EMPLOYMENT DIVISION V. SMITH AT THE SUPREME COURT: THE JUSTICES, THE LITIGANTS, AND THE DOCTRINAL DISCOURSE

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Since it was decided twenty years ago, many commentators, both scholarly and otherwise, have characterized *Employment Division v. Smith*[1] as a dramatic, unjustified departure from previous free exercise cases.[2] This interpretation of the case is so prevalent that it is treated by

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1 494 U.S. 872 (1990).

2 *See* David Perry Babner, *The Religious Use of Peyote After* Smith II, 28 IDAHO. L. REV. 65 (1991); Milner S. Ball, *Freedom of Religion—The Unfree Exercise of Religion*, 20 CAP. U. L. REV. 39 (1991); Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782 (1992); Christine A. Clark, *Religious Accommodation and Criminal Liability*, 17 FLA. ST. U. L. REV. 559 (1990); John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 IND. L. REV. 71 (1991); Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672 (1992); James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91 (1991); Mark F. Kohler, *Neutral Laws, Incidental Effects, and the Regulation of Religion and Speech*, 40 DRAKE L. REV. 255 (1991); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Towards Religion*, 39 DEPAUL L. REV. 993 (1990); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841 (1992); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Douglas Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that Was Never Filed*, 8 J.L. & RELIGION 99 (1990); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992); Ralph D. Mawdsley, *Has* Wisconsin v. Yoder *Been Reversed? Analysis of* Employment Division v. Smith, 63 EDUC. L. REP. 11 (1990); Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329 (1991); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 HARV. J.L. & PUB. POL'Y 181 (1992); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52

many within and outside the field as obvious truth. The oft-stated premise is that *Smith* was on all fours with previous, obviously controlling case law, which mandated that the plaintiffs should have won. This reading treats a very small number of cases as determinative of free exercise doctrine, ignores the facts in *Smith* that distinguished it from earlier cases, and also suffers from an inadequate analysis of how the case was treated at the Supreme Court by the parties and the Justices.

Those cases purportedly controlling the decision in 1990 were: *Sherbert v. Verner*,[3] its progeny,[4] and *Wisconsin v. Yoder*.[5] This prevalent interpretation, led by preeminent legal academics, ignores, or treats as non-binding or less binding, other important cases, including *Reynolds v. United States*,[6] *Braunfeld v. Brown*,[7] *United States v. Lee*,[8] *Gillette v. United States*,[9] and others.

MONT. L. REV. 13 (1991); Richard K. Sherwin, *Rhetorical Pluralism and the Discourse Ideal: Countering Division of* Employment v. Smith*, A Parable of Pagans, Politics, and Majoritarian Rule*, 85 NW. U. L. REV. 388 (1991); Edward Egan Smith, *The Criminalization of Belief: When Free Exercise Isn't*, 42 HASTINGS L.J. 1491 (1991); Nadine Strossen, Michigan Department of State Police v. Sitz*: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285 (1991); Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1 (1991); Oliver S. Thomas, *Restoring Free Exercise and Preventing Religious Fraud: A Response to Milner Ball*, 20 CAP. U. L. REV. 67 (1991); David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769 (1991); John Witte, Jr., *The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay*, 40 EMORY L.J. 489 (1991); Edward McGlynn Gaffney, Jr., *How the Court Went Astray in the Peyote Case*, L.A. DAILY J., May 11, 1990, at 6; *see also The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 60 (1992) [hereinafter *Hearing on S. 2969*] (Appendix to statement of Oliver S. Thomas on behalf of the Baptist Joint Committee and the American Jewish Committee); U.S. DEP'T OF JUSTICE, REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (2010), *available at* http://www.justice.gov/crt/rluipa_report_092210.pdf; Angela C. Carmella, *Exemptions and the Establishment Clause*, 32 CARDOZO L. REV. 1731, 1731 (2011) ("In *Employment Division v. Smith*, the Supreme Court abandoned a strict scrutiny standard of review for most cases under the Free Exercise Clause and announced in its place the rule that neutral, general laws are constitutional, regardless of impact on religious practice."); Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 CARDOZO L. REV. 1755, 1755 (2011) ("In *Employment Division v. Smith*, the Court effectively overturned a quarter century of constitutional doctrine, reducing the protection of the Free Exercise Clause, in large measure, to an equality right as opposed to a liberty right.").

[3] 374 U.S. 398, 406 (1963) (finding denial of unemployment benefits unconstitutionally burdened plaintiff's free exercise by forcing a choice between abandoning Saturday religious practice or forfeiting benefits, but noting the statute excepted those worshipping on Sundays from having to make the same choice).

[4] Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 834 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987); Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981).

[5] 406 U.S. 205 (1972).

[6] 98 U.S. 145, 165-66 (1879).

[7] 366 U.S. 599 (1961).

[8] 455 U.S. 252, 261 (1982).

[9] 401 U.S. 437, 443-44 (1971).

The Court majority evaluated the *Smith* case against the backdrop of the spectrum of its religion precedents.[10] A comprehensive re-evaluation was necessary, because the majority found that the facts of *Smith* introduced a case of first impression for the Court. The case, therefore, triggered the need to engage in a conscientious effort to place the case within the full range of the Court's cases.

The *Smith* majority thus couched the holding in terms of many cases, not just *Sherbert* and *Yoder*. Instead, there was a long line of free exercise cases that fit the facts better. That means that the persistent claim that *Smith* radically altered free exercise doctrine is simply wrong.

This is an absolutely critical point for free exercise doctrine and discourse, and for legislative reform. The claim that *Smith* was a far departure from accepted doctrine was used to castigate the Court unfairly and then to launch extraordinary statutes like the Religious Freedom Restoration Act of 1993 (RFRA),[11] its state counterparts,[12] and the Religious Land Use and Institutionalized Persons Act of 2000.[13]

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[10] The Court included: *Reynolds*, 98 U.S. 145; *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Follett v. McCormick*, 321 U.S. 573 (1944); *United States v. Ballard*, 322 U.S. 78 (1944); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Braunfeld*, 366 U.S. 599; *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Sherbert*, 374 U.S. 398; *United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Gillette*, 401 U.S. 437; *Yoder*, 406 U.S. 205; *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Wooley v. Maynard*, 430 U.S. 705 (1977); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Jones v. Wolf*, 443 U.S. 595 (1979); *Thomas v. Review Board*, 450 U.S. 707 (1981); *Lee*, 455 U.S. 252; *Larson v. Valente*, 456 U.S. 228 (1982); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Bowen v. Roy*, 476 U.S. 693 (1986); *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); and *Hernandez v. Commissioner*, 490 U.S. 680 (1989).

[11] 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (2006). RFRA was declared unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[12] ALA. CONST. art. I, § 3.01 (ratified in 1999) (burden); ARIZ. REV. STAT. ANN. §§ 41-1493 to -1493.02 (1999) (substantial burden); CONN. GEN. STAT. ANN. § 52-571b (West 1993) (burden); FLA. STAT. ANN. §§ 761.01-.05 (West 1998) (substantial burden); IDAHO CODE ANN. §§ 73-401 to -404 (West 2000) (substantial burden); 775 ILL. COMP. STAT. ANN. 35/1-99 (West 1998) (substantial burden); LA. REV. STAT. ANN. §§ 13:5231-5242 (2010) (substantial burden); MO. ANN. STAT. §§ 1.302-.307 (West 2004) (restrictions on religious liberty); N.M. STAT. ANN. §§ 28-22-1 to -5 (West 2000) (restrictions on religious liberty); OKLA. STAT. ANN. tit. 51, §§ 251-258 (West 2000) (substantial burden); 71 PA. CONS. STAT. ANN. §§ 2401-2407 (West 2002) (substantial burden); R.I. GEN. LAWS ANN. §§ 42-80.1-1 to -4 (West 1998) (restrictions on religious liberty); S.C. CODE ANN. §§ 1-32-10 to -60 (1999) (substantial burden); TENN. CODE ANN. § 4-1-407 (West 2009) (substantial burden); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012 (West 2009) (substantial burden); UTAH CODE ANN. §§ 63L-5-101 to -403 (West 2008) (substantial burden; land use only); VA. CODE ANN. §§ 57-1 to -2.02 (West 2007) (substantial burden).

