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WHEN THE COURTS WERE TRIPPING: AN ANALYSIS OF *EMPLOYMENT
DIVISION V. SMITH* AND ITS IMPACT ON OREGON LAW

In 1990, the Supreme Court heard *Employment Division v. Smith*. At its core, the case was about religious freedom. The claimant Al Smith had been fired from his job for using peyote during a religious ceremony for the Native American church, and believed that he deserved compensation for his firing. However, in a reversal of expectations, the Supreme Court found in favor of the state.¹ This decision was and is widely regarded as the incorrect choice. Even today, *Employment Division v. Smith* is held as an example of a violation of religious freedoms and an overreach of judicial power.

First, a note on the literature available on *Employment Division v. Smith*. The case is largely absent from popular culture, with almost no work done about it that is not academic. It seems to have escaped the sensationalist depictions that one might expect for a case so high profile and fraught with taboo and human interest. One simple explanation for this fact may be that the case is simply too recent to have drummed up a significant amount of intrigue. It may

¹*Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

take several more years for the case and its implications to solidify in the public mind and prompt more dramaticized interpretations. Another, and possibly more significant reason, may be that it dealt with Native American rights, which is a topic that is all too often shunted to the side in the American national narrative. Regardless, most of the secondary sources available on this topic are strictly scholarly, and the most in depth reviews typically come from legal scholars. Of the legal interpretations available, most can be divided into two camps: analysis and criticism of the decision itself, which usually concludes by condoning the ruling as a disaster for religious rights²; and analysis of how the decision affected American law.³ This second camp focuses more on the responses that governments had.

It was 1982 when Al Smith began working as a drug counselor for Native American youth for an organization called ADAPT. He was an experienced drug counselor at this point and had been in the field since 1971.⁴ As a Native American man who had struggled with drug usage in the past, he found great fulfillment in his work and began to reconnect with his heritage, which he had been forced to abandon at a young age. During his employment, he became

²See Karin M. Rebesch, "The Illusory Enforcement of First Amendment Freedom: Employment Division, Department of Human Resources v. Smith and the Abandonment of the Compelling Governmental Interest Test," 69 N.C. L. Rev. 1332 (1991), and Kenneth Marin, "Employment Division v. Smith: The Supreme Court Alters the State of the Free Exercise Doctrine" [article on-line](Washington, DC: The American University Law Review, (1991).

³ See Robert McIver, "'Our constitution, our precedents, and (our) own best human judgments': a survey of free exercise state constitutional interpretation in the wake of *Oregon v. Smith*," *Albany Law Review*, 77:4 (Summer 2014), p. 1643+. Database on-line; and Lupu, Ira C.. "Employment Division v. Smith and the Decline of Supreme Court-Centrism." 1993 *BYU L. Rev.* 259 (1993).

⁴ *Smith v. Employment Division*, 75 Or.App. 764, 709 P.2d 246 (1985).

involved with the Native American church, and began attending its services and ceremonies. One cornerstone of the Native American church's practice is the use of peyote, a powerful hallucinogenic drug. The modern native American church combines elements of traditional American religion and Christianity. Followers believe that ingesting peyote is a way to communicate with the Great Spirit, a supreme being that can be equated to the Christian God. It is also considered an avenue to self-improvement.⁵ During a ceremony for the Native American church, Smith ingested peyote, as was standard for the proceedings. However, when his employers learned that he had taken peyote, they fired him immediately. Intentional use of peyote was a crime under Oregon law at the time, and the drug counseling center had also warned all employees that they had to abstain from drug usage while employed or their employment would be terminated. One of Smith's coworkers, Galen Black, had also been present for the ceremony and was fired as well. When Smith and Black applied for unemployment benefits from the state, the Employment Appeals Board denied them, claiming that they had been fired due to misconduct.⁶ Smith appealed the case, because he believed that the state had interfered with his freedom to worship as protected by the Oregon Constitution and the first amendment. *Employment Division of Oregon v. Smith* was opened.

The Oregon Court of Appeals heard the case in 1985, and they ruled against the Employment Appeals Board. They found that Smith and Black did deserve unemployment

⁵ Huston Smith and Reuben Snake, *One Nation Under God: The Triumph of the Native American Church* (Santa Fe, NM: Clear Light Publishers, 1996).

