D. SACRAMENTAL PRACTICES AND PROVISIONS

Most religions have certain ceremonies, ritual practices, rites or celebrations that utilize objects or substances deemed sacred or sacramental in the sense of evoking or evidencing reverence for deity. In some instances the use of such objects or substances may be prohibited or restricted by law, creating a potential or actual limitation in the free exercise of religion. Sometimes an exception is made for the religious use of otherwise regulated or banned substances, as when "sacramental wine" for religious use was excepted from the laws prohibiting transportation or sale of beverage alcohol during Prohibition. In other instances the religious group must do without or operate illegally. American Indians have encountered this problem with respect to eagle feathers, which they use in certain ritual ceremonies, since some eagles are on the endangered species list and cannot legally be hunted. Some religious groups seek to use "controlled substances" to induce euphoria, as will be seen below.

1. "Snake-Handling"

One of the more unusual "sacraments" encountered in religious life in the United States was the handling of venomous reptiles as an act or adjunct of worship, a practice found among certain Pentecostal groups in the Appalachian and Ozark regions. Several states adopted statutes prohibiting the practice, but it still continues. The reason for this hazardous activity was found, according to its practitioners, in the New Testament.[1]

The "mother church" of the snake-handling tradition—the Dolly Pond Church of God With Signs Following—was founded in 1909 at Sale Creek in Grasshopper Valley, Tennessee, by George Went Hensely. He was inspired by an experience he had atop White Oak Mountain near that valley when he confronted and seized a rattlesnake that he took down into the valley and admonished the people there to "take up [snakes] or be doomed to eternal hell." Hensely preached this gospel with some success for forty-six years, claiming to have been bitten 400 times "till I'm speckled all over like a guinea hen." He died—refusing medical attention to the end—from the bite of a diamondback rattlesnake during a prayer meeting at Lester's Shed near Altha, Florida, July 24, 1955.

> The church Hensely founded spread throughout the south and southeast and continues to exist today, primarily in rural and relatively

1. *Gospel According to Mark*, chapter 16, verses 17 and 18, as found in the Authorized or King James Version:

> And these signs shall follow them that believe; In my name shall they cast out devils; they shall speak with new tongues; They shall take up serpents; and if they drink any deadly thing, it shall not hurt them; they shall lay hands on the sick, and they shall recover.

(These lines are omitted in most modern versions of the Bible because they are not found in the earliest Greek manuscripts of the New Testament.)

> isolated regions throughout this area....
>
> To say that this is not a conventional movement would be a masterpiece of understatement. Its beliefs and practices are, to say the least, unconventional and out of harmony with contemporary customs, mores, and notions of morality. They oppose drinking (to include carbonated beverages, tea and coffee), smoking, dancing, the use of cosmetics, jewelry or other adornments. They regard the use of medicine as a sure sign of lack of faith in God's ability to cure the sick and look upon medical doctors as being for the use of those who do not trust God.[2]

Though eschewing tea and coffee, they do drink strychnine upon (sacramental) occasion, also in fulfillment of the injunction in Mark 16:18.

a. *Lawson v. Kentucky* (1942). In 1940 the Commonwealth of Kentucky adopted a statute that provided "No person shall display, handle or use any kind of snake or reptile in connection with any religious service or gathering." Tom Lawson and several others were convicted of violating this statute, and they appealed, challenging the constitutionality of the statute. The Kentucky Court of Appeals upheld the conviction and the statute in a unanimous decision written by Judge Tilford.

> Many snakes are poisonous, and only the zoologist, herpetologist, or experienced woodsman is able to distinguish which are not.... Legislation enacted by a state in the exercise of its police power may not be invalidated because included among the prohibited articles or acts are some, which, perchance, may be harmless, where only experts can distinguish between them[,] and the public, for whose protection the legislation is enacted, is unable to do so. Notoriously, religious services or gatherings are not conducted by herpetologists, and rather than entrust the selection of the types of snakes to be displayed and handled at such meetings to the inexpert and thus imperil the lives of the participants, the Legislature had the right, unless forbidden by the State or Federal Constitution from so doing, to prohibit the practice altogether. Moreover, there is no pretense that the snakes handled or exhibited by the appellants were non-poisonous, since the very purpose sought to be accomplished by their handling was to demonstrate appellants' immunity, through faith, to the fatal consequences which would ensue to those who possessed it not.
>
> Appellants' main contention is that since they believe that the handling of snakes is a test of their faith, and it is part of their religious belief and practice, the statute which would penalize the practice is violative of the freedom of religion guarantees contained in the Federal and State Constitutions....
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> * * *
>
> [P]reachers and members of his [*sic*] congregation may be prohibited by

2. *Swann v. Pack*, 527 S.W.2d 99 (1975); the information in this quotation and in the preceding material was derived from sources cited in that opinion, esp. LaBarre, W., *They Shall Take Up Serpents* (Minneapolis: Univ. of Minnesota Press, 1962).

> penal statutes from committing acts which are calculated to endanger the safety and lives of themselves and others....[3]

• *North Carolina v. Massey*, 51 S.E.2d 179 (1949) (statute designed to protect public safety takes precedence over defendants' religious practice).

• *Harden v. Tennessee*, 216 S.W.2d 708 (1948) (same).

b. *Swann v. Pack* (1975). The Supreme Court of Tennessee considered this issue in 1975. The Circuit Court at Newport had enjoined one Liston Pack, pastor of the Holiness Church of God in Jesus Name, of Newport, from handling poisonous snakes. This action was taken after "an Indian boy was bitten and his arm became swollen" at a church service on April 7, 1973, and two members drank strychnine and died as a result. At the funeral of one of these, Pastor Pack and others handled snakes, and Pack proclaimed his intention of continuing to do so. Indeed, within a few months a national convention of snake-handling pentecostals was held in the premises, and as a result Pack and others were held in contempt of court for violating the injunction.

The Supreme Court of Tennessee, in an opinion by Justice Joseph W. Henry, reviewed the appeal of the sentences for contempt. The court related the origin and nature of the snake-handling tradition,[4] and clarified a minor misunderstanding in *Harden*, which had stated that snake-handling was viewed by its devotees as "the test and proof of the sincerity of their belief."

> Our research indicates that this is not precisely correct. Their basic reason is compliance with the scripture as they interpret it, and as required by their Articles of Faith.... Its sole purpose is to "confirm the word." In the words of Alfred Ball, a defendant to this suit:
>
> > We don't take up serpents, handle fire or drink strychnine to test the faith of the people at all. That's not the point of it.... These are signs that God said would follow the believers. And these signs are to confirm the Word of God, and that's the only purpose for them.... That's all God
>
> * * *
>
> Lastly, it should be pointed out that snakes are only handled when the member or handler has become "anointed." As we understand this phenomenon and the emotional reaction it produces, it is something akin to saying that a member doesn't handle snakes until the "spirit moves him." Unquestionably this is an emotional stimulus produced by extreme faith and generating great courage. Perhaps the whole belief in "anointment" can best be summed up by the defendant, Liston Pack:
>
> > When I become anointed to handle serpents, my hands get real numb. It is a tremendous feeling. Maybe symbolic to an electric shock, only an electric shock could hurt you. This'll be pure joy. * * * It comes from inside... If you've got the Holy Ghost in you, it'll come out and nothing can hurt you. Faith brings contact with God and then you're anointed. It is not tempting God. You can't tempt God by doing what He says do.

3. *Lawson v. Kentucky*, 164 S.W.2d 972 (1942).

4. See summary at the beginning of this section.

> You can have faith, but if you never feel the anointing, you had better leave the serpent alone....
>
> Again, this is not a conventional religious group and its members are few. There is, however, no requirement under our State or Federal constitution that any religious group be conventional or that it be numerically strong in order that its activities be protected. Nor is there any requirement that its practices be in accord with prevailing views.
>
> * * *
>
> A "mode of worship," even of a religious group wherein the handling of serpents is central to its Articles of Faith, is constitutionally protected under the Constitutions of Tennessee and of the United States.... We, therefore, hold that the Holiness Church of God in Jesus Name, is a constitutionally protected religious group.
>
> This is not to say, however, that this or any other religious group has an absolute and unbridled right to pursue any practice of its own choosing. The right to believe is absolute; the right to act is subject to reasonable regulation designed to protect a compelling state interest. This belief-action dichotomy has been the subject of numerous decisions of the Supreme Court of the United States.[5]

The Court of Appeals below had thought those precedents had been superseded when the "belief-action dichotomy" upon which it was based was rejected by the U.S. Supreme Court in *Wisconsin v. Yoder*. But the Tennessee Supreme Court insisted that *Yoder* had not made the belief-action distinction obsolete.

> We hold that under the First Amendment to the Constitution of the United States and under the substantially stronger provisions of...the Constitution of Tennessee, a religious practice may be limited, curtailed or restrained to the point of outright prohibition, where it involves a clear and present danger to the interests of society; but the action of the state must be reasonable and reasonably dictated by the needs and demands of society as determined by the nature of the activity as balanced against societal interests. Essentially, therefore, the problem becomes one of balancing of the interest between religious freedom and the preservation of the health, safety and morals of society. The scales must be weighed [weighted?] in favor of religious freedom, and yet the balance is delicate.
>
> The right to the free exercise of religion is not absolute and unconditional. Nor is its sweep susceptible of discrete and concrete compartmentalization. It is perforce, of necessity, a vague and nebulous notion, defying the certainties of definition and the niceties of description. At some point the freedom of the individual must wane and the power, duty and interest of the state becomes compelling and dominant.
>
> Certain guidelines do, however, emerge under both constitutions.
>
> Free exercise of religion does not include the right to violate statutory law.
>
> It does not include the right to commit or maintain a nuisance.

5. *Swann v. Pack*, 527 S.W.2d 99 (1975), citing *Reynolds v. U.S.*, 98 U.S. 145 (1879), *Davis v. Beason*, 133 U.S. 333 (1890), and *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The fact that one acts from the promptings of religious beliefs does not immunize against lawless conduct.

But, again, the scales are always weighted in favor of free exercise and the state's interest must be compelling; it must be substantial; the danger must be clear and present....

We decide this controversy in the light of these objectives. In so doing we have not lost sight of the fact that snake handling is central to respondents' faith. We recognize that to forbid snake handling is to remove the theological heart of the Holiness Church[,] and this has prompted this Court to investigate and research this matter with meticulous care and to announce its decision through an unusually extensive opinion.

* * *

[The] statute is not as comprehensive or as conclusive as is generally believed.... [I]t does not forbid snake-handling *per se*. It condemns the *manner* and not the *fact* of snake handling.

Conversely, it permits snake handling if done in a careful and prudent manner or, in the statutory terminology, under any circumstances or in any manner which does not endanger the life or health of any person.

Obviously, it was not intended to prevent zoologists or herpetologists from handling snakes as part of their professional pursuits, nor to preclude handling by those who do so as a hobby, nor those who are engaged in scientific or medical pursuits requiring the handling of snakes.

* * *

This is not a criminal prosecution.... This is a suit to abate a nuisance.... We hold that the handling of snakes as a part of a religious ritual is a common law nuisance, wholly independent of any state statute....

[A] public nuisance is defined as follows:

> It is a condition of things which is prejudicial to the health, comfort, safety, property, sense of decency, or morals of the citizens at large, resulting either from an act not warranted by law, or from neglect of a duty imposed by law.

* * *

Under this record, showing as it does, the handling of snakes in a crowded church sanctuary, with virtually no safeguards, with children roaming about unattended, with the handlers so enraptured and entranced that they are in a virtual state of hysteria and acting under the compulsion of "anointment," we would be derelict in our duty if we did not hold that respondents and their confederates have combined and conspired to commit a public nuisance and plan to continue to do so. The human misery and loss of life at their "Homecoming" of April 7, 1970 is proof positive....

Tennessee has the right to guard against the unnecessary creation of widows and orphans.... We, therefore, have a substantial and compelling state interest in the face of a clear and present danger so grave as to endanger paramount public interest.

* * *

This holding is in no sense dependent upon the way or manner in which

snakes are handled since it is not based upon the snake handling statute. Irrespective of its import, we hold that those who publicly handle snakes in the presence of other persons and those who are aiding and abetting are guilty of creating and maintaining a public nuisance. Yes, the state has a right to protect a person from himself and to demand that he protect his own life.

Suicide is not specifically denounced as a crime under our statutes but was a crime at common law. Tennessee adopted the Common Law as it existed at the time of the separation of the colonies.... An attempt to commit suicide is probably not an indictable offense under Tennessee law; however, such an attempt would constitute a grave public wrong, and we hold that the state has a compelling interest in protecting the life and promoting the health of its citizens.

Most assuredly the handling of poisonous snakes by untrained persons and the drinking of strychnine are not calculated to increase one's life span.

* * *

We fully appreciate the fact that the decision we reach imposes stringent limitations upon the pursuit of a religious practice, a result we endeavored to avoid. After long and careful analysis of alternatives and lengthy deliberations on all aspects of this problem we reached the conclusion that paramount considerations of public policy precluded less stringent solutions. We gave consideration to limiting the prohibition to handling snakes in the presence of children, but rejected this approach because it conflicts with the parental right and duty to direct the religious training of his children. We considered the adoption of a "consenting adult" standard but, again, this practice is too fraught with danger to permit its pursuit in the frenzied atmosphere of an emotional church service, regardless of age or consent. We considered restricting attendance to members only, but this would destroy the evangelical mission of the church. We considered permitting only the handlers themselves to be present, but this frustrates the purpose of confirming the faith of non-believers and separates the pastor and leaders from the congregation. We could find no rational basis for limiting or restricting the practice, and could conceive of no alternate plan or procedure which would be palatable to the membership or permissible from a standpoint of compelling state interest. The very considerations which impel us to outright prohibition, would preclude fragmentation of the religious services or the pursuit of this practice on a limited basis.[6]

2. Use of Hallucinogens

Since human memory runneth not to the contrary, various substances have been used in worship because of their ability to stimulate unusual and exalted states of consciousness when imbibed or ingested. Among these is peyote, the product of a "small, spineless cactus" known to botanical science as *Lophophora williamsii*. The

6. *Swann v. Pack, supra.*

small button-shaped growths atop this cactus contain an ingredient, mescaline, that, when chewed or sipped as an infusion, can produce hallucinations of various types, depending upon the user.

> In most subjects it causes extraordinary vision marked by bright and kaleidoscopic colors, geometric patterns, or scenes involving humans or animals. In others it engenders hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia. Beyond its hallucinatory effect, peyote renders for most users a heightened sense of comprehension; it fosters a feeling of friendliness toward persons.[7]

Some of these substances have been regulated by law or outlawed entirely because of the supposed harm or threat of harm to users and others. Continued use for sacramental purposes then produced the case law reported here.

a. *People v. Woody* (1964). One of the first cases to treat this problem under the rubric of free exercise of religion was a landmark case involving the Native American Church in California in 1964.[8] Several Navajos were apprehended in a hogan in the desert near Needles, California, using peyote in a religious ceremony. They were tried and convicted of violating a section of the California Health and Safety Code that prohibited the unauthorized possession of peyote. The Supreme Court of California ruled on the case *en banc* in an opinion written by Justice Mathew O. Tobriner.

The state did not dispute defendants' claim to be using peyote for religious purposes, but contended that *any* use was illegal, whether religious or not. The state Supreme Court did not question the ability of the state under the police power to prohibit the use of peyote, but focused on whether that prohibition could be applied to long-standing religious use, relying upon the two-step test of free-exercise violation set forth in *Sherbert v. Verner*[9] the previous year: (1) whether the statute imposes a burden upon the free exercise of religion, and (2) whether that infringement is justified by some compelling state interest.

The court first examined the religious use of peyote by American Indians.

> Peyote...plays a central role in the ceremony and practice of the Native American Church, a religious organization of Indians. Although the church claims no official prerequisites to membership, no written membership rolls, and no recorded theology, estimates of its membership range from 30,000 to 250,000, the wide variance deriving from differing definitions of a "member." As the anthropologists have ascertained through conversations with members, the theology of the church combines certain Christian teachings with the belief that peyote embodies the Holy Spirit and that those who partake of peyote enter into direct contact with God.
>
> Peyotism discloses a long history. A reference to the religious use of peyote in Mexico appears in Spanish historical sources as early as 1560.

7. *People v. Woody*, 394 P.2d 813 (1964).
8. *People v. Woody*, 394 P.2d 813 (Cal. 1964).
9. 374 U.S. 398 (1963), discussed at § A7c above.

> Peyotism spread from Mexico to the United States and Canada; American anthropologists describe it as well established in this country during the latter part of the nineteenth century. Today, Indians of many tribes practice peyotism....
>
> The "meeting," a ceremony marked by the sacramental use of peyote, composes the cornerstone of the peyote religion. The meeting convenes in an enclosure and continues from sundown Saturday to sunrise Sunday. To give thanks for the past good fortune or find guidance for future conduct, a member will "sponsor" a meeting and supply to those who attend both the peyote and the next morning's breakfast....
>
> A meeting connotes a solemn and special occasion. Whole families attend together, although children and young women participate only by their presence. Adherents don their finest clothing, usually suits for men and fancy dresses for the women, but sometimes ceremonial Indian costumes. At the meeting the members pray, sing, and make ritual use of drum, fan, eagle bone, whistle, rattle and prayer cigarette, the symbolic emblems of their faith. The central event, of course, consists of the use of peyote in quantities suffient to produce an hallucinatory state.
>
> At an early but fixed stage in the ritual the members pass around a ceremonial bag of peyote buttons. Each adult may take four, the customary number, or take none. The participants chew the buttons, usually with some difficulty because of extreme bitterness; later, at a set time in the ceremony any member may ask for more peyote; occasionally a member may take as many as four more buttons. At sunrise on Sunday the ritual ends; after a brief outdoor prayer, the host and his family serve breakfast. Then the members depart. By morning the effects of the peyote disappear; the users suffer no aftereffects.
>
> 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 a feeling of brotherhood with other members; indeed, it enables the participant to experience the Deity. Finally, devotees treat peyote as a "protector." Much as a Catholic carries his medallion, an Indian often wears around his neck a beautifully beaded pouch containing one large peyote button.[10]

The court concluded that enforcement of the statute would be a "virtual inhibition of the practice of defendant's religion. To forbid the use of peyote is to remove the theological heart of Peyotism." Therefore it turned to the second question: whether the state had advanced an interest sufficiently compelling to justify such inhibition.

The state had argued several reasons for prohibiting the use of peyote even in religious worship. It contended that peyotism had deleterious effects upon the Indian community and that exempting such a practice would place a great burden on

10. *Woody, supra*.

enforcement of the narcotic laws to separate genuine from fraudulent claims of religious privilege.