[13] 42 U.S.C. §§ 2000cc to 2000cc-5. I discuss the serious constitutional faults of RLUIPA in Marci A. Hamilton, *The Constitutional Limitations on Congress's Power over Local Land Use:*

Those statutes have tilted the balance of public policy in favor of religious believers, and away from competing public interests. To think that this mass scale reconfiguration of power within the United States was prompted by a misleading analysis of a single Supreme Court decision should be troubling.

This Article will explore the history of *Smith* at the Supreme Court, including the discourse between the parties, between the parties and the Justices, and between the Justices. This history shows that those who have claimed that *Smith* was an unjustified and indefensible departure from prior doctrine have interpreted the case in a way that falsifies its prior history. In Part I, I outline the development of Supreme Court free exercise doctrine in the eighty-plus years leading up to *Smith*. In Parts II and III, I will document the history of *Smith* at the Supreme Court by analyzing the briefs, the oral argument, and the Justices' Conference notes. In the final Part, I conclude that the response to *Smith* was based on severely exaggerated descriptions of the prior law. This is a cautionary tale for legislators and scholars.

I. THE CASES BEFORE *SMITH*

The facts of *Smith* are straightforward. Two drug counselors were employed by a nonprofit company, which had a written policy requiring them to stay drug-free and alcohol-free as a condition for employment.[14] They used an illegal drug, peyote, as part of a Native American Church service, and were fired for engaging in work-related misconduct. There was no dispute that their religious beliefs were sincerely held and that the Native American Church uses peyote in its religious services. When they applied to the state for unemployment compensation, they were denied. Following the denial, they argued that the First Amendment forbade the state from denying unemployment compensation when their underlying conduct was religiously motivated. For the members of the Court, the question was whether the rule employed in *Sherbert* to plainly legal conduct—attendance at religious services—should be extended to a situation where the religious conduct was not legal.

By 1990, when *Smith* was decided, the Supreme Court had recognized two competing strands of thought in religious free exercise

Why the Religious Land Use and Institutionalized Persons Act Is Unconstitutional, 2 ALB. GOV'T L. REV. 366 (2009).

[14] Emp't Div. v. Smith, 494 U.S. 872, 874 (1990).

cases.[15] The predominant approach embraced the notion that religious believers are subject to the law. In most cases, a believer did not have a constitutional defense to neutral, generally applicable laws.[16] In the Court's first free exercise case in 1878, it explained the principle as follows: "To permit [polygamy among members of the Mormon Church] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[17] I will call this doctrine the "rule of law approach."

This approach was employed from 1878 until 1963 to uphold the anti-polygamy laws,[18] the social security laws,[19] military conscription laws,[20] Sunday closing laws,[21] social security identification requirements,[22] federal oversight of federal lands,[23] prison regulations,[24] and state taxation of products sold by a religious organization.[25]

Between 1963 and 1990, in very few cases, the Court departed from its dominant rule of law approach to the Free Exercise Clause. The Warren Court and then the Burger Court did not abandon the dominant doctrine, but rather engrafted a new doctrine onto it, introducing internal contradictions into the overall doctrine. The new approach mandated that strict scrutiny should be applied, at least in some cases.[26] This new rule was first introduced by Justice William Brennan in *Sherbert* and steadfastly defended by him throughout his tenure on the Court.[27] Ultimately, it was only followed in the unemployment compensation cases following *Sherbert* and then in *Yoder*. Accordingly, Brennan was in dissent in the other free exercise cases.[28]

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15 In 1993, the Court also would explicitly recognize a third, non-controversial principle that the Free Exercise Clause protects believers from government persecution. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993).

16 Gillette v. United States, 401 U.S. 437 (1971); Braunfeld v. Brown, 366 U.S. 599 (1961); Reynolds v. United States, 98 U.S. 145 (1879).

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

18 *Reynolds*, 98 U.S. 145.

19 United States v. Lee, 455 U.S. 252 (1982).

20 *Gillette*, 401 U.S. 437.

21 *Braunfeld*, 366 U.S. 599.

22 Bowen v. Roy, 476 U.S. 693 (1986).

23 Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

24 O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

25 Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 384-85 (1990).

26 Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 835 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987); Thomas v. Review Bd., 450 U.S. 707, 718 (1981); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Sherbert v. Verner, 374 U.S. 398, 406-07 (1963).

27 Brennan was in the majority in the unemployment compensation cases of *Sherbert*, *Thomas*, *Hobbie*, and *Frazee*. He also joined the majority in *Yoder*.

28 Brennan dissented in the free exercise cases of *Employment Division v. Smith*, 494 U.S. 872 (1990); *Lyng*, 485 U.S. 439; and *Goldman v. Weinberger*, 475 U.S. 503 (1986).

Smith presented a new question in the unemployment compensation field. In all of the previous unemployment cases, the believer's religious conduct was plainly legal. In *Sherbert*, it was attendance at church on a Saturday; in *Thomas*, it was termination of one's own employment because religious beliefs forbade participation in production of weaponry; in *Hobbie*, it was a religious convert's refusal to work certain hours due to sincerely held religious beliefs; and in *Frazee*, it was the existence of sincerely held religious beliefs prohibiting work on Sundays, but in the absence of adherence to a particular sect. *Smith* did not fit the mold of the earlier unemployment cases, because the religious conduct was illegal or contrary to public policy.

Only one case before *Smith* applied strict scrutiny to a fact scenario in which the religious conduct was in violation of the law or contrary to public policy. In *Yoder*,[29] the Court held that Amish parents were not required to obey Wisconsin's compulsory education law. *Yoder* is in fact an outlier in the free exercise lexicon.[30] In fact, Justice Stevens expressed his disapproval of *Yoder* throughout *Smith*'s journey.[31]

While the most famous *Smith* free exercise decision was the Court's 1990 decision on the merits, the Court issued an earlier opinion in the same case in 1988. When the case first appeared at the Court, there was some confusion regarding the Oregon Supreme Court's decision below, and so the Court vacated the Oregon decision and remanded for further clarification.[32] I will refer to this 1988 decision as *Smith I*, and the 1990 decision as *Smith II*.

The criticisms of *Smith II* not only minimized numerous precedents, but also treated *Sherbert* as standing for a single proposition that was purported to rule in all cases. Critics of *Smith* have argued that if *Sherbert* had been applied in *Smith II*, the result necessarily would have been the opposite. This was the reasoning that triggered enactment of RFRA, which "restored" *Sherbert* and *Yoder* as the governing cases in all free exercise cases.[33]

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[29] 406 U.S. 205.

[30] MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 131 (2005).

[31] *See infra* notes 56, 82 and accompanying text.

[32] Emp't Div. v. Smith, 485 U.S. 660 (1988).

[33] 42 U.S.C. § 2000bb(b) (2006) ("The purposes of this chapter [21B] are—(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.").

II. *SMITH I* AT THE SUPREME COURT

Contrary to the prevailing academic orthodoxy, the *Smith* case demanded at the least a debate over what *Sherbert* meant. In fact, the Court did not treat *Sherbert* as mandating a win or a loss for the drug counselors. Some Justices believed it could be extended to the facts of *Smith*; others thought that it was factually distinct and therefore not controlling. This theme at the Court runs through both *Smith I* and *Smith II*.

A. *The Discussion in the* Smith I *Briefs*

The Oregon Attorney General, David Frohnmayer, was the petitioner at the Court, and he included a number of free exercise cases in his briefing in *Smith I*.[34] The main thrust of the disagreement before the Court at that stage of the case involved the proper interpretation of *Sherbert* and its progeny. The petitioner's main argument distinguished *Sherbert*.