⁶ *Smith v. Employment Division*, 75 Or.App. 764, 709 P.2d 246 (1985).

compensation, and that the state had interfered with their right to practice their religion.⁷ The state disagreed with this finding and appealed to the Oregon Supreme Court, who again ruled in favor of Smith. This time, they said that Smith's right to worship had been violated under the federal constitution, but not the Oregon Constitution. They used federal precedent to decide that the burden placed on Smith outweighed the burden placed on the state by his drug usage.⁸ The state was again dissatisfied, as they still believed that Smith did not deserve compensation since peyote use was a crime. They appealed again to the U.S. Supreme court. The Supreme Court sent the case back down to the Oregon Supreme Court so that they could clarify the state's stance on peyote's legality for religious use.⁹ No prior case had involved citizens of Oregon losing their jobs for illegal conduct, so clarification was necessary. Oregon decided that the use of peyote in religious ceremonies was illegal,¹⁰ but that its illegality was in violation of the first amendment. They concluded again that the state could not deny Smith unemployment benefits.¹¹ They then sent the case back to the Supreme Court to make their final decision.

⁷ *Smith v. Employment Division, Department of Human Resources*, 75 Or.App. 764, 709 P.2d 246 (1985).

⁸ *Smith v. Employment Division*, 301 Or. 209, 721 P.2d 445 (1986).

⁹ Peyote's legality in religious ceremonies was widely debated. 23 other states and the Federal Drug Enforcement Administration both considered peyote permissible for religious uses, but Oregon did not. Smith's attorney actually cited the California law granting religious peyote use protection during the court proceedings, which further confused the matter.

¹⁰ This finding by the Oregon Supreme Court was later recognized by various legal scholars as their refusal to take a stance on the issue.

¹¹ *Employment Division v. Smith*, 485 U.S. 660 (1988).

Surprisingly, the Supreme Court completely disagreed with the Oregon courts' prior rulings. They also invented an entirely new method of determining whether a law violated the first amendment. Legal scholars were shocked: the ruling went against precedent, and was hugely detrimental to religious rights. The Native American Church specifically was also harmed. During the proceedings, Smith's attorney had argued that finding in favor of the state "would be total destruction" of Smith's religion.¹²

Prior to *Smith*, courts approached first amendment issues on a careful case by case basis and generally allowed religious exceptions to laws. They used a legal balancing test called the Sherbert test to come to decisions, and weighed religious freedom with common safety. However, according to the precedent set by Antonin Scalia's majority opinion, a law that was not designed to inhibit religious freedom but did so anyway was still constitutionally sound:

We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes.¹³

The ruling completely flew in the face of past rulings on religious freedoms. It said that religious activity that was generally viewed as criminal by neutral law was still criminal, no matter the beliefs of the person doing the action. According to Scalia's logic, it did not require any sort of

¹² Ed Goodman, "Peyote Decision Hurts All Native Americans' Freedoms," *Smoke Signals* [Grand Ronde, Oregon], (May 1, 1990).

¹³*Employment Division v. Smith*, 485 U.S. 660 (1988).

test to determine whether a religious action was legal or not, and tests used in the past were ruled “inapplicable.” Scalia wrote that “

The government's ability to enforce generally applicable prohibitions of socially harmful conduct... 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development'... To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'... permitting him, by virtue of his beliefs, 'to become a law unto himself'...contradicts both constitutional tradition and common sense.¹⁴

The ruling established that the Oregon law banning peyote use was “an across-the-board criminal prohibition on a particular form of conduct,” and did not need to be overruled for religious reasons, even if the law did infringe on religious freedoms. They also stated that the only forms of conduct that did fall under religious exceptions were those that were somehow combined with another right, such as if a law infringed on both a person’s freedom of worship and freedom of speech.¹⁵ A law that limited religious freedom alone was perfectly constitutional. In essence, Scalia decided that the First Amendment did not warrant religious exceptions to laws, and that laws were only unconstitutional if they specifically targeted a religion or religious practice. This

¹⁴ *Ibid.*

¹⁵This portion of the opinion is called the “Hybrid Rights Doctrine,” and has caused much head scratching in the legal community. It is poorly explained in the original ruling, and some scholars have argued that it can actually be used to expand religious freedoms. See Ryan S. Rummage, "In Combination: Using Hybrid Rights to Expand Religious Liberty," *Emory Law Journal* 64, no. 4 (2015).

