# NEUTRAL LAWS, INCIDENTAL EFFECTS, AND THE REGULATION OF RELIGION AND SPEECH*

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Religious liberty is a cornerstone of the American constitutional system. The degree to which we, as a society, are willing or unwilling to tolerate and accommodate religious diversity reflects our commitment to religious freedom. That commitment, however, becomes more and more difficult to sustain in a society that is increasingly heterogeneous and is continually confronting unfamiliar and unorthodox religious expression and practices.[1]

The constitutional commitment to religious liberty is similar to the constitutional commitment to free speech. In both instances, the Constitution

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* This is the second in a planned three-part series of articles comparing the doctrine of the free speech clause and the religion clauses of the first amendment. The first, Kohler, *Of Flags and Menorahs: The Power of Individual and Governmental Symbolic Speech*, 23 AKRON L. REV. 371 (1990), compares the regulation of symbolic speech of individuals and the use of religious symbols by government. The third article, which is presently in preparation, will address the associational rights under the first amendment of political and religious organizations.

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1. *See, e.g.*, Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1469-71 (S.D. Fla. 1989) (animal sacrifice by Lukumi religion).

requires tolerance of views and beliefs that may be unfamiliar to the majority of the population.[2] In addition, an overlap exists in the constitutional protection of speech and religion. For example, the free speech clause[3] protects the speaker whose message is religious as well as the speaker whose message is political. The religious speaker, however, would also be protected by the free exercise clause.[4] Yet, the free exercise clause protection extends beyond religious speech; it also encompasses religiously motivated conduct that would not be protected as expression under the free speech clause. Thus, two individuals—one motivated by religious belief and another motivated by political conviction—who are both involved in the same course of conduct may be treated differently under the Constitution.

This dichotomy presents an important, unanswered question: *Why is religion special?* The Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*[5] considers this question. In *Smith*, the Court held that a state may, consistent with the free exercise clause, prohibit the religious use of peyote, an hallucinogenic drug, and could accordingly deny unemployment benefits to persons fired for taking peyote.[6] Upholding the state's action, the Court dramatically departed from established free exercise clause doctrine. Ironically, the analysis embraced by the *Smith* Court echoes the standards developed under the free speech clause.

This Article answers why religion is special, and concurrently addresses the *Smith* Court's analytical shift and its potential impact on the constitutional protection of nonmainstream religions. The Article begins with an historical overview of the free exercise clause doctrine, identifying the origin of the *Smith* rationale and its conflict with previous free exercise cases. Next, the Article compares the *Smith* rationale to the rationale in free speech cases and assesses the propriety of their merger. It also addresses the need for special scrutiny of free exercise claims. Finally, the Article concludes *Smith* is an ill-chosen turn from the path of previously accepted doctrine.

## I. From Polygamy to Peyote: The Wandering Course of the Free Exercise Clause

The evolution of the free exercise doctrine has not been consistent. Initially, the free exercise clause was restrictive, granting absolute protection to beliefs, but little protection to actions based on those beliefs. Modern cases, however, give broader protection to religious conduct. Courts balance the

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2. *See generally* L. Bollinger, The Tolerant Society (1986).

3. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

4. *Id.* ("Congress shall make no law . . . prohibiting the free exercise [of religion]").

5. Employment Div., Dept. of Human Resources v. Smith, 110 S. Ct. 1595 (1990).

6. *Id.* at 1606.

claimant's right to religious exercise against the government's interest in regulating such conduct. In *Smith*, the Supreme Court again altered the course of the free exercise clause.

### A. *The Belief-Action Dichotomy*

In the Supreme Court's first free exercise case, *Reynolds v. United States*,[7] the Court upheld a federal conviction of a Morman for polygamy.[8] Reynolds was a professed member of the Church of Jesus Christ of the Latter-Day Saints, commonly known as the Morman Church.[9] He believed that, through a revelation to Joseph Smith, the founder and prophet of the Morman Church, God had directed men to practice polygamy and that the punishment for failure to do so was "damnation in the life to come."[10]

In an opinion written by Chief Justice Waite, the Court distinguished between the government's power to regulate belief and its power to regulate conduct. The Court held that through the first amendment "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[11] Thus, one could harbor the belief that polygamy was a divinely ordained marital arrangement, but could not practice that belief without fear of prosecution.[12]

The Court justified the belief-action distinction on two bases. First, it noted government can prohibit human sacrifice, even if it is part of religious worship, or prevent a wife from burning herself to death on her husband's funeral pyre, despite her belief it is her religious duty to do so.[13] By implication, if the government has the power to proscribe religious murder or suicide, it should have the power to regulate other religiously motivated conduct, including polygamy.[14] Second, the Court suggested that permitting a person to excuse otherwise criminal conduct on the basis of his religious beliefs would "make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself."[15] In other words, if every religious cult could avoid the law by merely asserting a religious belief to justify prohibited conduct, the structure of government would crumble.[16]

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

8. The offense took place in the Territory of Utah, which, as a territory, was under federal jurisdiction at the time. For a discussion of the persecution of the Mormans and their practice of polygamy, *see infra* notes 166-83 and accompanying text.

9. Reynolds v. United States, 98 U.S. at 161.

10. *Id.*

11. *Id.* at 164.

12. *Id.* at 166.

13. *Id.*; *see also* Davis v. Beason, 133 U.S. 333, 343 (1890).

14. Reynolds v. United States, 98 U.S. at 166.

15. *Id.* at 167.

16. As the Supreme Court later stated in *Davis v. Beason*, in which the Court reaffirmed

The belief-action dichotomy of *Reynolds* did not remain unaltered. As early as 1940 in *Cantwell v. Connecticut*,[17] the Supreme Court modified the distinction. The first amendment, the *Cantwell* Court stated, "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."[18] Thus, as *Reynolds* held, although government cannot compel belief in any creed, it nevertheless can regulate conduct "for the protection of society."[19] Unlike *Reynolds*, however, the Court in *Cantwell* expressly concluded regulation of conduct must not "unduly infringe" the freedom to act.[20] Government could not, consistent with the free exercise clause, regulate all conduct unmindful of the religious basis for such conduct.[21] However, the *Cantwell* Court provided little direction for determining when governmental regulation of religious conduct is permitted or proscribed by the free exercise clause.

### B. *The Genesis of "Incidental Effects"*

The belief-action dichotomy, as modified in *Cantwell*, proved of little significance in deciding cases. Government has seldom attempted to coerce profession of a belief.[22] The more difficult case arises when government prohibits or burdens religiously motivated conduct.

The Supreme Court addressed this question in *Braunfeld v. Brown*,[23] a 1961 case that upheld Sunday closing laws under the free exercise clause.[24]

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the holding of *Reynolds*, the first amendment did not protect

> against legislation for the punishment of acts inimical to the peace, good order and morals of society. . . . However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. Davis v. Beason, 133 U.S. at 342-43.

17. Cantwell v. Connecticut, 310 U.S. 296 (1940). *Cantwell* made the free exercise clause applicable to the states via the due process clause of the fourteenth amendment. *Id.* at 303. Prior to the enactment of the fourteenth amendment, the free exercise clause was construed to extend only to the federal government. Permoli v. First Municipality, 44 U.S. (3 How.) 588, 609 (1845).

18. Cantwell v. Connecticut, 310 U.S. at 303-04.

19. *Id.* at 304; *see also* Jacobson v. Massachusetts, 197 U.S. 11, 37-38 (1905).

20. Cantwell v. Connecticut, 310 U.S. at 304.

21. *Id.*

22. *See, e.g.*, Torasco v. Watkins, 367 U.S. 488 (1961) (declaration of belief in existence of God required for holding public office); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (flag salute); Owens v. Kelley, 681 F.2d 1362 (11th Cir. 1982) (condition of probation requiring adoption of religion); Tirmenstein v. Allain, 607 F. Supp. 1145 (S.D. Miss. 1985) (declaration of belief in existence of a Supreme Being required for holding public office).

23. Braunfeld v. Brown, 366 U.S. 599 (1961).

24. *Id.* at 601. The companion cases to *Braunfeld* rejected challenges under the establishment, due process, and equal protection clauses. McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); Gallagher v. Crown Kosher Super Market, Inc., 366 U.S. 617 (1961). The Supreme Court had previously upheld Sunday closing laws. *See* Petit v. Minnesota, 177 U.S. 164, 165 (1900); Hennington v. Georgia,

Several small merchants, all Orthodox Jews, challenged a Pennsylvania criminal statute prohibiting retail sale of certain commodities on Sundays.[25] Their religious beliefs required they abstain from all work from sunset Friday to sunset Saturday in observance of the Jewish Sabbath.[26] They claimed that, because they were forced to close their businesses Saturday—because of their religious beliefs—and Sunday—by force of law—their ability to earn a livelihood was seriously threatened.[27]

In a plurality opinion by Chief Justice Warren, the Supreme Court rejected the free exercise claim.[28] The Court emphasized the Sunday closing law did not criminalize a religious practice.[29] Instead, it merely prohibited a secular activity—retail sales on Sunday.[30] This prohibition had the incidental effect of making observance of the Jewish Sabbath more expensive than it would be absent the statute.[31] Merely making a religious practice more expensive, the Court suggested, did not offend the Constitution.[32] Many valid laws, according to the Court, could result in an economic disadvantage to some religions but not others.[33]

The Court determined a statute that merely imposes an "indirect burden" on religious exercise—that is, "legislation which does not make unlawful the religious practice itself"[34]—is valid as long as (1) the statute's purpose is not to discriminate invidiously between religions, and (2) the statute's secular purpose cannot be secured by a means that does not impose the burden.[35] In this case, the Court reasoned an exemption for Orthodox Jews could impair the state's interest in providing a single day of rest.[36] Such an exemption could (1) make enforcement of the Sunday closing law more difficult; (2) give those exempted an economic advantage over non-Sabbatarians; and (3) require those exempted to hire only Sabbatarians in violation of antidiscrimination laws.[37]

*Braunfeld* therefore stated a relatively deferential standard. As long as the challenged statute did not directly criminalize a religious practice or dis-

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163 U.S. 299, 304-07 (1896); Soon Hing v. Crowley, 113 U.S. 703, 710 (1885); *see also* Ex Parte Newman, 9 Cal. 502, 519-28 (1858) (Field, J., dissenting).

