The BOISI CENTER for
RELIGION and AMERICAN PUBLIC LIFE

Symposium on Religion and Politics

Religious Toleration in America

24 QUINCY ROAD, CHESTNUT HILL, MASSACHUSETTS 02467
TEL: 617.552.1861 FAX: 617.552.1863 EMAIL: PUBLIFE@BC.EDU WEB: WWW.BC.EDU/BOISI

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Supreme Court

Employment Division, Department of Human Resources of Oregon v. Smith
(No. 88-1213)
307 Or. 68, 763 P.2d 146, reversed.

Syllabus	Opinion [Scalia]	Concurrence [O'Connor]	Dissent [Blackmun]
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SCALIA, J., Opinion of the Court

SUPREME COURT OF THE UNITED STATES

494 U.S. 872

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

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 88-1213 Argued: Nov. 6, 1989 --- Decided: April 17, 1990

Justice SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

I

Oregon law prohibits the knowing or intentional possession of a "controlled substance" unless the substance has been prescribed by a medical practitioner. Ore.Rev.Stat. § 475.992(4) (1987). The law defines "controlled substance" as a drug classified in Schedules I through V of the Federal Controlled Substances Act, 21 U.S.C. §§ 811-812 (1982 ed. and Supp. V), as modified by the State Board of Pharmacy. Ore.Rev.Stat. § 475.005(6) (1987). Persons who violate this provision by possessing a controlled substance listed on Schedule I are "guilty of a Class B felony." § 475.992(4)(a). As compiled by the State Board of Pharmacy under its statutory authority, *see* Ore.Rev.Stat. § 475.035 (1987), Schedule I contains the drug peyote, a hallucinogen derived from the plant Lophophorawilliamsii Lemaire. Ore.Admin. Rule 855-80-021(3)(s) (1988).

Respondents Alfred Smith and Galen Black were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. When respondents applied to petitioner Employment Division for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related "misconduct". The Oregon Court of Appeals reversed that determination, holding that the denial of benefits violated respondents' free exercise rights under the First Amendment. [p875]

On appeal to the Oregon Supreme Court, petitioner argued that the denial of benefits was permissible because respondents' consumption of peyote was a crime under Oregon law. The Oregon Supreme Court reasoned, however, that the criminality of respondents' peyote use was irrelevant to resolution of their constitutional claim -- since the purpose of the "misconduct" provision under which respondents had been disqualified was not to enforce the State's criminal laws, but to preserve the financial integrity of the compensation fund, and since that purpose was inadequate to justify the burden that disqualification imposed on respondents' religious practice. Citing our decisions in *Sherbert v. Verner,* 374 U.S. 398 (1963), and *Thomas v. Review Board, Indiana Employment Security Div.,* 450 U.S. 707 (1981), the court concluded that respondents were entitled to payment of unemployment benefits. *Smith v. Employment Div., Dept. of Human Resources,* 301 Or. 209, 217-219, 721 P.2d 445, 449-450 (1986). We granted

certiorari. 480 U.S. 916 (1987).

Before this Court in 1987, petitioner continued to maintain that the illegality of respondents' peyote consumption was relevant to their constitutional claim. We agreed, concluding that

> 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.

Employment Div., Dept. of Human Resources of Oregon v. Smith, 485 U.S. 660, 670 (1988) (*Smith I*). We noted, however, that the Oregon Supreme Court had not decided whether respondents' sacramental use of peyote was in fact proscribed by Oregon's controlled substance law, and that this issue was a matter of dispute between the parties. Being "uncertain about the legality of the religious use of peyote in Oregon," we determined that it would not be "appropriate for us to decide whether the practice is protected by the Federal Constitution." *Id.* at 673. Accordingly, we [p876] vacated the judgment of the Oregon Supreme Court and remanded for further proceedings. *Id.* at 674.

On remand, the Oregon Supreme Court held that respondents' religiously inspired use of peyote fell within the prohibition of the Oregon statute, which "makes no exception for the sacramental use" of the drug. 307 Or. 68, 72-73, 763 P.2d 146, 148 (1988). It then considered whether that prohibition was valid under the Free Exercise Clause, and concluded that it was not. The court therefore reaffirmed its previous ruling that the State could not deny unemployment benefits to respondents for having engaged in that practice.

We again granted certiorari. 489 U.S. 1077 (1989).

II

Respondents' claim for relief rests on our decisions in *Sherbert v. Verner, supra, Thomas v. Review Board, Indiana Employment Security Div., supra,* and *Hobbie v. Unemployment Appeals Comm'n of Florida,* 480 U.S. 136 (1987), in which we held that a State could not condition the availability of unemployment insurance on an individual's willingness to forgo conduct required by his religion. As we observed in *Smith I,* however, the conduct at issue in those cases was not prohibited by law. We held that distinction to be critical, for

> 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,

and

> the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation.

485 U.S. at 672. Now that the Oregon Supreme Court has confirmed that Oregon does prohibit the religious use of peyote, we proceed to consider whether that prohibition is permissible under the Free Exercise Clause.