> The People urge that "the use of peyote by Indians in place of medical care, the threat of indoctrination of small children," and the "possible correlation between the use of this drug and the possible propensity to use some other more harmful drug" justify the statutory prohibition. The record, however, does not support the state's chronicle of harmful consequences of the use of peyote.
>
> The evidence indicates that the Indians do not in fact employ peyote in place of proper medical care; and, as the Attorney General with fair objectivity admits, "there was no evidence to suggest that Indians who use peyote are more liable to become addicted to other narcotics than non-peyote-using Indians." Nor does the record substantiate the state's fear of "the indoctrination of small children"; it shows that Indian children never, and Indian teenagers rarely use peyote. Finally, as the Attorney General likewise admits, the opinion of scientists and other experts is "that peyote * * * works no permanent deleterious injury to the Indian. * * *" Indeed...these experts regard the moral standards of members of the Native American Church as higher than those of Indians outside the church.
>
> The Attorney General also argues that since "peyote could be regarded as a symbol, one that obstructs enlightenment and shackles the Indian to primitive conditions," the responsibility rests with the state to eliminate its use. We know of no doctrine that the state, in its asserted omniscience, should undertake to deny the defendants the observance of their religion in order to free them from the suppositious "shackles" of their "unenlightened" and "primitive condition."[11]

The court disposed of the state's purported anxiety about drug users' making fraudulent claims of religious immunity from law enforcement by noting that similar arguments were advanced by the state in *Sherbert v. Verner*, and it disposed of them as the Supreme Court had done in that case.

> In the instant case, as in Sherbert, the state produced no evidence that spurious claims of religious immunity would in fact preclude effective administration of the law or that other "forms of regulation" would not accomplish the state's objectives.
>
> That other states have excepted from the narcotic laws the use of peyote, and have not considered such exemption an impairment to enforcement, weakens the prosecution's forebodings. New Mexico in 1959, and Montana in 1957, amended their narcotics laws to provide that the prohibition against narcotics "shall not apply to the possession, sale or gift of peyote for religious sacramental purposes by any bona fide religious organization

11. *Woody, supra*. The same doctrine was used for many years to justify the efforts of the U.S. government to suppress Native American customs and practices such as the Sun Dance.

> incorporated under the laws of the state." Arizona has reached a similar result by judicial decree.[12]
>
> * * *
>
> We have weighed the competing values represented in this case on the symbolic scale of constitutionality. On the one side we have placed the weight of freedom of religion as protected by the First Amendment; on the other, the weight of the state's "compelling interest." Since the use of peyote incorporates the essence of the religious expression, the first weight is heavy. Yet the use of peyote presents only slight danger to the state and to the enforcement of its laws; the second weight is relatively light. The scale tips in favor of the constitutional protection.
>
> We know that some will urge that it is more important to subserve the rigorous enforcement of the narcotic laws than to carve out of them an exception for a few believers in a strange faith. They will say that the exception may produce problems of enforcement and that the dictates of the state must overcome the beliefs of a minority of Indians. But the problems of enforcement here do not inherently differ from those of other situations which call for the detection of fraud. On the other hand, the right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan near Needles, California.[13]

This decision has been often cited by "religions" of more recent provenance that seek exemption from laws restricting the use of "controlled substances," but with little success. The underlying inclination seems to be that the practitioners of peyoteism are few and dwindling in numbers, and their usage is an ancient one (though the Native American Church—in organizational form—is of fairly recent origin), but that view is usually not made very explicit any more than it is in this opinion, in which the only reference to the venerable age of the practice is found in an incidental allusion in the last sentence.

The following pages scan some of the more recent claimants to religious use of hallucinogens, mainly marijuana, culminating in a revisit by the Supreme Court of the United States to the peyote practice of American Indians in the disastrous decision of *Oregon v. Smith.*[14]

b. *Leary v. U.S.* (1967). One of the more notorious cases was that of the sometime Harvard professor turned Hindu guru of psychedelia, Timothy Leary. His experiments with psilocybin attracted some not altogether favorable attention, and in

12. *Woody*, 394 P.2d at 819 & n.5, *citing Arizona v. Attakai*, Crim. Act. No. 4098, Coconino County Superior Ct., Arizona (July 26, 1960).

13. *People v. Woody, supra.*

14. See § e below.

1963 he left Harvard to pursue his research independently. He set up a spiritual retreat center in Millbrook, New York, furnished with "shrines devoted to Hindu, Buddhist and Christian ways of finding God," and pursued his studies also in India, leading to his becoming a member of the Brahmakrishna sect of Hinduism.

In December 1965, Dr. Leary and his two children, Susan, 18, and John, 16, drove from New York to Texas, headed for Yucatan, Mexico, where they intended to spend time vacationing. They crossed the International Bridge at Laredo into Mexico, but returned in a few minutes to the United States, having been unable to obtain tourist permits because of the lateness of the hour, and planning to reapply the next morning. Upon their reentry U.S. Customs inspectors discerned traces of marijuana on the floor of the vehicle. A strip-search of Leary's daughter, Susan, discovered a small metal container holding "three partially smoked marihuana cigarettes, a small quantity of semi-refined marihuana and capsules of detroamphetamine sulphate (said to be a nonprohibitive narcotic)." Leary and his daughter were convicted of transporting marijuana, and Leary appealed the conviction on a number of points of error, the pertinent ones for this topic being that the trial court had erred in refusing to instruct the jury to acquit if it found the defendant's claims of religious use of marijuana to be honest and in good faith, and that in the absence of the government's ability to prove marijuana more harmful than peyote the denial of religious exemption from anti-marijuana legislation was an invidious discrimination between religions. Further, that the trial court erred in refusing to instruct the jury that they could consider as a defense Leary's honest belief that he had a right to engage in his activities because of his religious, scientific and parental beliefs, which beliefs negated the criminal intent necessary for conviction of a crime.

The Fifth Circuit Court of Appeals was not impressed by these—or any other—points of error, nor by Dr. Leary's academic and religious credentials, nor those of several fellow researchers who confirmed his testimony about the bona fides of his spiritual researches. The court, in an opinion by Justice Robert Andrew Ainsworth, Jr., brushed them aside.

> Congress has seen fit to legislate, with appropriate criminal sanctions, concerning the possession, importation, concealment, and taxation of marihuana. The severity of the penalties provided by statute for violation of these laws provides an insight into the grave concern of Congress to control the use of this drug. The testimony of appellants' witnesses relative to his sincerity of purpose in his religious and scientific endeavors is not pertinent here; nor is the evidence about the so-called harmless nature, the therapeutic value, and the accepted use of marihuana for religious rituals by certain sects in India.
>
> Our concern is with the laws of the United States, which [Leary] admittedly, knowingly and purposely violated because they conflicted with his personal religious beliefs and practices. [He] has attempted to demonstrate that the experience he finds through the use of marihuana is the essence of his religion. We do not inquire into the truth or verity of [his] religious beliefs—to do so would be violative of the Free Exercise

> Clause of the First Amendment. United States v. Ballard....[15] But [his] religious creed and the sincerity of his beliefs are not at issue here. The district judge properly refused an instruction to the jury that they should acquit [him] if they found his religious practices were in good faith.[16]

The court rejected Leary's reliance on *Sherbert v. Verner*.[17]

> We cannot reasonably equate deliberate violation of federal marihuana laws with the refusal of an individual to work on her Sabbath day and nevertheless claim compensation benefits. The Court in Sherbert, while upholding the Free Exercise Clause under the facts of that case, recognized that it had rejected challenges under the same clause "to governmental regulation of certain overt acts prompted by religious beliefs or principles, for `even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' Braunfeld v. Brown....[18] The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace, or order."
>
> The unlawful transportation, possession and use of marihuana falls within the category of cases cited in Sherbert which require government regulation. ""Crime is not the less odious because sanctioned by what any particular sect may designate as `religion.'" Davis v. Beason.[19]
>
> There is no evidence in this case that the use of marihuana is a formal requisite of the practice of Hinduism, the religion which Dr. Leary professes. At most, the evidence shows that it is considered by some as being an aid to attain consciousness expansion by which an individual can more easily meditate or commune with his god. Even as such an aid, it is not used by Hindus universally....
>
> * * *
>
> Congress has demonstrated beyond doubt that it believes marihuana is an evil in American society and a serious threat to its people. It would be difficult to imagine the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marihuana laws would be meaningless, and enforcement impossible. The danger is too great, especially to the youth of the nation, at a time when psychedelic experience, "turn on," is the "in" thing to so many, for this court to yield to the argument that the use of marihuana for so-called religious purposes should be permitted under the Free Exercise Clause. We will not, therefore, subscribe to the dangerous doctrine that the free exercise of religion accords an unlimited freedom to violate the laws of the land relative to marihuana.[20]

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15. 322 U.S. 78 (1944), discussed at IIB6a.
16. *Leary v. U.S.*, 383 F.2d 851 (1967).
17. 374 U.S. 398 (1963), discussed at § A7c above.
18. 366 U.S. 599 (1961), discussed at § A7b above.
19. 133 U.S. 333 (1890), discussed at § A2b above.
20. *Leary v. U.S., supra.*

Likewise, the court was not persuaded by the *Woody* line of cases.

> [Dr. Leary] argues that the religious use of peyote, a psychedelic hallucinogen, by Indians who are members of the Native American Church has been constitutionally protected by the Supreme Court of California in People v. Woody.....[21] He refers also to the California Supreme Court's decision in In re Grady...,[22] decided the same day as Woody, in which conviction of a "self-styled peyote preacher" for unlawful possession of narcotics, namely, peyote, was annulled and a new trial [ordered so that he] might have opportunity to prove that his use of peyote was in connection with an honest and bona fide practice of a religious belief. By parity of reasoning he contends that marihuana, another psychedelic drug, is entitled to the same constitutional protection as peyote. With due deference to the California Supreme Court, we are of course not bound by its decisions. However, we note an essential difference between Woody and the instant matter in that peyote in the Woody case played "a central role in the ceremony and practice of the Native American Church, a religious organization of American Indians," and that the "ceremony marked by the sacramental use of peyote composes the cornerstone of the peyote religion." Grady was apparently the spiritual leader of a group of individuals and provided peyote for the group which he said was for religious purposes.
>
> We are not impressed that the California cases are directly in point, and we will not apply them insofar as the circumstances of this case are concerned.
>
> In the early case of State v. Big Sheep,...[23] (1926), the Montana Supreme Court held, "It was clearly within the power of the Legislature to determine whether the practice of using peyote is inconsistent with the good order, peace, and safety of the state," against the contention that the defendant's religious freedom was infringed.
>
> In State v. Bullard...,[24] the North Carolina Supreme Court held, "the defendant may believe what he will as to peyote and marijuana and he may conceive that one is necessary and the other is advisable in connection with his religion. But it is not a violation of his...rights to forbid him, in the guise of his religion, to possess a drug which will produce hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia, and his position cannot be sustained here—in law or in morals."

The conviction was sustained, apparently without dissent, but the U.S. Supreme Court reversed on other grounds, having to do with the privilege against self-incrimination.[25]

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21. 394 P.2d 813 (1964), discussed immediately above.
22. 394 P.2d 728 (1964), not discussed here.
23. 243 P. 1067 (1926).
24. 148 S.E.2d 565 (1966).
25. *Leary v. U.S.*, 395 U.S. 6 (1969).

c. *U.S. v. Kuch* (1968). One of the more bizarre of religious claims came before Judge Gerhard Gesell in the federal district court for the District of Columbia in 1968. It arose from the indictment of one Judith H. Kuch for unlawful traffic in marijuana and LSD. She moved to dismiss on several grounds, mainly because enforcement of the statutes interfered with her free exercise of religion. She asserted that she was an "ordained minister of the Neo-American Church." In ruling on her motions to dismiss, Judge Gesell reported on the information provided about that organization.

> The Neo-American Church was incorporated in California in 1965 as a non-profit corporation. It claims a nationwide membership of about 20,000. At its head is a Chief Boo Hoo. Defendant Kuch is the primate of the Potomac, a position analogized to bishop. She supervised the Boo Hoos in her area. There are some 300 Boo Hoos throughout the country. In order to join the church a member must subscribe to the following principles:
>
> "(1) Everyone has the right to expand his consciousness and stimulate visionary experience by whatever means he considers desirable and proper without interference from anyone;
>
> "(2) The psychedelic substances, such as LSD, are the true Host of the Church, not drugs. They are sacramental foods, manifestations of the Grace of God, of the infinite imagination of the Self, and therefore belong to everyone;
>
> "(3) We do not encourage the ingestion of psychedelics by those who are unprepared."
>
> Building on the central thesis of the group that psychedelic substances, particularly marihuana and LSD, are the true Host, the Church specifies that "it is the Religious duty of all members to partake of the sacraments on regular occasions."
>
> A Boo Hoo is "ordained" without any formal training. He guides members on psychedelic trips, acts as a counselor for individuals having a "spiritual crisis," administers drugs and interprets the Church to those interested. The Boo Hoo [of Washington] D.C., testified that the Church was pantheistic and lacked a formal theology. Indeed, the church officially states in its so-called "Catechism and Handbook" that "it has never been our objective to add one more institutional substitute for individual virtue to the already crowded lists." In the same vein, this literature asserts "we have the right to practice our religion, even if we are a bunch of filthy, drunken bums." The members are instructed that anyone should be taken as a member "no matter what you suspect his motives to be."

Judge Gesell reflected on the problems posed by the Neo-American Church.

> The dividing line between what is, and what is not, a religion is difficult to draw. The Supreme Court has given little guidance. Indeed, the Court appears to have avoided the problem with studied frequency in recent years.[26] Obviously this question is a matter of delicacy and courts must be

26. Citing in the margin *U.S. v. Ballard*, 322 U.S. 78 at 86; *Davis v. Beason*, 133 U.S. 333 at 342; *Minersville v. Gobitis*, 310 U.S. 586; and *Fowler v. Rhode Island*, 345 U.S. 67 at 69.

ever careful not to permit their own moral and ethical standards to determine the religious implications of beliefs and practices of others. Religions now accepted were persecuted, unpopular and condemned at their inception.

Subtle and difficult though the inquiry may be, it should not be avoided for reasons of convenience. There is need to develop a sharper line of demarkation between religious activities and personal codes of conduct that lack spiritual import. Those who seek the constitutional protections for their participation in an establishment of religion and freedom to practice its beliefs must not be permitted the special freedoms this sanctuary may provide merely by adopting religious nomenclature and cynically using it as a shield to protect them when participating in antisocial conduct that otherwise stands condemned. In a complex society where the requirements of public safety, health and order must be recognized, those who seek immunity from these requirements on religious grounds must at the very least demonstrate adherence to ethical standards and a spiritual discipline.

The defendant has sought to have the Church designated a religion primarily by emphasizing that ingestion of psychedelic drugs brings about a religious awareness and sharpens religious instincts. There was proof offered that the use of psychedelic drugs may, among other things, have religious implications. Various writings on the subject were received in evidence and testimony was taken from two professors, not members of the Church but having theological interest in the subject, who had themselves taken drugs experimentally and had studied religious manifestations of psychedelic drug ingestion.

Just as sacred mushrooms have for 2000 years or more triggered religious experiences among members of Mexican faiths that use this vegetable, so there is reliable evidence that some but not all persons using LSD or marihuana under controlled conditions may have what some users report to be religious or mystical experiences. Experiments at Harvard and at a mental institution appear to support this view and there are specific case histories available, including the accounts of the professors who testified as to their personal experiences under the influence of psychedelic drugs. Researchers have found that religious reactions are present in varying degrees in the case of from 25 percent to 90 percent of those partaking. A religious reaction appears most frequently among users already religiously oriented by training and faith. While experiences under the influence have no single pattern, a religious reaction includes the following effects. Sometimes senses are sharpened and apparently a mixed feeling of awe and fear results. There may be mystery, peace, and a sharpening of impressions as to all natural objects, perhaps even something akin to the vision Moses had of a burning bush as described in Exodus. That there may be wholly different effects upon given individuals is equally clear. Psychotic episodes may be initiated, leading to panic, delusions, hospitalization, self-destruction and various forms of antisocial and criminal behavior....

While there may well be and probably are some members of the Neo-

American Church who have had mystical and even religious experiences from the use of psychedelic drugs, there is little evidence in this record to support the view that the Church and its members as a body are motivated by or associated because of any common religious concern. The fact that the use of drugs is found in some ancient and some modern recognized religions is an obvious point that misses the mark. What is lacking in the proofs received as to the Neo-American Church is any solid evidence of a belief in a supreme being, a religious discipline, a ritual, or tenets to guide one's daily existence.[27] It is clear that the desire to use drugs and to enjoy drugs for their own sake, regardless of religious experience, is the coagulent of this organization and the reason for its existence.

Reading the so-called "Catechism and Handbook" of the Church containing the pronouncements of the Chief Boo Hoo, one gains the inescapable impression that the membership is mocking established institutions, playing with words and totally irreverent in any sense of the term. Each member carries a "martyrdom record" to reflect his arrests. The Church symbol is a three-eyed toad. Its bulletin is the "Divine Toad Sweat." The Church key is, of course, the bottle opener. The official songs are "Puff, the Magic Dragon" and "Row, Row, Row Your Boat." In short, the "Catechism and Handook" is full of goofy nonsense, contradictions, and irreverent expressions.... Constitutional principles are embraced wherever helpful to the cause but the effect of the "Catechism and Handbook" and other evidence as a whole is agnostic, showing no regard for a supreme being, law or civic responsibility.

The official seal of the Church is available on flags, pillow cases, shoulder patches, pill boxes, sweat shirts, rings, portable "communion sets" with chalice and cup, pipes for "sacramental use," and the like. The seal has the three-eyed toad in the center. The name of the Church is at the top of the seal and across the bottom is the Church motto: "Victory over Horseshit!" The court finds this helpful in declining to rule that the Church is a religion within the meaning of the First Amendment. Obviously the structure of this so-called Church is such that mere membership in it or participation in its affairs does not constitute proof of the beliefs of any member, including Kuch. In short, she has totally failed in her burden to establish her alleged religious beliefs, an essential premise to any serious consideration of her motions to dismiss.

Assuming, however, that the Neo-American Church is a genuine religion and that Kuch subscribes fully to its doctrines and thus may invoke the full constitutional guarantees for free religious expression, her contentions are still without merit. The Constitution protects the right to have and to express beliefs. It does not blindly afford the same absolute protection to acts done in the name of or under the impetus of religion.[28]

The practices of the Neo-American Church involving the use, possession, transfer and sale of marihuana and LSD are contrary to the

27. Citing *Fellowship of Humanity v. Alameda County*, 315 P.2d 394 (1957) and *Washington Ethical Society v. District of Columbia*, 249 F.2d 127 (1957), discussed at VF, nn. 3 and 4.