According to the petitioner, the Oregon Supreme Court had interpreted *Sherbert* to require that the only relevant state interest in an unemployment benefits free exercise case was an interest in the vitality of the unemployment compensation fund.[35] That meant that the state's interest in deterring illegal drug use or misconduct connected with a job was categorically out of bounds. The petitioner's brief rejected this reading of *Sherbert* and argued that *Smith* presented issues that were beyond the holdings of *Sherbert* and the later unemployment cases, because the *Smith* case implicated not just a state interest in the unemployment compensation fund, but also a state interest in the underlying law or policy violated by the employee. The petitioner explained:

> The Oregon court offered no authority, principle or rationale for the limitation it placed on its assessment of the state interests. But

[34] Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); United States v. Lee, 455 U.S. 252, 257 (1982); Thomas v. Review Bd., 450 U.S. 707 (1981); Whalen v. Roe, 429 U.S. 589 (1977); *Yoder*, 406 U.S. at 220; Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968); Sherbert v. Verner, 374 U.S. 398 (1963); Zorach v. Clauson, 343 U.S. 306, 313-14 (1952); 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).

[35] Smith v. Emp't Div., 721 P.2d 445, 450 (Or. 1986) ("The state's interest in denying unemployment benefits to a claimant discharged for religiously motivated misconduct must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote."); Brief for Petitioners at 10, *Smith*, 485 U.S. 660 (Nos. 86-946, 86-947), 1987 WL 880306.

> by thus narrowing the range of those interests, the state court's conclusion was foregone. The court did not announce a *per se* rule, but it necessarily created one: if the state's interests are always financial only, the burden of denying benefits for religiously motivated misconduct always will outweigh them. As a consequence, a state is constitutionally obligated to award benefits whenever a claimant sincerely asserts that he or she acted (or refused to act) for religious reasons, regardless how socially offensive or dangerous the conduct.
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> The Oregon Supreme Court's resolution of these cases runs afoul of this Court's refusal to declare "the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment." The criminality of claimants' conduct powerfully distinguishes these cases from Sherbert, as does the claimants' insistence on actively undermining their employer's interests rather than resigning from work or refusing to work on terms that offended their religious beliefs. Nothing in Sherbert, Thomas or the Court's recent opinion in Hobbie v. Unemployment Appeals Comm'n of Fla., commands or even suggests that courts must hold the myopic and sterilized vision of the state's interests adopted by the Oregon court in this case. . . .
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> If Oregon may criminalize religious peyote use without running afoul of the Constitution, it necessarily follows that claimants cannot assert a burden on "protected" religious exercise interests. If the Constitution permits a state to prohibit certain conduct at any time for any purpose, including religious purposes, citizens have no free exercise interest to assert. At the point at which the Constitution permits conduct to be criminalized and severely sanctioned, the Constitution necessarily withdraws any protection to engage in that conduct.
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> Assuming the constitutionality of Oregon's criminal statute, the analysis in *Sherbert v. Verner* is inapposite. The state's interest cannot be weighed against the claimants' free exercise interest when they have no free exercise interest to assert. Claimants, in apparent recognition of this, have challenged the constitutionality of Oregon's statute.[36]

The petitioner suggested that there was an alternative line to be drawn which should be taken from the Court's other free exercise cases. He did not argue that any cases be overturned, but rather that the free exercise doctrine had to permit consideration of the interest the state argued was compelling. In essence, he was trying to persuade the Court to modestly expand *Sherbert* so as to permit consideration of a state

[36] Brief for Petitioners, *supra* note 35, at 11-12 (citations omitted) (quoting *Sherbert*, 374 U.S. at 409-10) (citing *Hobbie*, 480 U.S. 136).

interest beyond the unemployment compensation fund in an unemployment compensation case.

The two fired employees were the respondents at the Court. They, too, referred to a number of free exercise cases but focused sharply on *Sherbert*.[37] They argued that *Sherbert* and other unemployment cases plainly foreclosed courts from considering any state interest other than the interest in the preservation of the fund. Accordingly, they argued *Sherbert* was "clear" and accused the petitioner of asking the Court to overrule *Sherbert*:

> As grounds for review the state submits this Court's analysis of First Amendment free religious exercise claims is inconsistent and suggests the decisions in *Sherbert v. Verner*, and *Thomas v. Review Bd. of Indiana Employment Security Div.*, be overruled in light of the result in the case at bar.
>
> The cases relied upon by petitioner, however, illustrate a refinement of First Amendment principles rather than the reverse. Assuming the "balancing or 'compelling state interest' analysis" is incomplete, as petitioner complains, review of this case would not further illuminate the issue the state finds so confusing, to wit: "how to measure the burden on a claimant's religion and how to assess the state's interest." (Petition at 9.)
>
> In that regard, this Court held in *Sherbert* and reaffirmed in *Thomas* that the loss of unemployment benefit eligibility as cost of adherence to religious beliefs imposed a substantial burden on a worker's constitutional rights of free exercise which was not outweighed by the state's interest in protecting the unemployment insurance fund from undue depletion. Thus, the application of religious freedom principles in the context of an unemployment compensation case is perfectly clear. As petitioner aptly observes, the law on this particular issue is so clear it may be characterized as a "*per se* rule." (Petition at 9.)
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> . . . .
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> The guidance provided by *Sherbert* and *Thomas* is clear. As the Oregon Courts properly decided, the state cannot challenge the legality of respondent's religious practices by means of Employment Division law. The Petition for a Writ of Certiorari should therefore be denied, or the order below summarily affirmed on the merits pursuant to U.S. Supreme Court Rule 23.1.[38]

To make their argument, respondents attempted to focus attention solely on the unemployment compensation cases and away from any other free exercise cases.

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[37] 374 U.S. 398; *see also Thomas*, 450 U.S. 707; Respondents' Brief in Opposition to Writ of Certiorari at 6, *Smith*, 485 U.S. 660 (Nos. 86-946, 86-947).

[38] Respondents' Brief in Opposition to Writ of Certiorari, *supra* note 37, at 3-4, 9 (citations omitted) (citing *Thomas*, 450 U.S. 707; *Sherbert*, 374 U.S. 398).

B. *The Conversations at the Oral Argument and at Conference*

1. Oral Argument

Deputy Attorney General William F. Gary asserted early in the oral argument that "[t]he [Oregon] Supreme Court's conclusion was that it was bound by this Court's decision in *Sherbert v. Verner* to consider only the state's interest in the fiscal integrity of the fund."[39] But, according to him, this was an artificially constrained inquiry. Rather, the court should have considered the "criminal law, . . . education programs, rehabilitation programs, and also . . . the unemployment scheme itself" when determining the state's interest.[40] Thus, his argument was not so much that *Sherbert* should be scuttled, but rather that even under *Sherbert*, these compelling state interests should have been taken into account. He distinguished the Court's pre-existing unemployment compensation cases, saying that "[t]he vital distinction in this case between this case and *Sherbert* and *Thomas* and *Hobbie* is that here the state does have a vital health and safety interest in regulating the conduct that these claimants engaged in."[41] He went on to factually distinguish the case as well: "[Oregon] has acted on that health and safety interest by making the conduct criminal. If the conduct is criminal, the state cannot be required to provide benefits to these claimants because the claimants had no right to engage in the conduct in the first place."[42]

This last point proved to be very powerful. Gary stated: "*Sherbert* simply doesn't apply because *Sherbert* only controls when the state has no interest that it has acted upon in regulating the conduct itself."[43] The Justices also suggested that while there might be constitutional protection for the conduct implicated in the unemployment cases up to that point, the conduct here might just well be beyond constitutional protection altogether. One Justice stated: "Then, it seems to me you're suggesting that really the critical issue in the case that has to be decided is whether the conduct of using peyote in a Native American religious

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[39] Transcript of Oral Argument at 4, *Smith*, 485 U.S. 660 (Nos. 86-946, 86-947). He later stated that the court below "concluded that it was bound by this Court's decision in Sherbert to look only at the fiscal integrity of the fund as the state's interest, that it was prohibited to look at other compelling health and safety interests." *Id.*

[40] *Id.* at 4.

