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The Undoing of Mandatory Free Exercise Accommodation—Employment Division, Department of Human Resources v. Smith, 110 S. Ct. 1595 (1990)

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THE UNDOING OF MANDATORY FREE EXERCISE ACCOMMODATION—*Employment Division, Department of Human Resources v. Smith,* 110 S. Ct. 1595 (1990).

Abstract: The United States Supreme Court has struggled to find a fair and consistent approach to cases in which an individual's religious practice conflicts with a generally applicable law. Prior to *Employment Division, Department of Human Resources v. Smith,* the Court used a balancing approach to determine whether the state's interests in denying an exemption to a criminal law justified the burden that the law placed on an individual's religious practice. After *Smith,* the state must show only that the law is generally applicable and does not directly target a religious practice. This new approach underprotects religious conduct because it provides no guarantee against unnecessary infringements on religious freedom. By following certain objective guidelines, such as framing the state's interests narrowly and making an inquiry into the burden on the claimant, courts can apply the balancing approach in a fair and consistent manner, thus providing substantial protection for religious conduct.

In the 1990 decision *Employment Division, Department of Human Resources v. Smith,* the United States Supreme Court determined that a state may constitutionally prohibit the sacramental use of peyote by members of the Native American Church.[1] To arrive at this conclusion, the Court abandoned its balancing approach to free exercise claims and held that criminal laws that burden a religious practice need not be justified by a compelling state interest.[2] As long as a criminal law is generally applicable and does not directly target a religious practice, the Court will not use the free exercise clause of the United States Constitution as a basis for requiring an exemption to the law.[3] Perhaps more importantly, however, the majority strongly suggested that this rule will be applied to other types of generally applicable state regulations as well as to criminal laws.[4]

The abandonment of the balancing approach in *Smith* is the Court's latest and perhaps most threatening move away from court-mandated free exercise accommodation. Mandatory accommodation is based on the premise that when religious conscience conflicts with a government obligation or prohibition, the government sometimes may have to give way.[5] In *Smith,* the Court recognized that exemptions to criminal laws may sometimes be necessary to protect religious conduct, but

1. 110 S. Ct. 1595 (1990).

2. *See id.* at 1603.

3. *Id.* at 1599–1600; U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). This Note focuses primarily on the free exercise clause, but in many instances establishment clause concerns are implicated.

4. *Smith,* 110 S. Ct. at 1605–06.

5. McConnell, *Neutrality Under the Religion Clauses,* 81 NW. U.L. REV. 146, 152–53 (1987).

delegated this task to legislatures.[6] This solution provides no guarantee that religious exemptions will be granted when a practice is burdened. To protect individual choice in religion, courts must be able to occasionally step in and mandate exemptions, based on a consistent and fair formulation of the balancing approach.

I. THE DEVELOPMENT OF THE DOCTRINE OF ACCOMMODATION: 1878-1989

The religion clauses of the first amendment were enacted with two primary goals in mind: first and foremost, to prevent religious coercion and, second, to encourage religious pluralism.[7] The desire to prevent coercion stemmed from the framers' experience with the establishment of the Anglican Church, which Thomas Jefferson and others denounced as "sinful and tyrannical."[8] The goal of promoting religious pluralism can be traced to James Madison's belief that religious diversity was necessary to guard society, and especially the rights of the minority, from oppression.[9] Madison believed that a large number of religious sects would make religious rights more secure because it would prevent any one group from dominating and oppressing others.[10] He also believed that government should not interfere with religion "unless under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered."[11]

A. *Pre-1940s:* Reynolds v. United States—*No Religious Exemptions to Secular Laws*

The Court's early interpretations of the free exercise clause did little to promote religious diversity.[12] In *Reynolds v. United States,*[13] for example, the Court held that a Mormon was not entitled to an exemption from state criminal laws prohibiting polygamy, even though his

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

7. McConnell, *Accommodation of Religion,* 1985 SUP. CT. REV. 1, 20.

8. Adams & Emmerich, *A Heritage of Religious Liberty,* 137 U. PA. L. REV. 1559, 1574 (1989).

9. The Federalist No. 51, at 283 (J. Madison) (M. Chadwick ed. 1987).

10. *Id.*

11. M. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment 21–22 (1978).

12. Smith, *Getting Off On the Wrong Foot and Back On Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the* Reynolds *and* Everson *Decisions,* 20 WAKE FOREST L. REV. 569, 635 (1984).