28. Citing *Leary v. U.S.*, discussed immediately above.

> criminal law.... As the Court has instructed in the flag salute cases, freedom of worship is "susceptible to restriction only to prevent grave and immediate danger to interests which the state may lawfully protect...."[29] This is not a precise test and only recently has the Court sought to put flesh on the bones of this doctrine. It now appears from a reading of such cases as Braunfeld v. Brown...[30] and U.S. v. O'Brien...,[31] that claims such as claims of religious exemption will be honored unless a substantial state interest will be frustrated in a significant way.
>
> Defendant misconceives the Constitution and the decisions when she claims in effect an unbridled right to practice her beliefs. The public interest is paramount and if properly determined the Congress may inhibit or prevent acts as opposed to beliefs even where those acts are in accord with religious convictions or beliefs. If individual religious conviction permits one to act contrary to civic duty, public health and the criminal laws of the land, then the right to be let alone in one's belief with all the spiritual peace it guarantees would be destroyed in the resulting breakdown of society. There is abroad among some in the land today a view that the individual is free to do anything he wishes. A nihilistic, agnostic and anti- establishment attitude exists. These beliefs may be held. They may be expressed[,] but where they are antithetical to the interests of others who are not of the same persuasion and contravene criminal statutes legitimately designed to protect society as a whole, such conduct should not find any constitutional sanctuary in the name of religion or otherwise.

Evidently warming to his task, Judge Gesell addressed what he saw as a pernicious trend in the nation's highest court.

> Unfortunately we have been gradually drifting away from this pristine view taken by our founding fathers that religious beliefs were to be upheld at all cost but that acts induced by religious beliefs could be prohibited where Congress spoke in the interests of society as a whole. Recent decisions of the Supreme Court suggest that there must be a balancing of the legislative end to be achieved against the effect of the legislation on practices and hence the acts of the members of a particular religion.[32] This is but a way of saying that each case will depend on its own facts and a balancing of factors as the members of the court may see them at any given point in time. No United States District Judge who must act within the confines of a record and available judicial time has the wisdom or means of doing adequately what the cases appears [sic] to require. It is to be hoped that there will develop a constitutional doctrine in this field that more closely approximates that contemplated by the framers of the Constitution and that leaves the balancing function in all but obvious cases of clear abuse in the hands of the Congress, where it belongs. Be that as it

29. *West Virginia v. Barnette*, 319 U.S. 624 at 639 (1943), discussed at § A6b above.
30. 366 U.S. 599 (1961), *supra.*
31. 391 U.S. 367 (1968), involving the burning of draft cards.
32. Citing *Sherbert v. Verner, supra.*

may, the Court has carefully sought to apply prevailing doctrine in this field. The Court concludes that under any common sense view of undisputed facts the full enforcement of the statute here involved is necessary in the public interest and the unintended but obvious restrictions on the practices of defendant's church are wholly permissible.

There is substantial evidence that the use of marihuana creates a health hazard, is often the first step toward serious drug addiction in the progression to heroin, and is frequently associated with the commission of non-drug crimes, often crimes of violence. While all its effects are still unknown and the reactions of users differ, depending on emotional, psychological and frequency-of-use factors, the drug marihuana may often predispose to antisocial behavior and precipitate psychotic episodes.[33]

* * *

To except the members of the Neo-American Church from the regulation of this drug, as Kuch requests, would not amount to some slight exception that would in no way interfere with the purposes of the Marihuana Tax Act. On the contrary, it would permit anyone to violate the law by paying the Church membership fee. The number of marihuana cases in this Court suggests that there are many who would quickly take out membership and the Act would soon be a nullity.

* * *

The Court is not required nor would it be proper to substitute its judgment for that of Congress.... The Court is not the legislature and the legislature has spoken.... The Free Exercise Clause of the First Amendment does not prohibit the prosecution of this defendant.... The practice of her beliefs—if beliefs they be—must give way to the public good.

* * *

As part of her motion to dismiss the indictment on religious grounds, defendant has also made what may be broadly described as the "peyote" argument. The claim is that she is denied equal protection in the constitutional sense because members of another religion are permitted under the narcotic law to use peyote, a similar and at least as harmful an hallucinatory drug.[34]

* * *

Defendant asserts that marihuana is less harmful, or no more harmful, than peyote and that under the reasoning in Woody, she is entitled to an exemption from the Marihuana Tax Act.... This argument is both novel and unpersuasive for several reasons....

While it would appear that this argument is not, in fact, an equal protection argument but, rather, a novel attempt to take a second bite at the free exercise apple, the prohibited use of marihuana by the Neo-American Church is readily distinguished from the permissive use of peyote by the Native American Church and no constitutional discrimination is present.

The Court must assume that the [Food and Drug Administration] in

33. The court referred to a bibliography of 14 titles listed in an appendix to the opinion.

34. Citing *People v. Woody*, discussed immediately above.

> granting the peyote exemption [to the Native American Church] acted within its delegated authority. Under the statute the FDA could exempt peyote only if the Commission determined after hearing that the regulation and control of the drug otherwise required by the statute was "not necessary for the protection of the public health." No such determination has been made as to LSD by the FDA. As to marihuana, Congress, rather than delegating responsibility to the FDA, itself determined that there was a clear hazard to health in the use of the drug.... [It is not the] function of the Court to go any further behind this legislative determination as to marihuana any more than it will be possible in this proceeding to review the basis for the FDA peyote regulation.
>
> In short there is nothing before the Court except a claim of equal protection premised on the fact that the acts of one religion, the Neo-American Church, are hazardous to health and the acts of another are not. There is no purpose to interfere with the beliefs of either....[35]

Judge Gesell, though a conscientious, hard-working and "liberal" judge, was clearly "turned off" by the defendant in this case and the mocking posturings of the Neo-American Church. He was obviously even more averse to the recently enunciated test for free exercise of religion in *Sherbert v. Verner* and longed for the good old days of the "pristine view" of the "founding fathers" that religious acts were subject to limitation by law without any need for tedious "balancing" of religious claims against "compelling state interest," expressed so simply in *Reynolds v. U.S.* and *Davis v. Beason* (to which the Supreme Court did indeed return in *Oregon v. Smith* in 1990). As a consequence, his application of the new-fangled *Sherbert* test was a bit wooden, to say the least.

First, he discerned that the statutes in question had not been drawn up with the intent of penalizing religion or the Neo-American Church, or discriminating against it in favor of the Native American Church. The same could be said of the unemployment compensation system at issue in *Sherbert*. That was not the issue in the free exercise test. The issue was whether the statute—whatever its merits—burdened the carrying out of religious obligations, as this statutory scheme clearly did (assuming the use of hallucinogens to be a religious obligation, to be discussed below). Judge Gesell assumed that only religious practices that were *required* of *all* members of a religious body were worthy of protection under the Free Exercise Clause—a "primitive" concept, but one not yet out of style in 1968, as was the belief/action dichotomy following *Sherbert*, which was then already five years old.

Then in his assessment of the state's interest in enforcing the statute, he declined to do any independent weighing but simply accepted the legislature's assessment at face value. Legislatures are not always the best judges of what is of *compelling* importance to the state, nor of the most effective or least intrusive means of attaining the desired ends. Just as religious bodies or their individual members should not be able to assert unilaterally a free exercise claim that must prevail against all adverse interests, even so the state should not be in a position simply to assert an irrebuttable

35. *U.S. v. Kuch*, 288 F.Supp. 439 (1968).

contention of its interest that must prevail over all others.

It is not a derogation of the legislative responsibility (or of the "pristine view" of the "founding fathers"—whatever it may have been) for the courts to say that the Constitution entitles those seeking free exercise of their religion to an objective weighing of whether the interests sought to be advanced by the legislature and the executive do in fact obstruct their religious obedience and, if so, whether they are of "paramount" importance and can be attained in no less intrusive way. This Judge Gesell did not do, despite his (grudging) recognition that *Sherbert* required it. And his effort to distinguish *Woody* was similarly wooden: if the FDA said peyote was different from LSD, who was he to second-guess the FDA?

However, Judge Gesell was not wrong in his threshold inquiry: whether the Neo-American Church or its members could assert a religious interest that would require a weighing against the state's interest. He clearly perceived, and pointed out in some detail, the facts that indicated the Neo-American Church was clearly a huge "put-on," a farcical, baboonish simulacrum of a church, with a garish facade and no content inside, no serious tenets, teachings, rituals, discipline or standards of membership. This being obviously the case, there was no need to proceed further with the *Sherbert* test, which he didn't handle very well anyway.

The "Neo-American Church" was not the only group of people seeking legal recognition of their use of hallucinogens under the aegis of "religion." Others flocked forward in the era of the "flower children" under exotic new banners offering exalting flights of mystical communion assisted by various chemical and pharmacological means, but their claims were uniformly rejected.

• *People v. Collins*, 78 Cal.Reptr. 151 (1969) (state's prohibitions against use of marijuana represented a compelling state interest that outweighed claim to exception for religious practice).

• *Llewellyn v. Oklahoma*, 489 P.2d 511 (1971) (same).

• *Kennedy. v. Bureau of Narcotics*, 459 F.2d 415 (1972) (upholding refusal of California Bureau to amend its exemption from control of religious use of peyote by Native American Church to include an exemption for "Church of the Awakening").

• *Gaskin v. Tennessee*, 490 S.W.2d 521 (1973) (claim that prohibition against use of marijuana should not apply to religious use was "without merit").

• *Arizona v. Whittingham*, 504 P.2d 950 (1973) (couple convicted of use of peyote exonerated by showing the use occurred at a bona fide "meeting" of Native American Church).

• *People v. Mullins*, 123 Cal.Reptr. 61 (1975) (conviction for growing marijuana upheld despite claim of free exercise of religion).

d. *Whitehorn v. Oklahoma* (1977). The Court of Criminal Appeals of Oklahoma reviewed the conviction of one George L. Whitehorn, Jr., for possession of peyote, prohibited by the Uniform Controlled Dangerous Substances Act of that state. He had been apprehended by state troopers for driving a motor vehicle with an expired safety inspection sticker. The vehicle was impounded, and Whitehorn was booked into jail. In that process it was discovered that he was wearing a string of peyote buttons around his neck and carrying others wrapped and tied in a handkerchief in his

pocket. He claimed that he was a member of the Native American Church, that the peyote he was carrying was inherited from his uncle, Harrison Whitehorn, and that he was driving to visit his father in a care home to learn some peyote songs.

Testimony by various prosecution witnesses cast doubt on whether Whitehorn was actually a member of the Ponca or Oteo chapters of the church as he had claimed, since he had no membership credentials, was not listed on their membership rolls, and was not recognized by some church officers. Cross-examination brought out that not all members were listed on membership rolls or carried credentials or were personally known to church officers. Defense witnesses testified that some chapters of the church did not keep membership rolls, while others did, and that peyote was sometimes carried by members as a religious symbol or protective amulet.

The trial court was not convinced that Whitehorn was a member of the Native American Church or that the fact, if established, would have exculpated him under Oklahoma law. He was found guilty, sentenced to two years, suspended.

The appellate court, noting that this was a case of first impression in Oklahoma, reversed the trial court, holding—on the basis of uncontradicted testimony by several witnesses corroborating Whitehorn's claim of church membership—that he was indeed a member of the Native American Church. A second question was whether he was carrying peyote "in connection with a bona fide practice of the Native American Church." The court cited testimony that "carrying this peyote is something that is very holy and religious to our people..." and concluded:

> This use of peyote by the Native American Church members is an intricate [intrinsic?] part of their constitutionally protected religious beliefs and therefore should be protected from governmental interference.... [W]e are of the opinion that there has been no state interest shown compelling enough to prevent the Native American Church members from possessing their sacred, sometimes "inherited," peyote and from transporting the same on their person within the State of Oklahoma.[36]

The court added that the church would be wise to credential its members who would be transporting peyote so that their bona fides would be more readily attested.

e. *Oregon v. Smith* (1988 and 1990). The Supreme Court of the United States gave its attention to the sacramental use of peyote by American Indians in a case arising in Oregon—with disastrous results, not only for the Indian religious practice but for the scope of the protection of the Free Exercise Clause for everyone. The court took two bites at the apple, the first in 1988, the second in 1990 (referred to as *Smith I* and *Smith II*, respectively). The listed petitioner in each instance was "Employment Division, Department of Human Resources of the State of Oregon," referred to here simply as "Oregon."

The case originated when two employees of the Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT), Alfred Smith and

36. *Whitehorn v. Oklahoma*, 561 P.2d 539 (1977). [SEE ALSO: *American Ethiopic Orthodox Church* (Fla.), marijuana, 1930s]

Galen Black, were discharged for violating their employer's rule against any use of alcohol or drugs. The violation was a single instance of "ingesting a small quantity of peyote for sacramental purposes at a ceremony of the Native American Church. It is undisputed that respondents are members of that church, that their religious beliefs are sincere, and that those beliefs motivated the `misconduct' that led to their discharge."[37] When the two discharged drug counselors applied for unemployment compensation, their applications were denied on the basis that their unemployment had been caused by work-related misconduct and thus was not compensable.

The Oregon Court of Appeals reversed the Employment Division on constitutional grounds, and the Supreme Court of Oregon affirmed, finding that the Native American Church was a recognized religion, that peyote was a sacrament of that church, and that Smith and Black were engaged in sincere participation in that sacrament.[38] Quoting extensively from the leading case on peyote, *People v. Woody*,[39] and following the free-exercise test of *Sherbert* and *Thomas*,[40] the Oregon Supreme Court held that the denial of unemployment compensation benefits burdened the two Indians' free exercise of religion and that the state had not shown a compelling interest sufficient to justify that burden. It did not accept the state's contention that its interest in prohibiting the use of dangerous drugs was that compelling interest.

> [T]he 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 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."[41]

(1) *Smith I* (1988). The United States Supreme Court, apparently attracted to the prospect of another case approaching the Free Exercise issue, like *Sherbert, Thomas, Hobbie* and *Frazee,*[42] through the narrow aperture of denial of unemployment compensation, granted the state's petition for writ of *certiorari* and produced an opinion at the hand of Associate Justice John Paul Stevens that focused on the illegality of the act in question under Oregon law.

> The state court appears to have assumed, without specifically deciding, that respondent's conduct was unlawful. That assumption did not influence the court's disposition of the cases because, as a matter of state law, the commission of an illegal act is not itself a ground for disqualifying

37. *Employment Division, Department of Human Resources of the State of Oregon v. Smith and Black*, 483 U.S. 660 (1988) [*Smith I*].

38. Ibid., citing 301 Ore. 209, 721 P.2d 445 (1986).

39. 394 P.2d 813 (1964), discussed at § a above.

40. *Sherbert v. Verner*, 374 U.S. 398 (1963), discussed at § A7c above, and *Thomas v. Review Board*, 450 U.S. 707 (1981), discussed at § A5l above.

41. *Oregon v. Smith I, supra,* quoting Oregon Supreme Court.

42. *Sherbert, supra*; *Thomas. supra; Hobbie v. Florida*, 480 U.S. 136 (1987), discussed at § A6i above, and *Frazee v. Illinois*, 489 U.S. 829 (1989), discussed at § A6j above.

> a discharged employee from benefits. It does not necessarily follow, however, that the illegality of an employee's misconduct is irrelevant to the analysis of the federal constitutional claim. For if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct.
>
> * * *
>
> The results we reached in *Sherbert, Thomas,* and *Hobbie* might well have been different if the employees had been discharged for engaging in criminal conduct.... The protection that the First Amendment provides to "*legitimate* claims to the free exercise of religion," see *Hobbie*...(emphasis added), does not extend to conduct that a State has validly proscribed.
>
> Neither the Oregon Supreme Court nor this Court has confronted the question whether the ingestion of peyote for sincerely held religious reasons is a form of conduct that is protected by the Federal Constitution from the reach of a State's criminal laws. It may ultimately be necessary to answer that federal question in this case, but it is inappropriate to do so without first receiving further guidance concerning the status of the practice as a matter of Oregon law. A substantial number of jurisdictions have exempted the use of peyote in religious ceremony from legislative prohibitions against the use and possession of controlled substances. If Oregon is one of those States, respondents' conduct may well be entitled to constitutional protection. On the other hand, if Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon.
>
> * * *
>
> We therefore vacate the judgments of the Oregon Supreme Court and remand the cases for further proceedings not inconsistent with this opinion.[43]

Justice Stevens was joined in this opinion by Chief Justice Rehnquist and Associate Justices White, O'Connor, and Scalia. Justice Kennedy took no part in the consideration or decision of the case. Justice Brennan filed a dissenting opinion, in which Justices Marshall and Blackmun joined, chiding the majority for reaching out to decide a question that was not presented by the lower courts or the parties. On that score one could say "they hadn't seen anything yet!" In the next round the court would reach even farther out to decide without advance notice matters not raised nor briefed by the parties and sweeping away almost three decades of "settled" law. Justice Brennan observed:

> The only difference between the cases before us and the situations we faced in *Sherbert, Thomas* and *Hobbie* is that here the Employment Division has asserted in court a "`compelling state interest...in the proscription of illegal drugs,'" not merely the interest of avoiding the financial "`burden

43. *Smith I, supra.*

> upon the Unemployment Compensation Trust Fund'" that we found not compelling in *Sherbert*. Such an interest in criminal law enforcement would present a novel issue if it were in fact an interest that Oregon had sought to advance in its unemployment compensation statute.
>
> Far from validating any such state interest, however, the State's highest court has disavowed it.... The state court could find no legislative intent expressed in the unemployment statute to reinforce criminal drug-abuse laws.... [W]e have never attributed to a state legislature a validating purpose that the State's highest court could find nowhere in the statute. To do so would be inconsistent with our responsibility to scrutinize strictly [any] state-imposed burdens on fundamental rights. At any rate, this Court offers no reason to discount the Oregon Supreme Court's disavowal of the validating purpose.... I would therefore affirm the Oregon Supreme Court.[44]

(2) *Smith II* (1990). So the case went back to the Oregon Supreme Court, which in due course concluded that the Oregon criminal statutes made no exception for sacramental use of peyote, but then found the statute to that extent invalid under the Federal Free Exercise Clause, reaffirming its previous ruling that the state could not deny unemployment benefits for participation in that practice.[45]

The Supreme Court of the United States again granted *certiorari* and again addressed the case in an opinion written this time by Justice Scalia for the same majority, plus Justice Kennedy, but with Justice O'Connor concurring only in the judgment and filing a very significant separate opinion that disagreed profoundly with the majority's rationale.

Justice Scalia noted that the Oregon Supreme Court had confirmed that the religious use of peyote was prohibited by law in that state, so he proceeded to consider whether that prohibition was permissible under the Free Exercise Clause.

> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." Sherbert v. Verner, supra, at 402. The government may not compel affirmation of religious belief, see Torcaso v. Watkins,[46] punish the expression of religious doctrines it believes false, United States v. Ballard,[47] impose special disabilities on the basis of religious views or religious status, see McDaniel v. Paty,[48] Fowler v. Rhode Island;[49] cf. Larson v. Valente,[50] or lend its power to one or the other side in controversies over religious authority or dogma, see Presbyterian Church

44. Ibid., Brennan dissent.
45. 307 Ore. 68, 763 P.2d 146 (1988).
46. 367 U.S. 488 (1961), discussed at VB2.
47. 322 U.S. 78 (1944), discussed at IIB6a.
48. 435 U.S. 618 (1978), discussed at IIE4k.
49. 345 U.S. 67 (1958), discussed at IIA2r.
50. 456 U.S. 228 (1982), discussed at IIC5c.

v. Hull Church,[51] Kedroff v. St. Nicholas Cathedral,[52] Serbian Eastern Orthodox Diocese v. Milivojevich.[53]

But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to consider the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom...of the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment is not offended....

