exercise freely one's religion places "a

48. *See Smith*, 110 S. Ct. at 1614 (O'Connor, J., concurring) ("[T]he critical question in this case is whether exempting respondents from the State's general criminal prohibition 'will unduly interfere with fulfillment of the governmental interest.' " (quoting United States v. Lee, 455 U.S. 252, 259 (1982))); Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest); *Yoder*, 406 U.S. at 222 (education of children at home does not interfere with state's goal of intelligent, responsible citizenry).

49. 98 U.S. 145 (1878).

50. *Id.* at 165-66. "Marriage . . . is . . . a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal." *Id.* at 165.

51. *Id.* at 166-68.

52. The Court's analysis took the form commonly seen in later cases. First the Court examined whether the state law infringed on Reynolds' right to exercise his religion freely. *Id.* at 162. After finding that the statute did infringe on his free exercise right, the Court determined whether the state had a compelling interest that could justify the infringement. *Id.* at 165-66. Finally, the Court determined that an exception from the statute for the religious conduct of the individuals would interfere with satisfying of the state's interest. *Id.* at 166.

53. 310 U.S. 296 (1940).

54. *Id.* at 301-02. Petitioner distributed religious pamphlets and played records in public that contained remarks offensive to certain religions. Two men who stopped to listen to the record were "incensed" by it and "were tempted to strike [petitioner] unless he went away." *Id.* at 303.

55. *Id.* at 307-11.

forbidden burden upon the exercise of liberty protected by the Constitution."[56] In an often-quoted passage, the Court described a state's power to regulate religious conduct under the first amendment: "[T]he Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but . . . the second cannot be. Conduct remains subject to regulation for the protection of society."[57] The Court stated that "[i]n every case the power to regulate must be exercised as not . . . unduly to infringe the protected freedom."[58]

Although the Connecticut statute was "general and nondiscriminatory legislation,"[59] the Court found that the state's interest in "public safety, peace, comfort or convenience" and in "protect[ing] its citizens from fraudulent solicitation"[60] did not justify preconditioning first amendment rights on an official examination of the validity of a religious cause.[61]

The Court's decision in *Cantwell* is important for several reasons. It established that the first amendment applies to the states through the fourteenth amendment.[62] It also held that while the government can regulate religious conduct "for the protection of society," it cannot "unduly . . . infringe" upon protected freedoms.[63] The Court recognized that, although individuals might abuse their first amendment rights, "the people of this nation have ordained . . . that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of citizens of a democracy."[64] The Court further acknowledged that freedom of religion is especially necessary "in our own country for a people composed of many races and many creeds."[65] Most importantly, the Court's decision gave some definition to the permissible limits of religious conduct; the state may "appropriately . . . punish . . . coercive activity of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to exercise of their liberties."[66] Finally, the Court applied a test that balanced the state's interest in protecting its citizens against the individual's right to free exercise of religious conduct, even though a neutral

56. *Id.* at 303-07.

57. *Id.* at 303-04.

58. *Id.* at 304.

59. *Id.*

60. *Id.* at 306-07.

61. *Id.* at 307. Regarding the breach of peace charge, the Court found that petitioner's conduct did not amount to a breach of peace. *Id.* at 309-10. The Court also mentioned that there was no narrow and defined statute regulating the offense. If there had been, it "would weigh heavily in any challenge of the law as infringing constitutional limitations." *Id.* at 308. The state has power "to prevent or punish" in the face of "clear and present danger of . . . immediate threat to public safety, peace or order." *Id.*

62. *Id.* at 304.

63. *Id.* at 304.

64. *Id.* at 310. Thus, the idea that free exercise of religion is necessary to the vitality of a democracy is contrary to Justice Scalia's statement that infringement of free exercise is an "unavoidable consequence of democratic government." *Smith*, 110 S. Ct. at 1606.

65. *Cantwell*, 310 U.S. at 310. This also tends to discredit Justice Scalia's assertion that the diversity of religious beliefs warrants greater restriction on the free exercise of religion.

66. *Id.*

statute of general applicability regulated the conduct involved.[67]

As the compelling state interest test developed, the Court also considered whether the state could accommodate specific religious conduct without harming its interest. In *United States v. Lee*,[68] the Supreme Court applied the compelling state interest test to a challenge by an Amish employer against a Social Security law requiring employers to pay Social Security taxes for their employees. The employer asserted that the law requiring him to pay Social Security taxes violated his first amendment rights because the Amish faith holds that it is sinful not to take care of one's own elderly. After finding that the Social Security law interfered with the free exercise of the Amish religion, the Court next determined that the state had a compelling interest in the welfare of the elderly that justified the infringement.[69] Finally, the Court considered whether creating an exemption for the Amish belief would so interfere with the attainment of the state's interest as to "radically restrict" the power of the legislature to enact laws furthering the state's purpose.[70] The Court found that it would be too difficult to accommodate the Social Security system to every individual who claimed the law infringed upon his religious beliefs.[71] Thus, the Court held that the public interest in maintaining a sound tax system outweighed the infringement on the employer's exercise of religion, considering that the employer chose to enter commerce initially.[72]

The Court reached the "high-water mark" in its free exercise jurisprudence in the 1972 case of *Wisconsin v. Yoder*.[73] *Yoder* involved a neutral compulsory school attendance law of general applicability, yet the Court held that the constitutional rights of the Amish prevailed over the state's interest. The Court reasoned that the Amish religion and way of life were accommodated easily without interfering with the State's interest in compulsory school attendance.[74] The Amish believed that sending their children to high school would expose them to secular and worldly ideas rejected by the Amish faith.[75] They offered

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67. *Id.* at 307.

68. 455 U.S. 252 (1982).

69. *Id.* at 258-59.

70. *Id.* at 259 (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

71. *Id.* at 260.

72. *Id.*

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

74. *Id.* at 235-36. The Court also strongly emphasized that the Amish religion is an established one, having existed in this country for almost 200 years. *Id.* at 227, 229, 235. It is not "a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." *Id.* at 235. The Court also noted that the compulsory school attendance law is relatively recent (less than 60 years old) compared to the existence of the Amish religion. *Id.* at 226.

75. Id. at 218.

> The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenants and practice of the Amish faith, both as to the parent and the child.

Id.