13. 98 U.S. 145 (1878).

religion encouraged the practice.[14] The Court held that although Congress had no legislative power over opinion, it could regulate actions which were "in violation of social duties or subversive of good order."[15]

The Court in *Reynolds* reasoned that the free exercise clause did not require the government to accommodate religious practices.[16] Freedom of religion was narrowly viewed as freedom from persecution for religious beliefs.[17] It did not encompass freedom from laws whose purpose was secular, regardless of the law's effect on a religious practice.[18]

B. The Departure from Reynolds

Cantwell v. Connecticut marked the beginning of the Court's gradual departure from *Reynolds.*[19] In *Cantwell,* a Jehovah's Witness was charged with soliciting contributions for a religious cause without a permit.[20] The Court held that the state's power to deny permits was an unconstitutional infringement on religious and other constitutional freedoms.[21] According to the Court in *Cantwell,* when a regulation infringes on religious and other constitutional freedoms, it is constitutionally invalid[22] unless the regulated conduct presents a "clear and present danger" to a substantial state interest and the statute is "narrowly drawn."[23] Despite these inroads on the *Reynolds* rule, however, the Court did not actually move away from *Reynolds* until the 1960s.

In 1961, the Court stated for the first time that if a neutral law burdens a religious practice, the law is constitutional only if the state cannot accomplish its purpose by less burdensome means.[24] In *Braunfeld v. Brown,*[25] two Orthodox Jews, whose faith prohibited them from working on Saturdays, requested an exemption from the Philadelphia

14. *Id.* at 166–68.
15. *Id.* at 164.
16. *Id.* at 166.
17. Galanter, *Religious Freedoms in the United States: A Turning Point?,* 1966 WIS. L. REV. 217, 235.
18. *Id.*
19. Cantwell v. Connecticut, 310 U.S. 296 (1940).
20. *Id.* at 301–02.
21. *Id.* at 305. Note, however, that *Cantwell* dealt with an infringement on both free speech and free exercise, which may explain why the *Reynolds* rule still controlled free exercise decisions until the 1960s.
22. *Id.* at 303–04.
23. *Id.* at 311.
24. Braunfeld v. Brown, 366 U.S. 599, 607 (1961).
25. *Id.*

Sunday closing law.[26] The law limited them to a five-day work week, putting them at a substantial economic disadvantage in relation to other merchants who were able to work a six-day week.[27] The Court upheld the law on the basis that the state's interest in a uniform day of rest could not be accomplished by any other means.[28] The Court acknowledged, however, that where less intrusive means are available to the state, the state may be required to use them.[29]

C. *The Balancing Approach:* Sherbert *and* Yoder

In 1963, the Court formulated a test which incorporated elements from both *Braunfeld* and *Cantwell* and became the basis for deciding free exercise claims until the mid-1980s.[30] In *Sherbert v. Verner,*[31] the Court held that a state could not deny unemployment benefits to a Seventh Day Adventist who was fired for refusing to work on Saturdays, the church's Sabbath.[32] To reach this conclusion, the Court required the state to justify the denial by showing a compelling interest[33] which was being secured by the least restrictive means available to the state.[34]

Sherbert opened the door to claims for exemptions from criminal laws. In *Wisconsin v. Yoder,*[35] the Court held that Amish parents could not be criminally convicted of violating compulsory attendance laws for high school students.[36] To determine whether the Amish religion was burdened by the attendance laws, the Court thoroughly examined the Amish interests at stake, including tenets of the Amish religion, its history and values, and the devastating effect that mandatory high school attendance could have on the sect.[37]

Against these interests, the Court balanced the state's interests in denying the requested exemption, stating that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[38] The Court determined

26. *Id.* at 601–02.
27. *Id.* at 602.
28. *Id.* at 607–08.
29. *Id.* at 607 (citing Cantwell v. Connecticut, 310 U.S. 296 (1940)).
30. Sherbert v. Verner, 374 U.S. 398 (1963).
31. *Id.*
32. *Id.* at 410.
33. *Id.* at 403.
34. *Id.* at 407.
35. 406 U.S. 205 (1972).
36. *Id.* at 234.
37. *Id.* at 210–12.
38. *Id.* at 215.

that the state's interest in requiring the Amish children to attend school until the tenth grade was weak, especially considering that the Amish trained their own children to become productive members of the Amish community.[39] In addition, Amish practices presented no threat to "the public safety, peace, order, or welfare . . . ."[40] The Court concluded that requiring Amish children to attend high school could cause the Amish great damage, and that the parents should therefore be exempted from the law.[41]