ruling was a disaster for minority religious groups, who often need special exceptions to broad laws in order to practice their faith in full.¹⁶

It is possible to trace the Supreme Courts' various rulings on religious and personal freedom issues over the course of several decades to see how the court became more conservative on the lead up to *Smith*. To understand the case, it is important to start in 1963 with the case *Sherbert v. Verner*, which established the Sherbert test. The Sherbert test was used to determine if an action infringed on individual religious freedoms. *Sherbert* was the most relevant precedent to *Oregon v. Smith*, and was the precedent that was usually used to decide cases like it. In fact, the Oregon Supreme Court cited *Sherbert* as the main reason behind their initial ruling in favor of Smith.¹⁷ In the case, Sherbert quit her job because the textile mill that she worked at required work on Saturdays, which was her Sabbath day. The state denied her unemployment benefits, which are usually reserved for fired employees. The Supreme Court ruled in favor of Sherbert,¹⁸ and established a precedent for deciding issues of First Amendment rights called the Sherbert test. First, the claimant had to have a sincere religious belief that had been hindered by the government's actions. If this was shown to be true, then the government had to show that their action against the claimant served a "compelling government interest," and that allowing an exception to the law undermined that interest. They also had to show that they were using the

¹⁶ *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

¹⁷ *Smith v. Employment Division*, 301 Or. 209, 721 P.2d 445 (1986).

¹⁸ *Sherbert v. Verner*, 374 U.S. 398 (1963).

least restrictive means to limit religious expression. The Sherbert test is also called the strict scrutiny or balancing test, and continued to be applied in freedom of religion cases after the *Sherbert* ruling. One notable example is in *Wisconsin v. Yoder*, when an Amish family claimed that mandatory school attendance laws interfered with their religious belief that children should be educated within the home beyond the eighth grade. The court found in favor of Yoder. During the proceedings, the Justices utilized the Sherbert test, and ultimately found that the state's interest in educating children seriously undermined the Amish faith, as "high school attendance with teachers who are not of the Amish faith -- and may even be hostile to it -- interposes a serious barrier to the integration of the Amish child into the Amish religious community." This "endanger[ed] their own salvation and that of their children", significantly burdening their religious practice.¹⁹

The case was heard in 1972, and marked the height of the federal court's move towards freedom of religious expression rather than just freedom of thought.²⁰ The Sherbert test continued to be utilized, although the nature of its use changed fairly soon after the ruling was reached. In his 1991 article "*Employment Division v. Smith: The Supreme Court Alters the State of the Free Exercise Doctrine*," Kenneth Marin wrote:

¹⁹ *Wisconsin v. Jonas Yoder*, 406 U.S. 205 (1972).

²⁰ In the past, belief action doctrine had dictated judicial rulings on religious matters. According to belief action doctrine, citizens could believe what they wanted, but the government generally had the right to curtail religious expression whenever necessary to protect others. *Wisconsin v. Yoder* was a radical move away from this belief, because non-Amish people or people critical of the Amish faith likely believed that Yoder's children were endangered or harmed by being removed from school so as to better absorb their faith. However, the courts did not keep this mindset for long. During the 1980s, they quickly returned to a more conservative, limiting stance on religious expression. By 1990, the *Smith* ruling was not out of place.

During the last decade, the Supreme Court was less willing to grant religious exemptions under the strict scrutiny test. Although the Court retained the test in theory, in most instances it shifted the balance in favor of the state by interpreting the states' interests broadly and the religious interests narrowly.²¹

After the *Sherbert* and *Yoder* rulings, there were a series of cases decided in favor of government control and against religious freedoms. Many of these cases used the Sherbert test in their proceedings, but simply did not find that the government's interest was less important than religious rights. Examples include *United States v. Lee* and *Gillette v. United States*.²² In fact, in later years the Supreme Court abandoned the Sherbert test almost entirely. In the Smith majority opinion, the Justices claimed that the test was mostly relevant to employment compensation issues, but that it was no longer pertinent to many of the cases they were seeing at the time. They stated that they had largely abandoned the test for most religious rulings.²³ Many notable cases from the time also had a "fraudulent" air about them that made their rulings acceptable to

²¹Kenneth Marin, "*Employment Division v. Smith: The Supreme Court Alters the State of the Free Exercise Doctrine*" [article on-line](Washington, DC: The American University Law Review, 1991, accessed 24 November 2018).