The Amish object to high school because "the values [high schools] teach are in marked vari-

proof that their children received an adequate education at home while the children worked and were intelligent, productive members of society. The Court identified a valid state interest in protecting children from ignorance and child labor, and in ensuring that they become productive members of society.[76] It held, however, that exempting the Amish from the statute would not harm the state's interest and, similarly, that forcing the Amish to comply with the law would not advance the state's interest.[77]

The Court first applied the compelling state interest test to an unemployment compensation case in 1973 in *Sherbert v. Verner*.[78] *Sherbert* is one of three cases in which the Supreme Court held that the state's interest in the integrity of its unemployment compensation fund does not justify an infringement of an individual's first amendment rights.[79] *Sherbert* involved a mill worker who was discharged because she refused to work on Saturday. Her religious group, the Seventh Day Adventists, did not permit work on Saturday, the group's Sabbath. The Employment Security Division found that appellant, without good cause, did not accept "suitable work" offered to her by her employer, and thus it denied her unemployment compensation.[80] The Supreme Court reaffirmed that the government may regulate specifically conduct or actions that pose "some substantial threat to public safety, peace, or order."[81] Because appellant's conscien-

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ance with . . . the Amish way of life; they view secondary school education as an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs." *Id.* at 210-11. Specifically, the Amish way of life teaches "informal learning-through-doing; a life of 'goodness' rather than intellect; wisdom, rather than technical knowledge; community welfare, rather than competition," while a high school education emphasizes "intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students." *Id.* at 211.

76. *Id.*

77. *Id.* at 222. There are many other free exercise cases in which the Court applied a "compelling interest" or similar test. In Braunfeld v. Brown, 366 U.S. 599 (1961), the Court upheld Sunday closing laws that infringed on Jewish petitioners' ability to exercise their religion by imposing "serious economic disadvantages on them if they adhered to the observance of the Sabbath." *Id.* at 602. The Court found that the state's "preoccupation with improving the health, safety, morals and general well-being of [its] citizens" justified any infringement on petitioners' ability to freely exercise their religion. *Id.* at 603. In addition, the Court found that "to permit the exemption [of petitioners from the Sunday closing laws] might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity." *Id.* at 608.

In Prince v. Massachusetts, 321 U.S. 158 (1944), the Court held that the state's interest in protecting children from abuse and in giving them the opportunity to grow "into free and independent well-developed men and citizens" justified a law forbidding a guardian to permit sales of periodicals in public places by minors, even though the law infringed on the rights of Jehovah's Witnesses to exercise their religion freely. *Id.* at 165; *see also* Gillette v. United States, 401 U.S. 437 (1971) (substantial governmental interests relating to military conscription justify burden on conscientious objectors); Minersville School Dist. Bd. of Ed. v. Gobitis, 310 U.S. 586 (1940) (government's interest in unity and loyalty severed by compulsory flag salute law outweighs infringement on Jehovah's Witness prohibition against idol worship).

78. 374 U.S. 398 (1963).

79. The other two cases are Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981), and Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987). While these cases may seem particularly applicable to *Smith*, which also concerned a denial of unemployment benefits, the *Smith* Court explicitly stated that proper analysis should focus not on the Oregon Unemployment Compensation statute, but rather on the Oregon law prohibiting use and possession of peyote. *Smith*, 110 S. Ct. at 1598-99.

80. *Sherbert*, 374 U.S. at 400-01.

81. *Id.* at 402. "[T]he Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles . . . . The conduct

tious objection to Saturday work did not pose a substantial threat to public safety, peace or order, however, the State was obliged to show either that appellant's disqualification as a beneficiary did not infringe her rights to free exercise, or that "any incidental burden on the free exercise of appellant's religion may be justified 'by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate.' "[82] Employing the compelling state interest test, the Court first found that the unemployment compensation statute placed a condition on the receipt of unemployment benefits, which discouraged appellant's free exercise of religion by "forc[ing] her to choose between following the precepts of her religion and forfeiting benefits . . . and abandoning one of the precepts of her religion in order to accept work."[83] After finding that the statute did infringe on appellant's constitutional rights, the Court moved to the second stage of its analysis—whether the state had a compelling interest in enforcing its statute that could justify the infringement.[84] In this second stage analysis, the Court asserted that " 'only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.' "[85] A showing of "merely . . . a rational relationship to some colorable state interest" is not sufficient to justify an infringement of religious conduct.[86] The Court dismissed a State argument that claimants could defraud the unemployment fund by feigning religious objections to Saturday work.[87] The Court noted that no evidence of fraud existed and that, in any case, the State would have to demonstrate that no alternative means existed to stop such abuses before infringing on religious conduct.[88] The Court concluded, after applying the test, that the state's interest did not outweigh the infringement on appellant's first amendment rights.[89]

Recently, the Court signalled a move away from the compelling state interest test in the free exercise context. In *Lyng v. Northwest Indian Cemetery Protection Association*,[90] the Court declined to apply the test, finding that the governmental action did not even infringe on the first amendment right. *Lyng* involved a free exercise challenge to a government project to construct a road through a national forest, near an area that several Native American tribes used

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or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Id.* at 403 (citing Cleveland v. United States, 329 U.S. 14 (1946); Prince v. Massachusetts, 321 U.S. 158 (1944); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Reynolds v. United States, 98 U.S. 145 (1878)); *see also* Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) ("No one would have the hardihood to suggest that . . . religious liberty connotes the privilege to exhort others to physical attack . . . . When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, appears, the power of the state to prevent or punish is obvious.")

82. *Sherbert*, 374 U.S. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

83. *Id.* at 404. The Court observed that "such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.*

84. *Id.* at 406.

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

86. *Id.*

87. *Id.* at 407.

88. *Id.* The Court referred to Braunfeld v. Brown, 366 U.S. 599 (1961), in which the Court held that the state's interest in providing a uniform day of rest for all workers could be achieved only by "declaring Sunday to be that day of rest." Sherbert, 374 U.S. at 408.

89. *Sherbert*, 374 U.S. at 406-09.

90. 485 U.S. 439 (1988).

for religious rituals.[91] The Native Americans claimed that a quiet, private, and "undisturbed natural setting" was crucial to the performance of these rituals.[92] Construction of the road therefore would interfere with the Native Americans' ability to practice their religion. Nonetheless, the Court held that the "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" do not violate the first amendment.[93] In this instance, the state did not need to show a compelling interest for its action.[94] "The crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' "[95]

Although the *Smith* Court refused to apply the compelling state interest test to respondents' free exercise claim, it did not dismiss the test for all purposes. Apparently the test still applies in cases in which unemployment compensation is denied because the claimant is unemployed as a result of religiously motivated conduct.[96] According to the Court, the issue in this case is not the validity of the unemployment compensation statute, but the validity of the Oregon drug use statute, which does not provide an exemption for respondents' religious use of peyote.[97] In the eyes of the Court, *Smith* falls outside the unemployment compensation context.[98] According to Justice Scalia, when the Court in the past applied the test outside of the unemployment context, it always found that the state demonstrated a compelling interest to justify the infringement.[99]

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91. *Id.* at 442-43.

