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The free exercise clause of the first amendment[1] protects the fundamental right of Americans to worship as they see fit.[2] This safeguard is made applicable to the states by the fourteenth amendment.[3] Over the years, the United States Supreme Court has upheld the right to freely exercise religion so long as it does not unduly conflict with the establishment clause of the first amendment.[4]

Traditionally, any burden imposed by state or federal government on the free exercise clause must be justified by a compelling state interest.[5] Furthermore, statutes imposing such burdens must be narrowly tailored to accomplish their goals in the least restrictive means possible.[6] However, the Court abruptly departed from this well-grounded standard in *Employment Division, Department of Human Resources v. Smith*,[7] in which five of the nine justices refused to apply the compelling interest test.[8]

This note will briefly explore the development of the compelling interest test as it relates to the free exercise clause of the first amendment. Next, the note will analyze *Smith* and show that its deviation from traditional first amendment jurisprudence was erroneous. This note will suggest that the Court's departure might have been due to a lack of knowledge of the Peyote Ritual, which was the subject of controversy in *Smith*. The note will also compare the Peyote Ritual to various Judeo-Christian rituals. Finally, this note will consider the implications of the Court's reasoning upon Judeo-Christian religions.

Prior Case Law

Sherbert v. Verner

Cases prior to *Smith* reveal that statutes abridging an individual's freedom of religion are to be analyzed under the compelling interest test.[9] The leading

1. U.S. CONST. amend. I, cl. 2.

2. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). The majority classifies the free exercise of religious beliefs as a fundamental right.

3. U.S. CONST. amend. XIV, § 1.

4. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987); Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981); Sherbert v. Verner, 374 U.S. 398, 403 (1963); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

5. *Thomas*, 450 U.S. at 719; *Yoder*, 406 U.S. at 215.

6. *Thomas*, 450 U.S. at 719.

7. 110 S. Ct. 1595 (1990), *reh'g denied*, 110 S. Ct. 2605 (1990).

8. *Id.* at 1602.

9. *See generally* Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987); Sherbert v. Verner, 374 U.S. 398, 403 (1963). The compelling interest test requires the government to show a sufficiently important objective in

case in this area is *Sherbert v. Verner*.[10] In that case, a Seventh Day Adventist was fired for refusing to work on Saturday (her Sabbath). She then applied for unemployment compensation while she looked for another job. The South Carolina Employment Security Commission denied Sherbert compensation pursuant to a Florida law which denied benefits to those fired for work related misconduct. As a result, Sherbert brought suit, claiming that the statute denied her rights enumerated under the free exercise clause of the first amendment.[11]

The Court held that the statute was unconstitutional.[12] The majority reasoned that when the state restricts conduct mandated by religious beliefs to such a degree that the law coerces adherents of a particular faith to either conform their belief to fit the state's law or to move to a different state that is more tolerant of religious tenets, such a statute must undergo strict scrutiny.[13] The statute will be upheld only if two conditions are met. First, the state must show a compelling interest served by the statute. Second, the statute must be narrowly tailored to achieve that interest.[14] *Sherbert* set the standard by which free exercise issues have since been analyzed.

Wisconsin v. Yoder

Another important case contributing to the development of free exercise jurisprudence is *Wisconsin v. Yoder*.[15] That case involved a statute neutral in application. In other words, the statute did not facially discriminate against religious conduct. Nevertheless, the Court held that a facially neutral regulation may, in application, violate the constitutional mandate of governmental neutrality if the statute unduly restricts the free exercise of religion.[16] In *Yoder*, members of the Old Order Amish religion declined to send their children to public school after they completed the eighth grade. They believed that to do so would violate the teachings of the Amish faith by exposing them to the ungodly philosophies of materialism, competition, and various other worldly principles.

In addition, the Yoders sincerely believed that attendance would endanger their own salvation and that of their children. Unfortunately for the Yoders, Wisconsin had a compulsory school-attendance statute. The Yoders were convicted under that statute and fined. The lower court upheld the conviction, reasoning that the state's interest in creating and operating a system

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order to override the challenger's competing interest. The test is well stated in the free exercise case of *Yoder*: "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Yoder v. Wisconsin, 406 U.S. 205, 215 (1972).