A

The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into [p877] the Fourteenth Amendment, *see Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940), provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof.* . . . " U.S. Const. Am. I (emphasis added). 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,* 374 U.S. at 402. The government may not compel affirmation of religious belief, *see Torcaso v. Watkins,* 367 U.S. 488 (1961), punish the expression of religious doctrines it believes to be false, *United States v. Ballard,* 322 U.S. 78, 86-88 (1944), impose special disabilities on the basis of religious views or religious status, *see McDaniel v. Paty,* 435 U.S. 618 (1978); *Fowler v. Rhode Island,* 345 U.S. 67, 69 (1953); *cf. Larson v. Valente,* 456 U.S. 228, 245 (1982), or lend its power to one or the other side in controversies over religious authority or dogma, *see Presbyterian Church v. Hull Church,* 393 U.S. 440, 445-452 (1969); *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 95-119 (1952); *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 708-725 (1976).

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 [p878] 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 regard 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 has not been offended. *Compare Citizen Publishing Co. v. United States,* 394 U.S. 131, 139 (1969) (upholding application of antitrust laws to press), *with Grosjean v. American Press Co.,* 297 U.S. 233, 250-251 (1936) (striking down license tax applied only to newspapers with weekly circulation above a specified level); *see generally Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575, 581 (1983).

Our decisions reveal that the latter reading is the correct one. We have never held that an individual's religious beliefs [p879] 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,* 310 U.S. 586, 594-595 (1940):

> 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 concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

(Footnote omitted.) We first had occasion to assert that principle in *Reynolds v. United States,* 98 U.S. 145 (1879), 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 religious 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.

Id. at 166-167.

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).

United States v. Lee, 455 U.S. 252, 263, n. 3 (1982) (STEVENS, J., concurring in judgment); *see Minersville School Dist. Bd. of Educ. v. Gobitis, supra,* 310 U.S. at 595 (collecting cases). In *Prince v. Massachusetts,* 321 U.S. 158 (1944), we held that a mother could be prosecuted under the child labor laws [p880] for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in "excluding [these children] from doing there what no other children may do." *Id.* at 171. In *Braunfeld v. Brown,* 366 U.S. 599 (1961) (plurality opinion), we upheld Sunday closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In *Gillette v. United States,* 401 U.S. 437, 461 (1971), we sustained the military selective service system against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds.

Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion was *United States v. Lee,* 455 U.S. at 258-261. There, an Amish employer, on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. We rejected the claim that an exemption was constitutionally required. There would be no way, we observed, to distinguish the Amish believer's objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes.

> If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.

Id. at 260. *Cf. Hernandez v. Commissioner,* 490 U.S. 680 (1989) (rejecting free exercise challenge to payment of income taxes alleged to make religious activities more difficult). [p881]

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, *see Cantwell v. Connecticut,* 310 U.S. at 304, 307 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania,* 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick,* 321 U.S. 573 (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), to direct the education of their children, *see Wisconsin v. Yoder,* 406 U.S. 205 (1972) (invalidating compulsory school attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).[n1] [p882] Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, *cf. Wooley v. Maynard,* 430 U.S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943) (invalidating compulsory flag salute statute 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,* 468 U.S. 609, 622 (1983) ("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.").

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 prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental 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, the communication of 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.

Gillette v. United States, supra, 401 U.S. at 461.

B

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 [p883] religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner,* 374 U.S. 398 (1963). Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. *See id.* at 402-403; *see also Hernandez v. Commissioner, supra,* 490 U.S. at 699. 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. *See Sherbert v. Verner, supra; Thomas v. Review Board, Indiana Employment Div.,* 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n of Florida,* 480 U.S. 136 (1987). 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, *see United States v. Lee,* 455 U.S. 252 (1982); *Gillette v. United States,* 401 U.S. 437 (1971). In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all. In *Bowen v. Roy,* 476 U.S. 693 (1986), we declined to apply *Sherbert* analysis to a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers. The plaintiffs in that case asserted that it would violate their religious beliefs to obtain and provide a Social Security number for their daughter. We held the statute's application to the plaintiffs valid regardless of whether it was necessary to effectuate a compelling interest. *See id.* at 699-701. In *Lyng v. Northwest Indian Cemetery Protective Assn.,* 485 U.S. 439 (1988), we declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities "could have devastating effects on traditional Indian religious practices," 485 U.S. at 451. [p884] In *Goldman v. Weinberger,* 475 U.S. 503 (1986), we rejected application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes. In *O'Lone v. Estate of Shabazz,* 482 U.S. 342 (1987), we sustained, without mentioning the *Sherbert* test, a prison's refusal to excuse inmates from work requirements to attend worship services.

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. As a plurality of the Court noted in *Roy,* a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment:

> The statutory conditions [in *Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, "without good cause," he had

> quit work or refused available work. The "good cause" standard created a mechanism for individualized exemptions.

Bowen v. Roy, supra, 476 U.S. at 708 (opinion of Burger, C.J., joined by Powell and REHNQUIST, JJ.). *See also Sherbert, supra,* 374 U.S. at 401, n. 4 (reading state unemployment compensation law as allowing benefits for unemployment caused by at least some "personal reasons"). As the plurality pointed out in *Roy,* our decisions in the unemployment cases stand for the proposition that where 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. *Bowen v. Roy, supra,* 476 U.S. at 708.

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, *see United States v.* [p885] *Lee, supra,* 455 U.S. at 257-260; *Gillette v. United States, supra,* 401 U.S. at 462, 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,* 485 U.S. at 451. 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. United States,* 98 U.S. at 167 -- contradicts both constitutional tradition and common sense.[n2]

The "compelling government 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 the basis of race, *see, e.g.,* [p886] *Palmore v. Sidoti,* 466 U.S. 429, 432 (1984), or before the government may regulate the content of speech, *see, e.g., Sable Communications of California v. FCC,* 492 U.S. 115 (1989), 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.[n3]

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. *Cf. Lyng v. Northwest Indian Cemetery Protective Assn., supra,* 485 U.S. at 474-476 (BRENNAN, J., dissenting). It is no [p887] 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. 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,* 455 U.S. at 263 n. 2 (STEVENS, J., concurring). As we reaffirmed only last Term,

> [i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds.