25. Braunfeld v. Brown, 366 U.S. at 601.
26. *Id.*
27. *Id.* at 600-01, 610-11.
28. *Id.* at 609.
29. *Id.* at 605.
30. *Id.*
31. *Id.*; *accord* McGowan v. Maryland, 366 U.S. 420, 521 (1961) (Frankfurter, J., concurring).
32. Braunfeld v. Brown, 366 U.S. at 606.
33. *Id.*
34. *Id.*
35. *Id.* at 606-07.
36. *Id.* at 608.
37. *Id.* at 608-09; *accord* McGowan v. Maryland, 366 U.S. 420, 515-16 (1916) (Frankfurter, J., concurring).

criminate between religions,[38] the free exercise clause was not implicated. Although the *Braunfeld* test imposed a "least restrictive alternative" requirement, the requirement was not difficult to meet. Indeed, in his dissenting opinion, Justice Brennan described the difficulties presented by an exemption to Sunday closing laws for Sabbatarians as "more fanciful than real," and stated the Court had "exalted administrative convenience to a constitutional level."[39] *Braunfeld* gave the free exercise clause a very limited reach, leaving a "cruel choice" for the Orthodox Jew "between his religious faith and his economic survival."[40]

### C. *The "Anomalous" Compelling Interest Standard*

Two short years after *Braunfeld*, the Supreme Court took a sharply different position. In *Sherbert v. Verner*,[41] South Carolina denied unemployment benefits to a Seventh-Day Adventist who was fired from her job because she would not work on Saturday, her Sabbath.[42] In an opinion by Justice Brennan, who dissented in *Braunfeld*, the Court noted disqualification of the Sabbatarian "[i]n a sense . . . may be only an indirect result of welfare legislation within the State's general competence to enact," and no criminal penalties attached to compel the Sabbatarian to work on Saturdays.[43] Nevertheless, the Court held the choice presented to the Sabbatarian between fidelity to her belief and the receipt of benefits was the same burden on religious exercise as a criminal fine on Saturday worship.[44]

The situation faced by the Seventh-Day Adventist in *Sherbert* appears similar to that of the Orthodox Jews in *Braunfeld*. In both, the state made observance of the Saturday Sabbath more expensive without criminalizing Saturday worship. In *Sherbert*, both Justice Stewart, in a separate concurrence, and Justice Harlan, in dissent, stated the majority's opinion was inconsistent with and implicitly overruled *Braunfeld*.[45] The majority distinguished *Braunfeld* on the ground that South Carolina discriminated against Sabbatarians, removing the case from application of *Braunfeld*'s deferential standard.[46] Thus, the Court stated Sherbert's "declared ineligibility for benefits derives solely from the practice of her religion."[47] Moreover, the Court noted the exemption provided for Sunday worshippers under South Caro-

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38. *See* Fowler v. Rhode Island, 345 U.S. 67, 70 (1953); Niemotko v. Maryland, 340 U.S. 268, 272 (1951); Murdock v. Pennsylvania, 319 U.S. 105, 112-13 (1943).
39. Braunfeld v. Brown, 366 U.S. at 615 (Brennan, J., dissenting).
40. *Id.* at 616 (Stewart, J., dissenting).
41. Sherbert v. Verner, 374 U.S. 398 (1963).
42. *Id.* at 399-401.
43. *Id.* at 403.
44. *Id.* at 404.
45. *Id.* at 417 (Stewart, J., concurring); *id.* at 421 (Harlan, J., dissenting).
46. *See supra* notes 35, 38 and accompanying text.
47. Sherbert v. Verner, 374 U.S. at 404.

lina law.[48] Although the discriminatory effect of South Carolina's unemployment benefits scheme is a thin reed to distinguish *Braunfeld*, the essential thrust of the Court's opinion goes further. The basic constitutional infirmity, according to the Court, was not discrimination against Sabbatarians, but the coercive burden placed on Sabbatarians between their religious beliefs and unemployment benefits.[49] It is difficult, however, to see how the economic burden in *Braunfeld* is any "less direct" than the loss of such benefits.[50]

As important as the relationship between *Sherbert* and *Braunfeld* in terms of *stare decisis* was the new standard of judicial scrutiny announced in *Sherbert*. The Court required the state show not just a "rational relationship to some colorable state interest," but rather that the burden on free exercise was justified by a "compelling state interest."[51] Applying this standard, the Court held the asserted interests—avoiding fraudulent claims that would dilute the compensation fund and easing the scheduling of Saturday workers by employers—did not justify the burden created by denying benefits to Sabbatarians.[52] *Sherbert* thus created the potential for taking the Court's free exercise doctrine in a different direction than that articulated in *Braunfeld*.

The Court appeared to follow *Sherbert*'s lead in its next major free exercise clause decision, *Wisconsin v. Yoder*.[53] In *Yoder*, members of the Amish faith challenged Wisconsin's compulsory school attendance law.[54] They claimed mandatory school attendance after the eighth grade threatened their way of life and their own salvation as well as that of their children.[55] The Amish objected to formal education past the eighth grade because it exposed their children to "worldly" influences contrary to Amish beliefs, which emphasize informal learning, community welfare, and separation from the outside world.[56]

The Court held only "those interests of the *highest order*" could outweigh a burden on the free exercise of religion.[57] Although a state has a great interest in universal compulsory education, the Court rejected the as-

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48. *Id.* at 406.

49. *Id.* at 404; *see* Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829, 832 (1989); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141 (1987); Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 717-18 (1981).

50. *See* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1322 (1970) (criticizing *Sherbert* as incompatible with *Braunfeld*); Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115, 1139 (1973) (suggesting it is impossible to reconcile *Sherbert* and *Braunfeld*).

51. Sherbert v. Verner, 374 U.S. at 406.

52. *Id.* at 407.

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

54. *Id.* at 207.

55. *Id.* at 209.

56. *Id.* at 211.

57. *Id.* at 215.

sertion that the interest in compelling Amish children to go to school beyond the eighth grade outweighed the "very real threat of undermining the Amish community and religious practice as they exist today."[58] The choice presented to the Amish by the school attendance statute was either move to a more tolerant region or give up their way of life.[59] The Court ruled this was an unconstitutional choice.[60] In so holding, the Court reaffirmed *Sherbert's* heightened standard of judicial scrutiny for free exercise cases.[61] Moreover, *Yoder* emphasized that the standard applied to neutral regulations of general applicability if their application impairs religious exercise.[62]

With *Yoder*, the compelling interest standard appeared firmly in place. Indeed, on three separate occasions from 1981 to 1989, the Supreme Court reaffirmed *Sherbert's* precise holding using the compelling interest standard.[63] The application of the standard in other cases, however, was not always uniform.[64]

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58. *Id.* at 218. In rejecting the state's interest in compulsory education, the Court placed great emphasis on the Amish's "excellent record as law-abiding and generally self-sufficient members of society." *Id.* at 212-13; *see also id.* at 222-25, 235-36. As H. C. Macgill has gruffly remarked, the Court

> stacked the deck firmly against any other marginal, religious community by emphasizing the relative antiquity of the Old Order Amish, their clean police blotter, and their work ethic (none of which ought [to] have any bearing on their constitutional claim, as Justice Douglas pointed out). Their drunkenness and rate of defection were glossed over. Their farm training was made to appear adequate preparation for modern life, though now the farmer who does not have a $500,000 line of credit is indeed doomed to marginality and extinction. As a case, *Yoder* is merely a crumb of free exercise from the Establishment's table—a trivial concession made in the spirit of *noblesse oblige*.

Macgill, *Introduction: In the Teeth of the Master Trend*, 21 CONN. L. REV. 849, 853-54 (1989); *see also* Wisconsin v. Yoder, 406 U.S. at 246 (Douglas, J., dissenting in part); Tushnet, *"Of Church and State and the Supreme Court:" Kurland Revisited*, 1989 SUP. CT. REV. 373, 382 ("It is not unfair to read [*Yoder*'s emphasis on the Amish record] as saying that the claims of the Amish prevailed because they were a 'good' religion.").

59. Wisconsin v. Yoder, 406 U.S. at 218.

60. *Id.* at 221-22.

61. *Id.*

62. *Id.* at 220.

63. *See* Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829, 835 (1989); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981); *see also* Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) (tax laws); Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 303-04 (1985) (minimum wage laws).