10. 374 U.S. 398 (1963).
11. *Id.* at 399-400.
12. *Id.* at 402.
13. *Id.* at 406-07.
14. *Id.* at 407.
15. 406 U.S. 205 (1972).
16. *Id.* at 213.

of education overrode the Yoders' claim.[17] Nevertheless, the Supreme Court reversed.[18]

In deciding that the statute was not a valid exercise of governmental power, the Court concluded that the state's interest in education, though of great importance, did not outweigh a valid free exercise claim.[19] Applying the *Sherbert* compelling governmental interest test, the Court determined that the statute could not withstand constitutional muster.[20] The Court reasoned that the state could not successfully maintain that its interest in education outweighed the rights of the sincere religious practices of the Amish. The scales tipped in favor of allowing the religious practice because the survival of the Amish way of life in Wisconsin would be severely hindered if the Amish were not granted an exception to the statute.[21]

Yoder served to extend the *Sherbert* standard beyond the unemployment compensation area to at least that of criminal law. Courts had consistently used the *Sherbert* test in many settings, considering it an integral part of first amendment jurisprudence.[22] However, the peyote decision, discussed below, drastically altered the course of the Court's determination of religious freedom.

The Peyote Decision

In *Employment Division, Department of Human Resources v. Smith*,[23] the respondents were fired from their jobs as counselors with a drug rehabilitation program because of work-related misconduct. They had ingested peyote for sacramental purposes at a ritual in their Native American Church. They applied to petitioner, Employment Division, Department of Human Resources, for unemployment compensation. However, their applications were denied.

As a result, the workers brought suit in Oregon state court.[24] At trial, the respondents claimed that the failure of the state to exempt religiously inspired peyote use from an otherwise neutral statute prohibiting the use or possession of drugs unconstitutionally deprived them of their right to freely exercise their religion.[25] Over several years of litigation, the case worked its

17. *Id.*

18. *Id.*

19. *Id.* at 215; *see also* Prince v. Massachusetts, 321 U.S. 158, 165, *reh'g denied*, 321 U.S. 804 (1944).

20. *Yoder*, 406 U.S. at 215.

21. *Id.* at 235.

22. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141-42 (1987); Thomas v. Review Bd., Indiana Employment Sec. Div., 450 U.S. 707, 718 (1981); Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990); Minker v. Baltimore Annual Conference, 894 F.2d 1354 (D.C. Cir. 1990); Christian Gospel Church, Inc. v. City & County of San Francisco, 896 F.2d 1221 (9th Cir. 1989).

23. 110 S. Ct. 1595 (1990).

24. *Id.* at 1597-98.

25. The use of peyote was prohibited by schedule 1 of the Federal Controlled Substances Act, 21 U.S.C. §§ 811-812 (1982 & Supp. V 1987) as amended by Oregon's State Board of

way to the United States Supreme Court twice.[26] Various courts involved in the decision-making process made a number of important findings.

The first time the case appeared before the United States Supreme Court, the majority declined to address the constitutional issue because the Oregon Supreme Court had failed to consider whether the use of peyote was actually forbidden under the statute.[27] After the Oregon high court held that peyote use was not allowed under the statute, the Court again granted the writ of certiorari.

Finally, in 1990, the Supreme Court addressed the constitutional issue. The Court held that because the statute is religion-neutral on its face and is constitutional as applied to those who violate the act for nonreligious reasons, no exception could be made for those whose sincere exercise of religion is burdened by the statute.[28] In so holding, the Court eschewed the well-established compelling interest test.[29] The Court cited several reasons for its holding. However, each point of reasoning contains questionable conclusions.

First, Justice Scalia, writing for the Court, reasoned that generally applicable statutes, such as the religion-neutral statute at issue in *Smith*, are "one large step" from statutes aimed specifically at religious practices.[30] Because of the difference between the two types of statutes, the Court reasoned that strict scrutiny need not be applied to generally applicable laws.[31] The Court suggested that a statute barring erection of statues used for worship or a law preventing worshipful allegiance to a "golden calf" would be subjected to strict scrutiny.[32] However, the Court refused to apply the same compelling interest test to Oregon's religion-neutral statute.[33]

The Court's refusal to apply the compelling interest test is difficult to square with *Sherbert*. *Sherbert* is the seminal case in the free exercise area because that case concerned a religion-neutral law and yet *established* the precedent of applying the compelling interest test to free exercise cases.[34] Indeed, Justice O'Connor pointed out in *Smith* that "[o]ur free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice."[35] Hence, it is quite perplexing

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Pharmacy. OR. REV. STAT. § 475.005(6) (1987). It was so listed because of its hallucinogenic effects. *Smith*, 110 S. Ct. at 1597.