Our decisions reveal that the latter reading is the correct one. We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in Minersville School Dist. Bd. of Educ. v. Gobitis:[54] "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant

51. 393 U.S. 440 (1969), discussed at IB5.

52. 344 U.S. 94 (1952), discussed at IB3.

53. 426 U.S. 696 (1976), discussed at IB7.

54. 310 U.S. 586, 594-595 (1940), discussed at § A6a above, *overruled* (although Justice Scalia failed to mention it) by *West Virginia v. Barnette*, 319 U.S. 624 (1943), discussed at § A6b above.

concerns of a pluralistic society does not relieve the citizen from the discharge of political responsibilities." We first had occasion to assert that principle in Reynolds v. United States,[55] where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere belief and opinions, they may with practices.... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)"[56]...; see Minersville... v. Gobitis, supra (collecting cases)....

* * *

The 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[57]... or the rights of parents, acknowledged in Pierce v. Society of Sisters,[58] to direct the education of their children, see Wisconsin v. Yoder[59] (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). Some of our cases prohibiting compelled expression, decided exclusively on free speech grounds, have also involved freedom of religion, cf. Wooley v. Maynard[60] (invalidating compelled display of a license plate slogan that offended individual religious beliefs); West Virginia... v. Barnette[61] (invalidating compulsory flag salute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. Roberts v. United States Jaycees,[62] ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed.")

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55. 98 U.S. 145 (1879), discussed at § A2a above.

56. *U.S. v. Lee*, 455 U.S. 252, 263, n.3 (1982), Stevens, J., concurring in judgment, discussed at § A8b above.

57. Citing *Cantwell v. Connecticut,* 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. McCormick*, 321 U.S. 573 (1944), discussed at IIA2c, i and m, respectively.

58. 268 U.S. 510 (1925), discussed at IIIB1b.

59. 406 U.S. 205 (1972), discussed at IIIB2.

60. 430 U.S. 705 (1977), discussed at § A6c above.

61. 319 U.S. 624 (1943), discussed at § A6b above.

62. 468 U.S. 609, 622 (1983).

> The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibited conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from government regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since Reynolds plainly controls. "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."[63]
>
> Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in Sherbert v. Verner. Under the Sherbert test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.... 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.[64] We have never invalidated any governmental action on the basis of the Sherbert test except the denial of unemployment compensation. Although we have sometimes purported to apply the Sherbert test in contexts other than that, we have always found the test satisfied.... In recent years we have abstained from applying the Sherbert test (outside the unemployment compensation field) at all.[65]

The opinion cited *Bowen v. Roy* (1986)[66] for the proposition that applicants for public welfare benefits who refused for religious reasons to obtain and provide a Social Security number were nevertheless obliged to comply with the statute requiring the use of such numbers. That was not exactly what the court decided: a majority held that the government was not obliged to comply with the objectors' religious views in arranging its internal operations and could therefore continue to use those numbers to classify and record its cases. Only three members of the court, however, contended that the government could compel the *objectors* to use the objectionable numbers. The Scalia opinion in *Smith II* also cited *Lyng v. Northwest Indian Cemetery Protective Assn.*[67] as another instance in which the court declined to apply the *Sherbert* analysis, but held that the government could build a logging road through the National Forest lands despite the concededly "devastating" effect it could have on an immemorial Indian religious use of the land; this decision, however, professed to follow the rationale of *Bowen v. Roy*, in that the use of National Forest

63. *Gillette v. U.S.*, 401 U.S. 437 (1971), discussed at § A5k above.
64. Citing *Sherbert v. Verner, supra; Thomas v. Review Board, supra; Hobbie v. Florida, supra.*
65. *Oregon v. Smith (II)*, 494 U.S. 872 (1990).
66. 476 U.S. 693 (1986), discussed at § A9g above.
67. 485 U.S. 439 (1988), discussed at § E1i below.

land was supposedly "internal" to the government and therefore not subject to religious objections, dubious as that rationale might be.

Two other cases were cited by Justice Scalia as examples of free exercise claims to which the *Sherbert* test was not applied: *Goldman v. Weinberger*[68] and *O'Lone v. Estate of Shabazz*[69]. In the former, a Jewish rabbi serving as a captain in the Air Force sought protection under the Free Exercise Clause for the wearing of a yarmulke or religious skull-cap instead of the regulation uniform headgear. His claim was rejected out of deference to the requirements of military life rather than under the usual *Sherbert* free exercise test. In the latter, Black Muslim inmates in a state prison sought relief in the Free Exercise Clause from prison regulations that prevented their participation in Friday midday Islamic religious services. Again the claim was rejected out of deference to the security needs of prison life as asserted by correctional officials, and the usual balancing test of *Sherbert* was not reached.

These citations were almost as inapposite to the contention that the rule of *Sherbert* had fallen into desuetude as the incredible assertion just preceding it that "we have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation," which clearly was belied by *Wisconsin v. Yoder* (1972), in which three Amish farmers convicted of *criminal* violations of the truancy law were exonerated by the "compelling interest" test that was the essence of *Sherbert*: the state of Wisconsin was deemed not to have shown sufficient justification for requiring two years of formal education beyond eighth grade to outweigh the possible damage to the Amish religious community. (Of course, Justice Scalia had sought to distinguish *Yoder* as being a "hybrid" case involving "parental rights" as well as free exercise of religion.)

These efforts by the majority opinion to sweep *Sherbert* under the rug have been devastatingly characterized by Douglas Laycock:

> [T]he Court's account of its precedents in Smith is transparently dishonest. Perhaps the point is made most effectively by quoting Justice Scalia, in a pair of opinions fourteen months apart. Here is Scalia in 1989:
>
> > In such cases as Sherbert v. Verner, Thomas v. Review Bd. of Indiana Employment Security Div., and Hobbie v. Unemployment Appeals Comm'n of Fla., we held that the free exercise clause of the First Amendment required religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws.[70]
>
> And here is Scalia in 1990, for the Court in Smith:
>
> > We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.
>
> He was right the first time.[71]

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68. 475 U.S. 503 (1986), discussed at § E2c below.

69. 482 U.S. 342 (1987), discussed at § E3c(2) below.

70. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting) (emphasis in original).

71. Laycock, D., "The Remnants of Free Exercise," 1990 *S.Ct. Rev.* 1, 3. Copyright © 1991

The Scalia opinion in *Smith* continued.

> Even if we were inclined to breathe into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The Sherbert test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct.... [A] distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment.... [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.[72]
>
> Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct. Although, as noted earlier, we have sometimes used the Sherbert test to analyze free exercise challenges to such laws..., we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the 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." Lyng, supra. 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," Reynolds [v. U.S., supra]—contradicts both constitutional tradition and common sense.
>
> The "compelling governmental interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on account of race...or before the government may regulate the content of speech...is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.
>
> Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion.... It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field

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University of Chicago.

72. Cf. *U.S. v. Lee*, 455 U.S. 252 (1982), Stevens, J., concurring.

This was simply an incredible statement for anyone to make who had ever taught Constitutional Law (as Justice Scalia had). Judges are constantly having to determine the relative "importance" of speech, and the Supreme Court itself has concluded otherwise.

> [T]he argument comes close to plain silliness. The Court has "long recognized that not all speech is of equal First Amendment importance."[73] It holds that political speech is more important than commercial speech,[74] that criticism of public figures is more important than criticism of private figures,[75] that pornography has limited value[76] and obscenity has almost no value,[77] and that some speech is not of public concern.[78] The day after *Smith*, four of the five justices in the majority routinely balanced the "exceedingly modest" interest in possessing child pornography against the state's compelling interest in preventing "the exploitative use of children."[79] They did not find it necessary to explain away their statement of the day before.[80]

Justice Scalia's opinion in *Smith* continued.

> What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." United States v. Lee (Stevens, J., concurring).... Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.
>
> If 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. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every

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73. *Hustler Magazine, Inc., v. Falwell*, 485 U.S. 46, 56 (1988), quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 758 (1985).

74. See, e.g., *Posadas de Puerto Rico Assoc. v. Tourism Co.,* 478 U.S. 328, 340 (1986), etc.

75. Compare *New York Times v. Sullivan*, 376 U.S. 254 (1964) (public figure suing for defamation must show actual malice) with *Gertz v. Welch*, 418 U.S. 323 (1974) (private figure suing for defamation need show only negligence).

76. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70-71 (1976) (plurality opinion).

77. *Miller v. California*, 413 U.S. 15, 20, 34-36 (1973).

78. See Estlund, Cynthia L., "Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category," 59 *Geo. Wash L. Rev.* 1 (1990).

79. *Osborne v. Ohio*, 110 S.Ct. 1691, 1695, 1696 (1990).

80. Laycock, *supra,* pp. 31-32.

> conceivable religious preference," Braunfeld v. Brown,[81] and precisely because we value and protect that religious divergence [diversity?], we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service...to the payment of taxes...; to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.... The First Amendment's protection of religious liberty does not require this.

But Justice Scalia offered a consolation to people whose religious practices were burdened by state action: they could complain to the legislature.

> 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.
>
> Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug. The decision of the Oregon Supreme Court is accordingly reversed.[82]

(3) Justice O'Connor's Opinion. This view of the matter did not appeal to some other members of the court. Justice O'Connor disagreed strenuously with the majority's reasoning, although she would uphold a denial of unemployment compensation for a narrower reason.

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81. 366 U.S. 599 (1961), discussed at § A7b above.

82. *Oregon v. Smith (Smith II)*, 494 U.S. 872 (1990)(emphasis in original).

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.

* * *

The Court today extracts from our long history of free exercise precedents the single categorical rule that "if prohibiting the exercise of religion...is...merely the incidental effect of a generally applicable criminal provision, the First Amendment has not been offended." Indeed, the Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.

The Free Exercise Clause of the First Amendment commands that "Congress shall make no law...prohibiting the free exercise [of religion]." In Cantwell v. Connecticut,[83] we held that this prohibition applies to the state by incorporation into the Fourteenth Amendment and that it categorically forbids government regulation of religious beliefs. As the Court recognizes, however, the "free exercise" of religion often, if not invariably, requires the performance of (or abstention from) certain acts.[84] "[B]elief and action cannot be neatly confined in logic-tight compartments." Wisconsin v. Yoder (1972). Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must therefore be presumptively protected by the Free Exercise Clause.

The Court today, however, interprets the Clause to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as that prohibition is generally applicable. But a law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person's free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or for all persons. It is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns.

The Court responds that generally applicable laws are "one large step" removed from laws aimed at specific religious practices. The First

83. 310 U.S. 296 (1940), discussed at IIA2c.

84. Citing 3 *A New English Dictionary on Historical Principles* 401-402 (J. Murray, ed. 1897) (defining "exercise" to include "[t]he practice and performance of rites and ceremonies, worship, etc.; the right or permission to celebrate the observance (of a religion)" and religious observances such as acts of public and private worship, preaching, and prophesying).

> Amendment, however, does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice. As we have noted in a slightly different context, "`[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides.'" (Hobbie v. Unemployment Appeals Comm'n of Florida, quoting Bowen v. Roy (1986) opinion concurring in part and dissenting in part).

Justice O'Connor continued her dispute with the majority opinion in *Smith* by pointing out its central absurdity of supposing that the strict scrutiny test meant that everyone claiming to be actuated by religion could do whatever they pleased irrespective of the law.

> To say that a persons' right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in that conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the Government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that 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." *Yoder, supra.*
>
> The Court attempts to support its narrow reading of the Clause by claiming that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." But as the Court later notes, as it must, in cases such as *Cantwell* and *Yoder* we have in fact interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct. Indeed, in *Yoder* we expressly rejected the interpretation the Court now adopts:
>
> > "[O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety and general welfare, or the Federal Government in the exercise of its delegated powers. But 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 Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability*....
>
> "...A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." (emphasis added)

The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labelling them "hybrid" decisions, but there is no denying that both cases expressly relied on the Free Exercise Clause and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence. Moreover, in each of the other cases cited by the Court to support its categorical rule, we rejected the particular constitutional claims before us only after weighing the competing interests.... That we rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking at the win-loss record of the plaintiffs who happen to come before us.

Respondents, of course, do not contend that their conduct is automatically immune from all government regulation simply because it is motivated by their sincere religious beliefs. The Court's rejection of that argument might therefore be regarded as merely harmless dictum. Rather, respondents invoke our traditional compelling interest test to argue that the Free Exercise Clause requires the State to grant them a limited exemption from its general criminal prohibition against the possession of peyote. The Court today, however, denies them even the opportunity to make that argument, concluding that "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling interest] test inapplicable to" challenges to general criminal prohibitions.

In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community.... A state that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible.... I would have thought it beyond argument that such laws implicate free exercise concerns.

Indeed, we have never distinguished between cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct. The *Sherbert* compelling interest test applies in both kinds of cases.... I would reaffirm that principle today: a neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, *more* burdensome

than a neutral civil statute placing legitimate conditions on the award of a state benefit.

Legislatures, of course, have always been "left free to reach actions which were in violation of social duties or subversive of good order." *Reynolds*. Yet because of the close relationship between conduct and religious belief, "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell*. Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the Government to demonstrate that the unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest," *Lee, supra*, or represents "the least restrictive means of achieving some compelling state interest," *Thomas*.... To me, the sounder approach—the approach more consistent with our role as judges to decide each case on its individual merits—is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling.... Given the range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment *never* requires the State to grant a limited exemption for religiously motivated conduct.

Moreover, we have not "rejected" or "declined to apply" the compelling interest test in our recent cases. Recent cases have instead affirmed that test as a fundamental part of our First Amendment doctrine. See, e.g..., *Hobbie, supra* (rejecting Chief Justice Burger's suggestion in *Roy, supra*, that free exercise claims be assessed under a less rigorous "reasonable means" standard). The cases cited by the Court signal no retreat from our consistent adherence to the compelling interest test. In both *Bowen v. Roy, supra,* and *Lyng v. Northwest Indian Cemetary* [*sic*] *Protective Assn.* (1988), for example, we expressly distinguished *Sherbert* on the ground that the First Amendment does not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development.... The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Roy, supra*; see *Lyng, supra* [where the same rationale was applied]. This distinction makes sense because "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." *Sherbert, supra* (Douglas, J., concurring). Because the case *sub judice*, like the other cases in which we have applied *Sherbert*, plainly falls into the former category, I would apply those established precedents to the facts of this case.

Similarly, the other cases cited by the Court for the proposition that we have rejected application of the *Sherbert* test outside the unemployment compensation field 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. See *Goldman v. Weinberger* ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society"); *O'Lone v. Estate of Shabazz* ("[P]rison regulations alleged to infringe constitutional rights are judged under a `reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights"). That we did not apply the compelling interest test in these cases says nothing about whether the test should continue to apply in paradigm free exercise cases such as the one presented here.

The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result in a "constitutional anomaly," the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a "constitutional nor[m]," not an "anomaly".... We have in any event recognized that the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause. As the language of the Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity. A law that makes criminal such activity therefore triggers constitutional concern—and heightened judicial scrutiny—even if it does not target the particular religious conduct at issue.... The Court's parade of horribles not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests.

Finally, the Court today suggests that the disfavoring of minority religions is an "unavoidable consequence" under our system of government and that accommodation of such religions must be left to the democratic process. In my view, however, 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. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish. Indeed, the words of Justice Jackson in...*Barnette* (overruling *Minersville... v. Gobitis*) are apt:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other

> fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[85]
>
> * * *
>
> The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a "luxury" is to denigrate "[t]he very purpose of a Bill of Rights."[86]

In this ringing rebuttal to the majority, Justice O'Connor was joined by Justices Brennan, Marshall and Blackmun. But with her they went no farther, and she fared on alone.

> The Court's holding today not only misreads settled First Amendment precedent; it appears to be unnecessary to this case. I would reach the same result applying our established free exercise jurisprudence.
>
> There is no dispute that Oregon's criminal prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion. Peyote is a sacrament of the Native American Church and is regarded as vital to respondents' ability to practice their religion.... Under Oregon law, as construed by that State's highest court, members of the Native American Church must choose between carrying out the ritual embodying their religious beliefs and avoidance of criminal prosecution. That choice is, in my view, more than sufficient to trigger First Amendment scrutiny.
>
> There is also no dispute that Oregon has a significant interest in enforcing laws that control the possession and use of controlled substances by its citizens.... Indeed, under federal law (incorporated by Oregon in relevant part...), peyote is specifically regulated as a Schedule I controlled substance, which means that Congress has found that it has a high potential for abuse, that there is no currently accepted medical use, and that there is a lack of accepted safety for use of the drug under medical supervision.... [R]espondents do not seriously dispute that Oregon has a compelling interest in prohibiting the possession of peyote by its citizens.
>
> Thus, the critical question in this case is whether exempting respondents from the State's criminal prohibition "will unduly interfere with fulfillment of the governmental interest." *Lee, supra.* Although the question is close, I would conclude that uniform application of Oregon's criminal prohibition is "essential to accomplish," *Lee, supra,* its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance. Oregon's criminal prohibition represents the State's judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous. Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them.... Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at

85. *West Virginia v. Barnette*, 319 U.S. 624, 638 (1943), discussed at § A6b above.

86. *Oregon v. Smith (II)*, *supra,* O'Connor opinion, Part II.

> issue is essential to the effectiveness of Oregon' stated interest in preventing any possession of peyote.
>
> For these reasons, I believe that granting a selective exemption in this case would seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens. Under such circumstances, the Free Exercise Clause does not require the State to accommodate respondents' religiously motivated conduct....
>
> Respondents contend that any incompatibility [of their practice with the State's interest in controlling illegal drugs] is belied by the fact that the Federal Government and several States provide exemptions for the religious use of peyote.... But other governments may surely choose to grant an exemption without Oregon, with its specific asserted interest in uniform application of its drug laws, being *required* to do so by the First Amendment. Respondents also note that the sacramental use of peyote is central to the tenets of the Native American Church, but I agree with the Court...that because "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith," *Hernandez, supra,* our determination of...constitutionality...cannot, and should not, turn on the centrality of the particular religious practice at issue. This does not mean, of course, that courts may not make factual findings as to whether a claimant holds a sincerely held religious belief that conflicts with, and thus is burdened by, the challenged law. The distinction between questions of centrality and questions of sincerity and burden is admittedly fine, but it is one that is an established part of our free exercise doctrine...and one that courts are capable of making.
>
> I would therefore adhere to our established free exercise jurisprudence and hold that the State in this case has a compelling interest in regulating peyote use by its citizens and that accommodating respondents' religiously motivated conduct "will unduly interfere with fulfillment of the governmental interest." Accordingly, I concur in the judgment of the Court.[87]

(4) Justice Blackmun's Dissent. The three justices who had joined the earlier part of Justice O'Connor's opinion let it be known in a footnote at the beginning of her opinion that they did not join her in the latter part and did *not* concur in the court's judgment. They also filed a forceful dissent written by Justice Blackmun and joined by Justices Brennan and Marshall.