92. *Id.* at 442.

93. *Id.* at 450.

94. *Id.* at 450-51.

95. *Id.* at 451 (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). Justice O'Connor found it material that affording the Native Americans the privacy they sought "could easily require *de facto* beneficial ownership of some rather spacious tracts of public property." *Id.* at 453. The rights of the Native Americans to exercise their religion could not divest the Government of its right to use its own land. *Id.* Justice O'Connor pointed out, however, that if the Government prohibited the Native Americans access to the area, that restriction would constitute a violation of the free exercise clause. *Id.*

See also Bowen v. Roy, 476 U.S. 693, 700 (1986) (Plaintiffs' claim that the assignment of a Social Security number to their daughter would rob her of her spirit dismissed because the law did not violate the free exercise clause. "The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."); Braunfeld v. Brown, 366 U.S. 599, 602 (1961) (Sunday closing laws causing "serious economic disadvantage" to Sabbatarians do not prohibit appellants' free exercise of religion). The Court in *Braunfeld*, however, did go on to weigh the state's interest in preserving a unified day of rest for its citizens. *Id.* at 607-09.

96. *Smith*, 110 S. Ct. at 1598.

97. *Id.* at 1598-99.

98. *Id.*

99. *Id.*

> Applying that test, we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. . . . We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. . . . In recent years we have abstained from applying the *Sherbert* test [outside the unemployment compensation field] at all.

Id. at 1602 (citing United States v. Lee, 455 U.S. 252 (1982); Megre v. Larsen, 402 U.S. 934 (1971); Gillette v. United States, 401 U.S. 437 (1971)).

He also noted that the Court has started refusing to apply the test outside of the unemployment compensation context.[100] According to Scalia, *Smith* differs from the Court's prior unemployment cases, *Sherbert v. Verner*,[101] *Thomas v. Review Board of Indiana Employment Security Division*,[102] and *Hobbie v. Unemployment Appeals Commission of Florida*.[103] Justice Scalia asserted that these previous unemployment cases allowed for an individualized assessment of the reasons for the misconduct, permitting a balancing against the state's interest,[104]

100. *Smith*, 110 S. Ct. at 1602-03; *see* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (analysis not applied to logging and construction activities of federal government near land used by Native Americans for religious rituals, even though the government's activity would render almost impossible the Native Americans' religious ceremonies); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (test not used in upholding prison's refusal to alter work schedules so that prisoner could attend worship services); Bowen v. Roy, 476 U.S. 693 (1986) (test not applied to law requiring every citizen to have a social security number, even though plaintiffs believed that it would violate their religious belief and hinder their daughter's spiritual growth); Goldman v. Weinberger, 475 U.S. 503 (1986) (*Sherbert* test not applied to challenge of military dress codes that did not allow the wearing of yarmulkes).

There are several rationales, however, for not applying the compelling state interest test in these cases. In her concurring opinion in *Smith*, in which she objects to the Court's abandonment of the test, Justice O'Connor refers to *Roy* and *Lyng* as cases dealing with the regulation of internal governmental affairs (as opposed to external affairs such as criminal laws). *Smith*, 110 S. Ct. at 1611-12 (O'Connor, J., concurring). Justice O'Connor asserted that the "Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Id.* at 1611 (O'Connor, J., concurring) (quoting *Sherbert* v. Verner, 374 U.S. 393, 412 (Douglas, J., concurring)). Therefore, while the government cannot prohibit or interfere with an individual's free exercise of religion, an individual cannot require the government to change the regulations of its own internal affairs to *advance* her religious beliefs. (*i.e.*, the government cannot act to prohibit an individual from attaining spiritual growth, but it does not have to act in such a way as to foster that spiritual growth).

Justice Scalia in *Smith* rejected this argument by asserting that what Justice Douglas must have meant in *Sherbert* is that "what 'the government cannot do to the individual' includes not just the prohibition of an individual's freedom of action through criminal laws, but also the running of its programs . . . in such fashion as to harm the individual's religious interests." *Id.* at 1603-04 n.2. Justice Scalia also found it difficult to understand "why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, or its administration of welfare programs." *Id.* (citations omitted).

One commentator criticized Justice Scalia's approach. Referring to *Goldman* and *O'Lone*, this commentator asserts that "[p]rison and the military . . . are not contexts pertinent to defining the constitutional rights of citizens in a free society." R. Neuhaus, *Church, State and Peyote: Supreme Court Ruling on Use of Peyote in Indian Religious Ceremonies*, NAT'L REV., June 11, 1990, at 40, 42; *see also Smith*, 110 S. Ct. at 1612 (O'Connor, J., concurring) (*Goldman* and *O'Lone* are "distinguishable because they arose in the narrow, specialized contexts in which we have not traditionally required the government to justify a burden on religious conduct by articulating a compelling interest.").

101. 374 U.S. 398 (1963); *see supra* notes 78-89. In *Sherbert*, the Court held that the state's interest in the integrity of its unemployment compensation fund did not justify the infringement on the first amendment rights of a Seventh Day Adventist who was fired because she refused to work on Saturday, in accordance with her religious beliefs. *Sherbert*, 374 U.S. at 406-09.

102. 450 U.S. 707 (1981). In *Thomas*, the Court held that the denial of unemployment benefits to petitioner violated his first amendment right to free exercise of religion. Petitioner, a Jehovah's Witness, was fired because he refused to work in a department that produced weapons, which he claimed were against his religion. *Id.* at 719.

103. 480 U.S. 136 (1987). In *Hobbie*, the Court held that the state's refusal to grant appellant, a Seventh Day Adventist, unemployment benefits violated the free exercise clause of the first amendment. *Id.* at 139-46. Appellant was discharged because she refused to work on Friday evenings and Saturdays, her religion's Sabbath. *Id.* at 138.