26. These were Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660 (1988) (*Smith I*) and Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990), *reh'g denied*, 110 S. Ct. 2605 (1990) (herein simply cited as *Smith*).

27. *Smith I*, 485 U.S. at 670.

28. *Smith*, 110 S. Ct. at 1599.

29. *Id.* at 1602; *see also* Petition for Rehearing at 2, Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990) (No. 88-1213).

30. *Smith*, 110 S. Ct. at 1599.

31. *Id.*

32. *Id.*

33. *Id.* at 1602.

34. Sherbert v. Verner, 374 U.S. 398, 406-07 (1963).

35. *Smith*, 110 S. Ct. at 1608 (O'Connor, J., concurring).

that the Court deviated so sharply from precedent in declining to apply the compelling interest test in *Smith*.

Second, the Court reasoned that because the law does not prohibit a belief but merely a religious act, it should stand.[36] However, as Justice O'Connor pointed out, the Constitution does not merely protect religious belief, but also religious exercise.[37] Exercise encompasses not only belief, but performance of various acts of worship as well.[38] O'Connor conceded that acts, unlike beliefs, are not beyond reproof.[39] Nevertheless, prior case law holds that religious acts may only be restricted by a compelling state interest.[40]

Third, the Court noted that it had not previously required an exception to an otherwise constitutional state law simply because the law prohibited religious adherents from freely exercising their religious beliefs.[41] This assertion is inaccurate. Before *Smith*, the Court had consistently required such an exception. The most obvious example of a case so holding is *Yoder*. In *Yoder*, the Court held that the free exercise clause required an exemption for the Amish to a regulation mandating compulsory attendance in the public school until the eighth grade.[42] Thus, religious freedom as protected by the first amendment had been held to compel an exception to an otherwise valid generally applicable state statute.

Indeed, the majority conveniently sidestepped *Yoder* in much of its reasoning. In the third major point of reasoning, the Court declined to apply the compelling interest test outside the unemployment compensation field.[43] The Court asserted that earlier cases did not concern criminal conduct.[44] However, *Yoder* dealt with a conviction under a criminal statute — not an unemployment compensation regulation.[45] *Smith* deals with both a criminal statute[46] and denial of unemployment compensation.[47] Therefore, the Court should have applied the compelling interest test.

36. *Id.* at 1599-1600 (citing Reynolds v. United States, 98 U.S. 145 (1879)). In *Reynolds*, the Court upheld the conviction of a Mormon for practicing polygamy, which was against the law.

37. *Smith*, 110 S. Ct. at 1607-08 (O'Connor J., concurring).

38. *Id.*

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

40. *Id.* (O'Connor, J., concurring) (citing Hernandez v. Commissioner, 109 S. Ct. 2136, 2148 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987); United States v. Lee, 455 U.S. 252, 257-58 (1982); Thomas v. Review Bd., Ind. Employment Security Div., 450 U.S. 707, 718 (1981); McDaniel v. Paty, 435 U.S. 618, 626-29 (1978) (plurality opinion); Wisconsin v. Yoder, 406 U.S. 205 (1972); Gillette v. United States, 401 U.S. 437, 462 (1971); Sherbert v. Verner, 374 U.S. 398, 403 (1963); Bowen v. Roy, 476 U.S. 693, 732 (1986) (opinion concurring in part and dissenting in part); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943)).

41. *Smith*, 110 S. Ct. at 1599.

42. *Yoder*, 406 U.S. at 213.

43. *Smith*, 110 S. Ct. at 1602.

44. *Id.* at 1598.

45. *Yoder*, 406 U.S. at 208 ("[R]espondents were tried and convicted of violating the compulsory-attendance law in Green County Court. . . .").