> This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.
>
> Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a "constitutional anomaly." As carefully

87. *Smith (II), supra,* O'Connor opinion concurring in the judgment.

> detailed in Justice O'Connor's concurring opinion, the majority is able to arrive at this view only by mischaracterizing this Court's precedents.... The Court cites cases in which, due to various exceptional circumstances, we found strict scrutiny inapposite, to hint that the Court has repudiated that standard altogether. In short, it effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution. One hopes that the Court is aware of the consequences, and that its result is not a product of overreaction to the serious problems the country's drug crisis has generated.
>
> This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening free exercise of religion is a "luxury" that a well-ordered society cannot afford and that the repression of minority religions is an "unavoidable consequence of democratic government." I do not believe that the Founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty—and they could not have thought religious intolerance "unavoidable," for they drafted the Religion Clauses precisely in order to avoid that intolerance....

Justice Blackmun assessed the relative importance of the interests asserted in this case.

> In weighing respondents' clear interest in the free exercise of their religion against Oregon's asserted interest in enforcing its drug laws, it is important to articulate in precise terms the state interest involved. It is not the State's broad interest in fighting the critical "war on drugs" that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious ceremonial use of peyote.... Failure to reduce the competing interests to the same plane of generality tends to distort the weighing process in the State's favor....
>
> The State's interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, cannot be merely abstract or symbolic. The State cannot plausibly assert that unbending application of a criminal prohibition is essential to fulfill any compelling interest, if it does not, in fact, attempt to enforce that prohibition. In this case, the State actually has not evinced any concrete interest in enforcing its drug laws against religious users of peyote. Oregon has never sought to prosecute respondents, and does not claim that it has made any significant enforcement efforts against other religious users of peyote. The State's asserted interest thus amounts only to the symbolic preservation of an unenforced prohibition....
>
> Similarly, this Court's prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded evidentiary support for a refusal to allow a religious exemption.... In this case, the State's justification for refusing to recognize an exception to its criminal laws for religious peyote use is entirely speculative.
>
> The State proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote has ever harmed anyone.

[Footnote 4 at this point: "This dearth of evidence is not surprising, since the State never asserted this health and safety interest before the Oregon courts; thus, there was no opportunity for factfinding concerning the alleged dangers of peyote use. What has now become the State's principal argument for its view that the criminal prohibition is enforceable against religious use of peyote rests on no evidentiary foundation at all."] The factual findings of other courts cast doubt on the State's assumption that religious use of peyote is harmful.[88]

The fact that peyote is classified as a Schedule I controlled substance does not, by itself, show that any and all used of peyote, in any circumstance, are inherently harmful and dangerous. The Federal Government, which created the classifications of unlawful drugs from which Oregon's drug laws are derived, apparently does not find peyote so dangerous as to preclude an exemption for religious use....

The carefully circumscribed ritual context in which respondents use peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs. [Footnote 6 at this point: "In this respect, respondents' use of peyote seems closely analogous to the sacramental use of wine by the Roman Catholic Church. During Prohibition, the Federal Government exempted such use of wine from its general ban on possession and use of alcohol.... However compelling the Government's then general interest in prohibiting the use of alcohol may have been, it could not plausibly have asserted an interest sufficiently compelling to outweigh Catholics' right to take communion."] 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 [citing documentation].

Moreover, just as in Yoder, the values and interests of those seeking a religious exemption in this case are congruent, to a great degree, with those the State seeks to promote through its drug laws [citing documentation]. Not only does the Church's doctrine forbid nonreligious use of peyote; it also generally advocates self-reliance, familial responsibility, and abstinence from alcohol [citing documentation]. There is considerable evidence that the spiritual and social support provided by the Church has been effective in combatting the tragic effects of alcoholism on the Native American population [citing documentation]. Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual code exemplifies values that Oregon's drug laws are presumably intended to foster.

The State also seeks to support its refusal to make an exception for religious use of peyote by invoking its interest in abolishing drug trafficking. There is, however, practically no illegal traffic in peyote [citing documentation]. Also, the availability of peyote for religious use, even if Oregon were to allow an exemption from its criminal laws, would still be strictly controlled by federal regulations [that require registration of

88. Citing *State v. Whittingham*, 504 P.2d 950 (1973), discussed at § c above, and *People v. Woody*, 394 P.2d 813 (1964), discussed at § a above.

distribution of peyote] and by the State of Texas, the only State in which peyote grows in significant quantities.... Peyote is simply not a popular drug; its distribution for uses in religious rituals has nothing to do with the vast and violent drug traffic in illegal narcotics that plagues this country.

Finally, the State argues that granting an exception for religious peyote use would erode its interest in the uniform, fair, and certain enforcement of its drug laws. The State fears that, if it grants an exception for religious peyote use, a flood of other claims to religious exemptions will follow. It would then be placed in a dilemma, it says, between allowing a patchwork of exemptions that would hinder its law enforcement efforts, and risk violation of the Establishment Clause by arbitrarily limiting its religious exemptions. This argument, however, could be made in almost any free exercise case.... This Court, however, consistently has rejected similar arguments in past free exercise cases, and it should do so here as well....

The State's apprehension of a flood of other religious claims is purely speculative. Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions. [Footnote 8 at this point: "Over the years, various sects have raised free exercise claims regarding drug use. In no reported case, except those involving claims of religious peyote use, has the claimant prevailed."] Allowing an exemption for religious peyote use would not necessarily oblige the State to grant a similar exemption to other religious groups. The unusual circumstances that make the religious use of peyote compatible with the State's interests in health and safety and in preventing drug trafficking would not apply to other religious claims. Some religions, for example, might not restrict drug use to a limited ceremonial context, as does the Native American Church.... Some religious claims...involve drugs such as marijuana and heroin, in which there is significant illegal traffic, with its attendant greed and violence, so that it would be difficult to grant a religious exemption without seriously compromising law enforcement efforts. That the State might grant an exemption for religious peyote use, but deny other religious claims arising in different circumstances, would not violate the Establishment Clause. Though the State must treat all religions equally, this obligation is fulfilled by the uniform application of the "compelling interest" test to all free exercise claims, not by reaching uniform results as to all claims. A showing that religious peyote use does not unduly interfere with the State's interests is "one that probably few other religious groups or sects could make," Yoder; this does not mean that an exemption limited to peyote use is tantamount to an establishment of religion....

Finally, although I agree with Justice O'Connor that courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is "central" to the religion, I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion....

Respondents believe, and their sincerity has never been at issue, that the peyote plant embodies their deity, and eating it is an act of worship and

> communion. Without peyote, they could not enact the essential ritual of their religion....
>
> If Oregon can constitutionally prosecute them for this act of worship, they, like the Amish, may be "forced to migrate to some other and more tolerant region." Yoder. This potentially devastating impact must be viewed in the light of the federal policy—reached in reaction to many years of religious persecution and intolerance— of protecting the religious freedom of Native Americans. See American Indian Religious Freedom Act.... Congress recognized that certain substances, such as peyote, "have religious significance because they are sacred, they have power, they heal, they are necessary to the exercise of the rites of the religion, they are necessary to the cultural integrity of the tribe, and, therefore, religious survival."[89]
>
> The American Indian Religious Freedom Act, in itself, may not create rights enforceable against government action restricting religious freedom, but this Court must scrupulously apply its free exercise analysis to the religious claims of Native Americans, however unorthodox they may be. Otherwise, both the First Amendment and the stated policy of Congress will offer to Native Americans merely an unfulfilled and hollow promise.
>
> For these reasons, I conclude that Oregon's interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents' right to the free exercise of their religion. Since the State could not constitutionally enforce its criminal prohibition against respondents, the interests underlying the State's drug laws cannot justify its denial of unemployment benefits. Absent such justification, the State's regulatory interest in denying benefits for religiously motivated "misconduct" is indistinguishable from the state interests this Court has rejected in Frazee, Hobbie, Thomas and Sherbert. The State of Oregon cannot, consistently with the Free Exercise Clause, deny respondents unemployment benefits.[90]

(5) Repartee in the Margins. Justice Scalia attempted in his footnotes to rebut some of the criticisms by the dissenters.

> 4. While arguing that we should apply the compelling interest test in this case, Justice O'Connor nonetheless agrees that "our determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of the particular religious practice at issue." This means, presumably, that compelling interest scrutiny must be applied to generally applicable laws that regulate or prohibit *any* religiously motivated activity, no matter how unimportant to the claimant's religion. Earlier in her opinion, however, Justice O'Connor appears to contradict this, saying that the proper approach is "to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling." "Constitutionally significant

89. H.R.Rep. No. 95-1308, p. 2 (1978).

90. *Oregon v. Smith (II)*, *supra,* Blackmun dissent.

> burden" would seem to be "centrality" under another name. In any case, dispensing with a "centrality" inquiry is utterly unworkable. It would require, for example, the same degree of "compelling state interest" to impede the practice of throwing rice at church weddings as to impede the practice of getting married in church. There is no way out of the difficulty that, if general laws are to be subjected to a "religious practice" exception, *both* the importance of the law at issue *and* the centrality of the practice at issue must reasonably be considered.
>
> Nor is this difficulty avoided by Justice Blackmun's assertion that "although courts should refrain from delving into questions of whether, as a matter of religious doctrine, a particular practice is `central' to the religion, I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion." As Justice Blackmun's opinion proceeds to make clear, inquiry into "severe impact" is no different from inquiry into centrality. He has merely substituted for the question "How important is X to the religious adherent?" the question "How great will be the harm to the religious adherent if X is taken away?" There is no material difference.
>
> 5. Justice O'Connor contends that the "parade of horribles" in the text only "demonstrates...that courts have been quite capable of strik[ing] sensible balances between religious liberty and competing state interests." But the cases we cite have struck "sensible balances" only because they have all applied the general laws, despite the claims for religious exemption. In any event, Justice O'Connor mistakes the purpose of our parade: it is not to suggest that courts would necessarily permit harmful exemptions from those laws (though they might), but to suggest that courts would constantly be in the business of determining whether the "severe impact" of various laws on religious practice... or the "constitutiona[l] significan[ce]" of the "burden on particular plaintiffs"... suffices to permit us to consider an exemption. It is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.[91]

Some may not view that prospect as so horrible but may instead think that was what the courts had been doing at least since *Sherbert* (1963) and *should* do if the Free Exercise Clause is to have much force against majorities, legislatures and executive administrators, who can otherwise all too easily suppress the religious practices of minorities without effective hindrance from the guarantees of the Religion Clauses. Douglas Laycock commented, "These cases are horrible not because of their possible results, but because they would require judges to make judgments.... [T]he Court's reductio ad absurdum boomerangs. The majority appears to say it would be `horrible' and inappropriate for judges to recognize the difference between throwing rice and getting married in church. I think they could handle it."[92]

Justice O'Connor did not adorn her opinion with a single footnote of surrebuttal

91. *Smith II, supra,* footnotes in majority opinion.

92. Laycock, "The Remnants of Free Exercise," *supra*, pp. 30, 32.

(or of any other kind). Justice Blackmun directed one caustic footnote at the majority that can well serve as an introduction to a critique of the New Look in Free Exercise jurisprudence.

> 2. ...I have grave doubts...as to the wisdom or propriety of deciding the constitutionality of a criminal prohibition which the State has not sought to enforce, which the State did not rely on in defending its denial of unemployment benefits before the State courts, and which the Oregon courts could, on remand, either invalidate on state constitutional grounds, or conclude that it remains irrelevant to Oregon's interest in administering its unemployment benefits program.
>
> It is surprising, to say the least, that this Court which so often prides itself about principles of judicial restraint and reduction of federal control over matters of state law would stretch its jurisdiction to the limit in order to reach, in this abstract setting, the constitutionality of Oregon's prohibition of peyote use.

This decision has been reported here at such length because it may represent a historic turning point—or attempted turning point—in the application of the Free Exercise Clause. In this somewhat obscure case a bare majority undertook a constitutional revolution, or at least a regression, to an earlier era that prevailed before *Sherbert v. Verner* (1968) and *Wisconsin v. Yoder* (1972), typified perhaps—in a small way—by the court's quoting from *Minersville v. Gobitis* (1940) at one point and citing it again at another as though it were still good law, although it was overruled *in toto* by *West Virginia v. Barnette* in 1943—a fact Justice O'Connor did not neglect to mention when she quoted the signal passage from *Barnette* about the very purpose of a Bill of Rights being to protect certain rights from officials and majorities. What might seem an incidental effort by the majority to resurrect a long-defunct and unlamented decision upholding the punishing of schoolchildren for conscientious refusal to salute the flag (*Gobitis*) might well be symptomatic of a nostalgia to revert to an earlier, simpler age when government could *govern* without having to stay its hand for all kinds of constitutional quibbles and when federal judges did not have to balance complicated claims against that government.

The remarkable sweep of this regression went generally unnoticed in the press at the time except for a few letters to the editor (mainly from exasperated Indians) and a gleeful chortle from George Will in his syndicated column welcoming the return to a supposedly saner policy. Perhaps that was because the sparring over the exemption for religious use of peyote masked the underlying evisceration of the Free Exercise Clause from those who had not been following the fretting within the court over the *Sherbert* test of free exercise. Several members of the court had expressed restiveness with the prevailing jurisprudence of the Religion Clauses, one of the earliest being the comment by then Associate Justice Rehnquist, dissenting in *Thomas:*

> The Court correctly acknowledges that there is a "tension" between the Free Exercise and Establishment Clauses.... The third, and perhaps most important, cause of the tension is our overly expansive interpretation of *both* clauses. By broadly construing both clauses, the Court has constantly

> narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny.
>
> * * *
>
> As Justice Harlan recognized in his dissent in *Sherbert v. Verner*, "Those situations in which the Constitution may require special treatment on account of religion are...few and far between."[93]

If the court were to seek to achieve Justice Harlan's minimalist view of the Religion Clauses, and had the votes to do so, would it not have been more forthright simply to announce that it was reconsidering its precedents and overruling those not consistent with its new vision rather than pretending that it was simply pointing out what it had meant all along, which was palpably untrue? Furthermore, it would have been more fitting to have invited briefing from the parties (and others) on its proposed change (as it did in some civil rights cases) rather than springing it on the nation in a surprise move that was not requested or briefed by the parties and was not necessary to the judgment (as Justice O'Connor pointed out).

(6) Petition for Rehearing and the Amicus Brief That Was Never Filed. The appellees in *Oregon v. Smith* entered a petition in the Supreme Court requesting a rehearing to enable them to address the issues the court decided that neither party had requested or briefed. The petition was endorsed by a long list of respected law professors from a wide spectrum of views, including Harold Berman, Lynn Buzzard, Angela Carmella, Robert Destro, Robert F. Drinan, S.J., W. Cole Durham, Carl Esbeck, Edward M. Gaffney, Marc Gallanter, Kent Greenawalt, Stanley Ingber, Douglas Laycock, Sanford Levinson, John Mansfield, Michael McConnell, Michael Perry, Norman Redlich, Charles E. Rice, Ruti Teitel, and Laurence Tribe. The petition was also endorsed by a wide array of religious and civil liberties organizations that normally agreed on very little, but they agreed that the court should give the case a serious reconsideration. Among such groups were the ACLU Foundation, the Catholic League for Religious and Civil Rights, the Christian Legal Society, the Evangelical Lutheran Church, the General Conference of Seventh-day Adventists, the Lutheran Church—Missouri Synod, the National Association of Evangelicals, the National Council of Churches, People for the American Way, the Stated Clerk of the Presbyterian Church, the Williamsburg Charter Foundation and the Worldwide Church of God. Two leading litigators of church-state issues who normally took opposite sides in court both signed the petition—William Bentley Ball and Leo Pfeffer.

The coalition supporting the petition agreed to enter a brief *amicus curiae* arguing their position. Professor Douglas Laycock of the University of Texas had written the brief and sent it to the printer when it was discovered that the 1990 amendments to Supreme Court rules expressly precluded such briefs in support of petitions for rehearing, so the brief was never filed. Nevertheless, it represented a serious and broadly supported critique of the *Smith* decision, and was subsequently published in the *Journal of Religion and Law*. Professor Laycock had developed his critique

93. *Thomas v. Review Board*, 450 U.S. 707 (1981), discussed at § A5l above.

immediately after the *Smith* decision was announced at the request of this author and presented it at the Religious Liberty Committee of the National Council of Churches on May 21, 1990, meeting at the offices of the American Jewish Committee in New York City. It was thus readily usable as the basis for the ill-fated *amicus* brief, and the following excerpts are taken from that version.

> The opinion in this case holds that religiously motivated conduct can be criminally punished pursuant to facially neutral legislation without a compelling state interest and apparently without any justification at all. If the statute has a rational basis as applied to secular conduct, it appears that the state need not show any reason for refusal to exempt sincere religious practice.
>
> This issue was not presented by the facts of the case, which involved no threat of criminal prosecution. The issue was not briefed by the parties. No one asked the Court to take this extraordinary step....
>
> On other occasions when the Court has decided to consider a new issue, broader than the issues raised by the parties, it has announced its intention and invited reargument. In some of these cases, full argument persuaded the Court not to take the step it had been considering.
>
> Notice and argument is the proper procedure. It is the only procedure consistent with due process to the parties and with this Court's responsibility for deciding cases of broad public importance....
>
> There are many reasons for believing that the Court's opinion may be in error. The opinion appears to be inconsistent with the original intent, inconsistent with the constitutional text, inconsistent with doctrine under other constitutional clauses, and inconsistent with precedent. It strips the free exercise clause of any independent meaning....
>
> The opinion is inconsistent with original intent. The Court had no way to know of exhaustive new scholarship on the original meaning of the free exercise clause. In an article published shortly after the Court's opinion, Professor Michael McConnell shows that legislatures in the founding generation considered exemptions from facially neutral laws to be part of the free exercise of religion, and that the new institution of judicial review made this right to free exercise judicially enforceable.[94]...
>
> The opinion is inconsistent with the constitutional text. The opinion acknowledges that religiously motivated conduct is the "exercise of religion," and that such conduct is prohibited by the Oregon law. We do not understand how this prohibiting of the exercise of religion is not "prohibiting the free exercise [of religion]."
>
> The decision in this case is inconsistent with doctrine under other constitutional clauses. First amendment rights frequently require exceptions from facially neutral laws. Unpopular political parties and

94. McConnell, M., "The Origins and Historical Understanding of Free Exercise of Religion," 103 *Harv. L. Rev.* 1409, May 1990 (discussed at § A4 above). This major contribution to the subject had not yet appeared in print at the time the *Smith* decision was announced, though copies were provided all members of the Court in connection with the request for rehearing.

movements have been exempted from facially neutral disclosure laws.[95] Just two years ago, the Court unanimously created special defenses to protect the press from the facially neutral tort of intentional infliction of emotional distress[96]....