[41] *Id.* at 7.

[42] *Id.*

[43] *Id.* at 12.

ceremony is protected or not."[44] The Justice followed up by asking: "You say if there really is no free exercise right out there, then we don't even reach the problems of *Sherbert* and those cases, is that right?"[45] Gary responded: "In essence, what the Oregon Supreme Court did was leap-frog that threshold inquiry [into whether illegal conduct can be constitutionally protected under the free exercise clause] and then enter into a balancing test which was hopelessly infected by a misreading of this Court's decision in *Sherbert*."[46]

There was also an exchange regarding whether the criminality of the underlying conduct was determinative because under Oregon law, the unemployment compensation was not denied due to criminality, but rather because it was job-related misconduct. Gary insisted that criminality should be relevant to the weight of the state's interest under the Free Exercise Clause. Nevertheless, the state could not take merely the criminal nature of the conduct into account in denying unemployment compensation because only conduct that was "work-related could result in the denial of unemployment compensation."

Ms. Suanne Lovendahl argued for the respondents. She was asked: "Have you got any cases like that, that say that there's a free exercise clause right to engage in—to use drugs?"[47] She conceded there was no case about drug use, but she quickly pointed to *Yoder*, saying that "the Court made clear that you still have to go through the entire balancing test."[48] She tried to avoid the distinction between illegal and legal underlying conduct by arguing that using peyote for religious purposes was more akin to having an involuntary illness:

> [Y]ou're talking about a religious impulse, and, so, that's why we feel that they're in the same position in *Sherbert*, *Thomas*, *Hobbie*. . . . It was in response to a dictate of their religion. I think that's the idea beyond *Sherbert*, *Thomas* and *Hobbie*, is that you're responding to an authority higher than your employer . . . .[49]

One Justice responded: "Yes, but in *Sherbert* and *Thomas*, there was no question but what the conduct engaged in was perfectly lawful."[50]

Lovendahl later circled back to *Yoder*, saying that "only those interests of the highest order and those otherwise served can over-balance claims to the free exercise of religion."[51] As she had argued in her briefs, she stated that the interest behind the unemployment

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[44] *Id.* at 13. Unfortunately, at that time, the Justices were not identified by name in the transcripts.

[45] *Id.* at 13-14.

[46] *Id.* at 13-15.

[47] *Id.* at 31.

[48] *Id.* at 32.

[49] *Id.* at 33-34.

[50] *Id.* at 34.

[51] *Id.* at 36.

compensation system simply could not take into account the other state interests to which Oregon was pointing. She also emphasized the "long history" of the Native American Church's "safe use" of peyote: "This is an ancient religion that's been going on before the practice was made criminal. The classic kind of situation that was presented in *Wisconsin v. Yoder*, with the Amish. Their practices were not illegal before enactment of the state criminal code."[52]

Both parties conceded at one point or another that it was not clear whether the Oregon Supreme Court had based its decision in favor of the counselors on a state law ground or a federal free exercise ruling and, therefore, the case might well need to be remanded for clarification by that court.[53]

2. Conference

The Conference notes of the Justices in *Smith I* repudiate the assumption that *Sherbert* had a single meaning and that *Yoder* was an unquestionable precedent. They also indicate that *Reynolds v. United States* was a significantly more important precedent than *Smith*'s critics have assumed.

During Conference, Chief Justice Rehnquist stated that the *Sherbert-Thomas-Hobbie*, or unemployment compensation, line of cases should not be extended to conduct the state may properly make criminal and, therefore, he recommended vacating the Oregon Supreme Court decision and remanding for further consideration regarding Oregon's interest in using its unemployment compensation system to deter criminal behavior.[54] Justice White agreed.[55] Justices Stevens, O'Connor, and Scalia also agreed, though with different rationales. For Justice Stevens, *Yoder* was "all wrong." He thought the *Smith* case was like the "bigamy case—*Reynolds*."[56] Justice Scalia agreed that this case was like the "bigamy case."[57] Justice O'Connor disagreed with Justices Stevens and Scalia, saying that this was not like *Reynolds*. Instead, she would have applied strict scrutiny, but suggested the case could be decided by holding that the state had a compelling interest.[58] Thus, she

52 *Id.* at 42.

53 *Id.* at 40, 45.

54 Justice Harry A. Blackmun, Conference Notes, *Smith* (Nos. 86-946, 86-947) (Dec. 11, 1987) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 495: Folder 7). Throughout, I will paraphrase the shorthand that the Justices use in taking Conference notes to make it understandable for the reader.

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

was willing to go along with an order to vacate the decision below and remand, but would have embraced strict scrutiny in even a case involving a neutral, generally applicable law.

Justice Brennan, the author of *Sherbert*, disagreed, arguing that the *Sherbert* line of cases "compelled" the Court to affirm the Oregon Supreme Court's reading of *Sherbert* as requiring an exemption for the religious use of peyote.[59] In his typed notes for the Conference, he explained that he read the Oregon court's decision as holding that the state's only interest lay in protecting the unemployment compensation fund, "which our cases hold is insufficient to overcome a burden on religion."[60] He was not convinced that Oregon treated drug use as criminal, and even if it did, he believed "that the usual *Yoder*-type analysis should apply. After all, I see no reason to give any greater deference to a state's definition of crimes than to any other burden on religion. On the facts of this case, *Yoder* would require an affirmance."[61] Brennan's comments in particular show that the case was going to turn on whether a Justice believed that it mattered whether the underlying religious conduct was legal, illegal, or against public policy. For most of the Justices, this presented a case of first impression. For Brennan, there was no reason to treat a religious believer's attendance at church any differently than a believer's use of a banned substance. Strict scrutiny, in his view, was the appropriate vehicle for all cases involving a burden on religious conduct.

One interesting point with respect to Brennan's comments is that he was willing to consider at that stage state interests beyond the viability of the compensation fund. Thus, it is clear that early in the *Smith* case, the Oregon Supreme Court's assumption that the only legitimate interest to be considered was the fund could not prevail. Once the door was open to consideration of a wide range of state interests, the range of relevant pre-existing precedents expanded dramatically. When compared against all existing free exercise cases, *Sherbert* and *Yoder* constituted a small number of cases involving only two contexts and, therefore, were not ineluctably controlling. All of the cases, the vast majority of which did not apply strict scrutiny, became part of the calculus.

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[59] *Id.*

[60] Justice William J. Brennan, Typewritten Notes "For Conference," Emp't Div. v. Smith (Nos. 86-946, 86-947) (on file with the Library of Congress, Manuscript Division, William J. Brennan Papers, Part I: Box 772: Folder 9).

[61] *Id.*

C. *The* Smith I *Decision*

Justice Stevens wrote the opinion for the majority. The Court vacated the Oregon Supreme Court's decision and remanded for further explanation of the state's interests.[62]

There is an exchange between Justices Stevens and Scalia behind the scenes that illuminates the way in which the majority was working out the meaning of *Sherbert*. Justice Scalia objected to the penultimate sentence in Justice Stevens's original draft that stated: "If, on the other hand, it rests on the unstated premise that the conduct is not unlawful in Oregon, the explanation of that premise would [almost certainly preclude any further review in this Court]."[63] Stevens in effect was saying that there was no need for the Supreme Court to decide the case if Oregon did not find the underlying conduct illegal. Scalia was not willing to foreclose state interests other than illegality; acts contrary to public policy also were distinguishable from the benign conduct in the earlier unemployment cases.