D. Free Exercise Challenges to Drug Laws

Yoder is the only case in which the United States Supreme Court has granted an exemption to a criminal law based on the free exercise clause. Other courts, however, have used the balancing test to grant exemptions to criminal laws. In *People v. Woody,*[42] for example, the California Supreme Court held that the state's interest in prohibiting Native American Church peyote use was not sufficiently compelling to override the defendant's free exercise rights.[43] The court examined Native American Church peyote use in detail, stressing the history of the church and the fact that peyote may be its "theological heart."[44] On the state's side, the court determined that the possible harmful effects of peyote use were unsubstantiated, and that the state's fears of fraudulent claims were speculative.[45]

Other claims for religious drug use have been rejected by the lower courts.[46] In *Olsen v. Drug Enforcement Administration,*[47] for example, members of the Ethiopian Zion Coptic Church had been convicted of various marijuana offenses, including an attempt to import twenty tons of marijuana into the United States.[48] Despite the church's use of marijuana as a sacrament, the court refused to grant Olsen an exemption from federal marijuana laws.[49] Because of the magnitude of illegal trafficking in marijuana and the burden that an exemption would place on enforcement of federal marijuana laws, the court determined

39. *Id.* at 212, 228–29.
40. *Id.* at 230.
41. *Id.* at 234.
42. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).
43. 394 P.2d at 821, 40 Cal. Rptr. at 77.
44. *Id.* at 818, 40 Cal. Rptr. at 74.
45. *Id.* at 818–19, 40 Cal. Rptr. at 74–75.
46. Some lower courts have also refused to grant an exemption for Native American Church peyote use. *See, e.g.,* State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1929); State v. Bullard, 267 N.C. 599, 148 S.E.2d 565 (1966), *cert. denied,* 386 U.S. 917 (1967).
47. 878 F.2d 1458 (D.C. Cir. 1989), *cert. denied,* 110 S. Ct. 1926 (1990).
48. *Id.* at 1459.
49. *Id.*

that the state's interest in denying an exemption for religious use was sufficient to override Olsen's interests in using the drug as a sacrament.[50]

E. The Move Away From the Balancing Approach

Although after *Sherbert* the United States Supreme Court used the balancing test to deal with free exercise claims, the Court was generally reluctant to grant exemptions even when the state's interest was fairly weak.[51] Finally, in the 1980s, the Court began to retreat from the balancing approach altogether.

In 1982, the Court rendered an opinion that changed the required showing on the part of the state.[52] In *United States v. Lee,*[53] the Court held that an Amish farmer/employer was not entitled to an exemption from the social security program, even though participation in the program violated his religious beliefs.[54] In balancing the interests, the Court accepted the claimant's assertion that his religious practice was burdened and then discussed the state's interests at length.[55]

The Court focused on the importance of the social security system in general and the need for universal participation.[56] Instead of inquiring whether the statute was the "least restrictive means" of achieving the state's interest, the Court discussed whether granting the exemption to the Amish would "unduly interfere" with fulfillment of the state's interest.[57] The Court concluded that exemptions of any kind would disrupt the program, and that the Amish employer therefore did not have a constitutional right to be exempted from the statute.[58]

In addition to easing the state's burden in *Lee,* the Court began to designate areas in which the balancing test did not apply. In *Bowen v. Roy,*[59] the Court declined to grant an exemption to members of the Native American Church who believed that using a social security number to identify their daughter would destroy her spirit.[60] The

50. *Id.* at 1463–64; *see infra* notes 108–09 and accompanying text (discussing factors that affect the strength of the state's interest in denying an exemption for religious drug use).
51. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1194 n.41 (2d ed. 1988).
52. *Id.* at 1261.
53. 455 U.S. 252 (1982).
54. *Id.* at 257, 260.
55. *Id.*
56. *Id.* at 258–60.
57. *Id.* at 259; *see* L. TRIBE, *supra* note 51, at 1261.
58. *Lee,* 455 U.S. at 260.
59. 476 U.S. 693 (1986).
60. *Id.* at 708.

Court reasoned that a policy decision by the government was entitled to substantial deference and that the government therefore did not need to demonstrate a compelling interest in denying the exemption.[61]

In 1988, the Court extended the *Roy* decision to include all regulations of government programs that incidentally burden religious interests. In *Lyng v. Northwest Indian Cemetery Protective Association,*[62] a number of organizations and individuals sought to enjoin the Forest Service from building a road through an area that traditionally had been used by several Native American tribes for religious purposes.[63] The Court compared the building of a road on public land to the government's use of a social security number in *Roy,* and held that the incidental effects of government programs did not require the government to show a compelling interest.[64] As in *Roy,* the Court in *Lyng* distinguished cases involving criminal sanctions, suggesting that a case involving coercion would still require the state to show a compelling interest.[65]