46. OR. REV. STAT. § 475.992(4) (1987).

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

Not only did the Court ignore the rationale in *Yoder*, but it also ignored the reasoning in *Sherbert*. To justify a deviation from the *Sherbert* test, the Court relied heavily upon such cases as *Goldman v. Weinberger*[48] and *O'Lone v. Estate of Shabaaz*.[49] Those cases, however, are distinguishable from *Smith* because both *Goldman* and *O'Lone* deal with circumstances in which not all constitutional rights are available. *Goldman* concerns an armed forces regulation, and *O'Lone* deals with a prison rule. In each of these circumstances, authority is needed to maintain strict discipline and promote uniformity.

In *Goldman*, a Jewish soldier wished to wear his skullcap with his military uniform for religious reasons. Wearing such headgear indoors would have violated an Air Force regulation.[50] In *O'Lone*, prisoners desired an exception from work requirements in order to attend Muslim worship services. In both cases, the Court decided not to apply *Sherbert*. Instead, the Court determined that, unlike society in general, neither the armed forces nor prisons need to foster debate or allow nonconformity.[51] Thus, the Court emphasized that it will exercise much greater deference when reviewing the constitutionality of military or prison regulations than generally applicable civil laws.[52] This statement, of course, implies that *Sherbert* will still be applicable in the more familiar civil setting. The *Smith* Court's reliance on these cases was therefore unjustified.

The fourth justification advanced by *Smith* is especially suspect in light of the fact that the Court has never addressed a statute specifically targeting religious practices.[53] The Court stated that the few occasions in which it has held that the free exercise clause prevents enforcement of an otherwise valid, generally applicable law against religiously inspired activity have never concerned the free exercise clause alone. Instead, they dealt with the free exercise clause only when combined with another constitutional right or interest, such as free speech or press.[54]

If this statement is followed by the Court in subsequent cases, free exercise jurisprudence will be severely affected. By requiring the combination of a free exercise claim with another constitutional claim, this statement could reduce the free exercise clause almost to insignificance. The Court's assertion

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

48. 475 U.S. 503 (1986).

49. 482 U.S. 342 (1987).

50. *Goldman*, 475 U.S. at 505 (citing Air Force Regulation 35-10 P 1-6.h(2)(f) (1980)). The regulation states in pertinent part that "[h]eadgear will not be worn . . . [w]hile indoors except by armed security police in performance of their duties.").

51. *Goldman*, 475 U.S. at 507; *O'Lone*, 482 U.S. at 347. Of course, even in a prison setting, constitutionally guaranteed rights cannot be totally denied. The proper standard for prison rules which restrict constitutional rights is clearly stated by the Court: "When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Goldman*, 475 U.S. at 507.

52. *Goldman*, 475 U.S. at 507.

53. *Smith*, 110 U.S. at 1601.

54. *Id.*

means that, under a statute not aimed narrowly at religious practices, the free exercise clause will be irrelevant unless it is combined with other constitutional rights.

However, those other rights are sufficient by themselves to trigger strict scrutiny.[55] If the Court is going to require this combination even when a claim is already deemed sufficient by itself to trigger the compelling interest test, potential plaintiffs might as well not bring their free exercise claim before the Court. Clearly, under the reasoning of *Smith*, the free exercise clause has been stripped of much of its importance.

Burden on Free Exercise Is Avoidable

The final point the Court made was that placing a burden on those who practice a religion which is not widely held is an "unavoidable consequence of democratic government . . . ."[56] Justice Scalia failed to cite any precedent to support this assertion. Additionally, Justice Scalia's statement directly contradicts the intent of the framers of the first amendment.[57] This contradiction is ironic in light of the fact that Justice Scalia is often associated with the doctrine of original understanding.[58]

In fact, an examination of history reveals that the framers of the first amendment would have thought otherwise. The very reason many of the first colonists came to America was to escape religious persecution in their homelands.[59] Furthermore, those early immigrants were not associated with majority religions such as the Anglican Church in England. In Scalia's words, these immigrants exercised "religious practices not widely engaged in."[60] Those Quakers, Pilgrims, and Puritans desired to escape the burdens placed upon their religious freedom in their home countries.[61]

One important goal of the framers in drafting the first amendment was to assure those members of smaller sects freedom from undue governmental

55. Rights enumerated in or fairly inferred from the Constitution are generally considered fundamental. Statutes denying fundamental rights are subject to strict scrutiny. *See generally* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Shapiro v. Thompson, 394 U.S. 618 (1969).