Hernandez v. Commissioner, 490 U.S. at 699. 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. *See, e.g., Thomas v. Review Board, Indiana Employment Security Div.,* 450 U.S. at 716; *Presbyterian Church v. Hull Church,* 393 U.S. at 450; *Jones v. Wolf,* 443 U.S. 595, 602-606 (1979); *United States v. Ballard,* 322 U.S. 78, 85-87 (1944).[n4] [p888]

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 conceivable religious preference," *Braunfeld v. Brown,* 366 U.S. at 606, and precisely because we value and protect that religious divergence, 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 [p889] compulsory military service, *see, e.g., Gillette v. United States,* 401 U.S. 437 (1971), to the payment of taxes, *see, e.g., United States v. Lee, supra;* to health and safety regulation such as manslaughter and child neglect laws, *see, e.g., Funkhouser v. State,* 763 P.2d 695 (Okla.Crim.App.1988), compulsory vaccination laws, *see, e.g., Cude v. State,* 237 Ark. 927, 377 S.W.2d 816 (1964), drug laws, *see, e.g., Olsen v. Drug Enforcement Administration,* 279 U.S.App.D.C. 1, 878 F.2d 1458 (1989), and traffic laws, *see Cox v. New Hampshire,* 312 U.S. 569 (1941); to social welfare legislation such as minimum wage laws, *see Susan and Tony Alamo Foundation v. Secretary of Labor,* 471 U.S. 290 (1985), child labor laws, *see Prince v. Massachusetts,* 321 U.S. 158 (1944), animal cruelty laws, *see, e.g., Church of the Lukumi Babalu Aye Inc. v. City of Hialeah,* 723 F.Supp. 1467 (S.D.Fla.1989), *cf. State v. Massey,* 229

N.C. 734, 51 S.E.2d 179, *appeal dism'd,* 336 U.S. 942 (1949), environmental protection laws, *see United States v. Little,* 638 F.Supp. 337 (Mont.1986), and laws providing for equality of opportunity for the races, *see, e.g., Bob Jones University v. United States,* 461 U.S. 574, 603-604 (1983). The First Amendment's protection of religious liberty does not require this.[n5] [p890]

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. *See, e.g.,* Ariz.Rev.Stat.Ann. § 13-3402(B)(1) (3) (1989); Colo.Rev.Stat. § 12-22-317(3) (1985); N.M.Stat.Ann. § 30-31-6(D) (Supp.1989). 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.

It is so ordered. [p891]

1. Both lines of cases have specifically adverted to the non-free exercise principle involved. Cantwell, for example, observed that

> [t]he fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged.

310 U.S. at 307. *Murdock* said:

> We do not mean to say that religious groups and the press are free from all financial burdens of government. . . . We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. . . . Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation.

319 U.S. at 112.

Yoder said that

> the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement under the **First Amendment**.

406 U.S. at 233.

2. Justice O'CONNOR seeks to distinguish Lyng v. Northwest Indian Cemetery Protective Assn., supra, and Bowen v. Roy, supra, on the ground that those cases involved the government's conduct of "its own internal affairs," which is different because, as Justice Douglas said in Sherbert,

> "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."

Post at 900 (O'CONNOR, J., concurring), quoting *Sherbert, supra,* at 412 (Douglas, J., concurring). But since Justice Douglas voted with the majority in *Sherbert,* that quote obviously envisioned that what "the government cannot do to the individual" includes not just the prohibition of an individual's freedom of action through criminal laws, but also the running of its programs (in *Sherbert,* state unemployment compensation) in such fashion as to harm the individual's religious interests. Moreover, it is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, *Lyng, supra,* or its administration of welfare programs, *Roy, supra.*

3. Justice O'CONNOR suggests that "[t]here is nothing talismanic about neutral laws of general

applicability," and that all laws burdening religious practices should be subject to compelling interest scrutiny because

> the **First Amendment** unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a "constitutional norm," not an "anomaly."

Post at 901 (O'CONNOR, J., concurring). But this comparison with other fields supports, rather than undermines, the conclusion we draw today. Just as we subject to the most exacting scrutiny laws that make classifications based on race, *see Palmore v. Sidoti, supra,* or on the content of speech, *see Sable Communications, supra,* so too we strictly scrutinize governmental classifications based on religion, *see McDaniel v. Paty,* 435 U.S. 618 (1978); *see also Torcaso v. Watkins,* 367 U.S. 488 (1961). But we have held that race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling interest analysis under the Equal Protection Clause, *see Washington v. Davis,* 426 U.S. 229 (1976) (police employment examination); and we have held that generally applicable laws unconcerned with regulating speech that have the *effect* of interfering with speech do not thereby become subject to compelling interest analysis under the First Amendment, *see Citizen Publishing Co. v. United States,* 394 U.S. 131, 139 (1969) (antitrust laws). Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.

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,

post at 906-907 (O'CONNOR, J., concurring). 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.

Post at 899. "Constitutionally significant 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.

Post at 919 (dissenting opinion). 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.