After *Lyng,* the free exercise clause provided potential relief in three primary contexts: (1) where a law directly and intentionally targeted a particular religion; (2) where an unemployment benefits statute had a mechanism for individualized exemption (*Sherbert*); and (3) where a particular form of religious conduct was either criminally compelled or forbidden (*Yoder*). Although the Court did not explicitly overrule *Yoder* in *Smith,* the Court dealt with and eliminated the application of the free exercise clause in the third context.[66]

F. Employment Division, Department of Human Resources v. Smith

In *Smith,*[67] a member of the Native American Church was discharged from his employment as a drug counselor after taking peyote

61. *Id.*

62. 485 U.S. 439 (1988).

63. *Id.* at 443.

64. *Id.* at 449, 458.

65. *See id.* at 448–49.

66. Instead of overruling *Yoder,* the Court distinguished it as a hybrid case in which other constitutional concerns in addition to free exercise were implicated. *See infra* text accompanying note 78.

67. 75 Or. App. 764, 709 P.2d 246 (1985) (*Smith I*), *aff'd,* 301 Or. 209, 721 P.2d 445 (1986) (*Smith II*), *cert. granted and remanded,* 108 S. Ct. 1444 (*Smith III*), on remand, 307 Or. 68, 763 P.2d 146 (1988) (*Smith IV*), *rev'd,* 110 S. Ct. 1595 (1990) (*Smith V*). *Smith* was decided in the Oregon courts together with a companion case involving another member of the Native American Church who was discharged by the same employer for the same reasons. *See* Black v. Employment Div., Dep't of Human Resources, 301 Or. 221, 721 P.2d 451 (1986).

as part of a ceremony conducted by the church.[68] Because his discharge was based on work-related misconduct, the Oregon Employment Appeals Board (EAB) denied him the right to unemployment compensation benefits.[69] The Oregon Court of Appeals, however, reversed the EAB order[70] and the Oregon Supreme Court affirmed, holding that a denial of benefits based on religious peyote use violated the first amendment of the United States Constitution.[71]

The United States Supreme Court granted certiorari and remanded to determine whether religious use of peyote was criminal in Oregon.[72] The Court reasoned that if religious peyote use was criminal in Oregon, it could distinguish *Smith* from the *Sherbert* line of cases in which the claimants' conduct did not violate any state law.[73] On remand, the Oregon Supreme Court determined that the statute did not contain an explicit exemption for religious peyote use, but held that the religious use of peyote could not be criminally prohibited because it was protected by the United States Constitution.[74] The United States Supreme Court again granted certiorari, this time to determine whether Oregon could constitutionally prohibit the religious use of peyote.[75]

The Court held that generally applicable criminal laws that incidentally burden a particular religious practice need not be justified by a compelling state interest,[76] and that a state may prohibit the religious use of peyote.[77] The Court reasoned that the government's ability to enforce prohibitions of socially harmful conduct cannot depend on the

68. *Smith V,* 110 S. Ct. at 1597.

69. The denial of benefits was based on Oregon Revised Statutes § 657.176, which provides, in pertinent part, that "[a]n individual shall be disqualified from the receipt of benefits . . . if . . . the individual: (a) Has been discharged for misconduct connected with work . . . ." OR. REV. STAT. § 657.176(2)(a) (1987). Employment Div., Dep't of Human Resources v. Smith, 301 Or. 209, 215, 721 P.2d 445, 448 (1986) (*Smith I*).

70. Smith v. Employment Div., Dep't of Human Resources, 75 Or. App. 764, 709 P.2d 246 (1985) (*Smith II*).

71. Smith v. Employment Div., Dep't of Human Resources, 301 Or. 209, 216–17, 721 P.2d 445, 449 (1986).

72. Employment Div., Dep't of Human Resources v. Smith, 108 S. Ct. 1444, 1445 (1988) (*Smith III*).

73. "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." *Id.* at 1451.

74. Smith v. Employment Div., Dep't of Human Resources, 307 Or. 68, 73, 763 P.2d 146, 148 (1988) (*Smith IV*).

75. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990) (*Smith V*).

76. "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' . . . contradicts both constitutional tradition and common sense." *Id.* at 1603.