²²*United States v. Lee*, 455 U.S. 252, 257-59 (1982) . Found that a person could not claim religious reasons to avoid paying taxes, as the public interest in paying taxes equally was too great. *Gillette v. United States*, 401 U.S. 437 (1971). Did not allow a man to be exempted from the Vietnam war draft for personal belief reasons, because he was not opposed to every type of war.

²³The majority opinion cites certain cases as concerning religious expression but not utilizing the Sherbert test: *Bowen v. Roy* decided that parents could not exempt their child from getting a social security number for religious reasons and still receive financial support from the state. *Lyng v. Northwest Indian Cemetery Protective Assn.* determined that the Forest Service could develop an area important to Native American religious belief, because the harm was incidental, not intentional. *O'Lone v. Estate of Shabazz* ruled that Muslim men in prison did not have to be excused from duties on the Friday Sabbath. Out of public interest in rehabilitation and reform.

the general public, despite the fact that all decisions ruled against wider religious freedom. This leniency on religious issues allowed for the slide towards the Smith ruling in 1990. In their ruling, the Justices completely invalidated the Sherbert test, stating that it was “inapplicable” in most cases and went against “common sense”.

The country’s general hysteria over drug usage also can also not be discounted in the decision of this case, as a case about peyote naturally sounded bad to most people. The fervor over the drug war reached its peak during this time, and people generally thought that the state did have an interest in preventing drug usage. Were this case to happen today, the general populace would likely be less concerned about the fact that the case involved peyote.

The ruling was also reached because the country and the courts at the time were in the throes of a conservative swing. In fact, strategic conservative court appointments began as early as 1968, which further explains why the Sherbert Test was not used as often or as radically as it could have been. According to an article by the *Washington Post*, “Richard Nixon’s election in 1968 launched an era of Republican domination of Supreme Court appointments. Nixon and subsequent GOP presidents made appointments a campaign issue, pledging to nominate conservative, ‘strict constructionist’ jurists.”²⁴ This suggests that the groundwork for the ultra conservative Smith ruling began to be laid in the late 1960s. By the time the case reached the Supreme Court in the late 1980s, the court was far more conservative than it may have been in earlier times or without the political jockeying that lead to many of its Justices’ appointments. The case was also making its way up through the court system during Ronald Reagan’s

²⁴ Brandon Bartels, "It Took Conservatives 50 Years to Get a Reliable Majority on the Supreme Court. Here Are 3 Reasons Why," *The Washington Post*, [article on-line], (June 29, 2018).

presidency, a notably right wing era in American politics. This wider attitude definitely influenced the *Smith* decision. In fact, both justices appointed by Reagan, Sandra Day O'Connor and Antonin Scalia, voted in favor of the state,²⁵ and Scalia wrote the majority opinion.

Congress immediately took action to prevent the *Smith* ruling from becoming weaponized by passing three separate acts designed to protect religious freedom. They passed the Religious Freedom Restoration Act of 1993, the American Indian Free Exercise of Religion Amendments of 1994, and the Religious Land Use and Institutionalized Persons Act of 2000. This first of these was clearly a response to the Supreme Court's findings in *Smith*, as it directly referenced the case within the first paragraphs of text. Its purpose was to restore the use of the Sherbert test, and to more explicitly protect government employees from religious persecution. It directly used the language of the *Smith* decision to express the opposite opinion: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."²⁶ The American Indian Free Exercise of Religion Amendments made peyote use a protected part of Native American religious ceremony. The Religious Land Use and Institutionalized Persons Act corrected issues with the Religious Freedom Act by prohibiting religious discrimination during the zoning process.