Stevens offered four alternatives to the bracketed language. The passage could state: "If, on the other hand, it rests on the unstated premise that the conduct is not unlawful in Oregon, the explanation of that premise would

a. ". . . presumably make it clear that respondent's conduct was protected by the First Amendment."

b. ". . . foreclose a distinction between this case and *Sherbert*, *Thomas*, and *Hobbie* based on the fact that those cases involved lawful conduct whereas this one appears to involve unlawful conduct."

c. ". . . make our decisions in *Sherbert*, *Thomas*, and *Hobbie* more clearly controlling."

d. ". . . make it more difficult to distinguish this case from our holdings in *Sherbert*, *Thomas*, and *Hobbie*."[64]

These options laid out the choices for line-drawing in *Smith*, and provide illuminating evidence of what the Justices were thinking. Stevens's original choice would have meant that a religious practice that is legal, but leads to being fired, could rarely be the basis for denying unemployment compensation. Option (a) would have meant that a legal religious practice triggering a firing always would be eligible for

62 Emp't Div. v. Smith, 485 U.S. 660, 673-74 (1988).

63 Letter from Chambers of Justice John Paul Stevens to Justice Nino Scalia (Apr. 19, 1988) (on file with author and *Cardozo Law Review*).

64 *Id.*

unemployment compensation. Option (b) would have fit the *Smith* facts under the umbrella of *Sherbert* and progeny. Option (c) left open the possibility that the unemployment compensation cases would be strong precedent when the underlying conduct was legal, but not dispositive. Finally, option (d), while close to (c), opened the door wider to a departure from the *Sherbert* line of cases. Scalia chose the last option, and that is what appeared in the final opinion, which gave the government more latitude to assert legal and policy interests to justify burdens on religious conduct.

Both parties as well as scholars should have been aware at that point that a majority of the Justices were unpersuaded by the argument that *Sherbert* must control.

III. *SMITH II* AT THE SUPREME COURT

By the time that the case reappeared at the Supreme Court, the discussion of the Court's free exercise cases encompassed many more than had been considered for *Smith I*. For the parties and the Justices, the issue before the Court became where to place this case in the full spectrum of free exercise cases, not just how and when *Sherbert* should control. It was no longer a case merely about unemployment compensation, but rather about where to draw the line generally between the state's interest and the believer's rights.

A. *The Discussion in the* Smith II *Briefs*

The petitioner's brief—again from the Oregon Attorney General—attempted to downplay the likely and actual impact of its arguments by opening with: "This case began as an unemployment benefits case and ultimately it will end as one."[65] The rest of the brief, though, argued strenuously against the dangers of downplaying the state's interests beyond the unemployment compensation fund. The case, therefore, had become a case about how to calibrate the free exercise doctrine generally, not just how to interpret *Sherbert*. Accordingly, the brief relied upon numerous free exercise cases.[66]

[65] Brief for Petitioners at 8, Emp't Div. v. Smith, 494 U.S. 872 (1990) (No. 88-1213), 1989 WL 1126846.

[66] Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829 (1989); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989); *Smith*, 485 U.S. 660; Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987); United States v. Lee, 455 U.S. 252 (1982); Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Lemon v. Kurtzman, 403 U.S. 602 (1971); Gillette v. United States, 401 U.S. 437 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970);

The petitioner urged the Court to look beyond the small galaxy of unemployment cases to the universe of its free exercise doctrine and suggested that there was an alternative line to be drawn from the decision below. The Oregon Supreme Court once again had treated *Sherbert* as limiting the state's interest to its fund. The petitioner, in response, explained that the Court's free exercise doctrine had left ample room for states to enact and enforce neutral, generally applicable laws against religious believers engaging in illegal practices:

> In actual practice, this Court has found no room for "accommodating" religion-by-religion exemptions from neutral laws of general applicability when those laws directly serve health, safety or public order interests. The decisions recognize that regulations of that kind depend on uniformity and comprehensiveness to be effective. Thus, for example, there may be some "exceptional" polygamists who conceivably could engage in multiple marriages without disturbing the social order. The constitution, however, does not require government to exempt them from laws making polygamy criminal. Similarly, although certain precautions may be taken by adults to avoid the hazards of child labor, the government constitutionally may eliminate all risks of harm through an absolute prohibition. And when a regulatory scheme would become difficult to administer and diluted in effectiveness by "myriad exceptions flowing from a wide variety of religious beliefs," government is not constitutionally obligated to grant exemptions based on religious beliefs. Government must be able to regulate the conduct of all citizens if it is to serve effectively the society's common needs. "The very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has a common interest."[67]

The Oregon Attorney General further underscored his defense of neutral, generally applicable laws by arguing that "individual-by-individual exemptions" open the door to Establishment Clause violations: "[T]he danger of an erratic and even discriminatory process of exemption has led the Court to refuse to create individual-by-individual exemptions to the draft based on specific religious beliefs,

Epperson v. Arkansas, 393 U.S. 97 (1968); Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961); Zorach v. Clauson, 343 U.S. 306 (1952); Prince v. Massachusetts, 321 U.S. 158 (1944); Cantwell v. Connecticut, 310 U.S. 296 (1940); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Reynolds v. United States, 98 U.S. 145 (1878).

[67] Brief for Petitioners, *supra* note 65, at 30-31 (citations omitted) (citing *Lee*, 455 U.S. at 260; *Yoder*, 406 U.S. at 230 (exempting Amish from mandatory schooling after eighth grade, and distinguishing laws that proscribe acts that threaten health and safety); *id.* at 215-16 n.12 ("The Court made the same point in *Reynolds v. United States.* To permit individuals for religious reasons to violate laws that serve the common good 'would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist in name only under such circumstances.'" (quoting *Reynolds*, 98 U.S. at 166-67)); *Prince*, 321 U.S. at 169-70; *Reynolds*, 98 U.S. at 166).

rather than on a general, non-sectarian 'conscientious objector' standard."[68]

The petitioner articulated what would become the central tenet of the *Smith II* opinion: "Simply stated, when conduct jeopardizes human health and safety, government cannot deregulate for religion without sacrificing its health and safety interests in the regulation."[69] The brief spent a great deal of time arguing that granting a drug exemption in this case was a steep slippery slope, because there were many other religious organizations that would demand a right to use illegal drugs.[70]

> Protection for religious drug use, if it constitutionally attaches, would thus extend to all areas where religion must be accommodated, not just to the application of criminal laws. Stated only in general terms, that conclusion would mean society must "accommodate" religious drug use practices. But more specifically and more accurately, it would require society to tolerate the presence and use of dangerous drugs in settings where it otherwise may insist that citizens remain drug free.
>
> The Free Exercise Clause does not compel that result. It is sometimes an unfortunate reality that to guarantee "religious freedom to a great variety of faiths requires that some religious practices yield to the common good." Religious use of hallucinogens and other dangerous drugs simply is not compatible with society's compelling interest in controlling and eliminating drug use and abuse. Accordingly, for the same reasons that constitutional protection has been denied to members of the Ethiopian Zion Coptic Church, to Hindus, to Tantric Buddhists, to Rastafarians and to the many individuals and organized churches that have sought protection for religious drug use, constitutional protection must be denied in this case.[71]

By forcing the discourse at the Court away from the unemployment compensation cases and toward the drug laws, the petitioner implicitly demanded a comprehensive review of all of the Court's cases in order to determine where the line should be drawn for the facts in this case.

Respondents accordingly needed to expand their discussion from the unemployment cases to the larger universe of free exercise cases,[72]

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[68] *Id.* at 32-33 (quoting *Gillette*, 401 U.S. 437).

[69] *Id.* at 18 (citing Kennedy v. Bureau of Narcotics & Dangerous Drugs, 459 F.2d 415 (9th Cir. 1972) (holding that the government's interest in prohibiting peyote use in order to protect the health of its citizens is not less or different when those citizens have certain religious beliefs), *cert. denied*, 409 U.S. 1115 (1973)).

[70] *Id.* at 11-36.

[71] *Id.* at 35-36 (quoting *Lee*, 455 U.S. at 133).

[72] Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989); Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829 (1989); Emp't Div. v. Smith, 485 U.S. 660 (1988); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Bowen v. Roy, 476 U.S. 693 (1986); Goldman v. Weinberger, 475 U.S. 503 (1986); Lynch v. Donnelly, 465 U.S. 668 (1984); *Lee*, 455 U.S. 232 (1982); Thomas v. Review Bd., 450

but they still insisted that the unemployment cases necessarily drove the result. One of their headings stated: "The Facts of This Case Lead To A Clear Conclusion Under This Court's Precedents."[73] That section then tried to fit every free exercise case into the *Sherbert* mold, and continued to argue that the only interest that could be considered was the state's interest in the fund, and not the state's interest in illegal drug use.