104. *Smith*, 110 S. Ct. at 1603. The unemployment compensation laws, because they base the allowance of compensation on the reason for the individual's dismissal, permit a case-by-case assessment of the conduct, thus facilitating the balancing of the conduct against the state's interest. "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that

and had "nothing to do with an across-the-board criminal prohibition on a particular form of conduct" as in *Smith*.[105] Although the Court in the past applied the test to challenges of laws other than unemployment compensation laws,[106] Justice Scalia concluded that "the sounder approach . . . is to hold the test inapplicable to such challenges."[107]

Justice Scalia asserted that to apply the compelling state interest test to all laws would invite anarchy.[108] He reasoned that if the "test is to be applied at all, then it must be applied across the board, to all actions thought to be religiously commanded."[109] Many laws could not meet the test and would be invalidated.[110] Justice Scalia concluded by stating that legislatures are free to exempt certain religious conduct from their criminal laws, but the federal constitution does not require them to do so.[111] While recognizing that abandoning the compelling state interest test will have an adverse effect on minority religions, he asserted that such is the price of democracy.[112]

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system to cases of 'religious hardship' without compelling reason." *Id.* (paraphrasing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

105. *Id.* The respondents' situation in *Smith* differed from that of the claimants in the cited cases. The conduct that caused respondents' dismissal from employment in *Smith* also violated a state criminal law. In the other unemployment compensation cases, the claimants dismissal resulted from either a personal decision or a refusal to comply with the requirements of the employer. *See e.g.*, Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987) (discussed *supra* note 103); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981) (discussed *supra* note 102); Sherbert v. Verner, 374 U.S. 398 (1963) (discussed *supra* notes 78-89 and accompanying text).

106. *See supra* notes 49-77 and accompanying text.

107. *Smith*, 110 S. Ct. at 1603. "The 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, 451 (1988)). The government's prohibition of the use of peyote by Native Americans in their religious ceremonies, however, does not have just some effect "on a religious objector's spiritual development" as it did in *Lyng*, but instead renders the legal use of peyote impossible in Oregon.

The Court also rejected the possibility of applying the test only to those situations in which a law infringes on conduct central to the individual's religious beliefs. The role of the judiciary, the Court asserted, does not include testing the sincerity or the importance of certain religious conduct. *Id.* at 1604. "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Id.* (quoting Hernandez v. Commissioner, 490 U.S. 680, 699 (1989)); *see also* United States v. Ballard, 322 U.S. 78, 86 (1944) (holding that the veracity of a person's religious beliefs should not be submitted to the jury).

108. *Smith*, 110 S. Ct. at 1605.

109. *Id.* This statement indicates that the test will not apply even to cases of denial of unemployment compensation because to apply it in that context would necessitate applying it "across-the-board."

110. *Id.* Justice Scalia added that the "danger [of anarchy] increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them." *Id.* Presumably, the danger would be the greatest in the United States because of the great diversity of religious beliefs.

111. *Id.* at 1606.

112. *Id.* Justice Scalia stated:

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

Id.

In *Smith*, Justice Scalia provided little, if any, justification for rejecting precedent and the application of the compelling state interest test. He construed the first amendment so that neutral laws of general applicability do not fall under its protection.[113] He implied, however, that the right to free exercise of religion, infringed on by laws directed at certain religious practices[114] and by unemployment compensation laws, is still protected under the first amendment through the application of the compelling state interest test. There is nothing in the wording of the first amendment to suggest such a distinction. The Constitution states that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[115] To follow the mandates of the Constitution, the Supreme Court has held that a state must prove a compelling interest in the purpose of its law, of general applicability or otherwise, to justify state infringement on an individual's first amendment rights. The justification for applying the test is to protect from arbitrary state legislation religious freedom that is not harmful to the state's interest. The first amendment was enacted "precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."[116]

Justice Scalia relies heavily on his interpretation of precedent, stating that the Court has never held a law of general applicability unconstitutional in a case involving *only* a free exercise claim.[117] Thus, *Cantwell v. Connecticut*,[118] because it involved freedom of speech (the right to disseminate religious views in public), and *Wisconsin v. Yoder*,[119] because it involved parental rights (the rights of Amish parents to educate their children at home), cannot apply to a case like *Smith*, which contains only a free exercise claim. These "hybrid" cases supposedly are more deserving of the application of the compelling state interest test because they involve more than one first amendment right. In her concurrence in *Smith*, however, Justice O'Connor points out that *Cantwell* and *Yoder* "expressly relied on the Free Exercise Clause."[120] In addition, these two cases applied the compelling state interest test: "[I]n each of the other cases cited by the Court to support its categorical rule, we rejected the particular constitutional claims before us only after carefully weighing the competing interests."[121] More

113. *Id.* at 1601-03.

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

115. U.S. CONST. amend. I.

116. *Smith*, 110 S. Ct. at 1613 (O'Connor, J., concurring).

117. The majority opinion states:

> [T]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.

Id. at 1601 (citations omitted). Justice Scalia went on to assert, "[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.* at 1602.

118. 310 U.S. 296 (1940). For a discussion of *Cantwell*, see *supra* notes 53-67 and accompanying text.

119. 406 U.S. 205 (1972). For a discussion of *Yoder*, see *supra* notes 73-77 and accompanying text.

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

121. *Id.* (O'Connor, J., concurring) (citing Gillette v. United States, 401 U.S. 437, 461 (1971);

importantly, Justice Scalia's analysis does not lead to the conclusion that the compelling state interest test should not be applied to nonhybrid cases. The rationale for applying the test to "hybrid" cases—ensuring the protection of first amendment rights against infringement by a lesser state interest—applies equally well to cases like *Smith*, which involved only one constitutional claim. That a case asserts a violation of only one first amendment right does not mean that the constitutional right deserves any less protection and consideration by the Court. The Court developed the compelling interest test to apply to any state regulation that had the effect of infringing on first amendment freedoms. The first amendment does not provide that when more than one constitutional right is present in a case, each right merits more protection. Nor does the Constitution imply that one constitutional right is so much more important than another that it can "boost" the right to free exercise of religion to a status requiring protections it would not have if presented alone. The assertion that the only cases that have reached the Court worthy of protection by the free exercise clause have involved other constitutional rights does not lead to the conclusion that a claim involving only an infringement on free exercise is not entitled to the same protection.