64. Two particular areas exempted from the heightened scrutiny of the compelling interest standard are the military and prisons. Extreme deference is given to military decisions that implicate religious practices. Goldman v. Weinberger, 475 U.S. 503, 507-10 (1986); *see also* Gillette v. United States, 401 U.S. 437, 463 (1971) (Douglas, J., dissenting). Similarly, prison regulations that impair religious exercise violate the free exercise clause only if they are not reasonably related to a legitimate penological interest. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987). *Compare* Benjamin v. Coughlin, 905 F.2d 571 (2d Cir. 1990) (finding free exercise violation); Whitney v. Brown, 882 F.2d 1068, 1076-77 (6th Cir. 1989) (same); Barrett v. Virginia, 689

In *United States v. Lee*,[65] the Amish were again before the Supreme Court. A member of an Amish community, who employed other Amish workers on his farm and in his carpentry shop, sought an exemption under the free exercise clause from the requirement that employers file and pay social security tax for their employees.[66] He claimed both payment and receipt of social security benefits violated Amish religious beliefs.[67] The Court nevertheless held the government interest in a nationwide, mandatory social security system was overriding.[68] It further held that granting exemptions to the Amish and other groups on the basis of their religious objections to a tax system would seriously undermine the system's ability to function.[69] The majority thus rejected the free exercise claim under the same compelling interest standard.

In a concurring opinion, Justice Stevens challenged whether the majority had in fact used that standard.[70] He suggested the Court overstated the danger of an exemption from the social security system for a small religious community with its own established welfare system.[71] He further suggested that, in the case of neutral laws of general application, application of the compelling interest standard would place "an almost insurmountable burden" on the claimant to demonstrate the need for an exemption.[72] Justice Stevens distinguished laws "intended to provide a benefit to a limited class of otherwise disadvantaged persons," such as unemployment compensation schemes from "neutral laws of general applicability," such as the tax laws.[73] A religious exemption from the latter is "a grant of favored treatment for members of a religious sect," while conferring benefits under the former to a person forced to leave a job because of her religious beliefs is merely ensuring equal treatment with others forced to give up their jobs.[74] Though he

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F.2d 498, 501-02 (4th Cir. 1982) (same) *with* Standing Deer v. Carlson, 831 F.2d 1525, 1528-30 (9th Cir. 1987) (no free exercise violation); Hadi v. Horn, 830 F.2d 779, 784-88 (7th Cir. 1987) (same); Allen v. Toombs, 827 F.2d 563, 566-67 (9th Cir. 1987) (same); Dettmer v. Landon, 799 F.2d 929, 933-34 (4th Cir. 1986) (same), *cert. denied*, 483 U.S. 1007 (1987); Cole v. Flick, 758 F.2d 124, 131 (3d Cir.) (same), *cert. denied*, 474 U.S. 921 (1985); Childs v. Duckworth, 705 F.2d 915, 921 (7th Cir. 1983) (same). *See generally* Note, *Judicial Review and Soldiers' Rights: Is the Principle of Deference a Standard of Review?*, 17 HOFSTRA L. REV. 465 (1989); Note, *The "Core"-"Periphery" Dichotomy in First Amendment Free Exercise Clause Doctrine: Goldman v. Weinberger, Bowen v. Roy, and O'Lone v. Estate of Shabazz*, 72 CORNELL L. REV. 827 (1987).

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

66. *Id.* at 254-55.

67. *Id.* at 257. Congress had provided an exemption from social security taxes for self-employed Amish and other religious groups with similar beliefs. *See* 26 U.S.C. § 1402(g) (1988).

68. United States v. Lee, 455 U.S. at 258-59.

69. *Id.* at 260.

70. *Id.* at 262 (Stevens, J., concurring).

71. *Id.* (Stevens, J., concurring).

72. *Id.* at 262 n.3 (Stevens, J., concurring).

73. *Id.* at 263 n.3 (Stevens, J., concurring).

74. *Id.* at 264 n.3 (Stevens, J., concurring).

spoke only for himself, Justice Stevens nevertheless exposed a crack in the compelling interest standard's foundation. That crack soon became a major fissure.

In the 1986 case of *Bowen v. Roy*,[75] the compelling interest standard sustained its first significant assault. In *Roy*, the parents of a girl named Little Bird of the Snow sought an exemption from the requirement they furnish state agencies with their daughter's social security number before they could receive welfare benefits.[76] They asserted it was their religious belief as Native Americans that using a social security number would "rob the spirit" of Little Bird of the Snow.[77]

A majority of the Court agreed an individual cannot require the government to conduct its internal affairs in a manner dictated by that person's religious beliefs.[78] Thus, the government is free to use a social security number in its internal administration of welfare programs despite any religious objection.[79] However, the Court split over the issue of whether the Roys could be required to furnish Little Bird of the Snow's social security number in order to receive welfare benefits.

Writing for himself, Justice Rehnquist, and Justice Powell, Chief Justice Burger stated the compelling interest standard should not apply to neutral government regulations of general applicability.[80] Instead, "[a]bsent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."[81] The Chief Justice's proposed reasonableness standard reflected a plea to return to the path taken by *Braunfeld* but from which the Court had departed in *Sherbert*.

Five other justices opined that *Sherbert* controlled this issue.[82] In her

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

76. *Id.* at 695.

77. *Id.* at 695-97.

78. *Id.* at 699.

79. *Id.* at 699-700. The rule that an individual claimant may not compel the government to act in its internal affairs in a manner dictated by the claimant's religious beliefs was extended to government land use. In Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988), the Court held a government decision to construct a road and permitting timber harvesting in a national forest in an area that has traditionally been used for religious purposes by Native Americans did not violate the free exercise clause. Justice O'Connor, writing for the majority, stated the case was indistinguishable from the first issue in *Roy*. *Id.* at 499. She found the compelling interest standard does not apply to instances in which the "incidental effects of government programs . . . have no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* at 450; *see infra* notes 186-90, 203-04 and accompanying text.

80. Bowen v. Roy, 476 U.S. at 707-08.

81. *Id.*

82. Justice Blackmun wrote a concurring opinion in which he concluded the case must be

separate opinion, Justice O'Connor stated that:

> [o]nce it has been shown that a governmental regulation burdens the free exercise of religion, . . . [o]nly an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.[83]

Applying this heightened standard to the Roys' claim, Justice O'Connor found the asserted government interest in administrative efficiency lacking. "[A]dministrative inconvenience is not alone sufficient to justify a burden on free exercise unless it creates problems of substantial magnitude."[84] Thus, despite the challenge to its application by at least three members of the Court, *Sherbert*'s compelling interest standard remained the controlling analysis.

### D. Smith *and the Return to Incidental Effects*

Before the Supreme Court heard *Employment Division, Department of Human Resources v. Smith*,[85] the Court's free exercise doctrine included two incompatible lines of cases. *Reynolds* and *Braunfeld* set forth a relatively deferential standard of review. *Sherbert* and its progeny established the stringent compelling interest standard. Although the latter had come under some attack, it was the prevailing standard until the *Smith* decision. *Smith* toppled *Sherbert*, making the *Reynolds-Braunfeld* line dominant.

In *Smith*, two Oregon members of the Native American Church who were employees of a private drug rehabilitation organization were discharged from their jobs for ingesting peyote during a religious ceremony.[86] Peyote is a hallucinogenic drug used for sacramental purposes by the Native American Church.[87] Oregon law lists peyote as a controlled substance, pro-

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remanded for further development of the record on the second issue, but stated that if he were to decide the issue, *Sherbert* would control. *Id.* at 713-16 (Blackmun, J., concurring in part). Justice White dissented on the ground that *Sherbert* controlled both issues. *Id.* at 733 (White, J., dissenting). In an opinion joined by Justices Brennan and Marshall, Justice O'Connor concluded *Sherbert* controlled the second issue. *Id.* at 728-32 (O'Connor, J., concurring in part, dissenting in part). Finally, Justice Stevens viewed the second issue as either moot or unripe. *Id.* at 722-23 (Stevens, J., concurring in part and concurring in result).

83. *Id.* at 728 (O'Connor, J., concurring in part, dissenting in part).

84. *Id.* at 731 (O'Connor, J., concurring in part, dissenting in part) (citing Sherbert v. Verner, 374 U.S. 398, 408-09 (1963)).

85. Employment Div., Dept. of Human Resources v. Smith, 110 S. Ct. 1595 (1990). This was the second time the case was before the Supreme Court. On its first hearing, the Court remanded the case to the Supreme Court of Oregon because that court had not decided the question whether Oregon law prohibited the sacramental use of peyote. Employment Div., Dept. of Human Resources v. Smith, 485 U.S. 660, 673-74 (1988).

86. Employment Div., Dept. of Human Resources v. Smith, 110 S. Ct. at 1597-98.

87. *Id.* at 1597; *see infra* notes 191-94 and accompanying text.

hibits its possession, and makes no exception for sacramental use.[88] When the two Native American Church members sought unemployment compensation after their discharge, their applications were rejected.[89]

Speaking for a majority of the Court, Justice Scalia rejected their claim that the Constitution requires an exemption from criminal drug laws for the sacramental use of peyote.[90] The free exercise clause, according to the Court, did not place religiously motivated conduct beyond the reach of neutral laws of general applicability.[91] This conclusion has two fundamental components. First, it distinguishes between "religion-neutral" and "religion-based" governmental regulation.[92] Greater scrutiny applies only to the latter.[93] Therefore, if a statute prohibits certain conduct because it is done for religious reasons, the statute would fall within the free exercise clause.[94] Second, the *Smith* Court stated an otherwise valid and generally applicable statute remains religion-neutral despite an incidental effect that may burden religious practices.[95] For example, the collection of a general tax from those who harbor a religious belief that support of government is wrong is no more an unconstitutional burden on free exercise than the imposition of the same tax on a publishing company is a denial of freedom of the press.[96]

Referring to *Reynolds*, the *Smith* Court justified its rule for neutral laws of general applicability on the premise that religious beliefs do not free an individual from " 'obedience to a general law not aimed at the promotion or restriction of religious beliefs.' "[97] Quoting Justice Stevens' concurrence in *Lee*, the Court succinctly remarked that "the right of free exercise does not relieve an individual of the obligation to comply with 'valid and neutral laws of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' "[98]

This rule presents an obvious conflict with the compelling interest standard. The Court endeavored to distinguish *Sherbert* and its progeny in several ways. First, it created a new category for cases, such as *Cantwell* and *Yoder*, that make exemptions from otherwise neutral laws of general application.[99] These cases, the Court asserted, are "hybrid[s]," involving not

88. Or. Rev. Stat. § 475.992(4) (1987); Or. Admin. R. 855-80-021(3)(s) (1988); Smith v. Employment Div., Dept. of Human Resources, 307 Or. 68, 72-73, 763 P.2d 146, 148 (1988).