The brief also rejected the petitioner's slippery slope argument, arguing that a holding in the respondents' favor would not open the door to other exemptions for drug use:

> The practices, beliefs and history of the Native American Church are so unique and well-defined that it is unlikely that they will be duplicated by any other religious group. . . . [A]ll courts to address the issue have been able to distinguish between the Native American Church and the claims of other religions. For example, there is no record of any legislative or judicial expansion of the existing exemption.[74]

B. *The Conversations at Oral Argument and Conference*

1. Oral Argument

In *Smith II*, the petitioner was represented by David Frohnmayer, the Oregon Attorney General. He distinguished *Sherbert* by pointing to the "underlying conduct" and reasoning that the state should be able to assert an interest in the law related to that underlying conduct, and not just the law of unemployment compensation.[75]

Yoder was present in the exchange under the guise of discussing whether the ongoing vitality of the Native American Church was threatened, and whether such a criterion was relevant. Justice Blackmun believed the case was similar to *Yoder*, because they both

U.S. 707 (1981); *Yoder*, 406 U.S. 205; Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961); Everson v. Bd. of Educ., 330 U.S. 1 (1947); Cleveland v. United States, 329 U.S. 14 (1946); *Prince*, 321 U.S. 158; United States v. Ballard, 322 U.S. 78 (1944); Cantwell v. Connecticut, 310 U.S. 296 (1940); Jacobson v. Massachusetts, 197 U.S. 113 (1905); *Reynolds*, 98 U.S. 145.

[73] Brief for Respondents at 14, Emp't Div. v. Smith, 494 U.S. 872 (1990) (No. 88-1213), 1989 WL 1126850.

[74] *Id.* at 31 (footnotes omitted). This prediction, of course, turned out to be wrong, as the Supreme Court employed the peyote exemptions to force the government to permit the use of another illegal drug in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

[75] Transcript of Oral Argument at 20, *Smith*, 494 U.S. 872 (No. 88-1213); *see also* David B. Frohnmayer, Employment Division v. Smith*: "The Sky that Didn't Fall,"* 32 CARDOZO L. REV. 1655 (2011).

dealt with religious entities that might cease to exist if not permitted to violate the relevant law.[76] One of the Justices apparently asked this question. Perhaps it was Blackman, who, in his notes from the argument, noted that Mr. Frohnmayer refused to "concede [the Native American Church] religion w[oul]d b[e] destroyed."[77]

The respondents' lawyer, Mr. Dorsay, remained tied up with their original position: No state interest was relevant other than the interest in the compensation fund. One of the Justices found this to be jarring in light of the Question Presented:

> QUESTION: I mean, we granted certiorari on the question presented, which is whether the Free Exercise Clause of the First Amendment protects a person's religiously-motivated use of peyote from the reach of the state's general criminal law prohibition. And you say maybe it is not so much a question of criminal law, but you agree that the First Amendment issue is here.
>
> MR. DORSAY: Yes, but we think it is disposed of, and we need to keep reemphasizing this by *Sherbert* and *Thomas*, that the criminality is irrelevant. If the criminality is relevant, we still believe that the state has not met their test under the First Amendment. And I would be glad to move to that issue.[78]

2. Conference

Chief Justice Rehnquist voted to reverse the Oregon Supreme Court, and was concerned that the Court otherwise would "walk into a trap," that would open all free exercise claims to mandatory exemption, because "all cases concern sincere belief."[79] He was also unwilling to recognize a "historic exception" in the case.[80] Based on the oral argument, he was saying that the lengthy history of the Native American Church did not justify providing an exception to the correct free exercise doctrine just for this church, or for any long-entrenched religious organization simply because of its longevity.

Arguments had been made that *Yoder* stood for the proposition that long-established religions had a right not to be destroyed by the law.

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[76] Justice Harry A. Blackmun, Notes in Preparation for Oral Argument, *Smith* (No. 88-1213) (Nov. 4, 1989) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 547: Folder 1).

[77] Justice Harry A. Blackmun, Notes of Oral Argument, *Smith* (No. 88-1213) (Nov. 6, 1989) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 547: Folder 1).

[78] Transcript of Oral Argument, *supra* note 75, at 28-30.

[79] Justice Harry A. Blackmun, Conference Notes, *Smith* (No. 88-1213) (Nov. 9, 1989) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 547: Folder 1).

[80] *Id.*

With this statement, Rehnquist also was rejecting that interpretation of *Yoder*, and perhaps *Yoder* itself.

Justice White joined the Chief, pointing out that there were "all sorts of relig[ion]s popping up."[81] Justices Stevens, Scalia, and Kennedy also voted with the Chief to reverse. Stevens rejected the notion that the church would be destroyed, pointing out that twelve states and the United States permitted the religious use of peyote. He also conceded that the result would be in "so[me] tension wi[th] Yoder but I never [illegible] it."[82] Scalia agreed with Stevens that the decision would be in tension with *Yoder*, as well as *Sherbert*, but thought this was a case involving a "neutral law + action" and, therefore, not a free exercise problem. He added that the fate of the religion was not relevant.[83] Kennedy saw the tension with *Sherbert* as well, but he thought *Sherbert* itself was in tension with *Lee*, which was "suff[icient] for this case." He did not think the opinion should say that a religious organization could be "stamped out."[84]

Justice O'Connor stated that the Oregon Supreme Court had failed to accurately assess Oregon's state interest.[85] She believed the state had

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.* He added the point that the use of peyote was "close to transsubstantiation in RC doc[trine]." *Id.*

85 Smith v. Emp't Div., 763 P.2d 146, 147-48 (Or. 1988) ("We had decided that the state could not, consistent with the First Amendment, deny unemployment compensation to petitioners, who had been discharged from employment for ingesting peyote in ceremonies of the Native American Church, of which they were members. In our earlier opinions, we observed that the record in each case established that peyote use was a sacrament in the Native American Church, that the respondents were members of the church and sincere adherents to this faith, and that their use was in the course of a church ceremony. We also stated that it was immaterial to Oregon's unemployment compensation law whether the use of peyote violated some other law. The Board found that the state's interest in proscribing the use of dangerous drugs was the compelling interest that justified denying the claimant unemployment benefits. However, the legality of ingesting peyote does not affect our analysis of the state's interest. The state's interest in denying unemployment benefits to a claimant discharged for religiously motivated misconduct must be found in the unemployment compensation statutes, not in the criminal statutes proscribing the use of peyote. The Employment Division concedes that 'the commission of an illegal act is not, in and of itself, grounds for disqualification from unemployment benefits. ORS 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.' The state's interest is simply the financial interest in the payment of benefits from the unemployment insurance fund to this claimant and other claimants similarly situated. The decisions of the United States Supreme Court on which we relied held that this financial interest did not suffice to override interests of unemployment compensation claimants in the free exercise of their religion. . . . We conclude that the Oregon statute against possession of controlled substances, which include peyote, makes no exception for the sacramental use of peyote, but that outright prohibition of good faith religious use of peyote by adult members of the Native American Church would violate the First Amendment directly and as interpreted by Congress. We therefore reaffirm our holding that the First Amendment entitles petitioners to unemployment compensation." (first alteration in original) (internal quotation marks and citations omitted)); Transcript of Oral Argument, *supra* note 75, at 21.

a compelling interest and, therefore, she would reverse the Oregon Supreme Court's holding that the Free Exercise Clause protected the respondents' use of peyote. According to Blackmun's Conference notes, she also did not agree with Justice Stevens that "neutral law can be upheld."[86] What she meant was more fully explained in her concurrence to *Smith II*.[87]