The rationale that abandoning the compelling state interest test is necessary to protect the state's interest is also incorrect. The Court has applied the compelling state interest test to "nonhybrid" cases and concluded that the state's interest justified the infringement on the constitutional right.[122] This fact lends support to the test's workability and usefulness.[123] The test has worked effectively to uphold state regulations at each of its stages. At the first stage, the court may find that the regulation or law does not infringe on the free exercise of religion at all. This was the case in *Lyng v. Northwest Indian Cemetery Protective Association*.[124] Interestingly, Justice O'Connor, who wrote the *Lyng* opinion, objects to the Court's refusal to apply the test in *Smith*.[125] At the second

Braunfeld v. Brown, 366 U.S. 599, 608-09 (1961); Prince v. Massachusetts, 321 U.S. 158, 168-70 (1944)). She further asserted that *Cantwell* and *Yoder* are regarded "as part of the mainstream of our free exercise jurisprudence." *Id.* (O'Connor, J. concurring).

122. *See supra* note 77.

123. *Smith*, 110 S. Ct. at 1612-13 (O'Connor, J., concurring). In the majority opinion, Justice Scalia listed cases in which the Court has applied the compelling state interest test, *id.* at 1605-06; Justice O'Connor refers to these cases as a "parade of horribles." *Id.* at 1612-13 (O'Connor, J., concurring). Justice Scalia seems to be trying to show that in applying the *Sherbert* test the Court has never invalidated "an across-the-board criminal prohibition on a particular form of conduct," and that the test is somehow ineffective against this type of law and thus should not be applied to analyze challenges against this type of law. *Id.* at 1603. This implication lacks merit. If the purpose of the test is to balance the state's right to regulate conduct in violation of its laws against the right of an individual to exercise his religion freely by requiring that the state's interest in regulating certain conduct is great or compelling, the cases the Court refers to show that the test was effective in upholding essential state laws. *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982) (Social Security laws); Gillette v. United States, 401 U.S. 437 (1971) (draft laws); Reynolds v. United States, 98 U.S. 145 (1879) (polygamy statute). Other cases such as Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment compensation statute), and Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory school attendance law), demonstrate that the test also is effective in protecting free exercise rights in cases in which either the state interest is not paramount or the religious conduct can be accommodated without interfering with the state's interest.

124. 485 U.S. 439 (1988); *see supra* notes 90-95 and accompanying text.

125. *Smith*, 110 S. Ct. at 1607, 1611-12 (O'Connor, J., concurring).

stage of the test, courts can uphold a governmental regulation by showing that the state has a compelling interest that justifies the infringement. This has been the most common theory for the Court's validation of a state's statute.[126] At the third stage, a court can uphold a state's law after a finding that it does infringe on an individual's right to free exercise of religion if accommodation of the religious conduct seriously would interfere with or unduly restrict the state's ability to fulfill its interest. Thus, in *United States v. Lee*,[127] the Court found that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."[128]

The majority's abandonment in *Smith* of the compelling state interest test lacks justification, especially in light of the Court's previous recognition of the need to balance the individual's right to religious freedom against the state's interest, and considering the successful application of the compelling state interest test to resolve this conflict.[129] The Court cannot argue that abandoning the test was necessary to protect the state's interest in this case. Justice O'Connor applied the test to the facts in *Smith* and came up with the same result as that of the majority.[130]

There are several factors that could have led the *Smith* Court to abandon the compelling state interest test. Four possible factors, discussed below, include the Court's desire to enhance judicial economy, the slippery slope argument, concerns that the compelling state interest test no longer worked, and the Court's desire to aid the war on drugs.

First, the Court may have been concerned with judicial economy. A bright line rule, like that of *Smith*, presumably is easier for courts to apply, and thus would reduce the number of appeals on that issue. Under the new *Smith* standard, if the lower court determines that the law is neutral and of general applicability, any resulting infringement on free exercise of religion is constitutional.[131]

126. *See* United States v. Lee, 455 U.S. 252, 258 (1982) (state's interest in welfare of the elderly); Gillette v. United States, 401 U.S. 437, 461 (1971) (government interest in military conscription justifies infringement); Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (interest in safeguarding children from abuse justifies law that affects ability of Jehovah's Witness children to hand out religious material); Minersville School Dist. v. Gobitis, 310 U.S. 586, 595 (1940) (state interest in national unity and loyalty as served by compulsory flag salute outweighs infringement on free exercise of Jehovah's witness); Reynolds v. United States, 98 U.S. 145, 165 (1878) (state's interest in upholding the integrity of marriage justifies infringement on Mormon practice of polygamy).

127. 455 U.S. 252 (1982).

128. *Id.* at 260.

129. *See supra* note 77.

130. Justice O'Connor found that the Oregon law prohibiting peyote use infringed on the rights of respondents because, as members of the Native American Church, they "must choose between carrying out the ritual embodying their religious beliefs and avoidance of criminal prosecution . . . ." She also found, however, that Oregon's interests in "enforcing laws that control the possession and use of controlled substances by its citizens" and "preventing the physical harm caused by the use of a schedule I controlled substance" were compelling enough to justify the infringement on respondents' first amendment rights. *Smith*, 110 S. Ct. at 1613-14 (O'Connor, J., concurring). Justice O'Connor concluded that exempting the Native American Church from the law prohibiting use of peyote would "seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens." *Id.* at 1614 (O'Connor, J., concurring).

131. *See id.* at 1600 (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J.,

Alternatively, if the court finds that the law is designed to prohibit conduct by members of a particular religion, then the law is unconstitutional.[132] Presumably, and this is a point the Court does not make clear, the Court must apply the compelling state interest test only in cases in which the statute involved is an unemployment compensation statute. This is so because "[t]he *Sherbert* test . . . was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. . . . [W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[133]

Cases argued in lower courts since *Smith* suggest that the new standard is not so easily understood or readily accepted.[134] Professor Choper suggests that the Court's decision in *Smith* will not affect greatly the way it decides future free exercise cases, but it will have a major effect on state courts.[135] His prediction appears to be playing out in the lower courts. In a recent Minnesota case, the Old Order Amish claimed that a Minnesota statute, requiring all slow moving vehicles to display a fluorescent symbol when on public highways, violates the free exercise clause.[136] The Minnesota Supreme Court deliberately avoided the application of the *Smith* standard and held that under its state constitution, state laws of general applicability that infringe on religious beliefs or practices are invalid, unless the state can prove that its compelling interest is not attainable through any other means.[137]

A concern related to the Court's desire for judicial economy is the "slippery slope" argument. The Court states that "[i]f the 'compelling interest' test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded."[138] Application of the test to all laws that violated religious beliefs, however, would invalidate many laws because they would not meet the test. This, the Court fears, could result in anarchy, the danger of

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concurring)). "Even if we were inclined to breathe . . . some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law." *Id.* at 1603.