The Court has never held that all restrictions on speech require equal justification. The Court is no more obliged to hold that all burdens on religious exercise require equal justification.... It is true that courts must consider the magnitude of the burden on religion as well as the magnitude of the government's interest. But it is not true that the courts must make a threshold determination of centrality, categorizing all religious practices as central or non-central. What the compelling interest test requires is that the government interest in regulating religion compellingly outweigh the resulting burden on religion, whatever the magnitude of that burden.

* * *

The opinion in this case reduces the free exercise clause to a cautious redundancy, relevant only to "hybrid" cases. The opinion appears to say that the free exercise clause merely emphasizes that religious speech is important to the free speech clause, that religious discrimination is important to the equal protection clause, and that religious education is important to the unenumerated right of parents to control their children's education. But the clause no longer has independent meaning.... Leaving a major clause of the Constitution without content is surely a signal that the Court might have made a mistake.

Indeed, the mere statement of the Court's holding should cause second thoughts. This case holds that criminal punishment of the central religious ritual of an ancient faith raises no issue under the free exercise clause and requires no justification!

The amici joining in this brief are divided on whether the peyote ritual should be constitutionally protected. Some agree with Justice O'Connor that the state has compelling reason to forbid the peyote ritual; some agree with the dissenters that the ritual is self-regulating and harmless. But all of these amici agree that the issue is whether Oregon has sufficient justification for applying its law to the peyote ritual. All of these amici are astonished at the holding that suppression of a worship service raises no issue under the free exercise clause!

That understanding of religious liberty is only marginally better than Oliver Cromwell's, who said to the Catholics of England and Ireland:

> As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to say the Mass, I would have you understand that in no place where the power of the Parliament of England prevails will that be permitted.[97]

This Court has said to Americans of all faiths that they have a constitutional right to believe their religion but no constitutional right to practice it.

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95. Citations include *NAACP v. Alabama*, 357 U.S. 449 (1958).

96. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

97. Hook, Sidney, *Paradoxes of Freedom* (Berkeley: Univ. of California Press, 1962), p. 23.

If the Court means what it said in this case, churches and believers are now subject to all the regulatory burdens of the modern welfare state. Given the largely secular ethos of modern society, facially neutral regulation will produce intolerable burdens on religion. These burdens will fall with special force on traditional religions that do not change their teaching to accommodate every shift in social and political mores.

* * *

It is true that legislatures often exempt the practices of religious minorities, especially the "respectable" practices of socially accepted minorities. But these legislative exemptions have often been motivated by the belief that they are constitutionally required. In the experience of these amici, debate at legislative hearings is often focused on this Court's opinions. If the Court says no exemptions are required, legislatures will enact many fewer exemptions.

It is also true that legislatures are sometimes captured by fear and hostility to unfamiliar minority faiths. Roman Catholics, Mormons, Jehovah's Witnesses, and contemporary "cults" have experienced periods of hostility and persecution even in America. It takes little imagination for a legislature so inclined to suppress a minority faith with a facially neutral law.

Even with the best of intentions, legislative protection for religious minorities is episodic, uninformed, and unreliable. Legislatures often enact laws without considering or even knowing about their impact on religion. Bureaucrats often enforce these laws with a single-minded focus on their agency's mission, brooking no exceptions. Powerful forces in modern society resist any accommodation for religious minorities. Religious minorities have little clout in the political process, and they face all the burdens of legislative inertia and crowded calendars in seeking legislative exemptions. If there are no votes in it, a busy legislature may never get around to listening.

The only branch of government that was required to listen to the complaints of religious minorities and render an unbiased decision was the judiciary. Now that branch has closed its doors. The inevitable consequence is that some Americans will suffer for conscience, and that others will abandon the practice of their faith to avoid prosecution. These are precisely the results the free exercise clause was intended to avoid.

* * *

The opinion's treatment of Wisconsin v. Yoder elevates the unenumerated right of parents to control the education of their children above the enumerated right to free exercise of religion. Many of these amici welcome this majority's recognition of unenumerated rights; others view that recognition with alarm.

But the point here is not the existence of unenumerated rights. Instead, the point is the relative status of enumerated and unenumerated rights. If the Court feels free to enforce the unenumerated rights it likes, and to strip all independent meaning from the enumerated rights it does not like, it is hard to see how the existence of a written Constitution affects its decisions.

> What is the point of enumerating certain rights at all if not to ensure that at least those rights get enforced?
>
> Decisions in free exercise cases are sometimes hard, and it appears to be the majority's judgment that they are not appropriate for the judiciary.... If this is the Court's motivation, we believe that the Court has erred. The free exercise clause is not just a speech clause, and it is not just an equality clause. It is an express, substantive protection for certain conduct, for religious exercise. The Court cannot simply say that such a clause is inconsistent with its conception of the judicial role. The judicial role is defined by the Constitution; the Constitution is not defined by changing conceptions of the judicial role. To refuse to enforce rights that are expressly stated in the Constitution is as mistaken as enforcing rights that are not in the Constitution.
>
> The opinion in this case has momentous consequences for all religions, and especially for religious minorities. Such a momentous decision should not be taken without notice and hearing. The Court should vacate its opinion in this case and restore the case to the docket for full briefing and argument.[98]

Scarcely was the ink dry on the *Smith* decision than its effects began to be felt. A case reached the Supreme Court in which the Minnesota Supreme Court had held that the state law requiring slow-moving vehicles to display a vivid orange triangle could not be enforced against the Amish religious objection to affixing such a garish emblem to their black buggies. (Grey-silver reflector stripes were an alternative acceptable to the Amish and to the court.) The U.S. Supreme Court sent the case back to Minnesota with instructions to reconsider it in the light of the *Smith* decision, with the implication that the Free Exercise Clause provided no defense for the Amish against Minnesota's traffic laws.[99]

Unless or until the *Smith* decision was rectified, the Free Exercise Clause would seem to have become virtually a dead letter. In the twenty-first century, that decision may come to be viewed as the Dred Scott decision of the Free Exercise Clause. In *Scott v. Sanford* (1856),[100] the Supreme Court reached out beyond the necessities of the case to declare the Missouri Compromise unconstitutional in the hope of resolving the growing conflicts over slavery that threatened national schism. Instead, it helped bring on the Civil War. In *Smith,* the court reached out beyond the necessities of the case to sweep aside three decades of generally accepted precedent in order to free the hand of government from constitutional impediments posed by religion. Instead, it may merely exacerbate religious conflicts that the courts should have resolved—probably not to the point of civil war, but far beyond the tolerance the Founders thought they had built into the Bill of Rights.

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98. Laycock, D., "The Supreme Court's Assault on Free Exercise, and the Amicus Brief That Was Never Filed," 8 *Journal of Law and Religion*, 99, 101-112 *passim* (1990). The Supreme Court denied the petition for rehearing on June 4, 1990.

99. *Minnesota v. Hershberger*, 495 U.S. 901 (1990). On remand the Minnesota Supreme Court again ruled in favor of the Amish, but on the basis of the *state* constitution, 462 N.W.2d 393 (Minn. 1990).

100. 60 U.S. 393 (1856).

In the *Dred Scott* decision, Chief Justice Roger Taney wrote that blacks were "so far inferior, that they had no rights, which the white man was bound to respect." In *Smith*, the court has said, in effect, that religious minorities have no rights to religious practice that majorities are bound to respect! That was surely not what the authors of the First Amendment had in mind. Chief Justice Taney, who was otherwise one of the great chief justices in the nation's history, is remembered today chiefly for his disastrous opinion in *Dred Scott*. Justice Scalia, one of the more brilliant justices to grace the bench of the Supreme Court, may also have earned a similar place in history for his remarkable opinion in *Smith*. Religion will doubtless survive the damage done by *Smith*—it has survived far worse—but the promise of the Free Exercise Clause was thought to be that it should have some accessible effect in shielding the practice of religion from governmental power, and that promise has been betrayed by five justices of the Supreme Court appointed and sworn to uphold it.

(7) The Religious Freedom Restoration Act (1993). Following the refusal of the Supreme Court to consent to rehearing of the *Smith* decision, a broad coalition of critics of that decision began concerted efforts to obtain a correction of the situation by action of Congress. The Coalition for the Free Exercise of Religion was one of the more remarkable alliances of the twentieth century, since it included advocacy organizations that were opponents on almost all other matters: the American Civil Liberties Union and Concerned Women for America, People for the American Way and the Home School Legal Defense Association, the American Jewish Congress, the American Jewish Committee and Agudath Israel, the National Council of Churches and the National Association of Evangelicals, Americans United for separation of Church and State and the Christian Legal Society, the Unitarian Universalist Association and the Traditional Values Coalition.

The only notable exception was the National Conference of Catholic Bishops, which held out for a more sweeping corrective, since they considered that the *status quo ante* was not all that favorable to the claims of religious freedom. They also entertained the hope that a change of heart on the part of the court itself would be the best solution, resulting in an overruling of *Smith*. (Such a course was urged by a newcomer to the court—subsequent to *Smith*—Justice David Souter, who wrote a long and thoughtful essay recommending reconsideration of *Smith* in concurrence in *Church of the Lukumi Babalu Aye v. Hialeah*, next below.) Most members of the coalition would have welcomed that solution but thought it highly unlikely, given the fact that the three dissenters in *Smith* were likely to retire or had already done so (Justices Brennan [1990], Marshall [1991] and Blackmun [1994]). After two years (and with the Court's issuance of its decision in *Planned Parenthood v. Casey*[101] indicating that it was not about to overrule *Wade*), the Catholic bishops endorsed the Religious Freedom Act. It was adopted by Congress in 1993 by unanimous vote in the House and 97-3 in the Senate and was signed into law by President Clinton on November 16 of that year.

Along the way to enactment, there were efforts by various interest groups to excuse themselves out of its coverage. The National School Boards Association

101. 112 S.Ct. 2791 (1992).

insisted that religious freedom was a good thing, but not in public schools (one of the main arenas of contention). Prison officials insisted that prisoners' claims to religious freedom should not be decided by the courts, and that was the exception that came closest to adoption. Attorney General Janet Reno asked Senator Ted Kennedy to give her two weeks to think about that issue, and in the end she concluded that the exemption was unnecessary. "She said that the compelling interest test would take care of any legitimate security and safety issues, and she stared down the Federal Bureau of Prisons."[102] But state prison authorities were not so easily diverted. On their behalf, state attorneys general pressed their states' senators to exempt prisons from the bill's coverage, and that proposal was the only amendment that gained substantial support, but it was defeated in the Senate by a vote of 58-41, perhaps partly on the observation that prisoners had not been winning many claims under the pre-*Smith* regime anyway (a condition that has not proved as prevalent since the adoption of the Religious Freedom Restoration Act!).[103]

The Senate's refusal to exempt prisons from the scope of the legislation was an important recognition of the principle that had guided the Coalition from its inception; no exemptions for anyone. The courts should be open to any and all claims of religious liberty from whatever source, and they should be dealt with under the same criteria, with the state gaining the same chance for relief in all cases: the showing of a compelling interest. Any other principle would have split the coalition down the middle and would similarly have imperiled the Act.

Since its enactment, the Act has been challenged by opponents of religious liberty claimants on the basis of its alleged unconstitutionality. The argument is that Congress did not have the authority under the Constitution to overrule a decision of the Supreme Court. The Coalition has entered a brief *amicus curiae* in defense of the constitutionality of RFRA wherever such a challenge has arisen. At least two federal district courts have ruled on the question—with opposite results. In *Belgard v. Hawaii*[104] the court upheld the constitutionality of RFRA, while in *Flores v. City of Boerne*[105] the court held it unconstitutional, but that decision was reversed by the Fifth Circuit Court of Appeals. Eventually this issue will reach the Supreme Court of the United States, and only then will the constitutional status of the Act be determined.

Following is the text of the Religious Freedom Restoration Act, 26 USC 2000bb:

> Sec. 2. Congressional Findings and Declaration of Purposes.
> (a) Findings.—The Congress finds that—
> (1) the framers of the Constitution, recognizing free exercise of religion as an inalienable right, secured its protection in the First Amendment to the Constitution;
> (2) laws "neutral" toward religion may burden religious exercise as

102. Laycock, D., "Free Exercise and the Religious Freedom Restoration Act," 62 *Fordham L. Rev.* 883, 896 (1994).

103. See catalog of cases at the end of this volume, § Ee.

104. C/A 93-00961 HG (D. Hawaii 1995).

105. SA-94-CA-0421 (W.D. Tex. Mar. 11, 1995).

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 Act 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.

Sec. 3. Free Exercise of Religion Protected.

(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).

(b) Exception.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial Relief.—A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

Sec. 4. Attorneys Fees. [amending two other sections of U.S.C. to provide attorneys fees]

Sec. 5. Definitions.

As used in this Act—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

Sec. 6. Applicability.

(a) In General.—This Act applies to all Federal and State law, and the

implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) Rule of Construction.—Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) Religious Belief Unaffected.—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

Sec. 7. Establishment Clause Unaffected.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term "granting," used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Approved November 16, 1993.

3. Other Sacramental Practices: Animal Sacrifice

a. *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993). In 1992 the Supreme Court took the opportunity to delineate a boundary line on the scope of the Free Exercise Clause under *Smith II* (1990). That opportunity was presented by a case arising in Florida as a result of the effort by devotees of the Santeria religion to gain public acceptance as a legitimate religion. They leased property in the city of Hialeah with a view to using it as a church. Santeria was an amalgam of Christian and African religion, whose central cultic ritual involves the sacrifice of small animals, a sacrament familiar to readers of the Christian gospels as having been practiced at the temple in Jerusalem by devout adherents of Judaism. It has fallen out of favor in much of the Western world, and the City of Hialeah was not pleased at the prospect of having this practice carried on in its precincts. The city council held an emergency session and passed several ordinances aimed at preventing the ritual slaughter of small animals within the city limits by the devotees of Santeria.

The Santerians filed suit charging violation of their rights under the Free Exercise Clause of the First Amendment. The federal district court ruled for the city, holding that it had a compelling interest in preventing public health risks and cruelty to animals. The Court of Appeals affirmed, and the Supreme Court granted *certiorari*. The case was ably argued by Professor Douglas Laycock for the church, who contended that the ordinances targeted religious practice and were therefore subject to strict scrutiny even under *Smith II*, the Court's 1990 decision that severely limited the previously settled scope of the protection afforded by the First Amendment for the free exercise of religion.[106]

(1) The Court's Opinion. The Court's decision was announced by Justice Anthony Kennedy. Though four opinions were filed, there was no dissent. In Part I,

106. See immediately preceding section.

Justice Kennedy was joined by Chief Justice Rehnquist and Justices White, Stevens, Scalia, Souter and Thomas.

I

The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. Concerned that this fundamental nonpersecution principle of the First Amendment was implicated here, however, we granted certiorari.

Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs. We invalidate the challenged enactments and reverse the judgment of the Court of Appeals.

Justice Kennedy began with an explanation of the Santeria religion.

This case involves practices of the Santeria religion, which originated in the nineteenth century. When hundreds of thousands of the Yoruba people were brought as slaves from eastern Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, "the way of the saints." The Cuban Yoruba express their devotion to spirits, called *orishas*, through the iconography of Catholic saints, Catholic symbols are often present at Santeria rites, and Santeria devotees attend the Catholic sacraments.

The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the *orishas*. The basis of the Santeria religion is the nurture of a personal relation with the *orishas*, and one of the principal forms of devotion is an animal sacrifice. The sacrifice of animals as part of religious rituals has ancient roots. Animal sacrifice is mentioned throughout the Old Testament, and it played an important role in the practice of Judaism before destruction of the Second Temple in Jerusalem. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son.

According to Santeria teaching, the *orishas* are powerful but not immortal. They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals.

Santeria adherents faced widespread persecution in Cuba, so the religion and its rituals were practiced in secret. The open practice of Santeria and its rites remains infrequent. The religion was brought to this

> Nation most often by exiles from the Cuban revolution. The District Court estimated that there are at least 50,000 practitioners in South Florida today.

Justice Kennedy summarized the several ordinances that the city council had adopted (discussed further below) to prohibit killing of animals "unnecessarily" within the city limits, but exempted a number of practices (including Kosher slaughter) already practiced.

> The District Court proceeded to determine whether the governmental interests underlying the ordinances were compelling and, if so, to balance the "governmental and religious interests."... The court found four compelling interests. First, the court found that animal sacrifices present a substantial health risk, both to participants and the general public. According to the court, animals that are to be sacrificed are often kept in unsanitary conditions and are uninspected, and animal remains are found in public places. Second, the court found emotional injury to children who witness the sacrifice of animals. Third, the court found compelling the city's interest in protecting animals from cruel and unnecessary killing. The court determined that the method of killing used in Santeria sacrifice was "unreliable and not humane, and that the animals, before being sacrificed, are often kept in conditions that produce a great deal of fear and stress in the animal." Fourth, the District Court found compelling the city's interest in restricting the slaughter or sacrifice of animals to areas zoned for slaughterhouse use....
>
> Balancing the competing governmental and religious interests, the District Court concluded the compelling governmental interests "fully justify the absolute prohibition on ritual sacrifice" accomplished by the ordinances. The court also concluded that an exception to the sacrifice prohibition for religious conduct would "`unduly interfere with fulfillment of the governmental interest'" because any more narrow restrictions—e.g., regulation of disposal of animal carcasses—would be unenforceable as a result of the secret nature of the Santeria religion....
>
> II
>
> The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." The city does not argue that Santeria is not a "religion" within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem abhorrent to some, "religious beliefs need not be acceptable, logical , consistent, or comprehensible to others in order to merit First Amendment protection."[107] Given the historical association between animal sacrifice and religious worship..., petitioners' assertion that animal sacrifice is an integral part of their religion "cannot be deemed bizarre or incredible."[108] Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for

107 . *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981), discussed at § A5l above.

108 . *Frazee v. Illinois*, 489 U.S. 829, 834 n.2 (1989), discussed at § A7j above.

religious reasons. We must consider petitioners' First Amendment claim.

In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.[109] Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. These ordinances fail to satisfy the Smith requirements. We begin by discussing neutrality.

A

* * *

Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the Free Exercise Clause is dispositive in our analysis.

At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons....

In the next section, Justice Kennedy was joined by Chief Justice Rehnquist and Justices Stevens, Scalia and Thomas. He lost Justices White and Souter, but still retained a bare majority.

1

Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or the context....