Justice Brennan stuck to his original position that the Oregon Supreme Court's reasoning regarding the Free Exercise Clause—which would force mandatory exemptions to conduct even in violation of the law or public policy—should be affirmed.[88] Justice Marshall agreed and pointed out, apparently in response to the Chief, that the respondents were "very sincere."[89] Blackmun apparently adhered to his notes for the oral argument in which he stated that the case was "close to *Yoder*."[90]

C. *The* Smith II *Decision*

In *Employment Division v. Smith*,[91] the Supreme Court held that Native American Church members could not obtain unemployment compensation if they violated state drug laws by using peyote, an illegal drug, at religious ceremonies. The Court plainly adopted Frohnmayer's reasoning that the underlying conduct's legality was relevant. In the context of surveying its free exercise jurisprudence, the Court stated that the First Amendment's Free Exercise Clause[92] did not provide a defense to neutral, generally applicable laws, like the unemployment compensation law and the criminal drug law implicated. The majority explained the principle as follows: "'Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.'"[93] As the Court also noted, this approach had governed the "vast majority" of free exercise cases since 1878.[94]

The *Smith II* decision is weighty because the majority opinion signaled that it was treating the case as an opportunity to analyze and assess the full scope of the cases interpreting the Free Exercise Clause.

86 Blackmun, Conference Notes, *supra* note 79.
87 Emp't Div. v. Smith, 494 U.S. 872, 891 (1990) (O'Connor, J., concurring).
88 Blackmun, Conference Notes, *supra* note 79.
89 *Id.*
90 Blackmun, Notes in Preparation for Oral Argument, *supra* note 76.
91 *Smith*, 494 U.S. 872.
92 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.
93 *Smith*, 494 U.S. at 882 (quoting Gillette v. United States, 401 U.S. 437, 461 (1971)).
94 *Id.* at 885.

That should not be surprising given the development of the themes from *Smith I* through the briefing, oral argument, and Justices' Conference in *Smith II*. The Court reviewed its entire free exercise jurisprudence to deduce there was one standard that had dominated since 1879, when the first free exercise decision was rendered in *Reynolds v. United States*.[95] Thus, the *Smith* decision did not simply decide the dispute before the Justices, but rather painted a panorama of all free exercise cases and demarcated the parameters of liberty and legal responsibility. This was the classic comprehensive opinion that was intended to be a landmark in the doctrinal field and became one. The majority stated:

> We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [strict scrutiny] test inapplicable to such challenges. 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."[96]
>
> To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself,"—contradicts both constitutional tradition and common sense.[97]

In *Smith*, the Court affirmed the rule of law as applied to religious entities and explicitly rejected the strict scrutiny alternative for neutrally applicable laws. While recognizing that the *Sherbert* test—under which "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest"[98]—had "sometimes" been used to analyze free exercise challenges, the Court concluded that an approach that was both more reasoned and grounded in precedent was to hold the test inapplicable to challenges to neutral, generally applicable laws.[99]

That was not the end of the Court's analysis of religious liberty. *Smith* also encouraged believers to go to the legislatures for relief from particular laws imposing particular burdens on religious practice. For example, the Court pointed approvingly to state law exemptions for the use of peyote from generally applicable drug laws.[100] On the relationship between the legislature and judiciary, the Court stated:

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

96 *Smith*, 494 U.S. at 885 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

97 *Id.* (quoting *Reynolds*, 98 U.S. at 167).

98 *Id.* at 883.

99 *See id.* at 885.

100 *Id.* at 890.

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. 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.[101]

In fact, a number of states and the federal government would follow suit after *Smith*, and enact exemptions for the religious use of peyote, in effect proving the efficacy of the Court's approach for religious believers. But those positive developments for religious liberty after *Smith* were lost in the maelstrom of invective against it.

IV. THE LEGAL ACADEMY TAKES THE *SMITH* DECISION OUT OF ITS DOCTRINAL CONTEXT

After *Smith* was decided, a chorus of academics cried that the Court had overturned a supposedly long-settled doctrine that required strict scrutiny of any law—no matter how neutral—that substantially burdened religious conduct.[102] That was the shared belief in a majority of the law schools. The well-known church/state scholar, Professor Douglas Laycock, fulminated that *Smith* was "inconsistent with the original intent, inconsistent with the constitutional text, inconsistent with doctrine under other constitutional clauses, and inconsistent with precedent."[103] Professor (and former federal appellate judge) Michael McConnell contended that the *Smith* Court's "use of precedent is

101 *Id.* (citations omitted).

102 *See* sources discussed *supra* note 2.

103 Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that Was Never Filed*, *supra* note 2, at 102.

troubling, bordering on the shocking."[104] Professor Harry F. Tepker, Jr., of the University of Oklahoma, said that *Smith* illustrated "judicial willingness to distort precedents to destroy traditional concepts of individual liberty."[105] Professor James D. Gordon III of Brigham Young University even went so far as to allege the Justices' motives, alleging that "the Court wanted to reach its result in the worst way, and it succeeded" and in so doing "'depublished' the free exercise clause."[106] It is not hyperbole to say they were all exaggerating. *Smith* was no tsunami in free exercise law. It was a case of first impression that led the Court to consider all of its free exercise precedents, and to which the Court applied the dominant doctrine in the field.

A defect underlying the overstated substantive critique of *Smith* was a tendency to treat free exercise doctrine as an either/or choice. The Court had followed not one, but two paths of reasoning that were internally inconsistent in the free exercise cases between 1963 and 1990. Just a few cases had been decided by the "only" free exercise approach that was touted by legal academics after *Smith*—yet the jurisprudence they found so shocking in *Smith* was in fact the predominant rule throughout the Court's free exercise jurisprudence. Despite the inflamed declarations by law professors, the Court had not produced a doctrine out of whole cloth. Quite to the contrary, it applied its dominant doctrine and limited the competing strict scrutiny approach to the bare handful of cases where it had been previously employed.

One might respond to my observations by saying that perhaps the professors were just giving their opinion regarding the doctrine to choose. That is not accurate, however. Their position in response to *Smith* was not that the Court had chosen between two pre-existing and conflicting doctrinal threads, preferring one thread, but rather that the Court had fabricated a whole new doctrine. According to Laycock and McConnell in particular, the Court had utterly abandoned controlling doctrine.[107] Thus, their argument was not only that the rule chosen was wrong, but also that the way it was derived by the Court was

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104 McConnell, *Free Exercise Revisionism and the* Smith *Decision*, *supra* note 2, at 1120; *see also* Steven D. Smith, *Free Exercise Doctrine and the Discourse of Disrespect*, 65 U. COLO. L. REV. 519, 575 (1994) (stating that the *Smith* Court "chose . . . to promote an advocacy of intolerance").

105 Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1, 1 (1991).

106 Gordon, *supra* note 2, at 114-15.

107 There was no shortage of invective against the Supreme Court. *See* Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, *supra* note 2, at 848-50; Laycock, *The Remnants of Free Exercise*, *supra* note 2, at 9; Laycock, *The Supreme Court's Assault on Free Exercise, and the Amicus Brief that Was Never Filed*, *supra* note 2; McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, *supra* note 2, at 726; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1120-21 (1990); Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 HARV. J.L. & PUB. POL'Y 181, 183-84 (1992).

illegitimate. On their account, *Smith* was irrational and the Justices had adopted a newly hostile theory against religious believers. Therefore, after authoritatively declaring what the doctrine had been, professors criticizing *Smith* claimed to be engaging in a neutral analysis of it. The fundamental error, however, was that the critics' purported "real" doctrine was in fact a grossly oversimplified version of the Court's cases. Their certainty and their description were misleading to members of Congress, religious entities, and the public.