89. Employment Div., Dept. of Human Resources v. Smith, 110 S. Ct. at 1598.

90. *Id.* at 1599.

91. *Id.*

92. *Id.* at 1600.

93. *Id.*

94. *Id.* at 1599, 1604 n.3.

95. *Id.* at 1599.

96. *Id.* at 1599-1600.

97. *Id.* at 1600 (quoting Minersville School Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594-95 (1940)).

98. *Id.* (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

99. *Id.* at 1601.

merely a free exercise challenge, but are coupled with a second constitutional right, such as freedom of speech or the right of parents to direct their children's education.[100] In these hybrid cases, heightened scrutiny would be appropriate; yet, when only the free exercise clause was implicated, the claimant could not demand exemption from the neutral law merely because it conflicted with a religious belief.[101]

Second, the *Smith* Court attempted to narrow the application of the compelling interest standard to the *sui generis* field of unemployment compensation benefits.[102] Greater judicial scrutiny is acceptable in the context of the denial of unemployment benefits, according to the Court, because a "distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment."[103] Unlike most cases involving neutral laws of general application, unemployment benefit cases call for "individualized governmental assessment of the reasons for the relevant conduct."[104] In a few swift strokes, the Court carved free exercise case law into four neat categories: (1) "religion-based" laws, which attract heightened scrutiny;[105] (2) "hybrid" cases, which also get strict review;[106] (3) unemployment compensation cases, which because of their individualized nature receive heightened scrutiny;[107] and (4) neutral laws of general application, which are deferentially reviewed.[108]

Finally, the *Smith* Court stated the compelling interest standard, if applied to religion-neutral laws, would produce a "constitutional anomaly."[109] As a rhetorical matter, "compelling governmental interest" is a standard used under the equal protection clause for strict scrutiny of racial discrimination[110] and under the free speech clause for review of content-based regu-

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100. *Id.* at 1601-02; *see, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 233 (1972) (parental rights); Follett v. McCormick, 321 U.S. 573 (1944) (free speech); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (free speech); Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940) (free speech); *cf.* Roberts v. United States Jaycees, 468 U.S. 609, 622 (1983) (freedom of association).

101. Employment Div., Dept. of Human Resources v. Smith, 110 S. Ct. at 1602.

102. *Id.*

103. *Id.* at 1603.

104. *Id.* Ironically, *Smith* is an unemployment compensation case. However, as the Court emphasized, the claimants in *Smith* were denied unemployment benefits because of illegal conduct, a factor not present in the other unemployment benefit cases. *Id.* at 1598-99. Therefore, unlike the other unemployment benefit cases, the inquiry was not an individualized one, but rather focused on the constitutionality of denying an exemption from criminal drug laws for the sacramental use of peyote.

105. *Id.* at 1600.

106. *Id.* at 1601-02.

107. *Id.* at 1603.

108. *Id.* at 1601.

109. *Id.* at 1604.

110. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432 (1984); Loving v. Virginia, 388 U.S. 1, 11 (1966).

lation of expression.[111] The Court concluded the same kind of distinction can be made under the free exercise clause. If a statute is religion-based, a compelling interest is required to justify it; if it is religion-neutral, a legitimate interest will suffice.[112] In sum, *Sherbert* might not be dead after *Smith*, but it is seriously wounded.

The majority opinion produced sharp dissent. Justice O'Connor concurred in the judgment, but rejected the majority's rationale. She criticized the "talismatic" power the Court placed in the phrase "neutral laws of general applicability."[113] She commented that "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such."[114] The majority's distinction between religion-based and religion-neutral laws, according to Justice O'Connor, is therefore ethereal: "[L]aws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion."[115]

Justice O'Connor also questioned the Court's categorization of past case law. She asserted the compelling interest standard had been firmly accepted as the controlling rule in all free exercise cases.[116] The so-called "hybrid" cases such as *Yoder* and *Cantwell*, she complained, are "part of the mainstream of our free exercise jurisprudence."[117] Furthermore, the attempt to isolate the unemployment benefits cases was improper; "a neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, *more* burdensome than a neutral civil statute placing legitimate conditions on the award of a state benefit," such as unemployment benefits.[118] Although she completely rejected the majority's rationale and erection of a new standard, Justice O'Connor nevertheless concurred in the rejection of the free exercise claim in *Smith* on the ground that Oregon's interest in enforcing its drug laws justified the burden on religious practices of members of the Native American Church.[119]

While agreeing with most of Justice O'Connor's criticism of the majority, Justice Blackmun dissented from the result. He asserted that "by mischaracterizing this Court's precedents," the majority "perfunctorily dismisses . . . as a 'constitutional anomaly' " what was previously "a settled

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111. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321 (1988); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

112. Employment Div., Dept. of Human Resources v. Smith, 110 S. Ct. at 1604 & n.3.

113. *Id.* at 1612 (O'Connor, J., concurring).

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

115. *Id.* at 1612 (O'Connor, J., concurring).

116. *Id.* at 1608-09, 1611-12 (O'Connor, J., concurring).

117. *Id.* at 1609 (O'Connor, J., concurring); *see also* Pfeffer, *supra* note 50, at 1140 (viewing *Yoder* as extension of and reaffirmation of *Sherbert*).

118. Employment Div., Dept. of Human Resources v. Smith, 110 S. Ct. at 1611 (O'Connor, J., concurring).

119. *Id.* at 1614-15 (O'Connor, J., concurring).

and inviolate principle of this Court's First Amendment jurisprudence."[120] Calling the Court's opinion a "wholesale overturning of settled law," Justice Blackmun suggested the holding may be "a product of overreaction to the serious problems the country's drug crisis has generated."[121] He suggested the sacramental use of peyote in rituals of the Native American Church does not implicate the health and safety concerns reflected in Oregon's interest in prohibiting drug use; therefore, denying an exemption from the state's criminal laws violates the free exercise clause.[122]

*Smith* is an unsettling case because of its alteration of the landscape of free exercise doctrine. Despite the uncomfortable inconsistency between the *Reynolds-Braunfeld* line of cases and *Sherbert* and its progeny, the latter was, until *Smith*, acknowledged as the prevailing standard. *Smith* purports to reverse the roles of the two lines, relegating *Sherbert* and its progeny to a limited exception.

This relatively detailed review of the evolution of free exercise case law—from polygamy to peyote—is not solely of historical significance. Rather, it illustrates *Smith* was not created out of whole cloth. Its origins are in *Reynolds* and *Braunfeld*. Despite Justice Scalia's valiant efforts to restructure the precedents, *Smith* remains largely inconsistent with the previously dominant analysis of free exercise claims. Indeed, it is a marked departure. The inconsistencies in *Smith* and the case law preceding it reflect the core dilemma of the free exercise clause: To what degree is religion, as opposed to other forms of belief, unique? If religious beliefs are not special, at least in a constitutional sense, then *Smith* may be correct—religious practices should not be exempted from neutral laws any more than conduct that is not religiously motivated. Why, then, is religion special?

## II. Religion-Neutral and Content-Neutral Regulation

*Smith* asserts an important premise: Religion-based laws and religion-neutral laws should, for purposes of the free exercise clause, be treated quite differently. The distinction has a very familiar ring. It is reminiscent of the analysis of content-based and content-neutral regulation of expression under the free speech clause. Therefore, a comparison of free speech and free exercise doctrine is appropriate. The comparison will show that merging the free exercise clause with the free speech clause is misguided. In addition, a more fundamental inquiry into the reasons for protecting religious exercise will show *Smith* seriously undervalues the importance to religious minorities of a constitutional shield from religion-neutral laws.

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120. *Id.* at 1616 (Blackmun, J., dissenting).
121. *Id.* (Blackmun, J., dissenting).
122. *Id.* at 1618-21 (Blackmun, J., dissenting).

### A. *Free Exercise as Free Speech*

The notion suggested by this section's heading is not novel. Indeed, Professor William Marshall has proposed the free exercise and free speech clauses "provide a unitary protection for individual liberty," and religious exercise should be protected only to the same extent as expression under the free speech clause.[123] The proposal has immediate appeal. As Marshall suggests, it would do away with many of the doctrinal problems of an independent free exercise right such as the "tension" with the establishment clause[124] and the ad hoc balancing of governmental interests against the burden on religious beliefs under the compelling interest standard.[125] More fundamentally, there is a substantial overlap between the free exercise clause and the free speech clause, as indicated by the fact many cases decided on free speech grounds have involved religious expression.[126]

The predominant concern of free speech doctrine is content neutrality.[127] A challenged statute's constitutional validity will often turn on whether it is deemed to be content-based or content-neutral regulation. If a statute is content-based—if it regulates speech on the basis of its message or subject matter—it is held to exacting judicial scrutiny.[128] By contrast, if a statute is content-neutral, it is reviewed under a much less stringent standard.[129]

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123. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 547 (1983); *see also* Kamenshine, *Scraping Strict Review in Free Exercise Cases*, 4 CONST. COMM. 147, 152-53 (1987) (suggesting a standard comparable to that for symbolic conduct).