132. *See id.* at 1599. "[A] state would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts [as assembling with others for a worship service] or abstentions only when they are engaged in for religious reasons, or only because of the belief that they display." *Id.*

133. *Id.* at 1603. The Court's opinion does not set forth a standard when a civil law of general applicability is at issue. It is arguable that the Court considers criminal laws of general applicability as inherently containing compelling state interests that justify infringement on first amendment rights, because violations of criminal laws tend to have greater effects on the state's citizens. For a different conclusion, see *Constitutional Law Conference*, 59 U.S.L.W. 2272, 2275 (Nov. 6, 1990). Professor Jesse H. Choper argues that Justice Scalia's apparent limitation of the *Smith* holding to criminal laws will not be a "serious limitation" because criminal laws generally command a higher scrutiny than do civil regulations and "are often thought to make a stronger case for recognizing a free exercise exemption." *Id.* The suggestion is that under the *Smith* holding, religious conduct in violation of a civil regulation will not be afforded any more protection than will religious conduct in violation of a criminal law.

134. *See infra* notes 163-64.

135. *Constitutional Law Conference*, *supra* note 133, at 2275.

136. The Amish claim that their religion prohibits the display of loud colors and worldly symbols. State v. Hershberger, 462 N.W.2d 393 (Minn. 1990).

137. *Id.* at 396-97.

138. *Smith*, 110 S. Ct. at 1605.

which "increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them."[139] Thus, because the United States is diverse religiously, the danger of anarchy is great.[140]

The "slippery slope" argument, however, lacks support in practical experience. Courts have applied the test in free exercise cases to strike down laws, and anarchy has not resulted.[141] To the contrary, the test has had the effect of upholding state laws when based on valid, compelling state interests.[142] Cases that have pointed out the deleterious effects of making exceptions to laws for all religious denominations have done so not as a justification for not applying the test at all, but as support for upholding a law in question.[143]

A third reason for Justice Scalia's rejection of the compelling state interest test might be that he felt that the test had become watered down and largely ineffective in deciding free exercise cases.[144] According to Professor Choper, it was not until the Court's decision in *Cantwell v. Connecticut*[145] in 1940 that the Court applied the compelling state interest test to invalidate a law of general applicability. Professor Choper asserts that after *Cantwell* and until *Sherbert v. Verner* in 1963, almost every free exercise case was of the "hybrid" type and could have been decided on free speech grounds.[146] After 1963, aside from *Sherbert*, the cases affirming Sherbert,[147] and *Wisconsin v. Yoder*,[148] the compelling state interest test was not used to invalidate a neutral law of general applicability. Thus, perhaps Justice Scalia felt he merely was laying to rest a test that

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139. *Id.*

140. *Id.*

141. *See supra* note 77.

142. *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982) (discussed *supra* notes 68-72 and accompanying text) (states' compelling interest in welfare of the elderly upheld social security law); Wisconsin v. Yoder, 406 U.S. 205 (1972) (discussed *supra* notes 73-77 and accompanying text) (struck down law compelling school attendance); Gillette v. United States, 401 U.S. 437 (1971) (discussed *supra* note 77) (upheld draft laws); Sherbert v. Verner, 374 U.S. 398 (1963) (discussed *supra* notes 78-89 and accompanying text) (struck down unemployment compensation law not allowing payment to employees discharged for religious purposes).

143. *See* United States v. Lee, 455 U.S. 252, 259-60 (1982) ("Unlike the situation presented in *Wisconsin v. Yoder* . . . , it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs."); Braunfeld v. Brown, 366 U.S. 599, 606 (1961) ("[W]e are a cosmopolitan nation made up of almost every conceivable religious preference . . . . Consequently, it cannot be expected, much less required, that the legislature enact no law regulating conduct that may in some way result in economic disadvantage to some religious sects . . . .")

The Court in *Braunfeld*, however, continued:

> To hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. . . . [I]f the State regulates conduct by enacting a general law within its power . . . the statute is valid despite its indirect burden on religious observance *unless the State may accomplish its purpose by means which do not impose such a burden.*

Id. at 607 (emphasis added). Thus, even in the face of a multitude of religious claims, the Court has held that the compelling state interest test is necessary.

144. *Constitutional Law Conference, supra* note 133, at 2274.

145. 310 U.S. 296 (1940).

146. *Constitutional Law Conference, supra* note 133, at 2274.

147. Thomas v. Review Bd. of Ind., 450 U.S. 707 (1981) (discussed *supra* note 102); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987) (discussed *supra* note 103).

148. 406 U.S. 205 (1972).

the Court never really applied anyway. Even if the Court has not used the test to *invalidate* a law under the free exercise clause, however, the Court has at least used the test. The test serves an important function in protecting the conduct of minority religions from infringement by arbitrary state laws by balancing the government's interests against the individual's religious interests. If Justice Scalia felt that the compelling state interest test was no longer effective, he should have replaced the test with one that better serves these competing interests. Instead, he set forth a new standard that leaves adherents of minority religions with little, if any, protection.

In his dissent, Justice Blackmun suggests a fourth possible explanation for the Court's departure from established jurisprudence: "One hopes that the Court is aware of the consequences [of 'overturning settled law concerning the Religious Clauses'] and that its result is not a product of overreaction to the serious problems the country's drug crisis has generated."[149] The idea that the war on drugs could prompt the Court to limit constitutional freedoms is not new.[150] Some commentators suggest that a pair of 1989 decisions in which the Court upheld mandatory drug testing,[151] thereby further restricting the fourth amendment right against unreasonable searches and seizures, was a result of the pressure of the war on drugs.[152]

If popular sentiment against illegal drug use influenced the Court in *Smith*, then the Court may have concluded wrongly that prohibiting use of peyote by Native Americans for religious ceremonies will favorably affect the battle. In *People v. Woody*,[153] the California Supreme Court applied the compelling state interest test to a claim that a state statute prohibiting possession and use of peyote, and providing no exemption for the Native American Church, violated the Native Americans' right to free exercise of religion. The California court held that the state's interest, lying in "the deleterious effects [of peyote use] upon the Indian community, and . . . in the infringement such practice would place upon the enforcement of the narcotic laws because of the difficulty of detecting fraudulent claims of an asserted religious use of peyote,"[154] did not justify infringing the Native Americans' free exercise rights.[155] In reaching its holding, the court closely examined the nature and circumstances of the religious use of peyote in the Native American Church.[156] The court noted that peyote use in the Church has a long tradition, referred to in sources dating back to 1560.[157]

149. *Smith*, 110 S. Ct. at 1616 (Blackmun, J., dissenting) (emphasis added).