Post at 902 (O'CONNOR, J., concurring). 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 these 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 (to use Justice BLACKMUN's terminology) or the "constitutiona[l] significan[ce]" of the "burden on the particular plaintiffs" (to use Justice O'CONNOR's terminology) suffices to permit us to confer 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.

Employment Division, Department of Human Resources of Oregon v. Smith (No. 88-1213)
307 Or. 68, 763 P.2d 146, reversed.

BLACKMUN, J., Dissenting Opinion

SUPREME COURT OF THE UNITED STATES

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494 U.S. 872

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

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 88-1213 Argued: Nov. 6, 1989 --- Decided: April 17, 1990

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

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. [n1] **[p908]**

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." *Ante* at 886. As carefully detailed in Justice O'CONNOR's concurring opinion, *ante*, the majority is able to arrive at this view only by mischaracterizing this Court's precedents. The Court discards leading free exercise cases such as *Cantwell v. Connecticut*, **310 U.S. 296** (1940), and *Wisconsin v. Yoder*, **406 U.S. 205** (1972), as "hybrid." *Ante* at 882. The Court views traditional free exercise analysis as somehow inapplicable to criminal prohibitions (as opposed to conditions on the receipt of benefits), and to state laws of general applicability (as opposed, presumably, to laws that expressly single out religious practices). *Ante* at 884-885. 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. *Ante* at 882-884. 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 the free exercise of religion is a "luxury" that a well-ordered society **[p909]** cannot afford, *ante* at 888, and that the repression of minority religions is an "unavoidable consequence of democratic government." *Ante* at 890. I do not believe 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.

For these reasons, I agree with Justice O'CONNOR's analysis of the applicable free exercise doctrine, and I join parts I and II of her opinion.[n2] As she points out,

the critical question in this case is whether exempting respondents from the State's general criminal prohibition "will unduly interfere with fulfillment of the governmental interest."

Ante at 905, quoting *United States v. Lee*, **455 U.S. 252**, 259 (1982). I do disagree, however, with her specific answer to that question.

I

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 **[p910]** 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. *See Bowen v. Roy*, **476 U.S. 693**, 728 (1986) (O'CONNOR, J., concurring in part and dissenting in part) ("This Court has consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector 'is essential to accomplish an overriding governmental interest,'" quoting *Lee*, 455 U.S. at 257-258); *Thomas v. Review Bd. of Indiana Employment Security Div.*, **450 U.S. 707**, 719 (1981) ("focus of the inquiry" concerning State's asserted interest must be "properly narrowed"); *Yoder*, 406 U.S. at 221 ("Where fundamental claims of religious freedom are at stake," the Court will not accept a State's "sweeping claim" that its interest in compulsory education is compelling; despite the validity of this interest "in the generality of cases, we must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exception"). Failure to reduce the competing interests to the same plane of generality tends to distort the weighing process in the State's favor. *See* Clark, Guidelines for the Free Exercise Clause, 83 Harv.L.Rev. 327, 330-331 (1969) ("The purpose of almost any law can be traced back to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue. To measure an individual interest directly against one of these rarified values inevitably makes the individual interest appear the less significant"); Pound, A Survey of Social Interests, 57 Harv.L.Rev. 1, 2 (1943) ("When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane . . . [or else] we may decide the question in advance in our very way of putting it").

The State's interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, **[p911]** 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

significant enforcement efforts against other religious users of peyote.[n3] The State's asserted interest thus amounts only to the symbolic preservation of an unenforced prohibition. But a government interest in "symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs," *Treasury Employees v. Von Raab,* **489 U.S. 656**, 687 (1989) (SCALIA, J., dissenting), cannot suffice to abrogate the constitutional rights of individuals.

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 exception. *See Thomas,* 450 U.S. at 719 (rejecting State's reasons for refusing religious exemption, for lack of "evidence in the record"); *Yoder,* 406 U.S. at 224-229 (rejecting State's argument concerning the dangers of a religious exemption as speculative, and unsupported by the record); *Sherbert v. Verner,* **374 U.S. 398**, 407 (1963) ("there is no proof whatever to warrant such fears . . . as those which the [State] now advance[s]"). 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 **[p912]** has ever harmed anyone.[n4] The factual findings of other courts cast doubt on the State's assumption that religious use of peyote is harmful. *See State v. Whittingham,* 19 Ariz.App. 27, 30, 504 P.2d 950, 953 (1973) ("the State failed to prove that the quantities of peyote used in the sacraments of the Native American Church are sufficiently harmful to the health and welfare of the participants so as to permit a legitimate intrusion under the State's police power"); *People v. Woody,* 61 Cal.2d 716, 722-723, 40 Cal.Rptr. 69, 74, 394 P.2d 813, 818 (1964) ("as the Attorney General . . . admits, the opinion of scientists and other experts is 'that peyote . . . works no permanent deleterious injury to the Indian'").

The fact that peyote is classified as a Schedule I controlled substance does not, by itself, show that any and all uses 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.[n5] Moreover, **[p913]** other Schedule I drugs have lawful uses. *See Olsen v. Drug Enforcement Admin.,* 279 U.S.App.D.C. 1-6, n. 4, 878 F.2d 1458, 1463, n. 4 (medical and research uses of marijuana).