56. *Smith*, 110 S. Ct. at 1606. Contrary to Justice Scalia's statement, the freedom to exercise religion must be guaranteed to all citizens, not merely those representing a religious majority. As was so eloquently stated in *Barnette*: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). The Supreme Court of the United States must acknowledge this fundamental truth.

57. Clearly, non-interpretivists (those who go beyond the original understanding in determining constitutional issues) would strike down the statute in *Smith*. This is evidenced by the fact that the dissenters in *Smith* — Blackmun, Brennan, and Marshall — adhere to the doctrine of non-interpretivism. The point is that those associated with original understanding should also find Scalia's statement puzzling.

58. *See generally* Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

59. Baker, *Belief and Action: Limitations on the Free Exercise of Religion*, in CHURCH, STATE AND POLITICS 41, 42 (J. Hensel ed. 1981).

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

61. Baker, *supra* note 59, at 42.

interference with their worship.[62] Now, the slight majority of *Smith* would allow the religious persecution of native Americans.

Would Exemption Provide a Loophole for Allowing Drug Use?

One factor which influenced the Court not to require an exception for religiously motivated peyote use may have been the fear that allowing such an exception for peyote would open the floodgates of litigation to other minority sects.[63] The Court might fear an outcry from factions desiring to acquire a similar exception for marijuana, LSD, or cocaine.[64] Some might argue that allowing an exception for religiously inspired ingestion of peyote would require across the board exceptions for religiously inspired use of all drugs.[65]

Alternatively, opponents to an exception for peyotists may argue that courts will determine whether to allow a given religion's request for exemption before applying the proper standard if such an exception is allowed for peyote. They submit that, if a court respects a religion, that court will provide for an exception allowing religiously inspired use of the restricted substance.[66] Moreover, opponents may claim that if the religious tenets of the minority religion involve the use of marijuana, the Court, simply because it does not condone the use of certain drugs, would deny an exception for those sects.[67] These arguments are flawed for three reasons.

First, unlike marijuana, LSD, and many other illicit drugs, the use of peyote does not represent a serious threat of abuse.[68] The taste of the drug is not pleasant.[69] Additionally, its effects when abused are disagreeable. Abuse causes noxiousness, vomiting, and general illness.[70]

Second, allowing an exemption to the Oregon statute for religious use of peyote would not hamper the state's interest in fighting the war on

62. Paulsen & Smith, *"A Luxury . . . We Can Not Afford": Religious Freedom After the Peyote Case*, QUARTERLY, Summer 1990, at 18, 19. According to Judge Bork, it is the duty of a judge committed to original understanding "to discern how the framers' values, defined in the context of the world they knew, apply to the world we know." Ollman v. Evans 750 F.2d 970, 995-96 (D.C. Cir. 1984) (en banc) (Bork, J., concurring). Therefore, Scalia should have applied the Framers' values regarding the free exercise of the Quakers, Pilgrims, and Puritans to today's minority religions, which include the Native American Church.

63. *Smith*, 110 S. Ct. at 1620 (Blackmun, J., dissenting).

64. *Id.*

65. *Id.* at 1621.

66. *Id.*

67. *Id.*

68. Oral Argument at 48, Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990) (No. 88-1213) [hereinafter Oral Argument]; *see also* W. LA BARRE, THE PEYOTE CULT 48 (1975). In his dissent, Justice Blackmun pointed out that the Native American Church considers peyote use outside the religious ceremony to be sacreligious. *Smith*, 110 S. Ct. at 1619. Therefore, the threat of abuse by a peyotist is very low. Abuse is characterized by the inability of the user to reduce consumption of the drug coupled with constant intoxication. G. DAVISON & J. NEALE, ABNORMAL PSYCHOLOGY 250 (1986). The religious use of peyote presents no such threat.

69. O. STEWART, PEYOTE RELIGION 3 (1987).

70. W. LA BARRE, *supra* note 68, at 148.

drugs.[71] Even the state admitted that in over a decade following the enactment of the statute making peyote illegal, only nineteen pounds of the substance had been seized by the DEA.[72] During this same period, some fifteen million pounds of marijuana were intercepted by the DEA.[73] Clearly, unlike marijuana, LSD, and cocaine, peyote simply does not contribute to the staggering problem of illegal drug trafficking in the United States.