The appellate courts also responded by limiting the power of the *Smith* ruling. Their attitude towards the ruling is apparent through their individual reactions to the hybrid rights section of the majority opinion, which was vague and confusing enough to be interpreted in a variety of different ways. Certain courts decided to ignore the hybrid rights doctrine entirely, and

²⁵*Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)

²⁶ Religious Freedom Restoration Act of 1993, Section 3a.

to continue to evaluate claims as though the hybrids rights rule had never been introduced. Members of this group included the Sixth Circuit, which called the hybrid rights rule “completely illogical;” the Second Circuit, which said that there was “no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated;” and the Third Circuit, which said that “until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta.”²⁷ It is clear that these courts had little regard for the ruling, and were especially frustrated and confused by the hybrid rights doctrine. This stance may be criticised as an overreach of the appellate courts’ power, as they dismissed outright the Supreme Court’s decision.

Other appellate courts interpreted the hybrid rights doctrine differently. Some believed that the secondary right had to be viable for the entire claim to be heard. This belief included the First and D.C. Circuit court, and this approach was the only one that used the hybrid rights doctrine to actually limit religious freedom.

The third approach was to consider the claim viable if there was a “colorable claim” that a secondary right had been infringed upon. This means that there must only be a likelihood. This interpretation was used by the Ninth and Tenth Circuit Courts, and actually granted a wide variety of religious activities legal protection. The colorable claim approach allowed two weak claims to be combined into one strong one, giving claimants a greater chance of earning religious

²⁷*Kissinger v. Board of Trustees of Ohio State Univ.*, 786 F. Supp. 1308 (S.D. Ohio 1992); *Leebaert Ex Rel. Leebaert v. Harrington*, 193 F. Supp. 2d 491 (D. Conn. 2002); *Combs v. Homer Center School Dist.*, 468 F. Supp. 2d 738 (W.D. Pa. 2006).

exemptions to laws. The “colorable claim” approach was also adopted by many district courts in various cases, even when the appellate courts had set no precedent.²⁸

The fact that so many district and appellate courts seemed determined to either ignore the hybrid rights doctrine or use it to expand religious freedom shows that they likely resented the *Smith* ruling’s limitations on the First Amendment.

One of the case’s other impacts was a change in the relationship between state and national governments. *Smith* was a wake up call to states that they could no longer follow the national courts’ actions completely, and that they needed to put in place their own protections of personal rights as a safeguard. Some state governments amended their own constitutions, and began putting in place state level protections of First Amendment rights, while others floundered for decades in the wake of the ruling to strike a balance between individual expression and state power. The sudden erosion of religious freedom that *Smith* marked actually weakened the Supreme Court’s power as a whole, because states began to exercise their own powers in response. One particular example that stands out is the Ohio Supreme Court’s ruling in *Humphrey v. Lane* in 2000. A Native American man named Humphrey had been fired from his job for wearing his hair long and refusing to cut it. He sued the government for religious discrimination, and the Ohio Supreme court ruled in his favor. In the majority opinion, the Justices talked at length about the *Smith* decision and how it forced the Ohio government to diverge from the federal courts: “The Ohio Constitution allows no law that even interferes with the rights of conscience. The federal Constitution concerns itself with laws that prohibit the free

²⁸*Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961 (N.D. Ill. 2003) was heard in the 7th circuit. *Alabama & Coushatta Tribes v. Big Sandy School District*, 817 F. Supp. 1319 (E.D. Tex. 1993) was heard in the 5th circuit.

exercise of religion. By its nature the federal Constitution seems to target laws that specifically address the exercise of religion, i.e., not those laws that tangentially affect religion. Ohio's ban on any interference makes even those tangential effects potentially unconstitutional.”²⁹ They also stress that it was the *Smith* decision specifically that forced the Ohio Court to act against federal precedent: “It was the *Smith* decision that marked the divergence of federal and Ohio protection of religious freedom. Not until *Smith* did the difference in the constitutional clauses become relevant... The *Smith* decision made it clear that earlier federal jurisprudence on free exercise claims should not be relied upon when contemplating religion-neutral, generally applicable laws.”³⁰ This statement clearly shows that the *Smith* decision caused certain governments to lose faith in the Supreme Court on religious issues. Ohio was not the only state with a broad protection of religious rights written into their constitution, so it can reasonably be assumed that many other courts felt the same way, although they may not have stated their opinions so explicitly.