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs.[n6] 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. *See Olsen,* 279 U.S.App.D.C. at 10, 878 F.2d at 1467 ("The Administrator [of DEA] finds that . . . the Native American Church's use of peyote is isolated to specific ceremonial occasions," and so "an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies" (quoting DEA Final Order)); *id.* at 7, 878 F.2d at 1464 ("for members of the Native American Church, use of peyote outside the ritual is sacrilegious"); *Woody,* 61 Cal.2d at 721, 394 P.2d at 817 ("to use peyote for nonreligious purposes is sacrilegious"); R. Julien, A Primer of Drug Action 148 (3d ed. 1981) ("peyote is seldom abused by members of the Native American **[p914]** Church"); J. Slotkin, The

Peyote Way, in Teachings from the American Faith (D. Tedlock & B. Tedlock, eds., 1975) 96, 104 ("the Native American Church . . . refuses to permit the presence of curiosity seekers at its rites, and vigorously opposes the sale or use of Peyote for nonsacramental purposes"); R. Bergman, Navajo Peyote Use: Its Apparent Safety, 128 Am.J. Psychiatry 695 (1971) (Bergman). [n7]

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. *See Yoder*, 406 U.S. at 224, 228-229 (since the Amish accept formal schooling up to 8th grade, and then provide "ideal" vocational education, State's interest in enforcing its law against the Amish is "less substantial than . . . for children generally"); *id.* at 238 (WHITE, J., concurring opinion). Not only does the Church's doctrine forbid nonreligious use of peyote; it also generally advocates self-reliance, familial responsibility, and abstinence from alcohol. *See* Brief for Association on American Indian Affairs, *et al.*, as *Amici Curiae* 33-34 (the Church's "ethical code" has four parts: brotherly love, care of family, self-reliance, and avoidance of alcohol (quoting from the Church membership card)); *Olsen*, 279 U.S.App.D.C., at 7, 878 F.2d at 1464 (the Native American Church, "for all purposes other than the special, stylized ceremony, reinforced the state's prohibition"); **[p915]** *Woody*, 61 Cal.2d at 721-722, n. 3, 394 P.2d at 818, n. 3 ("most anthropological authorities hold Peyotism to be a positive, rather than negative, force in the lives of its adherents . . . the church forbids the use of alcohol . . . "). There is considerable evidence that the spiritual and social support provided by the Church has been effective in combating the tragic effects of alcoholism on the Native American population. Two noted experts on peyotism, Dr. Omer C. Stewart and Dr. Robert Bergman, testified by affidavit to this effect on behalf of respondent Smith before the Employment Appeal Board. Smith Tr., Exh. 7; *see also* E. Anderson, Peyote: The Divine Cactus 165-166 (1980) (research by Dr. Bergman suggests "that the religious use of peyote seemed to be directed in an ego-strengthening direction with an emphasis on interpersonal relationships where each individual is assured of his own significance as well as the support of the group;" many people have "'come through difficult crises with the help of this religion. . . . It provides real help in seeing themselves not as people whose place and way in the world is gone, but as people whose way can be strong enough to change and meet new challenges'" (quoting Bergman, at 698)); P. Pascarosa and S. Futterman, Ethnopsychedelic Therapy for Alcoholics: Observations in the Peyote Ritual of the Native American Church, 8 (No. 3) J. of Psychedelic Drugs 215 (1976) (religious peyote use has been helpful in overcoming alcoholism); B. Albaugh and P. Anderson, Peyote in the Treatment of Alcoholism among American Indians, 131:11 Am.J.Psychiatry 1247, 1249 (1974) ("the philosophy, teachings, and format of the [Native American Church] can be of great benefit to the Indian alcoholic"); *see generally* O. Stewart, Peyote Religion 75 *et seq.* (1987) (noting frequent observations, across many tribes and periods in history, of correlation between peyotist religion and abstinence from alcohol). Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual **[p916]** 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. *See Olsen*, 279 U.S.App.D.C., at 6, 10, 878 F.2d at 1463, 1467 (quoting DEA Final Order to the effect that total amount of peyote seized and analyzed by federal authorities

between 1980 and 1987 was 19.4 pounds; in contrast, total amount of marijuana seized during that period was over 15 million pounds). 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, *see* **21 U.S.C. §§ 821**-823 (registration requirements for distribution of controlled substances); **21 CFR § 1307.31** (1989) (distribution of peyote to Native American Church subject to registration requirements), and by the State of Texas, the only State in which peyote grows in significant quantities. *See* Texas Health & Safety Code, § 481.111 (1990); Texas Admin.Code, Tit. 37, pt. 1, ch. 13, Controlled Substances Regulations, §§ 13.35-1-3.41 (1989); *Woody*, 61 Cal.2d at 720, 394 P.2d at 816 (peyote is "found in the Rio Grande Valley of Texas and northern Mexico"). Peyote simply is not a popular drug; its distribution for use in religious rituals has nothing to do with the vast and violent 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 exemption 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 risking a violation of the Establishment Clause by arbitrarily limiting its religious exemptions. This **[p917]** argument, however, could be made in almost any free exercise case. *See* Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv.L.Rev. 933, 947 (1989) ("Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe"). This Court, however, consistently has rejected similar arguments in past free exercise cases, and it should do so here as well. *See Frazee v. Illinois Dept. of Employment Security*, **489 U.S. 829**, 835 (1989) (rejecting State's speculation concerning cumulative effect of many similar claims); *Thomas*, 450 U.S. at 719 (same); *Sherbert*, 374 U.S. at 407.