Members of Congress listened to the religious entities and the law professors and within four months of the *Smith* decision, held hearings to castigate the Supreme Court for purportedly severely departing from its previous doctrine.[108] Religious groups, believing (or at least publicly proclaiming) that they had lost more than they actually had, turned to Congress to deliver what they claimed was their constitutional right: a "return" to *Sherbert* and *Yoder*, or strict scrutiny of every law in every free exercise case. Starting with a small number of religious organizations in Washington, D.C., who gathered soon after *Smith* was decided, and following the views of Professors Douglas Laycock and Michael McConnell, the group that would later call itself the Coalition for the Free Exercise of Religion drafted a statute that draped the level of scrutiny applied in *Sherbert* and *Yoder* over all legal domains.[109] They named it the Religious Freedom Restoration Act (RFRA, pronounced riff-rah), and only one member of Congress found it within him or herself to attempt to impede a statute so named.[110]

Members of Congress accepted the academics' characterization without question and leapt at the opportunity to pass RFRA, which would make them saviors of religious liberty (and superior to the Supreme Court). During the hearings, leading voices in the religious community heatedly denounced the Court's *Smith* decision.[111] Elder Dallin Oaks, a former law professor at the University of Chicago, represented the Church of Jesus Christ of Latter-day Saints at the hearings. He expressed the importance his church "attach[ed] to this

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[108] *See generally Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. (1990).

[109] For a list of religious groups in the Coalition, see HAMILTON, *supra* note 30, at 177-80.

[110] The one exception was Sen. Harry Reid of Nevada, who, in the final stages before RFRA was passed, requested an amendment to exempt the prisons. The amendment failed. *See* 139 CONG. REC. 26,407-14 (1993); *id.* at 26,178-97.

[111] *See Hearing on S. 2969*, *supra* note 2, at 44 (statement of Oliver S. Thomas on behalf of the Baptist Joint Committee and the American Jewish Committee) ("Rarely has a case generated so much criticism in such a short time. Critical editorials in newspapers and magazines abound . . . . More than 50 scholarly articles critical of *Smith* have been written."); *The Religious Freedom Restoration Act: Hearings on S. 2969 Before the Senate Comm. on the Judiciary*, 102d Cong. 60-62 (1992) (statement of Oliver S. Thomas, General Counsel, Baptist Joint Committee of Public Affairs). Attached to Thomas's statement to the Senate Committee was an appendix listing said critical articles. See *supra* note 2 for a list of articles.

congressional initiative to restore the free exercise of religion that a divided Supreme Court took away in *Employment Division v. Smith*."[112] Elder Oaks furthermore explained:

> With the abandonment of the "compelling governmental interest" test in [*Smith*], the Supreme Court ha[d] permitted any level of government to interfere with an individual's religious practice or worship so long as it does so by a law of general applicability that is not seen as overtly targeting a specific religion.[113]

Douglas Laycock similarly opined that RFRA was "urgently needed to protect the free exercise of religion from the Supreme Court's decision in *Employment Division v. Smith*," as the Court had held "in effect . . . that every American has a right to believe in a religion, but no right to practice it."[114]

Members of Congress were told that strict scrutiny was the *only* doctrine and that the Court had employed that approach in all free exercise cases. Moreover, if Congress reinstated the rule, it would be doing nothing more than returning the doctrine to its pre-1990 status. The plain language of RFRA makes clear it was supposedly a simple reinstatement of doctrine. As stated expressly in RFRA, Congress found that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests" and thus the purpose of the Act was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened."[115] In fact, RFRA was a dramatic alteration to the doctrine in many contexts.

It is not an exaggeration to say that these leading law professors incorrectly characterized prior case law to the public, including members of Congress. Religious groups either bought into the academics' analysis or were simply willing to take advantage of an extraordinary political opportunity.

Congress passed RFRA in 1993 and established what *Smith*'s detractors claimed (incorrectly) the preceding doctrine had required. Publicly, Congress was persuaded that it was standard free exercise doctrine to subject every single law to strict scrutiny. In fact, the members codified the lone case that had been decided as they described the law should be: *Yoder*. Under RFRA, every law was to be subject to

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112 *Hearing on S. 2969*, *supra* note 2, at 33 (statement of Elder Dallin H. Oaks, Quorum of the Twelve Apostles, Church of Jesus Christ of Latter-day Saints).

113 *Id.* at 37.

114 *Id.* at 67 (statement of Douglas Laycock, Professor of Law, University of Texas).

115 42 U.S.C. § 2000bb(a)(5), (b)(1) (2006) (citations omitted) (citing Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963)).

strict scrutiny, whether neutral and generally applicable or not. RFRA provided that:

> (a) In General. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
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> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[116]

With *Smith*, the Court had articulated the relationship between religious entities, the government, and society. Its constitutional vision was based on fundamental principles of republican democracy, judicial respect for legislative determinations regarding the public good, and the rule that no one may harm another. The legislative response rearranged those relationships. RFRA thus raised the question whether Congress could unilaterally rearrange the relationship between religious entities, the law, and the public good. If so, then the larger republican and democratic principles at the base of *Smith* could be abandoned in favor of permitting religious entities to avoid most generally applicable,

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[116] *Id.* § 2000bb-1. RFRA was nothing but an attempt by Congress to impose the reasoning of *Sherbert* and *Yoder* on all classes of neutral, generally applicable laws, even though the Court had never traveled that far. Congress stated in its findings and declared purposes that:

> (a) Findings. The Congress finds that—
>
> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
>
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) governments should not substantially burden religious exercise without compelling justification;
>
> (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.
>
> (b) Purposes. The purposes of this chapter are—
>
> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Id. § 2000bb.

neutral laws. It would take the decision invalidating RFRA—*Boerne v. Flores*[117]—to vindicate the bedrock republican governance principles that justify and require subjecting religious entities to the generally applicable, neutral laws that govern everyone else.

Boerne v. Flores held RFRA unconstitutional:

> Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. . . . The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a Constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."[118]

Like the *Smith* decision, many law professors claimed that the *Boerne* decision was shocking. As Professor Daniel Conkle put it: "Critics have contended . . . that *Boerne*'s interpretation and application of Section 5 were not only surprising, but also radical."[119] Congress held hearings following *Boerne* at which Professor Laycock argued that "*Boerne* has dramatically changed the law."[120] Those who benefited from RFRA echoed his analysis. Also at the hearing, Marc Stern, of American Jewish Congress, contended that *Boerne* was a "distortion of federalism" and that it "massively shifts power from Congress to the courts,"[121] while Charles Colson described the Court's decision as "novel and dangerous."[122] As with the characterizations of *Smith II*, these statements are based on inaccurate analyses of prior case law.

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117 City of Boerne v. Flores, 521 U.S. 507 (1997).

118 *Id.* at 519.

119 Daniel O. Conkle, *Congressional Alternatives in the Wake of* City of Boerne v. Flores*: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633, 634 n.7 (1998).

120 *Protecting Religious Freedom After* Boerne v. Flores*: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 97 (1997) [hereinafter *Protecting Religious Freedom After* Boerne v. Flores] (statement of Douglas Laycock, Associate Dean for Research, University of Texas Law School). Later, in an article, he argued that the decision "rolled back congressional power to enforce the Civil War Amendments quite generally." Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 39 (2000).

121 *Protecting Religious Freedom After* Boerne v. Flores, *supra* note 120, at 35-36 (statement of Marc D. Stern, Director, Legal Department, American Jewish Congress).

122 *Id.* at 13 (statement of Charles W. Colson, President, Prison Fellowship Ministries).

CONCLUSION

Neither the Supreme Court Justices nor the parties in *Smith* treated *Sherbert* or *Yoder* as such entrenched and expansive holdings that they obviously drove the result in *Smith II*. To be sure, the employees hoped that they could persuade the Court not to look beyond *Sherbert*, but that attempt failed early in the case's development, even with Justice Brennan. In fact, the discourse moved beyond the unemployment compensation cases even before the Court considered *Smith II*.

It is a matter of history that the academic response to *Smith II* drove the public discussion back to where it began early in Smith *I*, with a keyhole focus on *Sherbert* and a misguided claim that the state's interest should usually be treated as de minimis. This heated reaction papered over the more interesting and rich discussion at the Court, distorted the holding, and then triggered legislative overreaction.