Third, most of the sects using marijuana, cocaine, or LSD are actually only pseudo-religions, created solely as a front to justify illegal drug use.[74] In *Yoder*, Chief Justice Burger was careful to emphasize that the case concerned well-established beliefs of the Old Order Amish.[75] He pointed out that the Amish are not "a group claiming to have recently discovered some 'progressive' or more enlightened" view.[76] Instead, the Amish could point to three centuries of tradition as a religious group.[77] The religious tradition of the Amish, Burger emphasized, is one "few other religious groups or sects could make."[78]

However, the Native American Church is also among these few groups. The sacramental use of peyote represents an established part of the native American religion. The Peyote Ritual has been in existence among native Americans for at least three hundred years.[79] Therefore, like the Amish, the Native American Church was not instituted in order to avoid a governmental restriction. Instead, both churches represent sincere religious groups steeped in tradition.

By contrast, most groups created to avoid prosecution on drug charges are easy to recognize. For example, in *United States v. Kuch*,[80] the defendant desired designation of his organization as a religion primarily to be allowed to abuse drugs as a supposed right under the free exercise clause of the first amendment. The District of Columbia Circuit Court found that the use of drugs, such as peyote within the Native American Church and wine in Christian churches, cannot be construed to allow an exception which would allow use of a habit-forming illicit drug.[81]

The court in *Kuch* further found that the church failed to show evidence of a sincere belief in a "supreme being, a religious discipline, a ritual, or tenets to guide one's daily existence."[82] Included in the novel "beliefs" of the church in question was that the church's spiritual leader was known as

71. *Id.*
72. Oral Argument, *supra* note 68, at 9.
73. *Smith*, 110 S. Ct. at 1620 (Blackmun, J., dissenting).
74. *See generally* Annotation, *Free Exercise of Religion as Defense to Prosecution for Narcotic or Psychedelic Drug Offense*, 35 A.L.R. 3D 939 (1971 & Supp. 1989).
75. Wisconsin v. Yoder, 406 U.S. 205, 235 (1972).
76. *Id.*
77. *Id.*
78. *Id.* at 236.
79. O. STEWART, *supra* note 69, at 18.
80. 288 F. Supp. 439 (D.D.C. 1968).
81. *Id.* at 444.
82. *Id.*

Chief "Boo Hoo."[83] The group's symbol was a toad with three eyes. Its seal contained a picture of a toad surrounded by the name of the church and its motto: "Victory over horseshit."[84] Among its sacred hymns were "Puff the Magic Dragon" and "Row, Row, Row Your Boat." Obviously, such a faction, lacking any sincere religous belief, cannot be considered a religion within the meaning of the religion clauses of the first amendment.[85]

By contrast, in *Smith*, it was undisputed that the adherents to the Native American Church were sincere in their beliefs.[86] This fact is significant because in previous cases, the Court would not blindly accept the sincerity of any group claiming immunity from a statute on free exercise grounds. Instead, the Court would make some determination of the sincerity of the group's religious beliefs.[87]

These safeguards would adequately prevent those holding insincere and unestablished beliefs from obtaining an exception to a drug-related statute. Additionally, courts will uphold the state's interest in preventing drug trafficking and will disallow an exemption for a habit-forming illicit drug. Indeed, Justice Blackmun's dissent in *Smith* notes the precedent for disallowing all claims for illegal drug use except those involving peyote.[88]

Establishment Problems

Another possible problem with requiring an exemption for religious use of peyote is a concern that it might amount to an establishment of religion.[89] The applicable portion of the first amendment says "Congress shall make no law respecting an establishment of religion."[90] However, an exception to Oregon's statute would not violate the establishment clause for three reasons.

First, twenty-three other states and the federal government exempt the religious use of peyote from the scope of statutes which make peyote use illegal.[91] Second, during Prohibition, wine used for Communion was spe-

83. *Id* at 443.

84. *Id.* at 445.

85. *Id.*

86. Oral Argument, *supra* note 68, at 5. Not only was the religion a sincere one but the respondents themselves were earnest in their faith.