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.[n8] Allowing an exemption for religious peyote use **[p918]** 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. *See, e.g., Olsen*, 279 U.S.App.D.C., at 7, 878 F.2d at 1464 ("the Ethiopian Zion Coptic Church . . . teaches that marijuana is properly smoked 'continually all day'"). Some religious claims, *see* n. 8, *supra*, 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. [n9] 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, and not favor one over another, 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*, 406 U.S. at 236; this does not mean that an exemption limited to peyote use is tantamount to an establishment of religion. *See Hobbie v. Unemployment Appeals Comm'n of Fla.*, **480 U.S. 136**, 144-145 (1987) ("the government may (and **[p919]** sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause"); *Yoder*, 406 U.S. at 220-221 ("Court must not ignore the danger that an exception from a general [law] . . . may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise"); *id.* at 234, n. 22.

III

Finally, although I agree with Justice O'CONNOR that courts should refrain from delving into questions of whether, as a matter of religious doctrine, a particular practice is "central" to the religion, *ante* at 906-907, 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. *Cf. Yoder*, 406 U.S. at 219 (since "education is inseparable from and a part of the basic tenets of their religion . . . [just as] baptism, the confessional, or a sabbath may be for others," enforcement of State's compulsory education law would "gravely endanger if not destroy the free exercise of respondents' religious beliefs").

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. *See* Brief for Association on American Indian Affairs, *et al.*, as *Amici Curiae* 5-6 ("To the members, peyote is consecrated with powers to heal body, mind and spirit. It is a teacher; it teaches the way to spiritual life through living in harmony and balance with the forces of the Creation. The rituals are an integral part of the life process. They embody a form of worship in which the sacrament Peyote is the means for communicating with the Great Spirit"). *See also* Stewart, Peyote Religion at 327-330 (description of peyote ritual); **[p920]** T. Hillerman, People of Darkness 153 (1980) (description of Navajo peyote ritual).

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*, 406 U.S. at 218. This potentially devastating impact must be viewed in 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, 92 Stat. 469, **42 U.S.C. § 1996** ("it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites").[n10] 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 **[p921]** the rites of the religion, they are necessary to the cultural integrity of the tribe, and, therefore, religious survival.

H.R.Rep. No. 95-1308, p. 2 (1978), U.S.Code Cong. & Admin.News 1978, pp. 1262, 1263.

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.

IV

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," *see ante* at 874, 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.

I dissent.

1. See Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) ("The 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"); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987) (state laws burdening religions "must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest"); Bowen v. Roy, 476 U.S. 693, 732 (1986) (O'CONNOR, J., concurring in part and dissenting in part) ("Our precedents have long required the Government to show that a compelling state interest is served by its refusal to grant a religious exemption"); United States v. Lee, 455 U.S. 252, 257-258 (1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest"); Thomas v. Review Bd of Indiana Security Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (question is "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right").

2. I reluctantly agree that, in light of this Court's decision in Employment Division v. Smith, 485 U.S. 660 (1988), the question on which certiorari was granted is properly presented in this case. I have grave doubts, however, 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 criminal prohibition of peyote use.

3. The only reported case in which the State of Oregon has sought to prosecute a person for religious peyote use is State v. Soto, 21 Ore.App. 794, 537 P.2d 142 (1975), cert. denied, 424 U.S. 955 (1976).

4. 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.

5. See 21 CFR § 1307.31 (1989) ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law"); see Olsen v. Drug Enforcement Admin., 279 U.S.App.D.C. 1, 6-7, 878 F.2d 1458, 1463-1464 (1989) (explaining DEA's rationale for the exception).

Moreover, 23 States, including many that have significant Native American populations, have statutory or judicially crafted exemptions in their drug laws for religious use of peyote. *See Smith v. Employment Division*, 307 Ore. 68, 73, n. 2, 763 P.2d 146, 148, n. 2 (1988). Although this does not prove that Oregon must have such an exception too, it is significant that these States, and the Federal Government, all find their (presumably compelling) interests in controlling the use of dangerous drugs compatible with an exemption for religious use of peyote. *Cf. Boos v. Barry*, **485 U.S. 312**, 329 (1988) (finding that an ordinance restricting picketing near a foreign embassy was not the least restrictive means of serving the asserted government interest; existence of an analogous, but more narrowly drawn, federal statute showed that "a less restrictive alternative is readily available").

6. 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. See National Prohibition Act, Title II, § 3, 41 Stat. 308. 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.

7. The use of peyote is, to some degree, self-limiting. The peyote plant is extremely bitter, and eating it is an unpleasant experience, which would tend to discourage casual or recreational use. See State v. Whittingham, 19 Ariz.App. 27, 30, 504 P.2d 950, 953 (1973) ("peyote can cause vomiting by reason of its bitter taste"); E. Anderson, Peyote: The Divine Cactus 161 (1980) ("[T]he eating of peyote usually is a difficult ordeal in that nausea and other unpleasant physical

manifestations occur regularly. Repeated use is likely, therefore, only if one is a serious researcher or is devoutly involved in taking peyote as part of a religious ceremony"); Slotkin, The Peyote Way at 98 ("many find it bitter, inducing indigestion or nausea").