Oregon was in an interesting position, as it was both the originator of the case and a state government who had larger interests in protecting religious rights. The Oregon Supreme Court ruled in favor of *Smith* twice. The first time was when it first heard the case, and the second time, the Supreme Court sent the case back down to the Oregon Court to decide what status peyote held under Oregon law. Both times, the court found that the state could not deny unemployment

²⁹ *Humphrey v. Lane*, 89 Ohio St.3d 62, 2000-Ohio-435. From the majority opinion.

³⁰ *Ibid.*

benefits to the men who had used peyote.³¹ This indicates that the Oregon judicial system disagreed with the Supreme Court's final ruling. The Oregon Bill of Rights should have guided the court's reaction to the case: in terms of religious freedom, the Oregon Bill of Rights is much more thorough and explicit in its protections than the American Constitution. Rather than just one amendment protecting religious freedom, Oregon has five total. Amendments two through six all deal with religious rights, and laid the groundwork for Smith to win the case.

However, the Oregon Supreme Court's initial ruling on the Smith case was strange for several reasons. First, they ruled that Smith was actually not protected by the Oregon State Constitution. They used language very similar to that used on the Supreme Court's final decision: "Claimant was denied benefits through the operation of a statute that is neutral both on its face and as applied. The law and the rule defining misconduct in no way discriminate against claimant's religious practices or beliefs. If claimant's freedom to worship has been interfered with, that interference was committed by his employer, not by the unemployment statutes." The state is referring to the same neutral laws that the federal courts referred to, and are using the laws neutrality to justify its legality despite the burden it placed on Smith's religious practice. They then went on to say that Smith's "right to worship according to the dictates of his conscience [was not] infringed upon by the denial of unemployment" under Oregon law specifically. According to the court, the Oregon Constitution protected people from religious

³¹ Roberta Ulrich, "Peyote: Decision Criticized as Posing Danger to Members of Minority Religions," *The Oregonian* (Portland, Oregon), April 18, 1990. Interestingly, a few Oregon cases referenced the Oregon Supreme Court's ruling in favor of Smith even after it was overturned by the federal Court. *Veneer v. Employment Division* (1991) said that it was not applicable to the situation at hand and *Meltebeke v. Bureau of Labor and Industry* (1993) used the ruling to actually justify a man's free expression of his beliefs.

persecution from the government, but since it was a private company who had terminated Smith's employment, the government had played no part. The justices wrote that "the rule denying unemployment benefits to one who loses his job for what an employer permissibly considers misconduct... is itself a neutral rule".³² ADAPT had a right to terminate his employment. As long as other job options remained open to Smith, his right to worship was not illegally threatened, according to Oregon law.

This ruling inspires confusion for several reasons. First, the Oregon Bill of Rights has a clause very similar to the "free conscience" section that the Ohio Supreme Court cited in their ruling in *Humphrey v. Lane*. Article 1, section three states that "No law shall in any case whatever interfere with the rights of conscience."³³ While *Humphrey v. Lane* obviously occurred after *Smith*, the wild deviation in the interpretation of the states' Bill of Rights is bizarre. Oregon gave very little justification for their dismissal of this portion of the Bill of Rights, too; they simply said that the claimant "had not shown" that his right to worship had been hindered under Oregon law. It is possible that Smith's attorneys simply did not argue his case well, but it seems unlikely that the State should not see the obvious burden that the Employment Board placed on Smith's religious beliefs.

The Oregon Supreme court then went on to examine whether or not he was protected under federal law. They found that he was by applying the rules of the Sherbert test. "The denial of unemployment benefits significantly burdened Smith's free exercise rights. The employer does not question the sincerity of Smith's religious beliefs... Under Sherbert and Thomas, we are

³² *Smith v. Employment Division*, 799 P.2d 148 (Or. 1990)

³³ Oregon Constitution Bill of Rights, Section 3

constrained to hold that the denial of unemployment benefits is a significant burden on Smith's religious freedom.” They concluded that Smith’s argument met all standards of the Sherbert test, and thus that he deserved unemployment compensation under federal law, not state law.

However, by coming to this conclusion, the Oregon Supreme Court rested their entire decision on the validity of the Sherbert test. In this way, they unknowingly undermined their own ruling. They could not know that the Supreme Court’s final ruling would find the Sherbert test essentially void in this case.