87. Such a determination was made in United States v. Ballard, 322 U.S. 78 (1944). In that case, leaders of the I Am movement were convicted for using the postal system to defraud the public. They solicited funds and sought membership in their organization through fraudulent and improper pretenses. A jury instruction in the case was at issue on appeal. It charged the jury to determine whether the defendants "honestly and in good faith" believed the things they professed in the literature distributed in the mail. The instruction did not ask the jury whether they agreed with the defendants' beliefs. It merely called for good faith. The instruction was upheld. *Id.* at 83-84. In this regard, sincerity of belief may be determined. *See also* Wisconsin v. Yoder, 406 U.S. 205, 235 (1972) (examining the sincerity and tradition of the Amish faith).

88. *Smith*, 110 S. Ct. at 1620 n.8 (Blackmun, J., dissenting).

89. Oral Argument, *supra* note 68, at 14.

90. U.S. CONST. amend. I, cl. 1.

91. Oral Argument, *supra* note 68, at 5.

cifically exempted from the prohibition statute.[92] Third, the exemption would not violate the *Lemon* test, which has been used to determine whether a statute violates the establishment clause.

The *Lemon* test was established in *Lemon v. Kurtzman*.[93] The Court handed down a three-part test which has since guided the Court's inquiry in establishment clause cases.[94] The test provides: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster an excessive government entanglement with religion."[95]

The exception sought in *Smith* fulfills all three prongs of the *Lemon* test. First, the secular purpose of the exception is to allow continuation of the customs and traditions of native Americans, which have existed for at least three hundred years.[96] Second, as will be discussed below, the primary effect of excepting peyote from the statute no more advances religion than allowing a similar exception for wine use for Communion during Prohibition. Without such an exception, peyotists would be forced to choose between not practicing their religion according to its tenets and moving to a more tolerant region of the country.

Finally, an exception for peyote use would not involve excessive governmental entanglement of church and state. Any exception to a generally applicable statute will unavoidably involve a limited amount of entanglement. Sometimes the state must involve itself to accommodate religious practices.[97] A minimal involvement must be tolerated in order to ensure compliance with the free exercise clause. Therefore, the exception passes all three prongs of the *Lemon* test.

Similarities to Communion

Perhaps the *Smith* Court decided to allow this burden on the religious exercise of Native Americans because such a religion is unfamiliar to the Court and to most Americans. Yet many do not realize that the Native American ritual involving the use of peyote is similar to Christian Communion. Most native American religious ceremonies involve the earth and are spatial in nature.[98] However, like Christian Communion, the Peyote Ritual involves the consumption of an element. In the ceremony, peyote is either eaten or drunk in the form of a tea.[99]

92. *Smith*, 110 S. Ct. at 1618 n.6.
93. 404 U.S. 602 (1971).
94. *Id.* at 612-13.
95. *Id.*
96. O. STEWART, *supra* note 69, at 18.
97. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45 (1987).
98. *See generally* Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319 (1988) (Native Americans claimed that construction of a road across sacred lands violated their free exercise rights).
99. The drug was originally used by aborigines in Mexico and south Texas, where peyote

Many Indians who had been exposed to Christianity but still wanted to reconcile their newfound religion with the religion of their tribal roots enthusiastically accepted peyote.[100] The Peyote Ritual allows them to celebrate their native religion in a manner similar to Christian sacramental worship.[101] In fact, many native Americans use peyote as a sacrament in a Christian ceremony, even displaying the crucifix during the ritual.[102] Just as the original American colonists desired to worship freely, peyote use among American Natives represents a sincere attempt to worship God as they see Him. Therefore, the compelling state interest test, as established in *Sherbert*, should have been applied in *Smith*.

Rule Disadvantages Judeo-Christian Religions

Justice Scalia's basic premise in his statement that minority religions are unavoidably discriminated against in democratic societies is erroneous. The *Smith* decision disadvantages not only native American religions but Judeo-Christian religions as well. *Smith* opens the door for innumerable restrictions on religious practices as long as the legislature couches the restrictions in generally applicable language.[103]

Imagine a statute which, though neutral on its face, had the effect of prohibiting observation of a fundamental Christian sacrament, such as Communion, or an important Jewish ceremony, such as Passover. Such a statute is not hard to conceive, as both ceremonies may involve the use of alcohol. So long as the statute bars only the use of alcohol in certain settings and does not facially mention religion, each of these fundamental religious ceremonies could, in effect, be outlawed under the reasoning in *Smith*.[104] This statute could read: "No alcoholic beverage shall be served in any public accommodation, business, facility, club, or other institution where minors are allowed to be present at the time such beverages are being or may be served."[105] Such a statute would be legally indistinguishable from the one in question in *Smith* for several reasons.