8. 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. See, e.g., Olsen v. Iowa, 808 F.2d 652 (CA8 1986) (marijuana use by Ethiopian Zion Coptic Church); United States v. Rush, 738 F.2d 497 (CA1 1984), cert. denied, 470 U.S. 1004 (1985) (same); United States v. Middleton, 690 F.2d 820 (CA11 1982), cert. denied, 460 U.S. 1051 (1983) (same); United States v. Hudson, 431 F.2d 468 (CA5 1970), cert. denied, 400 U.S. 1011 (1971) (marijuana and heroin use by Moslems); Leary v. United States, 383 F.2d 851 (CA5 1967), rev'd on other grounds, 395 U.S. 6 (1969) (marijuana use by Hindu); Commonwealth v. Nissenbaum, 404 Mass. 575, 536 N.E.2d 592 (1989) (marijuana use by Ethiopian Zion Coptic Church); State v. Blake, 5 Haw.App. 411, 695 P.2d 336 (1985) (marijuana use in practice of Hindu Tantrism); Whyte v. United States, 471 A.2d 1018 (D.C.App.1984) (marijuana use by Rastafarian); State v. Rocheleau, 142 Vt. 61, 451 A.2d 1144 (1982) (marijuana use by Tantric Buddhist); State v. Brashear, 92 N.M. 622, 593 P.2d 63 (1979) (marijuana use by nondenominational Christian); State v. Randall, 540 S.W.2d 156 (Mo.App.1976) (marijuana, LSD, and hashish use by Aquarian Brotherhood Church). See generally Annotation, Free Exercise of Religion as Defense to Prosecution for Narcotic or Psychedelic Drug Offense, 35 A.L.R.3d 939 (1971 and Supp.1989).

9. Thus, this case is distinguishable from United States v. Lee, 455 U.S. 252 (1982), in which the Court concluded that there was "no principled way" to distinguish other exemption claims, and the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." 455 U.S. at 260.

10. See Report to Congress on American Indian Religious Freedom Act of 1978, pp. 1-8 (1979) (history of religious persecution); Barsh, The Illusion of Religious Freedom for Indigenous Americans, 65 Ore.L.Rev. 363, 369-374 (1986).

Indeed, Oregon's attitude toward respondents' religious peyote use harkens back to the repressive federal policies pursued a century ago:

In the government's view, traditional practices were not only morally degrading, but unhealthy. "Indians are fond of gatherings of every description," a 1913 public health study complained, advocating the restriction of dances and "sings" to stem contagious diseases. In 1921, the Commissioner of Indian Affairs, Charles Burke, reminded his staff to punish any Indian engaged in

any dance which involves . . . the reckless giving away of property . . . frequent or prolonged periods of celebration . . . in fact, any disorderly or plainly excessive performance that promotes superstitious cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare.

Two years later, he forbade Indians under the age of 50 from participating in any dances of any kind, and directed federal employees "to educate public opinion" against them.

Id. at 370-371 (footnotes omitted).

Religious Freedom

Restoration Act of 1993

Public Law 103-141

November 16, 1993

103rd Congress

H.R.130

An Act

To protect the free exercise of religion.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. Short Title.

This Act may be cited as the 'Religious Freedom Restoration Act of 1993'.

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 unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes: The purposes of this 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. Attorney's Fees.

(a) Judicial Proceedings: Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting 'the Religious Freedom Restoration Act of 1993,' before 'or title VI of the Civil Rights Act of 1964'.

(b) Administrative Proceedings: Section 504(b)(1)(C) of title 5, United States Code, is amended--

(1) by striking 'and' at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting ', and'; and

(3) by inserting '(iv) the Religious Freedom Restoration Act of 1993;' after clause (iii).

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.

Religous Freedom Restoration Act Declared Unconstitutional!

The United States Supreme Court declared the Religious Freedom Restoration Act to be unconstitution in a 6 to 3 decision on June 25, 1997 in the case of *City of Boerne, Texas v. Flores.*

CHURCH OF LUKUMI BABALU AYE v. CITY OF HIALEAH, 508 U.S. 520 (1993)

508 U.S. 520

CHURCH OF LUKUMI BABALU AYE, INC. v. CITY OF HIALEAH
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
No. 91-948

Argued November 4, 1992
Decided June 11, 1993

Petitioner church and its congregants practice the Santeria religion, which employs animal sacrifice as one of its principal forms of devotion. The animals are killed by cutting their carotid arteries, and are cooked and eaten following all Santeria rituals except healing and death rites. After the church leased land in respondent city and announced plans to establish a house of worship and other facilities there, the city council held an emergency public session and passed, among other enactments Resolution 87-66, which noted city residents' "concern" over religious practices inconsistent with public morals, peace, or safety, and declared the city's "commitment" to prohibiting such practices; Ordinance 87-40, which incorporates the Florida animal cruelty laws and broadly punishes "[w]hoever . . . unnecessarily or cruelly . . . kills any animal," and has been interpreted to reach killings for religious reasons; Ordinance 87-52, which defines "sacrifice" as "to unnecessarily kill . . . an animal in a . . . ritual . . . not for the primary purpose of food consumption," and prohibits the "possess[ion], sacrifice, or slaughter" of an animal if it is killed in "any type of ritual" and there is an intent to use it for food, but exempts "any licensed [food] establishment" if the killing is otherwise permitted by law; Ordinance 87-71, which prohibits the sacrifice of animals, and defines "sacrifice" in the same manner as Ordinance 87-52; and Ordinance 87-72 which defines "slaughter" as "the killing of animals for food" and prohibits slaughter outside of areas zoned for slaughterhouses, but includes an exemption for "small numbers of hogs and/or cattle" when exempted by state law. Petitioners filed this suit under 42 U.S.C. 1983, alleging violations of their rights under, inter alia, the Free Exercise Clause of the First Amendment. Although acknowledging that the foregoing ordinances are not religiously neutral, the District Court ruled for the city, concluding, among other things, that compelling governmental interests in preventing public health risks and cruelty to animals fully justified the absolute prohibition on ritual sacrifice accomplished by the ordinances, and that an exception to that prohibition for religious conduct would unduly interfere with fulfillment of the governmental interest, because any more narrow restrictions would [508 U.S. 520, 521] be unenforceable as a result of the Santeria religion's secret nature. The Court of Appeals affirmed.