77. *Id.* at 1606.

religious beliefs of individuals.[78] *Yoder* and *Cantwell* were distinguished as hybrid cases in which free exercise claims were asserted in conjunction with other constitutional claims.[79] The Court also held that *Sherbert* was inapplicable to cases involving across-the-board criminal prohibitions.[80]

Both the concurring opinion and the dissent disagreed with the Court's decision to do away with the balancing process, which has been the mainstay of free exercise jurisprudence for decades.[81] Justice O'Connor, concurring, argued that because the state's interest in regulating the use of illegal drugs was so strong, the Court could have reached the same result under the balancing test.[82] The dissent, on the other hand, concluded that the balancing process would have resulted in an exemption for Smith.[83]

II. PROTECTING THE FREE EXERCISE OF RELIGION THROUGH MANDATORY ACCOMMODATION

After *Smith,* courts will not mandate exemptions from across-the-board criminal laws on the basis of the free exercise clause alone. Because the majority strongly indicated that this holding will be applied to other generally applicable laws as well as to criminal laws, *Smith* is likely to have far-reaching consequences.[84] According to the Court, a state prohibits the free exercise of religion only when it criminally prohibits a religious act with discriminatory intent.[85] Under this holding, a criminal law will be upheld regardless of its devastating effect on a religion, provided there is no evidence of discriminatory intent on the part of the state.[86]

The Court has essentially determined that religious conduct that is burdened by generally applicable criminal laws is no longer entitled to constitutional protection. Thus, the progress which the Court made in previous years towards protecting individual freedom in this area has

78. *Id.* at 1603.
79. *Id.* at 1601.
80. *Id.* at 1603.
81. *Id.* at 1606–07.
82. *Id.* at 1614.
83. *Id.* at 1622–23 (Blackmun, J., dissenting).
84. "The rule respondents favor [that the state be required to demonstrate a compelling interest] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind. . . . The First Amendment's protection of religious liberty does not require this." *Id.* at 1605–06.
85. *Id.* at 1599.
86. *Id.* As Justice O'Connor noted, however, "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such." *Id.* at 1608.

been reversed. Despite the difficulties involved in court-mandated exemptions, religious freedom requires and deserves the kind of protection that only courts are able to give. Consequently, the Court's decision to retreat from this area poses a threat to religious freedom.

A. The Importance of Protecting Religious Freedom

As in the Court's early free exercise opinions, the Court in *Smith* underprotects religious conduct by restrictively interpreting the scope of the free exercise clause.[87] This underprotection is inconsistent with the Bill of Rights, which embodied the nation's commitment to respecting cultural and religious diversity by limiting the government's ability to discriminate against minority groups.[88] Because the nation's founders recognized that legislatures have no place in matters of individual conscience,[89] the Bill of Rights was enacted to protect certain areas from politics, including "[o]ne's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights."[90]

Although the precise intentions of the first amendment's authors are unclear, most scholars agree that they intended the words "free exercise of religion" to include both religious beliefs and acts of worship.[91] As the Court noted in *Yoder,* "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."[92] Religious worship includes acts such as attending services, praying, proselytizing, and ingesting sacramental substances. Because most religious groups consider these acts a vital part of the expression of their religious beliefs, a society that seeks to promote religious diversity must also be willing to accommodate religious practices to the greatest extent possible. The approach used in *Sherbert* and *Yoder* reflected this belief.[93]

87. *See supra* notes 13–16 and accompanying text (discussing Reynolds v. United States, 98 U.S. 145 (1878)).

88. J. Norgren & S. Nanda, American Cultural Pluralism and Law 2 (1988).

89. Adams & Emmerich, *supra* note 8, at 1579–80.

90. *Smith V,* 110 S. Ct. at 1613 (O'Connor, J., concurring) (quoting Justice Jackson in West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

91. *See, e.g.,* Adams and Emmerich, *supra* note 8, at 1599; *Smith V,* 110 S. Ct. at 1608 (O'Connor, J., concurring).

92. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

93. *See Smith V,* 110 S. Ct. at 1609 (O'Connor, J., concurring) ("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.' ") (citing *Yoder,* 406 U.S. at 215).

B. Problems With Allowing Only Legislatures to Grant Exemptions

The Court in *Smith* recognized that exemptions may be desirable in some cases, but concluded that legislatures, rather than courts, were better able to grant them.[94] Although the Court did not specify the reasons for this decision, there are a number of practical advantages to voluntary legislative exemptions. Arguably, legislative exemptions are more flexible than court-mandated exemptions because they do not have the "crippling effect" on the government's ability to function that mandated exemptions may have.[95] Also, legislative errors are easier to correct than judicial errors because legislatures are not required to rely, at least formally, on precedent.[96] Finally, legislatures may be in a better position than courts to evaluate their own interests in denying an exemption.[97]

Unfortunately, the practical advantages of voluntary legislative accommodation do not outweigh the potential threat that minority religions will face without a constitutional guarantee. Provided that legislatures are willing to grant exemptions, legislative accommodation may well be more practical than court-mandated accommodation. When, however, a legislature refuses to accommodate a seriously burdened religious practice, courts should have the authority to step in and mandate an exemption.