124. *See, e.g.*, Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 674 (1980); Ely, *supra* note 50, at 1313; McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 37 (1989); Sherbert v. Verner, 374 U.S. 398, 422-23 (1963) (Harlan, J., dissenting).

125. *See* Marshall, *supra* note 123, at 589-91.

126. *E.g.*, Widmar v. Vincent, 454 U.S. 263, 269 (1981); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 652-53 (1981); Wooley v. Maynard, 430 U.S. 705, 714-15 (1977); Saia v. New York, 334 U.S. 558, 559-60 (1948); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 634-42 (1943); Martin v. City of Struthers, 319 U.S. 151, 145-47 (1943); Murdock v. Pennsylvania, 319 U.S. 105, 108-10 (1943); Cox v. New Hampshire, 312 U.S. 569, 576-78 (1941); Lovell v. City of Griffin, 303 U.S. 444, 451-52 (1938).

127. Police Dept. v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); Kalvin, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 29-30; Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 23-28 (1975); Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985, 990-92 (1986) [hereinafter Stone, *Compelled Exemptions*]; Stone, *Restrictions on Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 100-07 (1978).

128. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 412 (1989); Boos v. Barry, 485 U.S. 312, 321 (1988).

129. *See, e.g.*, Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 804-05 (1984); Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

The rationale for this distinction between content-based and content-neutral regulation of expression is well accepted. Content-based regulation prevents the regulated message from reaching the marketplace of ideas. By eliminating the expression of certain ideas and viewpoints from public discourse, the search for truth and the ability of a democratic community to self-govern becomes distorted and truncated.[130] In contrast, content-neutral regulation does not preclude the message from reaching the marketplace of ideas. Rather, it merely controls when, where, or how the message may be communicated. Thus, although a content-neutral regulation may make it more difficult for a speaker to get his message to the marketplace, it does not bar its entry.

Professor Marshall proposes to limit the reach of the free exercise clause in similar fashion. He stresses that much of what the free exercise clause would protect is already guarded by the free speech clause.[131] Religious speech, such as prayer, worship, and proselytization, are all protected forms of expression.[132] Moreover, Marshall notes that freedom from the compelled expression of belief is protected by the free speech clause.[133] This leaves only nonexpressive religious conduct.

Marshall asserts that, except in the case of religious-based discrimination, which would be subject to greater scrutiny, no exemption from neutral laws should be available unless such an exemption is required for claimants whose objection to the law is not religiously based.[134] This is exactly where *Smith* leads. Marshall's proposal assumes religious and nonreligious grounds for objection to an otherwise neutral statute are, constitutionally, of identical import. Indeed, Marshall specifically eschews any special treatment of religion, arguing exemptions limited to religious beliefs would amount to an

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130. The standard authorities for this rationale for free expression are J.S. MILL, ON LIBERTY (1859), *reprinted in* THE PHILOSOPHY OF JOHN STUART MILL 207-08 (M. Cohen ed. 1961); A MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25-26 (1948); Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 33 (1969).

131. Marshall, *supra* note 123, at 559-60.

132. *E.g.*, Widmar v. Vincent, 454 U.S. 263, 269 (1981); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953); Niemotko v. Maryland, 340 U.S. 268, 272 (1951). This would presumably extend also to symbolic religious speech, such as the erection of a cross or the wearing of the Star of David. *See* Kohler, *Of Flags and Menorahs: The Power of Individual and Governmental Symbolic Speech*, 23 AKRON L. REV. 371 (1990).

133. *E.g.*, Wooley v. Maynard, 430 U.S. 705, 715 (1977); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

134. Marshall, *supra* note 123, at 547. Professor Kurland offers a comparable proposal. His simple and straightforward suggestion is "religion may not be used as a basis for classification for purposes of governmental action," thus essentially collapsing the free exercise clause into the equal protection clause, rather than the free speech clause. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961). For an excellent discussion of Kurland's proposal and how it has stood up over time, see Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373. For a similar suggestion, *see* Ely, *supra* note 50, at 1314.

unconstitutional religious preference.[135] More importantly, Marshall's position assumes the constitutional value of protecting expression is the same as that for protecting religious exercise. A careful consideration of the special nature of religious belief in our constitutional system shows this assumption is invalid.

### B. *Why Is Religion Special?*

A simple answer is the Constitution makes it special.[136] The first amendment proscribes the enactment of laws respecting an establishment of religion or prohibiting the free exercise of religion.[137] Also, the Constitution prohibits the use of religious tests as a qualification for public office.[138] This answer, however, is not especially satisfying. It does not provide any foundation for doctrinal development, and is little more than restating the question in another way—that is, why does the Constitution treat religion specially?

Various suggestions about the importance of religious liberty have been offered, but none entirely answer Marshall's challenge that religion should not be afforded greater protection than other kinds of expression. A common position is that the free exercise clause protects individuals from the unique harm that results from a coerced violation of one's religious beliefs.[139] The suffering and anguish is especially severe when a religious person is faced with the choice of obedience to the state (with the possible penalty of criminal punishment) and fidelity to his convictions (with the possible penalty of eternal damnation).

Marshall effectively evades this view. He notes nonreligious ethical or moral beliefs can be held with as deep a sense of conviction as many religious beliefs. He offers the example of a Sabbatarian who also holds a nonreligious belief in pacifism, and contends the "psychic harm" would be greater to this person if he were compelled to kill in a war than if he were compelled to work on Saturday.[140] Thus, the suffering felt by a religious believer may not be that unique.

A variant of the special suffering theme emphasizes the conflict of secular and religious duties. Chief Justice Hughes articulated this view in his dissent in *United States v. MacIntosh*:[141]

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135. Marshall, *supra* note 123, at 586-87, 590-91.

136. *See* Smith, *The Special Place of Religion in the Constitution*, 1983 SUP. CT. REV. 83, 85.

137. U.S. CONST. amend. I.

138. U.S. CONST. art. VI, cl. 3.

139. *E.g.*, Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 597-601; Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 337-42 (1969); Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 792-94 (1986); Smith, *supra* note 136, at 93-94.

140. Marshall, *supra* note 123, at 587.

141. United States v. MacIntosh, 283 U.S. 605 (1931).

> Much has been said of the paramount duty to the State, a duty to be recognized, it is urged, even though it conflicts with convictions of duty to God. Undoubtedly that duty to the State exists within the domain of power, for government may enforce obedience to laws regardless of scruples. When one's belief collides with the power of the State, the latter is supreme within its sphere and submission or punishment follows. But, in the *forum of conscience*, duty to a moral power higher than the State has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relations. . . . [F]reedom of conscience itself implies respect for an innate conviction of paramount duty.[142]

Under this perspective the free exercise clause does not protect the value of the religious believer's susceptibility to unique suffering, but more directly protects the value of fidelity to religious conscience itself.[143] There is something intrinsically worthwhile in ensuring that individuals remain true to their conscience. Furthermore, there is a sense of compulsion inherent in the religious believer. From his vantage point, he *must* act or not act in a certain way; he has no choice. As Professor Garvey states "there is something special about religion. . . . [It] is a lot like insanity."[144] The duties imposed by religious belief deprive the religious person of the ability to choose between two courses of conduct—one which violates that law and one which violates religious duty. Thus, "[w]e protect their freedom . . . because they are not free."[145]

This still does not completely repel Marshall's argument that the same situation is faced by a nonreligious claimant. A person can feel a compelling duty to his fellow humans that prevents him from acting in accordance with the demands of the state. Why then should religious belief be entitled to exemption from neutral laws when nonreligious belief is not?

The following illustration explains why religion is special. Imagine two meeting houses. In one is a group of citizens of mixed denominations and beliefs. In the second is a group of members of "The Church," a fictitious religious organization. Both groups are discussing the establishment of a private adoption agency and the policies the agency would follow in arranging

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142. *Id.* at 633-34 (Hughes, C.J., dissenting) (emphasis added).

143. *See* Garvey, *supra* note 139, at 794-95; Stone, *Compelled Exemptions*, *supra* note 127, at 993.

144. Garvey, *supra* note 139, at 798.

145. *Id.* at 801; *see also* Minow, *Pluralisms*, 21 CONN. L. REV. 965, 971 (1989); Weisbrod, *Family, Church and State: An Essay on Constitutionalism and Religious Authority*, 26 J. FAM. L. 741, 745 (1987-88) ("[R]eligious groups may view themselves as a source of authority at least equal to the state, and . . . may see issues of church and state as questions involving competing systems of law or sovereignties." (footnotes omitted)); Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 362-64 (1980).

adoptions. In the first meeting house, the group accepts a rule that would favor prospective adoptive parents of the same cultural background as the child. The members justify that it would be in the child's best interests to permit the child to grow and develop in an environment of cultural continuity. In the second meeting house, the members of The Church devise a different rule. They decide no adoption will be approved unless the prospective parents profess a belief in God and undergo a confession of sins. The justification for this rule is a passage in "The Book," their sacred text, directing that no child who has lost her natural parents shall be taken in by nonbelievers or the unclean of spirit.

Imagine that the two groups decide to merge their adoption agencies. An immediate conflict arises over adoption policy. The group from the first meeting house argues the prospective parents' religious beliefs are relevant only to the extent they match the child's cultural background. The members of The Church point to the imperative of The Book. In their understanding of the world, the divine command that animates their adoption policy is a "trump card," overcoming any argument the other group puts forward in support of some other policy. To the other group, none of whom accept the creed of The Church, this trump card is irrelevant, irrational, and even silly. The two groups are playing by different rules.