First, both statutes prevent the observation of a basic tenet of a sincerely held and well-established belief. Communion, like the Peyote Ritual, is a sacrament occasionally observed in accordance with the teachings of a

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is indigenous. O. STEWART, *supra* note 69, at 17. Native Americans eventually using peyote in Oklahoma included the Cheyenne, Arapaho, Southern Cheyenne, Southern Arapaho, Osage, Quapaw, Seneca, Delaware, Ponca, Kaw, Tonkawa, Oto, Pawnee, Sac & Fox, Iowa, Kickapoo, and the Shawnee. *Id.* at 69-126. However, when these tribes were forced into what is now Oklahoma, they brought peyote and its ceremony with them. These Native Americans shared this aspect of their religion with the other tribes native to or recently relocated in Oklahoma. *Id.* at 99.

100. O. STEWART, *supra* note 69, at 97.

101. *Id.*

102. *Id.* at 115, 1356-57.

103. Petition for Rehearing, *supra* note 29, at 2.

104. Paulsen & Smith, *supra* note 62, at 18.

105. *Id.*

genuine faith. Communion is a celebration of the Last Supper within the Christian faith.[106] The ceremony is rich in symbolism and its observance is fundamental to Christians.[107] Therefore, the hypothetical statute, without an exception for Communion, would force Christians to either compromise their beliefs and conform to the will of the *Smith* majority or move to a different, more tolerant, state.

Similarly, an important Jewish celebration called Sederim could also be circumscribed by the hypothetical statute.[108] Congregational Sederim occurs during Passover night.[109] Sederim involves the recitation of psalms, prayers, singing of hymns, and consumption of wine.[110] Without an exception to the hypothetical statute, this occasion could not be celebrated in a public place. Jews would be forced either to celebrate in their homes or flee to a region that would not suppress their beliefs. Thus, the reasoning in *Smith* would tolerate a certain amount of suppression of Judaism.

Third, though rational, neither the hypothetical statute nor the one in *Smith* serves a compelling state interest in the context of religious ceremonies. Neither assures the protection of life, public health, or rights of others. The law in this area is well summarized in *Yoder*. There, the Court says that only those interests of the greatest importance and those not otherwise satisfied may outweigh valid free exercise claims.[111] The legitimate interests of the state could still be served if an exemption for religious use of wine were allowed in the hypothetical statute and a similar exception were allowed for religious use of peyote in *Smith*.

Conclusion

Smith marks a sad day in the jurisprudence of the free exercise clause of the first amendment. The outcome of *Smith* not only severely infringes upon the religious freedom of minority religions like the Native American Church, but also upon the Judeo-Christian majority. No wonder such a diverse combination of groups ranging from the American Civil Liberties Union to the Baptist Joint Committee on Public Affairs signed the petition for rehearing,[112] which, unfortunately, was denied.[113]

Justice Scalia wrote that "we cannot afford the luxury" of granting an exception for the religiously inspired use of peyote.[114] Still less, however, can we afford sacrificing the jurisprudence and plain language of the first amendment to the whims of the Court. How closely the Court will follow

106. *Luke* 22:7-38. The celebration commemorates the last time Christ dined with His disciples.

107. For purposes of the ritual, the wine represents (or becomes, according to some denominations) the blood of Christ. A. DICKINS, THE ENGLISH REFORMATION 62-63 (1964).

108. B. COHON, JUDAISM IN THEORY AND PRACTICE 196 (1948).

109. *Id.*

110. L. DEMBITZ, JEWISH SERVICE IN SYNAGOGUE AND HOME 356 (1898).

111. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

112. Daily Oklahoman, May 11, 1990, at 1.

113. 110 S. Ct. 2605 (1990).

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

Smith in subsequent free exercise cases remains to be seen. Nonetheless, *Smith* could represent the beginning of the end of the importance of the free exercise clause of the first amendment.

D. Brett Brewer