Under the *Smith* holding, the protection granted to religious conduct that is burdened by a criminal law will depend entirely on a legislature's sensitivity to minority religions and its commitment to individual freedom. The Court in *Smith* states that this sensitivity is a sufficient guarantee for these groups.

> 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 religious belief can be expected to be solicitous of that value in its legislation as well.[98]

The Court admitted that legislatures may not adequately protect minority religions, but dismissed the "relative disadvantage" that

94. *Id.* at 1606.

95. "Given the numerous opportunities for conflict between faith and government, the Free Exercise Clause would become a serious infringement on the government's ability to perform its functions were the Clause not confined to the most serious burdens on religious exercise . . . ." McConnell, *supra* note 6, at 30.

96. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1538 (1989).

97. McConnell, *supra* note 7, at 31.

98. *Smith V*, 110 S. Ct. at 1606.

minority religions will have in the legislative forum as an "unavoidable consequence of democratic government."[99] Thus, although legislatures can be expected to protect religion, they cannot, by the Court's own words, be expected to protect all religions equally. By admitting the difficulties that its decision will cause for some religions but refusing to intervene, the Court demonstrates a lack of commitment to religious liberty.

To support its reliance on legislative protection of religious beliefs, the Court points to the fact that some states have enacted exemptions for Native American Church peyote use into their drug laws.[100] These exemptions, however, provide little relief to a member of the Native American Church who wishes to use peyote but lives in a state without an exemption. This individual will be faced with the choice of abandoning his or her religion, practicing it illegally under the threat of criminal sanctions, or moving to a place where Native American Church peyote use is legal. If the goals of religious pluralism and tolerance are to be taken seriously, unnecessarily forcing an individual to either relocate or abandon a religious belief is not a reasonable alternative. The rule, as announced in *Sherbert* and *Yoder,* should be to grant an exemption unless the state's interest is so compelling that the exemption is simply not possible.

By restricting the scope of the free exercise clause, the Court has severely diminished religion's preferred constitutional status and has placed it alongside other private interests, where it must lobby for legislative favor. Although legislative exemptions may have some practical advantages over court-mandated exemptions, the *Smith* holding will create unnecessary hardship for some religious groups whose practices are seriously burdened by criminal laws. The Court's indifference to the problems that these groups may face is inconsistent with a broad interpretation of the guarantees embodied in the Bill of Rights.

C. *Making the Balancing Test More Fair: Weighing the Competing Interests*

The balancing test which the Court abandoned in *Smith* can provide a much better means of protecting religious conduct than the voluntary legislative exemptions recommended by the Court. Because the balancing approach has a seemingly infinite number of variables, how-

99. *Id.*

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

ever, it has been criticized for allowing the values of individual justices to play a larger role in the decision than is desirable.[101] This problem can be eliminated by consistently framing the state's interest narrowly and by examining the nature of the burden on the claimant's religion. By following these objective guidelines, the Court can avoid underprotecting minority religions,[102] and can ensure that seriously burdened religious conduct will be protected so long as the state's interests in denying an exemption are not sufficiently compelling.

1. Framing the State's Interest Narrowly

As Justice Blackmun pointed out in his dissent in *Smith,* one way to ensure that the balancing test is fair to free exercise claimants is to consistently frame the state's interest narrowly.[103] The proper question to be asked in free exercise cases is not whether the state has an interest in regulating the conduct in general, but rather, what is the state's interest in refusing an exemption in a particular case. In *Yoder,* for example, the proper question was not whether the state had an interest in universal education but rather, whether that interest was sufficiently compelling in the specific case of the Amish.[104] The state undoubtedly has a strong interest in mandatory education, but in the case of the Amish this interest seems considerably less compelling because of the community's isolation from society and the Amish belief in training their own children.[105] By framing the state's interest narrowly, the Court views it on a level consistent with the claimant's interest, thereby setting the stage for a fair evaluation of both.[106]

In the case of Native American Church peyote use, if the state's interest is viewed broadly as "fighting the war on drugs,"[107] any claim

101. *See Developments in the Law—Religion and the State,* 100 HARV. L. REV. 1606, 1712 (1987) ("The malleability of the balancing test permits commentators to assert confidently that the Court can arrive at almost any result given a distinctive set of facts.") [hereinafter *Developments*].