This illustration exposes the special nature of religion in our society. The key is not that religion is inherently special or more special than other forms of moral or ethical beliefs; rather, it is special in the context of the constitutional and political framework of a secular democracy. Viewed from this perspective, the reason for treating religion specially and affording protection under the free exercise clause beyond that which the free speech clause provides is apparent.

For the person objecting to a state requirement on nonreligious ethical or political grounds, recourse is available. He may turn to the political arena and voice his views. The emphasis on content neutrality under the free speech clause ensures his message gains entry into public debate. If his request for accommodation of his conscientious objection is rejected, he can accept the outcome of the majoritarian political process or continue his fight another day and accept the consequences.[146] In any event, he is theoretically able to state his position and have it considered on its merits.

For the religious objector this avenue of recourse may have very little value. The religious objector has the same right to present his position to the political process; to deny that right would implicate the free speech

146. *See* Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464-65 (1979) (per curiam) ("The First Amendment right to associate and to advocate 'provides no guarantee that a speech will persuade or that advocacy will be effective.' ") (quoting Hanover Township Fed'n of Teachers v. Hanover Community School Corp., 457 F.2d 456, 461 (7th Cir. 1972)).

clause as a content-based regulation.[147] There is, however, the "trump card" problem identified in the meeting house illustration. What the religious claimant views as his strongest argument—divine command or the threat of eternal damnation—carries no weight with the nonbeliever.[148] Unlike the political objector, the religious claimant cannot state his religiously based objection in the political process and obtain a hearing on its merits. The merits are grounded in an understanding of reality unknown to the nonbeliever. The best the religious objector can expect is sensitivity to the nature of the objection, not agreement with the religious substance of the objection.

The problem is far less significant for mainstream religions. The majoritarian political process, by definition, will be sensitive to the religious beliefs of the majority. It is not surprising the majoritarian political process provided an exemption for the sacramental use of alcohol at a time when the possession and use of alcoholic beverages was prohibited,[149] but it will not provide a similar exemption for the sacramental use of other drugs not commonly used by mainstream religions in their worship. Therefore, the need for additional constitutional protection is especially acute for nonmainstream religions.

The free speech clause does not offer the same protection to nonmainstream religions as it does to mainstream religions. Access to the marketplace of ideas and the political process, while adequate for the mainstream religions, is not sufficient to secure the religious liberty of nonmainstream religions. Contrary to Marshall's supposition, the free exercise clause does have value beyond the reach of the free speech clause despite the significant overlap between the two clauses.

Religion is special because it is different. Religious belief is not like other forms of belief, and religious expression is not like other forms of expression. To the nonbeliever, another's religious belief can appear irrational, nonsensical, and even a fraudulent attempt to justify what would otherwise be deemed immoral or antisocial conduct. The purpose of the free exercise clause is that of a counterweight, demanding sensitivity and tolerance of religious belief and expression.

## III. Free Exercise Standards and Nonmainstream Religions

A question has existed in free exercise doctrine for nearly three decades: How can the contradictions between the *Reynolds-Braunfeld* and *Sherbert* lines be resolved, and to the extent they cannot, which line controls? The

147. *See* Widmar v. Vincent, 454 U.S. 263, 269 (1981).

148. *See* United States v. Ballard, 322 U.S. 78, 93 (1944) (Jackson, J., dissenting) (suggesting a religious actor's conduct is controlled by factors that "cannot be verified to the minds of those whose field of consciousness does not include religious insight").

149. *See* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1618 n.6 (1990) (Blackmun, J., dissenting) (citing National Prohibition Act, ch. 85, tit. II, § 3, 41 Stat. 305, 308 (1919)).

resolution adopted in *Smith*—that the latter is a limited exception to the former—is unsatisfactory, particularly in its disregard for the need for constitutional protection of nonmainstream religions.

### A. *Anomaly or Misnomer?*

Justice Scalia correctly states the compelling interest standard is a doctrinal anomaly. The rhetoric of the standard developed in *Sherbert* is identical to the strict scrutiny standard applied under the equal protection and the free speech clauses. Strict judicial scrutiny—and its demand of a compelling governmental interest—is appropriate when there is a strong presumption that the challenged legislation is unconstitutional.[150] Thus, when a challenged statute involves racial classifications, content-based regulation of expression, or religious classifications, government faces a nearly insurmountable burden of justifying the statute.[151] As Professor Ira Lupu has pointed out, the compelling interest standard in the free exercise context cannot stand on the same presumption of unconstitutionality.[152] A neutral law of general applicability does not raise a presumption of unconstitutionality any more than a racially neutral or content-neutral law does. Therefore, the free exercise compelling interest standard must mean something different than the rhetorically identical standard for equal protection and free speech.

Even in those cases purporting to apply the compelling interest standard, the Supreme Court has not always been comfortable with the standard's rhetoric. For example, on numerous occasions the Court has used different language, such as "interests of the highest order"[153] or "especially important governmental interests."[154] Although portrayed as synonyms for compelling interest, a subtle difference nevertheless is conveyed, especially when contrasted with the rigorous scrutiny of racial classifications and content-based regulation of expression. More significantly, the free exercise compelling interest standard is not always applied in the strict manner that the standard requires. *United States v. Lee* is a good example.[155]

The Court's imprecise use of language does not mean that a standard

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150. *See* J. Ely, Democracy and Distrust, 140-48 (1980).

151. *E.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (racial classifications); Boos v. Barry, 485 U.S. 312, 321 (1988) (content-based regulation of expression); McDaniel v. Paty, 435 U.S. 618, 632 (1978) (Brennan, J., concurring) (religious classifications).

152. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 Conn. L. Rev. 739, 767-68 (1986) [hereinafter Lupu, *Keeping the Faith*]; *see* Kamenshine, *supra* note 123, at 154.

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

154. Bowen v. Roy, 476 U.S. 693, 728 (1986) (O'Connor, J., concurring in part, dissenting in part).

155. *See supra* notes 65-74 and accompanying text; *see* Stone, *Compelled Exemptions*, *supra* note 127, at 994; Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 Wm. & Mary L. Rev. 943, 952-53 (1986).

involving a higher degree of scrutiny than provided in *Reynolds*, *Braunfeld*, or *Smith* has never been used or is not necessary in free exercise claims. As Justice O'Connor remarked, neutral laws can be just as coercive as religion-based laws for the claimant whose religious belief is burdened.[156] Yet, because religion-neutral laws are not suspect in the same fashion that religion-based laws are, a standard imposing the requirement of a compelling interest is inappropriate. On the other hand, the review of neutral laws implicating the free exercise of religion should not be lowered to a deferential, nonexistent standard, as *Smith* suggests. Almost everything the government does can be justified as serving the legitimate interests of public order and welfare.[157]

This raises the difficult question of judicial competence to evaluate asserted governmental interests. It is a relatively simple judicial task to discern between the two ends of the spectrum of possible governmental interests. Compelling interests are of constitutional magnitude.[158] In contrast, a legitimate interest includes any concern on which government is authorized to act. Evaluating the degrees of importance between these two endpoints, however, is a task ordinarily unsuited to the judiciary and is best left to the political branch. Therefore, stating a standard for the free exercise clause that requires some "important" or "especially important" interest, rather than a compelling interest in its strict sense, is problematic.

The solution is not to refrain from establishing a standard. Instead, the proper emphasis should not solely be on the importance of the asserted government interest, but rather on the degree to which an exemption will interfere with achievement of the asserted interest.[159] An exemption should not be available only if granting an exemption to the religious objector will interfere with the accomplishment of the government's interest in regulating other nonreligious conduct.[160] In this regard, an "important" governmental interest is one that rises above administrative necessity. Although an exemption might result in administrative inconvenience, the mere inconvenience does not justify the denial of a free exercise objection.[161] This stan-

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156. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1612 (1990) (O'Connor, J., concurring).

157. *See* Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 330-31 (1969).

158. *E.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (interest in eradicating racial discrimination is compelling).

159. *See* Lupu, *Keeping the Faith*, *supra* note 152, at 768; Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943).

160. *See* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. at 1617 (Blackmun, J., dissenting); McConnell & Posner, *supra* note 124, at 53.

161. *See* Bowen v. Roy, 476 U.S. 693, 731 (1986) (O'Connor, J., concurring in part, dissenting in part); Braunfeld v. Brown, 366 U.S. 599, 615 (1961) (Brennan, J., dissenting); People v. Woody, 61 Cal. 2d 716, 727, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964). *See generally* Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 947-48 (1989).

dard resolves the anomalous rhetoric of the compelling interest standard without completely abolishing the values of the free exercise clause.

### B. *Protecting the Religious Exercise of Nonmainstream Religions*

If Justice Scalia is correct in condemning the anomaly of the compelling interest standard, he is also correct about the inability of the political process to accommodate nonmainstream religions. He is wrong, however, in asserting this is constitutionally tolerable. In *Smith*, Justice Scalia wrote:

> [i]t 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.[162]

The result relegates the constitutional protection of religious exercise, absent invidious religious discrimination, to the same level of protection as nonreligious expression. This is fine for the dominant religions. They can assure, through their majoritarian status, that governmental regulation is sensitive to and accommodates their religious exercise. Yet it offers a slender reed for nonmainstream religions.[163]

The ability of mainstream religions to secure accommodation for their practices is not necessarily reflective of conscious religious preferences or invidious discrimination against nonmainstream religions. Because of the special nature of religion—religious beliefs are not verifiable or understood by the nonbeliever[164]—our society undervalues religious beliefs and practices that are different. Thus, the failure to accommodate nonmainstream religion often is the product of innocent insensitivity and unfamiliarity.[165]

The step from innocent insensitivity to actual persecution is not always a large one. The history of the federal government's persecution of the Mormon Church in the late nineteenth century, out of which *Reynolds* arose, is illustrative.[166] After suffering severe persecution in Ohio, Missouri, and Illinois, the Mormans fled to the wild, unsettled Territory of Utah hoping to

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162. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. at 1606.