150. *See* Beck, Brown & Osborne, *The Cocaine War in America's Fruitbowl*, AMERICAN LAWYER, Mar., 1990, at 82.

151. National Treasury Employee's Union v. Von Raab, 489 U.S. 656 (1989) (testing of drug enforcement employees); Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989) (testing of railway workers).

152. *See* Ciolli, *Boost for Drug Testing: High court upholds test for railway, customs workers*, Newsday, (Nassau and Suffolk Edition); Mar. 22, 1989, at 5.

153. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

154. *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

155. *Id.*

156. For a full description of religious peyote use, see *id.* at 720-22, 394 P.2d at 816-18, 40 Cal. Rptr. at 72-74.

157. *Id.* at 720, 394 P.2d at 817, 40 Cal. Rptr. at 73.

Peyote use occurs in a controlled ceremony called a "meeting."[158] The Native American Church reveres peyote, and the drug's use is central to the religion.

> Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost. On the other hand, to use peyote for nonreligious purposes is sacrilegious. Members of the church regard peyote also as a "teacher" because it induces feelings of brotherhood with other members; indeed, it enables members to experience the Deity. Finally, devotees treat peyote as a "protector." Much as a Catholic carries his medallion, an Indian G.I. often wears around his neck a beautifully beaded pouch containing one large peyote button.[159]

In addition to regarding the use of peyote outside of the religious ceremonies as sacrilegious, the Native American Church also forbids the use of alcohol. Anthropologists "conclude that members observe higher standards than nonmembers."[160] Thus, this very limited, controlled peyote use is not drug abuse, and limitations on its use will not advance the war on drugs.

Peyote use is not the key to the war on drugs. Between 1980 and 1987, the Drug Enforcement Administration (DEA) seized and analyzed 19.4 pounds of peyote. This compares to the 15,302,468.7 pounds of marijuana seized and analyzed by the DEA in the same period.[161] Additionally, both the DEA and Congress have recognized the right of the Native American Church to use peyote in its religious ceremonies. The DEA exempts from its regulations the religious use of peyote by the Native American Church.[162] Congress also acknowledged the religious rights of Native Americans in the American Indian Religious Freedom Act.[163] It follows that exempting the Native American Church from the Oregon law prohibiting peyote use would not interfere substantially with Ore-

158. *Id.* at 720-21, 394 P.2d at 817, 40 Cal. Rptr. at 73.

159. *Id.* at 721, 394 P.2d at 817-18, 40 Cal. Rptr. at 73-74.

160. *Id.* at 721-722 n.3, 394 P.2d at 818 n.3, 40 Cal. Rptr. at 74 n.3.

161. Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1463 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1926 (1990). In *Olsen*, the court used these figures to distinguish between peyote and marijuana, both Schedule I drugs, in its decision holding that an Iowa law prohibiting possession and use of marijuana does not violate the free exercise rights of members of the Ethiopian Zion Coptic Church, which advocates smoking marijuana "continually all day." *Id.* at 1463-64.

162. "The 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 Church so using peyote are exempt from registration." 21 C.F.R. § 1307.31 (1990).

The regulation also provides for the proper distribution of peyote to the church: "[a]ny person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law." *Id.*

For an analysis of the legislative history behind 21 C.F.R. § 1307.31, see Frank, *Accommodating Religious Drug Use and Society's War on Drugs*, 58 GEO. WASH. L. REV. 1019, 1024-27 (1990).

163. 42 U.S.C. § 1996 (1988). The Act provides:

> [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to access to sites, use and possession of sacred objects, and freedom to worship through ceremonials.

Id.

gon's valid interest in enforcing its drug laws and protecting its citizens from harm.

None of the above-mentioned factors, therefore, justify rejecting the compelling state interest test. While a stricter, clearer test may reduce the volume of first amendment cases reaching the Supreme Court, judicial economy hardly seems to justify promulgating a test that has the effect of favoring the state over a preferred constitutional right.[164] To add to the problem, the Court offers a weak substitute for the test it abandoned. This result leaves religious conduct without any protection from unreasonable state laws. For example, a state could impose a general regulation prohibiting the wearing of hats. This would constitute a "criminal law of general applicability," and it would have the effect of prohibiting conduct mandated by certain religions, such as Judaism. The law would infringe on the free exercise of religion, but the religious groups offended would have no way of challenging the state law. Because the law is criminal and of general applicability, a court would not inquire into the state's interest in enforcing the law. The majority's glib answer that a religious group can petition the legislature to provide an exemption to the law for their group is insufficient. Many minority religions cannot muster the political clout necessary to influence the legislature. They effectively would be prohibited from free exercise of religion, even when the state has no "compelling" reason for imposing the law.

In his dissent in *Smith*, Justice Blackmun asserted that Oregon's interest is "not the State's broad interest in fighting the critical 'war on drugs' . . . but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote."[165] By narrowing the scope of Oregon's interest, he found that Oregon did not sustain its burden of proof. According to Blackmun, Oregon did not establish "any concrete interest in enforcing its drug laws against religious users of peyote."[166] Specifically, the State failed to offer evidence to support its claim that exemption of an individual would cause serious harm to the state's interest, instead it relied on "mere speculation about the potential harms."[167] The absence of any proof that peyote harmed anyone proved fatal to Oregon's assertion that its interest in the protection of "the health and safety of its citizens from the dangers of unlawful drugs"[168] justifies the regulation. In-

164. As Justice O'Connor pointed out in her concurrence, religious freedom occupies a "preferred position" in the Constitution, and "the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests 'of the highest order.'" *Smith*, 110 S. Ct. at 1609 (O'Connor, J., concurring) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

165. *Id.* at 1617 (Blackmun, J., dissenting). Justice Blackmun asserted that the state's interest must be reduced "to the same plane of generality" to avoid "distort[ing] the weighing process in the State's favor." *Id.* (Blackmun, J., dissenting). Almost any state interest can be reduced to concern for peace, order, morals, defense, and revenue of its citizens. *Id.* (Blackmun, J., dissenting) (quoting Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 330-31 (1969)).