We reject the contention advanced by the city...that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality,"[110] and "covert suppression of particular religious beliefs."[111] Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirements of facial

109 . *Oregon v. Smith*, 494 U.S. 872 (1990), discussed immediately above.

110 . *Gillette v. U.S.*, 401 U.S. 437, 452 (1971), discussed at § A5k above.

111 . *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (opinion of Burger, C.J.), discussed at § A9g above.

neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt....

The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances.

First, though use of the words "sacrifice" and "ritual" does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion. There are further respects in which the text of the city council's enactments disclose the improper attempt to target Santeria. Resolution 87-6...recited that "residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and "reiterate[d]" the city's commitment to prohibit "any and all [such] acts of any and all religious groups." No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria.

It becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination. The subject at hand does implicate, of course, multiple concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed animals, and health hazards from improper disposal. But the ordinances when considered together disclose an object remote from these legitimate concerns. The design of these laws accomplishes instead a "religious gerrymander,"[112] an impermissible attempt to target petitioners and their religious practices.

It is a necessary conclusion that almost the only conduct subject to [these ordinances] is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result. We begin with Ordinance 87-71. It prohibits the sacrifice of animals but defines sacrifice as "to unnecessarily kill...an animal in a public or private ritual or ceremony not for the primary purpose of food consumption." The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting Kosher slaughter. We need not discuss whether this differential treatment of two religions is itself an independent constitutional violation.[113] It suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern. The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its

112. *Walz v. Tax Commission*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring), discussed at VC6b(3).

113. Cf. *Larson v. Valente*, 456 U.S. 228, 244-246 (1982), discussed at IIC5c.

primary purpose is to make an offering to the orishas, not food consumption. Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.

Operating in similar fashion is Ordinance 87-52, which prohibits the "possess[ion], sacrifice or slaughter" of an animal with the "inten[t] to use such animal for food purposes." This prohibition, extending to the keeping of an animal as well as the killing itself, applies if the animal is killed "in any type of ritual" and there is an intent to use the animal for food, whether or not it is in fact consumed for food. The ordinance exempts, however, "any licensed [food] establishment" with regard to "any animals which are specifically raised for food purposes," if the activity is permitted by zoning and other laws. This exception, too, seems intended to cover Kosher slaughter. Again, the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others: If the killing is—unlike most Santeria sacrifices—unaccompanied by the intent to use the animal for food, then it is not prohibited by [the ordinance]; if the killing is specifically for food but does not occur during the course of "any type of ritual," it again falls outside the prohibition; and if the killing is for food and occurs during the course of a ritual, it is still exempted if it occurs in a properly zoned and licensed establishment and involves animals "specifically raised for food purposes." A pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander.

Ordinance 87-40 incorporates the Florida animal cruelty statute. Its prohibition is broad on its face, punishing "[w]hoever...unnecessarily... kills any animal." The city claims that this ordinance is the epitome of a neutral prohibition. The problem, however, is the interpretation given to the ordinance by [the city] and the Florida attorney general. Killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition. The city, on what seems to be a per se basis, deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. There is no indication in the record that [the city] has concluded that hunting or fishing for sport is unnecessary. Indeed, one of the few reported Florida cases decided under [this statute] concludes that the use of live rabbits to train greyhounds is not unnecessary.[114] Further, because it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct."[115] As we noted in Smith, in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of `religious hardship' without compelling reason." [The city's] application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment....

114 . *Kiper v. State*, 310 So.2d 42 (Fla. App.), cert. denied, 328 So.2d 845 (Fla. 1975).

115 . *Oregon v. Smith, supra*, 494 U.S. 872, 884 (1990).

The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice. If improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage. It did not do so. Indeed, counsel for the city conceded at oral argument that, under the ordinances, Santeria sacrifices would be illegal even if they occurred in licensed, inspected, and zoned slaughterhouses.[116] Thus, these broad ordinances prohibit Santeria sacrifice even when it does not threaten the city's interest in the public health. The District Court accepted the argument that narrower regulation would be unenforceable because of the secrecy of the Santeria rituals and the lack of any central religious authority to require compliance with secular disposal regulations. It is difficult to understand, however, how a prohibition of the sacrifices themselves, which occur in private, is enforceable, if a ban on improper disposal, which occurs in public, is not. The neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation.

Under similar analysis, narrower regulation would achieve the city's interest in preventing cruelty to animals. With regard to the city's interest in ensuring the adequate care of animals, regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice. The same is true for the city's interest in prohibiting cruel methods of killing. Under federal and Florida law and Ordinance 87-40, which incorporates Florida law in this regard, killing an animal by the "simultaneous and instantaneous severance of the carotid arteries with a sharp instrument"—the method used in Kosher slaughter—is approved as humane. The District Court found that, though Santeria sacrifice also results in severance of the carotid arteries, the method used during sacrifice is less reliable and therefore not humane. If the city has a real concern that other methods are less humane, however, the subject of the regulation should be the method of slaughter itself, not a religious classification that is said to bear some general relation to it.

Ordinance 87-72—unlike the three other ordinances—does appear to apply to substantial nonreligious conduct and not to be overbroad. For our purposes here, however, the four substantive ordinances may be treated as a group for neutrality purposes. Ordinance 87-72 was passed the same day as Ordinance 87-71 and was enacted, as were the three others, in direct response to the opening of the Church. It would be implausible to suggest that the three other ordinances, but not Ordinance 87-72, had as their object the suppression of religion. We need not decide whether Ordinance 87-72 could survive constitutional scrutiny if it existed separately; it must

116. Persons present at oral argument thought the city lost its case at this point. When counsel for the city, after resisting responding to this hypothetical, finally said that Santeria sacrifice would be illegal even under these circumstances, several of the justices leaned back in their chairs as though—for them—that settled it.

be invalidated because it functions, with the rest of the enactments in question, to suppress Santeria religious worship.

In the next section, Justice Kennedy was joined only by Justice Stevens. He lost the chief justice and Justices Scalia and Thomas, probably because of their reluctance to analyze the motivation of legislators. Lacking a majority, it was not the opinion of the court.

2

In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases.... Here, as in [those] cases, we may determine the city council's object from both direct and circumstantial evidence. Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, as well as the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body. These objective factors bear on the question of discriminatory object.

That the ordinances in question were enacted "`because of,' not merely `in spite of,'" their suppression of Santeria religious practice is revealed by the events preceding enactment of the ordinances. Although [the city] claimed at oral argument that it had experienced significant problems resulting from the sacrifice of animals within the city before the announced opening of the Church, the city council made no attempt to address the supposed problem before its meeting in June 1987, just weeks after the Church announced plans to open. The minutes and taped excerpts of the June 9 session, both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice. The public crowd that attended the June 9 meetings interrupted statements by council members critical of Santeria with cheers and the brief comments of [plaintiff] Pichardo with taunts. When Councilman Martinez, a supporter of the ordinances, stated that in prerevolution Cuba "people were put in jail for practicing this religion," the audience applauded.

Other statements by members of the city council were in a similar vein. For example, Councilman Martinez, after noting his belief that Santeria was outlawed in Cuba, questioned, "if we could not practice this [religion] in our homeland [Cuba], why bring it to this country?" Councilman Cardoso said that Santeria devotees at the Church "are in violation of everything this country stands for." Councilman Mejdes indicated that he was "totally against the sacrificing of animals" and distinguished Kosher slaughter because it had a "real purpose." The "Bible says we are allowed to sacrifice an animal for consumption," he continued, "but for any other purposes, I don't believe that the Bible allows that." The president of the city council, Councilman Echevarria, asked, "What can we do to prevent the Church from opening?"

> Various Hialeah city officials made comparable comments. The chaplain of the Hialeah Police Department told the city council that Santeria was a sin, "foolishness," "an abomination to the Lord," and the worship of "demons."... He concluded: "I would exhort you not to permit this Church to exist." The city attorney commented that Resolution 87-66 indicated that "This community will not tolerate religious practices which are abhorrent to its citizens...." Similar comments were made by the deputy city attorney. This history discloses the object of the ordinances to target animal sacrifice by Santeria worshippers because of its religious motivation.

In the following section, Justice Kennedy was joined by the chief justice and Justices Stevens, Scalia and Thomas, making it (barely) the opinion of the court.

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> In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion.

In Part IIB, Justice White rejoined the five justices aforementioned, but Justice Souter did not.

> IIB
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> We turn next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability. All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause "protect[s] religious observers against unequal treatment,"[117] and inequality results when a legislature decides that the government interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.... In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.
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> [The city] claims that [three of the ordinances] advance two interests: protecting the public health and preventing cruelty to animals. The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater

117. *Hobbie v. Florida*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in judgment), discussed at § A7i above.

degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential. Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. For example, fishing—which occurs in Hialeah—is legal. Extermination of mice and rats within a home is also permitted. Florida law incorporated by [one ordinance] sanctions[118] euthanasia of "stray, neglected, abandoned or unwanted animals," destruction of animals judicially removed from their owners "for humanitarian reasons" or when the animal "is of no commercial value," the infliction of pain or suffering "in the interest of medical science," the placing of poison in one's yard or enclosure, and the use of a live animal "to pursue or take wildlife or to participate in any hunting," and "to hunt wild hogs." [citations omitted]

The city concedes that "neither the State of Florida nor the City has enacted a generally applicable ban on the killing of animals." It asserts, however, that animal sacrifice is "different" from the animal killings that are permitted by law. According to the city, it is "self-evident" that killing animals for food is "important," the eradication of insects and pests is "obviously justified," and the euthanasia of excess animals "makes sense." These ipse dixits do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing cruel treatment of animals.

The ordinances are also underinclusive with regard to the city's interest in public health, which is threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat. Neither interest is pursued by [the city] with regard to conduct that is not motivated by religious conviction. The health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing preceded it. The city does not prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity. Despite substantial testimony at trial that the same public health hazards result from improper disposal of garbage by restaurants, [they] are outside the scope of the ordinances. Improper disposal is a general problem that causes substantial health risks, but which [the city] addresses only when it results from religious exercise.

The ordinances are underinclusive as well with regard to the health risk posed by consumption of uninspected meat. Under the city's ordinances, hunters may eat their kill and fishermen may eat their catch without undergoing governmental inspection. Likewise, state law requires inspection of meat that is sold but exempts meat from animals raised for the use of the owner and "members of his household and nonpaying guests and employees." The asserted interest in inspected meat is not pursued in contexts similar to that of religious animal sacrifice.

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118. This key but ambiguous word can mean either "permits" *or* "punishes," "penalizes." The context makes clear that the former is intended.

> [One ordinance], which prohibits the slaughter of animals outside of areas zoned for slaughterhouses, is underinclusive on its face. The ordinance includes an exemption for "any person, group, or organization" that "slaughters or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." [The city] has not explained why commercial operations that slaughter "small numbers" of hogs and cattle do not implicate its professed desire to prevent cruelty to animals and preserve the public health. Although the city has classified Santeria sacrifice as slaughter, subjecting it to this ordinance, it does not regulate other killings in like manner.
>
> We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances "ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself."[119] This precise evil is what the requirement of general applicability is designed to prevent.

Justice Souter rejoined the other six justices in the majority for the remainder of the Kennedy opinion.

> III
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> A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "`interests of the highest order'" and must be narrowly tailored in pursuit of those interests.[120] The compelling interest standard that we apply once a law fails to meet the Smith requirements is not "water[ed]... down" but "really means what it says."[121] A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have said that these ordinances cannot withstand this scrutiny.
>
> First, even were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests. As we have discussed, all four ordinances are overbroad or underinclusive in substantial respects. The proffered objectives are not pursued with respect to analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. The absence of narrow tailoring suffices to establish the invalidity of the ordinances.
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> [The city] has not demonstrated, moreover, that, in the context of these ordinances, its governmental interests are compelling. Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or

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119. *The Florida Star v. B.J.F.,* 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and concurring in judgment).

120. *McDaniel v. Paty*, 435 U.S., at 628, quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

121. *Oregon v. Smith*, *supra*, 494 U.S. 872, 888 (1990).

> alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest `of the highest order'...when it leaves appreciable damage to that supposedly vital interest unprohibited."[122] As we show above, the ordinances are underinclusive to a substantial extent with respect to each of the interests that [the city] has asserted, and it is only conduct motivated by religious conviction that bears the weight of the governmental restrictions. There can be no serious claim that those interests justify the ordinances.
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> IV
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> The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must insure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.[123]

This decision was the Supreme Court's first fine-tuning of the retrogressive rule announced in *Smith* that government need no longer justify burdening religious practice by laws of general applicability that do not target religion. This case enabled the court to demonstrate that it would not tolerate antireligious acts of government that remained still subject to strict scrutiny under the *Smith* rule. Justice Kennedy, one of the 5-4 *Smith* majority, spelled out the lesson in rather ponderous detail, but the very detail added to the ineluctability of the outcome.

(2) Partial Concurrence by Justice Scalia. Justice Scalia wrote separately (and was joined by the chief justice), concurring in part and concurring in the judgment. He explained that he would have parsed the criteria of "neutrality" and "general applicability" a little differently from the way the majority had done, but considered that they were not only "interrelated" terms, but substantially overlapping.

> In my view, the defect of lack of neutrality applies primarily to those laws that by their terms impose disabilities on the basis of religion (e.g., a law excluding members of a certain sect from public benefits, cf. McDaniel v. Paty)...; whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment, see Fowler v. Rhode Island (1953)[124].... Because I agree with most of the invalidating factors set forth in

122 . *The Florida Star v. B.J.F., supra.*

123 . *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

124 . 345 U.S. 67 (1953) (prohibiting Jehovah's Witnesses from holding religious services in public parks that were used for such purposes by other groups), discussed at IIA2r.

> Part II of the Court's opinion, and because it seems to me a matter of no consequence under which rubric ("neutrality," Part II-A, or "general applicability," Part II-B) each invalidating factor is discussed, I join the judgment of the Court and all of its opinion except section 2 of Part II-A.

That was the section reciting the views hostile to Santeria expressed by members of the city council, which could be expected to elicit Justice Scalia's mistrust of "legislative intent" as adduced from remarks of individual legislators, expressed so colorfully but extraneously in dissent in *Edwards v. Aguillard*.[125]

> I do not join that section because it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers, i.e.*, whether the Hialeah City Council actually *intended* to disfavor the religion of Santeria....
>
> Perhaps there are contexts in which determination of legislative motive *must* be undertaken. But I do not think that is true of analysis under the First Amendment.... The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted: "Congress shall make no law...prohibiting the free exercise [of religion]...." This does not put us in the business of invalidating laws by reason of the evil motives of their authors. Had the Hialeah City Council set out resolutely to suppress the practices of Santeria, but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to "prohibi[t] the free exercise" of religion. Nor, in my view, does it matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens. Had the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), they would nonetheless be invalid.[126]

Justice Scalia's characteristic disdain of legislators' (often self-serving) "explanations" of why they are enacting legislation and his impatience with their efforts to put various "spins" on otherwise ambiguous statutes by "legislative history" (written by committees, or by a few committee members, or even by committee staff, or expressed by legislative managers in staged "colloquies" on the floor) are not without merit. But he also often tended to consider inadmissible the unvarnished self-declarations by legislators of the prevailing sentiments leading to enactments, such as recited by Justice Kennedy in the section Justice Scalia and several other justices declined to join, which are useful collateral indications of animus. There is a difference between psychoanalyzing the *motives* of individual legislators, which is indeed hazardous at best, and discerning from their avowed assertions what their legislative *intent* is. That is, the *purpose* of legislation can be determined, not only by what it clearly on its face is designed to do, but by what the legislators announce that they are *trying* to do. The latter is not dispositive, but it is a

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125. 482 U.S. 578 (1987), discussed at IIIC3b(6)(b).

126. *Church of the Lukumi Babalu Aye v. City of Hialeah, supra*, Scalia concurrence in part and concurrence in the judgment.

useful supplement to the (sometimes ambiguous) facial text of the enactment and its (often unintended) impacts as applied.[127]

(3) Justice Blackmun's Concurrence in the Judgment. Justice Blackmun, joined by Justice O'Connor concurred only in the judgment and not in any part of the court's opinion. Thus it appeared in print as the last of the four opinions issued in this case. It is treated in third place here because Justice Souter's opinion focused almost entirely on the viability of the *Smith* rule and will thus be discussed last. (It appeared third in the published opinions because he joined in parts of the court's opinion.) Justice Blackmun also concerned himself extensively with *Smith*.

> The Court holds today that the city of Hialeah violated the First and Fourteenth Amendments when it passed a set of restrictive ordinances explicitly directed at petitioners' religious practices. With this holding I agree. I write separately to emphasize that the First Amendment's protection of religion extends beyond those rare occasions on which the government explicitly targets religion (or a particular religion) for disfavored treatment, as is done in this case. In my view, a statute that burdens the free exercise of religion "may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means."[128] The Court, however, applies a different test. It applies the test announced in Smith, under which "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." I continue to believe that Smith was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle. Thus, while I agree with the result the Court reaches in this case, I arrive at that result by a different route....
>
> When a law discriminates against religion as such, as do the ordinances in this case, it automatically will fail strict scrutiny under Sherbert v. Verner[129]. This is true because a law that targets religious practice for disfavored treatment both burdens the free exercise of religion and, by definition, is not precisely tailored to a compelling governmental interest.
>
> Thus, unlike the majority, I do not believe that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." In my view, regulation that targets religion in this way, ipso facto, fails strict scrutiny. It is for this reason that a statute that explicitly restricts religious practice violates the First Amendment. Otherwise, however, "[t]he First Amendment...does not distinguish between laws that are generally applicable and laws that target particular religious practice."[130]

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127 . See further discussion of this point at IIIC3b(6)(b).

128 . *Oregon v. Smith, supra,* dissenting opinion.

129 . The case that first enunciated the "compelling interest" test for Free Exercise, 374 U.S. 398 (1963), discussed at § A7c above.

130 . *Smith, supra,* 494 U.S. 872, 894 (1990) (O'Connor, opinion concurring in judgment).

> It is only in the rare case that a state or local legislature will enact a law directly burdening religious practice as such. Because the [city] here does single out religion in this way, the present case is an easy one to decide.
>
> A harder case would be presented if the petitioners were requesting an exemption from a generally applicable anticruelty law. The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals. This case does not present, and I therefore decline to reach, the question whether the Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment. The number of organizations that have filed *amicus* briefs on behalf of this interest, however, demonstrates that it is not a concern to be treated lightly.[131]

In the margin Justice Blackmun listed the following organizations filing briefs *amicus curiae* in support of the city: Washington Humane Society, People for the Ethical Treatment of Animals, New Jersey Animal Rights Alliance, Foundation for Animal Rights Advocacy, Humane Society of the United States, American Humane Association, American Society for the Prevention of Cruelty to Animals, Animal Legal Defense Fund, Massachusetts Society for the Prevention of Cruelty to Animals, International Society for Animal Rights, Citizens for Animals, Farm Animal Reform Movement, In Defense of Animals, Performing Animal Welfare Society, Student Action Corps for Animals, Institute for Animal Rights Law, American Fund for Alternatives to Animal Research, Farm Sanctuary, Jews for Animal Rights, United Animal Nations, and United Poultry Concerns. (Some others, including the National Council of Churches, though otherwise solicitous for free exercise values so clearly at stake here, failed to join in briefs supporting the religious group because of animal-rights concerns.)