102. The Court's consistent refusal to exempt members of the Native American Church may indicate discrimination against the Church and its values. *See id.* at 1734. On the other hand, in *Yoder* the Court spoke favorably of the Amish when it described their way of life as "virtuous and admirable." Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

103. "Failure to reduce the competing interests to the same plane of generality tends to distort the weighing process in the State's favor." *Smith V,* 110 S. Ct. 1595, 1617 (1990) (Blackmun, J., dissenting).

104. *Yoder,* 406 U.S. at 228–29; *see supra* notes 35–41 and accompanying text (discussing the Court's holding and reasoning in *Yoder*).

105. *See id.* at 212–13.

106. *See Smith V,* 110 S. Ct. at 1617 (Blackmun, J., dissenting).

107. "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." *Id.* at 1617 (Blackmun, J., dissenting).

for exemption to any drug law presumably would be denied. This broad framing of the state's interest creates images of gang warfare and crack houses that are far removed from the peyote rituals of the Native American Church. In essence, it gives the state's interest a sense of urgency and importance that is unwarranted in the case of peyote use. If, however, the state's interest is framed narrowly as an interest in prohibiting this particular group from using this particular drug, the Court must then look at factors that might make the state's interest less compelling in the case of the Native American Church.

Upon examination of the Native American Church's peyote use, the state's interest in denying an exemption appears to be considerably less compelling than it would be in the case of other drug use. Peyote is a strong hallucinogen, but its potential harmful effects to users are minimized by the controlled setting in which it is used by the Native American Church.[108] Further, the Church strictly regulates the time and place of use so that other members of society are not threatened in any way,[109] and there is virtually no trafficking in peyote, unlike in most other illegal drugs.[110]

Although in most cases the state's interest will be sufficiently compelling to override the claimant's interest in using illegal drugs, in the case of Native American Church peyote use it may not be.[111] Regardless of the outcome of the balancing process, however, claimants should be permitted to demonstrate individual circumstances that might make the state's interest weaker as applied to them. Framing the state's interest narrowly in this manner allows them to do so.

2. *Careful Consideration of the Burden on the Claimant*

In addition to framing the state's interest narrowly, courts must also carefully consider the nature of the burden on the claimant in order to properly weigh the competing interests.[112] This inquiry should take into account both objective circumstances, such as the nature of the

108. *See* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 816–17, 40 Cal. Rptr. 69, 72–73 (1964).

109. *See* Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1467 (D.C. Cir. 1989), *cert. denied,* 110 S. Ct. 1926 (1990) (quoting a DEA Final Order). In *Olsen,* the Court noted that Ethiopian Zion Coptic Church members were encouraged to smoke marijuana continuously, thus posing a possible danger to the community. *Id.* at 1462.

110. Between 1980 and 1987, 19.4 pounds of peyote were seized by the DEA, as compared to 15,302,468.7 pounds of marijuana. *Id.* (quoting a DEA Final Order); *see also Smith V,* 110 S. Ct. at 1620 (Blackmun, J., dissenting).

111. *See Smith V,* 110 S. Ct. at 1621 (Blackmun, J., dissenting).

112. "[T]he nature of the burden is relevant to the standard the government must meet to justify the burden." Bowen v. Roy, 476 U.S. 693, 707 (1986).

penalty being imposed on the claimant, and subjective circumstances, such as the importance of the practice to the claimant's religion. The subjective part of this inquiry should be based solely on the claimant's own assertions regarding his or her religion, provided there is no evidence of insincerity.

The Court has recently declined to make this kind of inquiry into the burden. Although the Court correctly refuses to question the truth of religious beliefs,[113] it has recently carried this prohibition even further, refusing to inquire into religious beliefs or practices in any way.[114] In *United States v. Lee,*[115] for example, to avoid inquiring into the religious practice, the Court accepted the claimant's assertion that a burden existed and then proceeded to determine whether that burden was justified by a state interest.[116]

Although at first glance the Court's acceptance of the assertion of a burden without further investigation seems to aid the claimant's case, it may ultimately disadvantage the claimant in the balancing process.[117] If the Court gives a detailed account of the state interests and then weighs these interests against a vague, undefined burden, the state will be more likely to prevail.[118] Without an understanding of the nature or severity of the burden, the Court cannot assess its weight and consequently cannot properly balance it against the state's interests.

To avoid these problems, the Court should accept the claimant's assertions of a burden, but should also make an attempt to understand the nature of the burden. Because of the very personal nature of religious beliefs, the Court should rely on the claimant's own interpretations of his or her religion, provided there is no evidence of insincerity. This limited inquiry would take into account factors such as the meaning that the claimant attaches to the practice and the centrality of the practice to the overall belief system.[119]

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113. United States v. Ballard, 322 U.S. 78, 86 (1944).