Held:

The judgment is reversed.

936 F.2d 586, (CA 11 1991) reversed.

JUSTICE KENNEDY delivered the opinion of the Court with respect to Parts I, IIA-1, II-A-3, II-B, III, and IV, concluding that the laws in question were enacted contrary to free exercise principles, and they are void. Pp. 531-540, 542-547.

(a) Under the Free Exercise Clause, a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability. Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 . However, where such a law is not neutral or not of general application, it must undergo the most rigorous of scrutiny: it must be justified by a compelling governmental interest, and must be narrowly tailored to advance that interest. Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied. Pp. 531-532.

(b) The ordinances' texts and operation demonstrate that they are not neutral, but have as their object the suppression of Santeria's central element, animal sacrifice. That this religious exercise has been targeted is evidenced by Resolution 87-66's statements of "concern" and "commitment," and by the use of the words "sacrifice" and "ritual" in Ordinances 87-40, 87-52, and 87-71. Moreover, the latter ordinances' various prohibitions, definitions, and exemptions demonstrate that they were "gerrymandered" with care to proscribe religious killings of animals by Santeria church members but to exclude almost all other animal killings. They also suppress much more religious conduct than is necessary to achieve their stated ends. 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, such as general regulations on the disposal of organic garbage, on the care of animals regardless of why they are kept, or on methods of slaughter. Although Ordinance 87-72 appears to apply to substantial nonreligious conduct and not to be overbroad, it must also be invalidated because it functions in tandem with the other ordinances to suppress Santeria religious worship. Pp. 533-540.

(c) Each of the ordinances pursues the city's governmental interests only against conduct motivated by religious belief, and thereby violates the requirement that laws burdening religious practice must be of general applicability. Ordinances 87-40, 87-52, and 87-71 are substantially under inclusive with regard to the city's interest in preventing cruelty [508 U.S. 520, 522] to animals, since they are drafted with care to forbid few animal killings but those occasioned by religious sacrifice, while many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. The city's assertions that it is "self-evident" that killing for food is "important," that the eradication of insects and pests is "obviously justified," and that euthanasia of excess animals "makes sense" do not explain why religion alone must bear the burden of the ordinances. These ordinances are also substantially underinclusive with regard to the city's public health interests in preventing the disposal of animal carcasses in open public places and the consumption of uninspected meat, since neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. Ordinance 87-72 is underinclusive on its face, since it does not regulate nonreligious slaughter for food in like manner, and respondent has not explained why the commercial slaughter of "small numbers" of cattle and hogs does not implicate its professed desire to prevent cruelty to animals and preserve the public health. Pp. 542-546.

(d) The ordinances cannot withstand the strict scrutiny that is required upon their failure to meet the Smith standard. They are not narrowly tailored to accomplish the asserted governmental interests. All four are overbroad or underinclusive in substantial respects because 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. Moreover, where, as here, government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the governmental interests given in justification of the restriction cannot be regarded as compelling. Pp. 546-547.

KENNEDY, J., delivered the opinion of the Court with respect to Parts I, III, and IV, in which REHNQUIST, C.J., and WHITE, STEVENS, SCALIA, SOUTER, and THOMAS, JJ., joined, the opinion of the Court with respect to Part II-B, in which REHNQUIST, C.J., and WHITE, STEVENS, SCALIA, and THOMAS, JJ., joined, the opinion of the Court with respect to Parts II-A-1 and II-A-3, in which REHNQUIST, C.J., and STEVENS, SCALIA, and THOMAS, JJ., joined, and an opinion with respect to Part II-A-2, in which STEVENS, J., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, C.J., joined, post p. 557. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, post p. 559. BLACKMUN, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, post, p. 577. [508 U.S. 520, 523]

Douglas Laycock argued the cause for petitioners. With him on the briefs were Jeanne Baker, Steven R. Shapiro, and Jorge A. Duarte.

Richard G. Garrett argued the cause for respondent. With him on the brief were Stuart H. Singer and Steven M. Goldsmith. *

[Footnote *] Briefs of amici curiae urging reversal were filed for Americans United for Separation of Church and State et al. by Edward McGlynn Gaffney, Jr., Steven T. McFarland, Bradley P. Jacob, and Michael W. McConnell; for the Council on Religious Freedom by Lee Boothby, Robert W. Nixon, Walter E. Carson, and Rolland Truman; and for the Rutherford Institute by John W. Whitehead.

Briefs of amici curiae urging affirmance were filed for the International Society for Animal Rights et al. by Henry Mark Holzer; for People for the Ethical Treatment of Animals et al. by Gary L. Francione; and for the Washington Humane Society by E. Edward Bruce.

Briefs of amici curiae were filed for the United States Catholic Conference by Mark E. Chopko and John A. Liekweg; for the Humane Society of the United States et al. by Peter Buscemi, Maureen Beyers, Roger A. Kindler, and Eugene Underwood, Jr.; for the Institute for Animal Rights Law et al. by Henry Mark Holzer; and for the National Jewish Commission on Law and Public Affairs by Nathan Lewin and Dennis Rapps.