163. *Compare* Tushnet, *supra* note 134, at 381 (noting that under the Supreme Court's free exercise cases "the pattern is sometimes Christians win but non-Christians never do") *with* Way & Burt, *Religious Marginality and the Free Exercise Clause*, 77 AM. POL. SCI. REV. 652, 662-65 (1983) (suggesting the Court's free exercise doctrine favors marginal religions).

164. *See supra* notes 146-48 and accompanying text.

165. *See* Lupu, *Keeping the Faith*, *supra* note 152, at 773; Tushnet, *supra* note 134, at 382-83.

166. For a comprehensive discussion, see Linford, *The Mormans and the Law: The Polygamy Cases—Part I*, 9 UTAH L. REV. 308 (1964) [hereinafter Linford, *Part I*]; Linford, *The Mormans and the Law: The Polygamy Cases—Part II*, 9 UTAH L. REV. 543 (1965) [hereinafter Linford, *Part II*].

freely practice their religion.[167] The Morman doctrine, based on a divine revelation to Joseph Smith, the Morman prophet, teaches that Morman men should have more than one wife "in order to provide earthly bodies rapidly enough for the innumerable spirits awaiting the opportunity to become Saints on earth, which was a prerequisite to achieving exaltation in the eternal world."[168] Their peace in Utah was quickly upset when Congress launched a fierce attack against polygamy, enacting a series of statutes criminalizing the practice.[169]

Numerous criminal prosecutions followed, including many against members of the Mormon leadership.[170] The government's program for eliminating polygamy did not end with criminal sanctions. Despite *Reynold*'s profession that religious beliefs are absolutely protected, even if acts predicated on those beliefs are not,[171] the government set a course designed to punish and change the Mormans' belief in polygamy. Those who refused to renounce polygamy were denied the right to vote, hold public office, serve on juries, and become citizens through naturalization.[172] Finally, the federal government attacked the Mormon Church itself, revoking its charter of incorporation and seizing its property.[173] The Mormans ultimately surrendered, and the Church officially vowed to follow the laws prohibiting the practice of polygamy.[174] Later, statehood was granted to Utah on the condition that polygamy be "forever prohibited."[175]

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167. *See* N. ANDERSON, DESERT SAINTS: THE MORMAN FRONTIER IN UTAH 16-51 (1942); L. ARRINGTON & D. BITTON, THE MORMAN EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS 44-82, 96-126 (1979).

168. Linford, *Part I*, *supra* note 166, at 310; *see* L. ARRINGTON & D. BITTON, *supra* note 167, at 185-205.

169. *See* Linford, *Part I*, *supra* note 166, at 314-29.

170. *E.g.*, Bassett v. United States, 137 U.S. 496 (1890); Cannon v. United States, 118 U.S. 355 (1886); Snow v. United States, 118 U.S. 346 (1886); Cannon v. United States, 116 U.S. 55 (1885); Clawson v. United States, 114 U.S. 477 (1885); Miles v. United States, 103 U.S. 304 (1880); Reynolds v. United States, 98 U.S. 145 (1879).

171. *See supra* note 11 and accompanying text.

172. *See* Davis v. Beason, 133 U.S. 333 (1890); Murphy v. Ramsey, 114 U.S. 15 (1885); Linford, *Part II*, *supra* note 137, at 544-61.

173. *See* Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890); Linford, *Part II*, *supra* note 166, at 561-80.

174. Linford, *Part II*, *supra* note 166, at 582-83. As Professor Linford aptly summarized:

> It was an uneven contest. The Mormans concentrated in the Territory of Utah, where they had carved a flourishing agricultural society out of the barren desert. The leading elders might have been polygamists, but they were also respectable, educated, highly responsible citizens, with a deep sense of moral obligation. Many of them had survived the persecutions of Missouri and Illinois, and those who had not been participants, were imbued with the tradition of defending their religious beliefs in the face of persecution, governmental and otherwise. They were not thieves, who could commit offenses and steal off into the night. Consequently, they were captive suspects in the most concentrated crusade against "crime" in the nation's history.

Linford, *Part I*, *supra* note 166, at 370.

175. Act of July 16, 1894, ch. 138, 28 Stat. 107; *see* UTAH CONST. art. III, § 1.

The Supreme Court opinions upholding the various manifestations of this policy of persecution ring with polemics against the "barbarism" of polygamy. As Justice Field stated in *Davis v. Beason*:[176]

> Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . .They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. . . .To call their advocacy a tenet of religion is to offend the common sense of mankind.[177]

Similarly, in the case upholding the revocation of the Morman Church's charter of incorporation, Justice Bradley remarked:

> It is a matter of public notoriety that its emissaries are engaged in many countries in propagating this nefarious doctrine, and urging its converts to join the community in Utah. The existence of such propaganda is a blot on our civilization. The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization that Christianity has produced in the Western world.[178]

To the late twentieth century reader, the Court's language has an uncomfortable theocratic bent. This was a time when the Supreme Court felt comfortable in asserting "this is a Christian nation."[179] Nevertheless, the language reflects religious prejudice and hostility. The Court's justification for the criminalization of polygamy—that it is contrary to the structure of

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176. Davis v. Beason, 133 U.S. 333 (1890).

177. *Id.* at 341-42.

178. Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. at 49. Justice Bradley again on the government's program to combat polygamy stated:

> The tale is one of patience on the part of the American government and people, and of contempt of authority and resistance to law on the part of the Mormans. Whatever persecutions they may have suffered in the early part of their history, in Missouri and Illinois, they have no excuse for their present defiance of law under the government of the United States.

*Id.* The members of the Court were not the only ones to speak out in such vitriolic language against polygamy. The Congress and various Presidents also railed against the barbarism of polygamy. *See* Linford, *Part I*, *supra* note 166, at 312-17, 322. Some fifty years after the last of the nineteenth-century polygamy cases, the Supreme Court heard Cleveland v. United States, 329 U.S. 14 (1946), in which a member of a fundamentalist Morman sect was prosecuted under the Mann Act, 18 U.S.C. § 398 (1980). A young Justice Douglas, writing for the Court, stated that "[t]he establishment or maintenance of polygamous households is a notorious example of promiscuity." Cleveland v. United States, 329 U.S. at 19. Ironically, about three decades later, Justice Douglas called for the reversal of *Reynolds*. Wisconsin v. Yoder, 406 U.S. 205, 247 (1972) (Douglas, J., dissenting in part).

179. Church of the Holy Trinity v. United States, 143 U.S. 457, 471 (1892). For a discussion of the historical context of *Reynolds*, see Weisbrod & Sheingorn, *Reynolds v. United States: Nineteenth-Century Forms of Marriage and the Status of Women*, 10 CONN. L. REV. 828, 834-56 (1978).

civilized society and "leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism"[180]—is completely unpersuasive.[181] Granting an exemption from anti-polygamy statutes for members of a religious group who deeply feel polygamy is divinely ordained would not signal the beginning of the end of Western Civilization. Both in terms of its precise holding and as a source of free exercise doctrine, *Reynolds* should be relegated to the constitutional status of such cases as *Plessy v. Ferguson*[182] and *Korematsu v. United States*.[183]

The Morman experience is an extraordinary story of religious intolerance in American history. It is an extreme example of the dangers inherent in keeping the majoritarian political process free from judicially imposed constitutional restraints. Unfortunately, it is not an entirely isolated example. The interaction of government regulation and the religious practices of a second group that has suffered a long history of persecution—Native Americans—also reveals the importance to nonmainstream religions of free exercise protection from neutral laws. Native American religious practices and neutral governmental regulation have collided in three different areas: regulation of protected animals, government land use, and criminalization of peyote.

The religious practices of some Native Americans require the use of parts from various federally protected animals. For example, the Katsina Society of the Pueblo Indians, like many other Native Americans, believes the eagle is "the primary messenger to the spirit world," and uses eagle feathers in ceremonies as a means of communicating with the spirit world.[184]

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180. Reynolds v. United States, 98 U.S. 145, 166 (1879).

181. Justice Murphy dissented in Cleveland v. United States, 329 U.S. 14, 26 (1946):

> [P]olygamy like other forms of marriage, is basically a cultural institution rooted deeply in the religious beliefs and social mores of those societies in which it appears. It is equally true that the beliefs and mores of the dominant culture of the contemporary world condemn the practice as immoral and substitute monogamy in its place. To those beliefs and mores I subscribe, but that does not alter the fact that polygamy is a form of marriage built upon a set of social and moral principles. It must be recognized and treated as such.

*See also* Note, *Polygamy in Utah*, 5 UTAH L. REV. 381, 384-89 (1957) (discussing the continued prevalence of polygamy among Fundamentalist Mormans).

182. Plessy v. Ferguson, 163 U.S. 537 (1896).

183. Korematsu v. United States, 323 U.S. 214 (1944); *see* Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806, 823-25 (1958). *Reynolds*, however, remains good law. Potter v. Murray City, 760 F.2d 1065, 1069-70 (10th Cir.), *cert. denied*, 474 U.S. 849 (1985); *see also* Zablocki v. Redhail, 434 U.S. 374, 392 (1978) (Stewart, J., concurring); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 n.15 (1973).