166. *Smith*, 110 S. Ct. at 1617 (Blackmun, J., dissenting). Blackmun supported his statement by showing that Oregon did not seek to prosecute respondents for their use of peyote and has only once sought to enforce its law against other religious users of the drug. *Id.* (Blackmun, J., dissenting).

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

168. *Id.* at 1618 (Blackmun, J., dissenting). "The Native American Church's internal restrictions on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns." *Id.* (Blackmun, J., dissenting). In addition, other states, presumably with the

stead, this absence of proof, according to Justice Blackmun, supports a finding that Oregon can accommodate religious users of peyote by exempting them from Oregon's drug laws, without interfering with the state's interest in protecting the health and welfare of its people.[169] Therefore, the state did not prove a compelling state interest that justifies infringing on the respondents' important right to the free exercise of religion.[170]

In refusing to apply the compelling state interest test, the Court ignores its own precedent. As Justice O'Connor pointed out in her concurrence, the Court in the past has expressly rejected the interpretation of the first amendment that the *Smith* Court adopted.[171] In *Wisconsin v. Yoder*,[172] the Court stated that "to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the . . . First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability*."[173] The facts of *Smith* closely parallel the facts of *Yoder*. In *Yoder*, the Court emphasized that the Amish religion is an established one, having existed for almost two hundred years, compared to the relatively short life (sixty years) of the compulsory school attendance law.[174] Likewise, there is evidence that Peyotism has existed since the sixteenth century,[175] hundreds of years before Oregon enacted a statute prohibiting peyote use. The Native American way of life, like the Amish way, is an established one. The Court in *Yoder* relied heavily on the fact that the state could not prove that education of the Amish children at home interferes with the state's interest.[176] Similarly, Oregon would have difficulty sustaining its burden of proof that accommodation of religious use of peyote by the Native American Church harms its "compelling interest," in light of the controlled use of the drug by the Church, the beneficial effects of the religious ceremony on group members, and the lack of evidence that the religious use of peyote by Native Americans seriously has harmed the enforcement of Oregon's drug laws.

The first amendment, which guarantees the right to free exercise of religion, was drafted against a background of religious intolerance and a desire to protect minority beliefs against the assertion of majority opinions.[177] Many of the early settlers came to the new world to escape religious persecution at the hands of the majority or government-supported religion. The persecution continued in

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same compelling interest in the health and welfare of its citizens, have exempted the Native American Church from their laws prohibiting use of peyote. *Id.* at 1618 n.5 (Blackmun, J., dissenting).

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

170. *Id.* at 1622-23 (Blackmun, J., dissenting). Justice Blackmun asserts that the Native Americans' ritualistic use of peyote actually advances the state's interest because the church prohibits use of peyote outside the religious ceremony and also forbids the use of alcohol. There is also some evidence that the ceremonial use of peyote is effective in overcoming alcoholism. *Id.* at 1619-20 (Blackmun, J., dissenting).

171. *Id.* at 1606 (O'Connor, J., concurring).

172. 406 U.S. 205 (1940); *see supra* notes 73-77 and accompanying text.

173. *Yoder*, 406 U.S. at 220 (emphasis added).

174. *Id.* at 226-27.

175. People v. Woody, 61 Cal. 2d 716, 720, 394 P.2d 813, 817, 40 Cal. Rptr. 69, 73 (1964).

176. *See supra* text accompanying notes 74-77.

177. *See* Sherbert v. Verner, 374 U.S. 398, 411 (1963) (Douglas, J., concurring).

America, however, where members of minority religions were harassed, jailed, and obliged to pay taxes to support government-sponsored churches for following the dictates of their faith. These practices "shock[ed] the freedom-loving colonials into a feeling of abhorrence," and led to the adoption of the first amendment.[178] The United States Supreme Court has recognized the importance of the right to free exercise of religion and has formulated a test to protect it against governmental regulations and laws, including laws of general applicability, which unjustifiably infringe on it. At the same time, this test allows the states to enact laws for the welfare and protection of their citizens, ensuring that conduct that is harmful to society cannot hide behind a cloak of religious freedom. The only requirement is that the state justify its infringement on religious conduct by demonstrating a compelling interest that outweighs the right protected by the Constitution. Application of the test has successfully resolved challenges of laws on free exercise grounds, protecting both the religious right and the state's interest. Because of the success of the compelling state interest test, and because of the deference religious freedom receives from courts, legislatures, and society in general, rejection of the test is not justified by reasons of judicial economy, "slippery slope" arguments. Neither the first amendment nor precedent compels this rejection.

The Court in *Smith* held that the denial of unemployment compensation to respondents because of their termination from work for religious use of peyote did not violate respondents' first amendment rights to free exercise of religion.[179] Whatever the reason for the decision in *Smith*, it is clear that the Court could have reached the same holding by applying the compelling state interest test.[180] The prohibition of respondents' religious use of peyote infringed on their free exercise of religion. The state could have shown that its interest in protecting its citizens from the dangers of drug use was compelling enough to justify the infringement. The more likely result of applying the test, however, is that the state's general interest in protecting the health and welfare of its citizens would not have been compelling enough to justify the prohibition of controlled, sincerely religious use of peyote by the Native American Church. Or the Court might have found that exempting the Native American Church from Oregon's drug enforcement laws, as the federal government does for its laws, would not interfere unduly with or prevent the state from satisfying its interest.[181] Perhaps the fear of this conclusion prompted the Court to reject the test altogether. If so, this fear is irrational in light of the evidence that peyote use does not have a significant effect on the war on drugs. The Court's abandonment of the compelling state interest test may have far-reaching ramifications for religious conduct, especially for adherents to minority religions. No longer does religious conduct enjoy protection against governmental regulations of general applicability that effectively coerce conduct in violation of, or prohibit conduct mandated by, reli-

178. *See* Everson v. Board of Educ., 330 U.S. 1, 8-14 (1946).

179. *Smith*, 110 S. Ct. at 1606.

180. *Id.* at 1613-15 (O'Connor, J., concurring).

181. *Id.* at 1617-22 (Blackmun, J., dissenting).

gious beliefs. The Court states that legislatures are free to exempt religious conduct from its laws. Majority religions have the power to gain legislative attention and thus procure exemptions in their favor. It is the minority religions, such as the Native American Church, which do not have the clout to gain legislative attention, that will suffer from the Court's decision, and minority rights are what the Constitution is designed to protect.

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