After the Supreme Court reached their decision in April 1990, they sent the case back down to the Oregon Supreme Court on remand. In their review of the case, the Oregon Supreme Court was forced by their initial findings to accept the Supreme Court’s ruling. In their statement, the justices first reviewed their initial findings-- that “claimants, who had been discharged from employment as drug counselors for ingesting peyote in ceremonies of the Native American Church, of which they were members, were entitled to receive unemployment compensation” and that “prohibition would violate the Free Exercise Clause of the First Amendment”-- which was proven by use of the Sherbert test, a test now deemed irrelevant. They then went on to say that there was “little left for [them] to decide” in light of the Supreme Court’s decision, and that the decision was not in violation of Articles 1, 2, and 3 of the Oregon State Constitution according to their prior ruling. They wrote that “the Supreme Court... rejected claimants' argument that their claim for religious exemption should be evaluated under the balancing test set forth in *Sherbert v. Verner*. Sherbert requires governmental actions that substantially burden a religious practice to be justified by a compelling governmental interest. In Smith, the Court limited the application of the Sherbert test to unemployment compensation

cases involving eligibility criteria.”³⁴ In this way, the Oregon court had backed themselves into a corner: they believed that Smith was in the right based on a rule that the Supreme Court had essentially nullified for this case. They had to remain as consistent as possible with their past views. In order to reconcile their past ruling with the federal ruling, they had to side with the state. They wrote that the only thing left for them to decide was whether Black should be awarded Employment Compensation or not, which they decided against in light of the evidence that the state had presented during the hearing.³⁵ It appears that the Oregon Supreme Court agreed with the Federal Supreme Court more out of respect for precedent than principle, as they were essentially forced to reverse their prior decision due to an unexpected legal curveball.

Even though the Oregon judiciary may have officially agreed with the Smith ruling, the rest of the government and the populace did not. Immediately after the decision was reached, the April 18 issue of the *Oregonian* ran a front-page article titled “peyote: Decision Criticised as posing danger to members of minority religions.”³⁶ From this, it is clear that criticism of the decision began in Oregon immediately after it was reached. The article quoted Smith as saying “we are talking about freedom of choice, freedom of religion. We are talking about the first amendment.” It also questioned what “overwhelming interest” the state had in banning peyote, as this was the burden that the state had to prove. It ended with a quote from Emerson Jackson, the national president of the Native American Church, who said: “the white people came here from

³⁴*Smith v. Employment Division*, 301 Or. 209, 721 P.2d 445 (1986).

³⁵ *Smith v. Employment Division*, 799 P.2d 148 (Or. 1990).

³⁶ Roberta Ulrich, "Peyote: Decision Criticized as Posing Danger to Members of Minority Religions," *The Oregonian* (Portland, Oregon), April 18, 1990.

Europe because they were persecuted for their religion... Now they want to persecute the (native) people who live here for their religious beliefs."³⁷ This article clearly expressed the outrage and confusion that most Oregonians felt over the decision.

A year after the Smith ruling, Oregon also revised a law to prohibit discrimination against jury members based on religious belief. While this was by no means a radical bucking of the Smith ruling, it does show that the Oregon legislature was legally bound to respect religious freedoms, and continued to adhere to that obligation. In 1991, the Oregon House passed HB 3039, which was aimed at protecting the religious use of peyote. It didn't legalize the drug, but it gave it better legal protections in religious cases.³⁸ Both Smith and Black spoke in favor of the bill and were present at its signing.³⁹

Employment Division v. Smith was a new frontier for both Federal and Oregon law. It marked a radical departure from standard interpretations of the First Amendment, and was disastrous for minority religions. However, it was in the rest of the legal system's responses that the most interesting discoveries are present. Had the Oregon Supreme Court given more weight to the Oregon Bill of Rights in their ruling, they may have come to the same conclusion that Ohio did. It was only larger government action that prevented the *Smith* ruling from degrading religious freedom beyond repair.

³⁷ *Ibid.*

³⁸ "Roberts Signs Law Allowing Use of Peyote by Indians," 123:6, *Walla Walla Union Bulletin*, (June 24, 1991).

³⁹ "Man Urges Panel to Protect Use of Peyote," *Smoke Signals* [Grand Ronde, Oregon], (May 1, 1990).

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