114. *See, e.g., Smith V,* 110 S. Ct. at 1604 ("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."); United States v. Lee, 455 U.S. 252, 257 (1982).

115. 455 U.S. 252 (1982).

116. *Id.* at 257; *see supra* notes 53–58 and accompanying text (discussing the Court's holding and reasoning in *Lee*).

117. Some authors have advocated a subjective approach to burden analysis. *See, e.g.,* Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test,* 86 MICH. L. REV. 266, 296 (1987).

118. *See, e.g., Lee,* 455 U.S. at 258–60 (in which the Court accepts the claimant's burden with virtually no discussion and then describes the state interests in detail).

119. *See* Brown, *Religion: The Psychedelic Perspective: The Freedom of Religion Defense,* 11 AM. INDIAN L. REV. 125, 133 (1983).

Wisconsin v. Yoder[120] demonstrates the advantage that this type of inquiry gives to the claimant. In *Yoder,* the Court gave a detailed account of the negative impact that compulsory high school attendance would have on the Amish community, including a discussion of Amish beliefs and values.[121] Through this examination of the Amish religion, the Court was able to understand the importance of the claimants' interests.

Had a balancing approach been used in *Smith,* an inquiry into the burden would have considered factors such as the severity of the criminal sanctions placed on the practice and the importance of peyote use to the religion. Criminal sanctions are the most severe penalty a state can place on a religious practice, since the claimant may risk imprisonment or other severe penalties by engaging in the practice.[122] Thus, prior to *Smith,* criminal laws were generally subject to more careful scrutiny than other laws that imposed less direct and less severe burdens.[123] An analysis of the importance of peyote use to the Native American Church would have revealed that peyote is to some extent its "theological heart."[124] By taking these kinds of facts into account, in addition to framing the state's interest narrowly, the Court can provide a fair and even-handed approach to claims for religious exemptions.

3. *The Balancing Test Applied to the Facts of* Smith

Following the guidelines set forth above, a balancing test applied to the facts of *Smith* would reveal that a state may not constitutionally prohibit the sacramental use of peyote by members of the Native American Church. Applied to the specific circumstances of the Church, the state's interest in denying an exemption for the Church's peyote use is fairly weak. Due to the controlled setting of the

120. 406 U.S. 205 (1972).

121. *See id.* at 210–11; *see also supra* notes 35–41 and accompanying text (discussing *Yoder*).

122. "A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it 'results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.' " Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1610 (1990) (*Smith V*) (O'Connor, J., concurring).

123. *See* Bowen v. Roy, 476 U.S. 693, 704 (1986); Sherbert v. Verner, 374 U.S. 398, 403–04 (1963); Braunfeld v. Brown, 366 U.S. 599, 605–06 (1961).

124. "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." People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 817, 40 Cal. Rptr. 69, 73 (1964); *see also Developments, supra* note 101, at 1735 (arguing that because Native Americans do not rank the importance of rituals, courts should more generously assess the centrality of practices to the Native American Church).

Church's peyote use and the minimal amount of trafficking in peyote, Smith's use of peyote presented very little threat either to himself or the community.[125]

On the other hand, peyote is the "theological heart" of the Native American Church, and criminal sanctions are the most severe restriction that a state can place on an individual's conduct.[126] Therefore, Smith's interest in obtaining an exemption was strong. Because the burden on Smith's rights to freely exercise his religion far outweighed the state's interest in denying him an exemption, the result should have been that the state could not constitutionally prohibit Smith's religious use of peyote.

III. CONCLUSION

When an individual's religious practices conflict with a generally applicable law, either the individual's interests or the state's interests will necessarily have to give way to the other. Although in many cases individual rights must be subordinated to the law in order to protect the public health, safety, or welfare, certain situations exist in which these rights will overcome the state's interests. The balancing approach, applied in the manner set forth above, can provide a fair and consistent means of determining which interests, the state's or the individual's, should prevail.

Because the *Smith* rule does not protect against unnecessary infringements on individual rights by generally applicable laws, it poses a potential threat to religious liberty in the United States. Legislatures should be permitted to grant exemptions, but where a legislature needlessly refuses to accommodate a seriously burdened religious practice, courts must have the authority and the willingness to step in and mandate an exemption. The failure of the *Smith* Court to provide this kind of guarantee will undoubtedly result in the unwarranted and arbitrary suppression of some minority religious practices.

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125. *See supra* notes 107–10 and accompanying text.
126. *See supra* notes 122–24 and accompanying text.