184. United States v. Abeyta, 632 F. Supp. 1301, 1303 (D.N.M. 1986); *see also* United States v. Billie, 667 F. Supp. 1485, 1496-97 (S.D. Fla. 1987) (panther claws and tails used by Seminole Indian); United States v. Thirty-Eight Golden Eagles or Eagle Parts, 649 F. Supp. 269 (D. Nev. 1986) (Chippewa Indian and eagles), *aff'd*, 829 F.2d 41 (9th Cir. 1987).

The practice conflicts with the federal Eagle Protection Act,[185] which imposes criminal and civil penalties for the possession, sale, purchase, or barter of bald and golden eagles.

The religious beliefs of many Native Americans are tied to specific geographic locations.[186] For instance, a site may be regarded as the embodiment of deities[187] or as the residence of gods.[188] Native Americans believe these places have unique spiritual or healing powers.[189] Any disturbance of the land's natural state, by commercial development for example, will diminish or destroy the special spiritual powers connected with the site.[190] Many of the sites held sacred are located on federal lands.

Certain Native American groups use peyote as an essential part of their worship. The Native American Church views peyote, which comes from a small, spineless cactus native to the southwestern United States and northern Mexico, as a sacrament.[191] The teachings of the Native American Church, which incorporate certain elements of Christian theology,[192] include the belief that peyote embodies the Holy Spirit and that ingestion of peyote brings one into direct contact with God.[193] The use of peyote is highly ritualized and regulated by Church doctrine. It is eaten during a religious ceremony, and its use outside of the ritual context is considered sacrilegious.[194] Peyote, a hallucinogenic drug, is a controlled substance.[195]

The legislature has accomodated Native American religious practices in

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185. 16 U.S.C. §§ 668-668d (1985).

186. *See* Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1449 (1985).

187. *E.g.*, Wilson v. Block, 708 F.2d 735, 738 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983); Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

188. *E.g.*, Wilson v. Block, 708 F.2d at 738.

189. *E.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 448 (1988); Wilson v. Block, 708 F.2d at 738; Crow v. Guillet, 541 F. Supp. 785, 788 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983).

190. *E.g.*, Wilson v. Block, 708 F.2d at 738; Badoni v. Higginson, 638 F.2d at 177; Sequoyah v. TVA, 620 F.2d 1159, 1162 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

191. Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1613 (1990) (O'Connor, J., concurring); People v. Woody, 61 Cal. 2d 716, 720-21, 394 P.2d 813, 817, 40 Cal. Rptr. 69, 73 (1964); O. STEWART, PEYOTE RELIGION 327-29 (1987); A. HULKRANTZ, BELIEF AND WORSHIP IN NATIVE NORTH AMERICA 284-93 (C. Vecsey ed. 1981); *see also* Peyote Way Church of God, Inc. v. Smith, 742 F.2d 193, 195-96 (5th Cir. 1984). On the sacramental use of marijuana by Rastafarians, see Taylor, *Redemption Song: An Update on the Rastafarians and the Free Exercise Clause*, 9 WHITTIER L. REV. 663, 676-78 (1988); Note, *Soul Rebels: The Rastafarians and the Free Exercise Clause*, 72 GEO. L.J. 1605, 1629-31 (1984).

192. *See*, H. DRIVER, INDIANS OF NORTH AMERICA 524 (2d ed. 1969).

193. People v. Woody, 61 Cal.2d at 720-21, 394 P.2d at 817, 40 Cal. Rptr. at 73; O. STEWART, *supra* note 191, at 331-32.

194. People v. Woody, 61 Cal.2d at 721, 394 P.2d at 817, 40 Cal. Rptr. at 73; Slotkin, *The Peyote Way* in TEACHINGS FROM THE AMERICAN FAITH 96-104 (D. Tedlock & B. Tedlock eds. 1975).

195. *See* 21 U.S.C. § 812(c) (Schedule I(c)(12)).

these areas. In 1978, Congress passed the American Indian Religious Freedom Act.[196] This Act states "the policy of the United States [is] to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites."[197] The Act in practice is an unenforceable statement of policy.[198] The Eagle Protection Act provides for the possibility of exemptions for religious use of eagle parts.[199] Similarly, the Native American Church is exempted from federal and many state laws prohibiting the use of peyote.[200] Nevertheless, the provision of legislative exemptions does not eliminate the possibility that the free exercise clause may require additional accommodation of Native American religious practices.

These three areas of Native American religious practices pose insightful illustrations of the proper application of the free exercise standards. The protection of eagles and the restriction of dangerous drugs are both valuable and important government objectives. Yet, the proper focus must be on the government interest in denying religious exemption, not on the overall interest of protecting eagles. If an exemption for the use of eagle parts in religious ceremonies by Native Americans will threaten the viability of the eagle population, the government's interest in protecting eagles prevails. If the exemption would not create such a threat, the free exercise clause requires accommodation.[201] Similarly, even though the general interest in prohibiting the use of dangerous substances is an important government objective, granting an exemption from antipeyote laws to members of a sect whose religious beliefs impose strict restrictions on the use of peyote will not undermine the achievement of the government's health and safety goals.[202]

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196. 42 U.S.C. § 1996 (1981).

197. *Id.*

198. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988).

199. 16 U.S.C. § 668a (1985). An American Indian may apply for a permit from the United States Fish and Wildlife Service to use eagle parts in religious ceremonies. 50 C.F.R. § 22.22 (1989); *see* United States v. Abeyta, 632 F. Supp. 1301, 1303 (D.N.M. 1986).

200. *E.g.*, 21 C.F.R. § 1307.31 (1989); ARIZ. REV. STAT. ANN. § 13-3402(B) (West Supp. 1987); COLO. REV. STAT. § 12-22-317(3) (1985); IOWA CODE ANN. § 204.204.8 (West 1987); MINN. STAT. ANN. § 152.02, subd. 2(4) (West Supp. 1988); NEV. REV. STAT. § 453.541 (1987); N.M. STAT. ANN. § 3-31-6(D) (Supp. 1988); S.D. CODIFIED LAWS ANN. § 34-20B-14(17) (1986); WIS. STAT. § 161.115 (1975); WYO. STAT. 35-7-1044 (1988). *Compare* Kennedy v. Bureau of Narcotics & Dangerous Drugs, 459 F.2d 415, 416-17 (9th Cir. 1972) (holding the defendant could not exclude religious group that also used peyote in religious ceremonies from exemption under federal criminal statute for the Native American Church); Native American Church v. United States, 468 F. Supp. 1247, 1251 (S.D.N.Y. 1979) (same), *aff'd mem.*, 633 F.2d 205 (2d Cir. 1980) *with* Peyote Way Church of God, Inc. v. Meese, 698 F. Supp. 1342 (N.D. Tex. 1988) (exemption limited only to the Native American Church).

201. *See* United States v. Abeyta, 632 F. Supp. at 1307.

202. *See* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1618-19

Government land use decisions that affect sites considered sacred by Native Americans pose an especially troublesome problem, and one that exposes the special nature of religion. Free exercise claims brought by Native Americans challenging government land use decisions have been rejected on the ground that, rather than imposing a burden or denying a benefit because of the claimants' religious exercise, the government is merely using "what is, after all, *its* land."[203] The land use decision from this view is just an internal question and the religious objector cannot compel the government to act in a certain way.[204] This is a classic example of the clash between religious and nonreligious understanding and the inability to bridge the gap between the two. To the government, ownership of land is all that matters. To the Native American, ownership is irrelevant; the site in question is sacred, and regardless of who owns the land, a disturbance to the land's natural state will harm the spiritual power of the site.

A proper focus returns to the question whether the grant of an exemption will disturb the government interest in the particular land use. In many instances accommodation may be especially difficult, because any use of the site in question will interfere with Native American religious practices. When the proposed land use can be altered in its manner or placement without substantially undermining the purpose of the planned development, the free exercise clause requires selection of a land use with the least onerous impact on Indian religious practices.

The treatment of Morman religious practices in the late nineteenth century and of Native American religious practices today shows the need for an independent right securing religious exercise from the "incidental" effects of neutral laws. The free exercise clause stands as a barrier against majoritarian actions that impose coercive pressures, intended or not, on religious exercise. Mainstream religions will often not need the refuge of the free exercise clause. The democratic process will work for them. This is not true for nonmainstream religions. To eliminate the shield provided by the free exercise clause, as *Smith* proposes, invites intolerance and persecution of nonmainstream religions.

## IV. Conclusion

A significant inconsistency has existed in free exercise case law for almost three decades. The deferential standard of *Reynolds* and *Braunfeld* on the one hand and the strict standard of *Sherbert* and its progeny on the

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(1990) (Blackmun, J., dissenting).

203. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. at 453.

204. *See id.* at 450-53; United States v. Means, 858 F.2d 404, 407 (8th Cir. 1988); Wilson v. Block, 708 F.2d 735, 741 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983); Manybeads v. United States, 730 F. Supp. 1515, 1517-18 (D. Ariz. 1989); Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182, 188-89 (D. Alaska 1982); *aff'd*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 474 U.S. 820 (1985); *see also* Bowen v. Roy, 476 U.S. 693, 699-700 (1986).

other stood side-by-side, seemingly irreconcilable. *Smith* forced a reconciliation by transforming *Sherbert* into a limited exception to the *Reynolds-Braunfeld* rule of deference to neutral laws of general applicability. In doing so, the Supreme Court gutted the free exercise clause of any substance beyond that already offered by the free speech clause.

*Smith*'s transformation of free exercise doctrine is unjustified. Religious exercise deserves a level of constitutional protection from majoritarian action greater than similar nonreligious conduct. Without such protection, nonmainstream religions are likely to suffer from intolerance in ways mainstream religions will not.