(4) Justice Souter's Concurrence. One of the more interesting facets of this case was the lengthy opinion indited by Justice Souter questioning the validity of the *Smith* rule on free exercise of religion. He had surprised and impressed students of the religion clauses by his scholarly and forceful solo opinion in *Lee v. Weisman* criticizing the "nonpreferentialist" view of the original intent of the founders with respect to the Establishment Clause.[132] Now he followed it with an equally knowledgeable and vigorous—though irenic—disquisition on the Free Exercise Clause.

> This case turns on a principle about which there is no disagreement, that the Free Exercise Clause bars government action aimed at suppressing religious belief or practice. The Court holds that Hialeah's animal sacrifice laws violate that principle, and I concur in that holding without reservation.
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> Because prohibiting religious exercise is the object of the laws at hand,

131. *Church of the Lukumi Babalu Aye v. City of Hialeah, supra*, Blackmun concurrence in the Judgment.

132. 508 U.S. 577 (1992), discussed at IIIC2d(11).

this case does not present the more difficult issue addressed in our last free-exercise case,... Oregon v. Smith (1990), which announced the rule that a "neutral, generally applicable" law does not run afoul of the Free Exercise Clause even when it prohibits religious exercise in effect. The Court today refers to that rule in dicta, and despite my general agreement with the Court's opinion I do not join Part II, where the dicta appear, for I have doubts about whether the Smith rule merits adherence. I write separately to explain why the Smith rule is not germane to this case and to express my view that, in a case presenting the issue, the Court should reexamine the rule Smith declared.

I

According to Smith, if prohibiting the free exercise of religion results from enforcing a "neutral, generally applicable" law, the Free Exercise Clause has not been offended. I call this the Smith rule to distinguish it from the noncontroversial principle, also expressed in Smith though established long before, that the Free Exercise Clause is offended when prohibiting religious exercise results from a law that is not neutral or generally applicable. It is this noncontroversial principle, that the Free Exercise Clause requires neutrality and general applicability, that is at issue here. But before turning to the relationship of Smith to this case, it will help to get the terms in order, for the significance of the Smith rule is not only its statement that the Free Exercise Clause requires no more than "neutrality" and "general applicability," but in its adoption of a particular, narrow conception of free-exercise neutrality.

That the Free Exercise Clause contains a "requirement for governmental neutrality"[133] is hardly a novel proposition; though the term itself does not appear in the First Amendment, our cases have used it as shorthand to describe, at least in part, what the Clause commands.[134] Nor is there anything unusual about the notion that the Free Exercise Clause requires general applicability, though the Court, until today, has not used exactly that term in stating a reason for invalidation....

While general applicability is, for the most part, self-explanatory, free-exercise neutrality is not self-revealing. A law that is religion neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids.... A secular law, applicable to all, that prohibits consumption of alcohol, for example, will affect members of religions that require the use of wine differently from members of other religions and nonbelievers, disproportionately burdening the practice of, say, Catholicism or Judaism. Without an exemption for sacramental wine, Prohibition may fail the test of religious neutrality.

It does not necessarily follow from that observation, of course, that the

133 . *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972), discussed at IIIB2.

134 . *Jimmy Swaggart Ministries v. California*, 493 U.S. 378, 384 (1990); *Thomas v. Review Board*, 450 U.S. 707, 717 (1981); *Yoder, supra*, at 220; *Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-793 (1973); *Abington v. Schempp*, 374 U.S. 203, 222 (1963), etc.

First Amendment requires an exemption from Prohibition; that depends on the meaning of neutrality as the Free Exercise Clause embraces it. The point here is the unremarkable one that our common notion of neutrality is broad enough to cover not merely what might be called formal neutrality, which as a free-exercise requirement would only bar laws with an object to discriminate against religion, but also what might be called substantive neutrality, which, in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws.[135] If the Free Exercise Clause secures only protection against deliberate discrimination, a formal requirement will exhaust the Clause's neutrality command; if the Free Exercise Clause, rather, safeguards a right to engage in religious activity free from unnecessary governmental interference, the Clause requires substantive, as well as formal, neutrality.

Though Smith used the term "neutrality" without a modifier, the rule it announces plainly assumes that free-exercise neutrality is of the formal sort. Distinguishing between laws whose "object" is to prohibit religious exercise and those that prohibit religious exercise as an "incidental effect," Smith placed only the former within the reaches of the Free Exercise Clause; the latter, laws that satisfy formal neutrality, Smith would subject to no free-exercise scrutiny at all, even when they prohibit religious exercise in application. The four Justices who rejected the Smith rule, by contrast, read the Free Exercise Clause as embracing what I have termed substantive neutrality. The enforcement of a law "neutral on its face," they said, may "nonetheless offend [the Free Exercise Clause's] requirement for governmental neutrality if it unduly burdens the free exercise of religion." The rule these Justices saw as flowing from free-exercise neutrality, in contrast to the Smith rule, "requir[es] the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest."

* * *

In considering...whether Hialeah's animal-sacrifice laws violate free-exercise neutrality, the Court rightly observes that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," and correctly finds Hialeah's laws to fail those standards. The question whether the protections of the Free Exercise Clause also pertain if the law at issue, though nondiscriminatory in its object, has the effect nonetheless of placing a burden on religious exercise is not before the Court today, and the Court's intimations on the matter are therefore dicta....

II

In being so readily susceptible to resolution by applying the Free Exercise Clause's "fundamental nonpersecution principle," this is far from a representative free-exercise case. While...the Hialeah City Council has

135. Citing Laycock, Douglas, "Formal, Substantive, and Disaggregated Neutrality Toward Religion," 39 *DePaul L. Rev.* 993 (1990).

provided a rare example of a law actually aimed at suppressing religious exercise, Smith was typical of our free-exercise cases, involving as it did a formally neutral, generally applicable law. The rule Smith announced, however, was decidedly untypical of the cases involving the same type of law. Because Smith left those prior cases standing, we are left with a free-exercise jurisprudence in tension with itself, a tension that should be addressed, and that may legitimately be addressed, by reexamining the Smith rule in the next case that would turn upon its application.

A

In developing standards to judge the enforceability of formally neutral, generally applicable laws against the mandates of the Free Exercise Clause, the Court has addressed the concepts of neutrality and general applicability by indicating, in language hard to read as not foreclosing the Smith rule, that the Free Exercise Clause embraces more than mere formal neutrality, and that formal neutrality and general applicability are not sufficient conditions for free-exercise constitutionality:

> "In a variety of ways we have said that `[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.'"[136]
>
> "[T]o 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 Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability."[137]

Not long before the Smith decision, indeed, the Court specifically rejected the argument that "neutral and uniform" requirements for governmental benefits need satisfy only a reasonableness standard, in part because "[s]uch a test has no basis in precedent."[138] Rather, we have said, "[o]ur cases have established that `[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'"[139]

Thus we have applied the same rigorous scrutiny to burdens on religious exercise resulting from the enforcement of formally neutral, generally applicable laws as we have applied to burdens caused by laws that single out religious exercise....[140]

Though Smith sought to distinguish the free-exercise cases in which the

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136 . *Church of Lukumi, supra,* Souter opinion, quoting majority opinion quoting *Thomas, supra,* at 717 (quoting *Yoder, supra* at 220).

137 . Ibid., quoting majority opinion.

138 . *Hobbie v. Florida*, 480 U.S. 136, 141 (1987).

139 . *Swaggart Ministries, supra*, at 384-385 (quoting *Hernandez v. Commissioner,* 490 U.S. 680-699 (1989).

140 . Citing *Hernandez v. Commissioner, supra; Frazee v. Illinois*, 489 U.S. 829 919 (1989); *Hobbie v. Florida*, *supra*, at 141; *Bob Jones University v. U.S.* 461 U.S. 574, 604 (1983); *U.S. v. Lee*, 455 U.S. 252, 257-258 (1982); *Thomas, supra,* at 718; *Sherbert, supra*, at 403; and *Cantwell v. Connecticut*, 310 U.S. 296, 304-307 (1940).

> Court mandated exemptions from secular laws of general application, I am not persuaded. Wisconsin v. Yoder and Cantwell v. Connecticut, according to Smith, were not true free-exercise cases but "hybrid[s]" involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the rights of parents...to direct the education of their children." Neither opinion, however, leaves any doubt that "fundamental claims of religious freedom [were] at stake."[141] And the distinction Smith draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the Smith rule, and, indeed, the hybrid exception would cover the situation exemplified by Smith, since free speech and associational rights are certainly implicated in the peyote-smoking[142] ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what Smith calls the hybrid cases to have mentioned the Free Exercise Clause at all.
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> * * *
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> As for the cases on which Smith primarily relied as establishing the rule it embraced, Reynolds v. United States and Minersville v. Gobitis,[143] their subsequent treatment by the Court would seem to require rejection of the Smith rule. Reynolds, which in upholding the polygamy conviction of a Mormon stressed the evils it saw associated with polygamy, has been read as consistent with the principle that religious conduct may be regulated by general or targeting law only if the conduct "pose[s] some substantial threat to public safety, peace or order."[144] And Gobitis, after three Justices who originally joined the opinion renounced it for disregarding the government's constitutional obligation "to accommodate itself to the religious views of minorities,"[145] was explicitly overruled in West Virginia... v. Barnette.[146]
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> Since holding in 1940 that the Free Exercise Clause applies to the States,[147] the Court repeatedly has stated that the Clause sets strict limits on the government's power to burden religious exercise, whether it is a

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141. *Yoder, supra,* at 221; see also *Cantwell, supra*, at 303-307. In a footnote, Justice Souter added: "The Yoders raised only a free-exercise defense to their prosecution under the school attendance law; certiorari was granted only on the free-exercise issue; and the Court plainly understood the case to involve `conduct protected by the Free Exercise Clause' even against enforcement of a "regulatio[n] of general applicability." (n. 4)

142. Justice Souter made a common mistake in supposing that peyote is smoked; it is normally chewed or ingested in an infusion in tea (see discussion in Justice Blackmun's dissent in *Smith*, at § 2e(4) above.

143. 98 U.S. 145 (1879) and 310 U.S. 586 (1940), respectively.

144. *Sherbert v. Verner*, 374 U.S. at 403; *U.S. v Lee*, 455 U.S. at 257-258; *Bob Jones Univ. v. U.S.*, 461 U.S. at 603; *Yoder, supra*, at 230.

145. *Jones v. Opelika*, 316 U.S. 584,624 (1942) (opinion of Black, Douglas, and Murphy, JJ.).

146. 319 U.S. 624, 642 (1943).

147. See *Cantwell, supra.*

law's object to do so or its unanticipated effect. Smith responded to these statements by suggesting that the Court did not really mean what it said, detecting in at least the most recent opinions a lack of commitment to the compelling-interest test in the context of formally neutral laws. But even if the Court's commitment were that pallid, it would argue only for moderating the language of the test, not for eliminating constitutional scrutiny altogether. In any event, I would have trouble concluding that the Court has not meant what it has said in more than a dozen cases over several decades, particularly when in the same period it repeatedly applied the compelling-interest test to require exemptions, even in a case decided the year before Smith.[148] In sum, it seems to me difficult to escape the conclusion that, whatever Smith's virtues, they do not include a comfortable fit with settled law.

B

The Smith rule, in my view, may be reexamined consistently with principles of stare decisis. To begin with, the Smith rule was not subject to "full-dress argument" prior to its announcement. The State of Oregon in Smith contended that its refusal to exempt religious peyote use survived the strict scrutiny required by "settled free exercise principles," inasmuch as the State had "a compelling interest in regulating" the practice of peyote use and could not "accommodate the religious practice without compromising its interest." [The other side] joined issue on the outcome of strict scrutiny on the facts before the Court, and neither party squarely addressed the proposition the Court was to embrace, that the Free Exercise Clause was irrelevant to the dispute. Sound judicial decision-making requires "both a vigorous prosecution and a vigorous defense" of the issues in dispute,[149] and a constitutional rule announced sua sponte is entitled to less deference than one addressed in full briefing and argument.

The Smith rule's vitality as precedent is limited further by the seeming want of any need of it in resolving the question presented in that case. Justice O'Connor reached the same result as the majority by applying, as the parties had requested, "our established free exercise jurisprudence," and the majority never determined that the case could not be resolved on the narrower ground, going instead straight to the broader constitutional rule. But the Court's better practice, one supported by the same principles of restraint that underlie the rule of stare decisis, is not to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." While I am not suggesting that the Smith Court lacked the power to announce its rule, I think a rule of law unnecessary to the outcome of a case, especially one not put into play by the parties, approaches without more the sort of "dicta...which may be followed if sufficiently persuasive but which are not controlling."

I do not, of course, mean to imply that a broad constitutional rule announced without full briefing and argument necessarily lacks

148 . *Frazee v. Illinois*, 489 U.S. 829 (1989).

149 . *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978).

precedential weight. Over time, such a decision may become "part of the tissue of the law," and may be subject to reliance in a way that new and unexpected decisions are not. Smith, however, is not such a case....

The considerations of full-briefing, necessity, and novelty thus do not exhaust the legitimate reasons for reexamining prior decisions, or even for reexamining the Smith rule. One important further consideration warrants mention here, however, because it demands the reexamination I have in mind. Smith presents not the usual question of which constitutional rule to follow, for Smith refrained from overruling prior free-exercise cases that contain a free-exercise rule fundamentally at odds with the rule Smith declared. Smith, indeed, announced its rule by relying squarely upon the precedent of prior cases. Since that precedent is nonetheless at odds with the Smith rule, as I have discussed above, the result is an intolerable tension in free-exercise law which may be resolved, consistently with principles of stare decisis, in a case in which the tension is presented and its resolution pivotal.

While the tension on which I rely exists within the body of our extant case law, a rereading of that case law will not, of course, mark the limits of any enquiry directed to reexamining the Smith rule, which should be reviewed not only in the light of precedent on which it was rested but also on the text of the Free Exercise Clause and its origins. As for the text, Smith did not assert that the plain language of the Free Exercise Clause compelled its rule, but only that the rule was "a permissible reading" of the Clause. Suffice it to say that a respectable argument may be made that the pre-Smith law comes closer to fulfilling the language of the Free Exercise Clause than the rule Smith announced. "[T]he Free Exercise Clause..., by its terms, gives special protection to the exercise of religion,"[150] specifying an activity and then flatly protecting it against government prohibition. The Clause draws no distinction between laws whose object is to prohibit religious exercise and laws with that effect, on its face seemingly applying to both.

Nor did Smith consider the original meaning of the Free Exercise Clause, though overlooking the opportunity was no unique transgression. Save in a handful of passing remarks, the Court has not explored the history of the Clause since its early attempts in 1879 and 1890,[151] attempts that recent scholarship makes clear were incomplete.[152] The curious absence of history from our free-exercise decisions creates a stark contrast with our cases under the Establishment Clause, where historical analysis has been so prominent.

This is not the place to explore the history that a century of free-exercise opinions have overlooked, and it is enough to note that, when the opportunity to reexamine Smith presents itself, we may consider recent

150 . *Thomas, supra,* at 713.

151 . See *Reynolds v. U.S.*, 98 U.S. at 162-166, and *Davis v. Beason*, 133 U.S. 333, 342 (1890).

152 . See McConnell, "The Origins and Historical Understanding of the Free Exercise of Religion," *supra,* 1409. (Interestingly, this article was published shortly after *Smith* was handed down, and the justices were supplied with copies of it in galleys appended to the unsuccessful motion for rehearing *Smith.*) It is discussed at § A4 above.

> scholarship raising serious questions about the Smith rule's consonance with the original understanding and purpose of the Free Exercise Clause. There appears to be a strong argument from the Clause's development in the First Congress, from its origins in the post-Revolution state constitutions and pre-Revolution colonial charters, and from the philosophy of rights to which the Framers adhered, that the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God, unless those activities threatened the rights of others or the serious needs of the State. If, as this scholarship suggests, the Free Exercise Clause's original "purpose [was] to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority,"[153] then there would be powerful reason to interpret the Clause to accord with the natural reading, as applying to all laws prohibiting religious exercise in fact, not just those aimed at its prohibition, and to hold the neutrality needed to implement such a purpose to be the substantive neutrality of our pre-Smith cases, not the formal neutrality sufficient for constitutionality under Smith....
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> III
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> The extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the individual to government and to God. "Neutral, generally applicable" laws, drafted as they are from the perspective of the nonadherent, have the unavoidable potential of putting the believer to a choice between God and government. Our cases now present competing answers to the question when government, while pursuing secular ends, may compel disobedience to what one believes religion commands. The case before us is rightly decided without resolving the existing tension, which remains for another day when it may be squarely faced.[154]

Once more Justice Souter served the best interests of American jurisprudence of the Religion Clauses by setting forth the considerations that should underlie it and that had been somewhat lost sight of in recent years. His essay was similar to, if not to some degree derived from, the cited law review articles of Douglas Laycock and Michael McConnell (a student of Laycock's)—two of the most perceptive and sympathetic interpreters of the church/state insights of the Framers, and Justice Souter has elevated their views to a place in the case law set forth in the *United States Reports*, where it cannot be disregarded—though it may not necessarily be adopted—by future generations of justices. That is important because Souter, Laycock, McConnell (and a few others) have expressed an understanding of, and solicitude for, the religious enterprise in human life all too rare in legal writings, especially in recent decades, and a much needed corrective to that trend. Though not, strictly speaking, necessary to the decision of the case before the court, Justice Souter's essay was an important contribution to the ongoing dialogue within the court over the religion

153 . *Abington v. Schempp*, 374 U.S. at 223.

154 . *Church of the Lukumi Babalu Aye v. Hialeah*, *supra*, Souter concurrence in the judgment.

clauses, and helped to set the terms for future consideration and reconsideration of the divergent positions shaping among the justices and pregnant with portentous possibilities for the future of American law in this area.

Postscript: In 1991 the legislature of Oregon amended its controlled substance statute to permit religious use of peyote,[155] and in 1994 Congress amended the American Indian Religious Freedom Act to include an explicit protection for the ritual use of peyote by Native Americans.[156]

155. Ore. Rev. Stat. § 475.992(5).

156. 42 U.S.C. § 1996a(b)(1), stating in part: "Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes is lawful and shall not be prohibited by the United States **or any State**. No Indian shall be penalized or discriminated against on the basis of such use, possession, or transportation, including but not limited to, denial of otherwise applicable benefits under public assistance programs" (emphasis added).