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THE FREE EXERCISE CLAUSE AFTER SMITH II

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In *Employment Division v. Smith*[1] the Supreme Court modified the free exercise clause.[2] This brief comment describes the potential effect of *Smith II* on the structure of free exercise clause analysis. The purpose is to supplement the author's 1989 article on the same subject.[3]

I. FREE EXERCISE CLAUSE ANALYSIS BEFORE SMITH II

Before *Employment Division v. Smith,* the structure of free exercise clause analysis seemed settled. If claimant satisfied the preliminary requirements (jurisdiction, justiciability, and government action), the threshold question on the merits was whether the government had imposed a cognizable disadvantage on claimant because of claimant's religiously motivated belief or conduct. However, the only burdens that triggered free exercise scrutiny were government action that (1) penalized belief or conduct prescribed by religion or (2) required belief or conduct proscribed by religion.[4]

If these threshold demands were met, the government was required to satisfy the free exercise clause. Coercion of religious belief was absolutely banned, but coercion of religious conduct was subject to means-end scrutiny. In general, coercion of religious conduct was subject to strict scrutiny; it violated the free exercise clause unless it was an effective and neces-

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1. 110 S. Ct. 1595 (1990) (*Smith II*). The case had reached the United States Supreme Court before in Employment Div. v. Smith, 485 U.S. 660 (1988) (*Smith I*).

2. The free exercise clause, U.S. CONST. amend. I, provides, "Congress shall make no law . . . prohibiting the free exercise [of religion]."

3. Galloway, *Basic Free Exercise Clause Analysis,* 29 SANTA CLARA L. REV. 865 (1989).

4. This article will use the phrase "coercion of religious belief or conduct" as a shorthand to refer to these two types of government action.

sary means to further a compelling government interest. In contrast, coercion of religious conduct in prisons and the military was subject to rationality review and violated the free exercise clause only if it was not rationally related to a valid government interest.

II. THE SMITH CASE

Smith and his fellow claimant were discharged from jobs as drug counselors because they used peyote in religious ceremonies conducted by the Native American Church. Oregon denied their unemployment compensation claims on the ground that claimants had been discharged for misconduct. The Oregon Supreme Court reversed, holding that the free exercise clause, as interpreted in *Sherbert v. Verner*,[5] prohibits the denial of benefits based on claimants' religiously prescribed drug use. In *Smith I*,[6] the United States Supreme Court vacated and remanded for a determination whether Oregon law exempts religiously motivated drug use from its general criminal prohibition. On remand, the Oregon Supreme Court held that Oregon's criminal statute prohibiting peyote use does not exempt religious ceremonies, but that denial of unemployment benefits violates the free exercise clause as construed in *Sherbert*. The United States Supreme Court granted certiorari a second time.

In *Smith II*,[7] the Court held that the free exercise clause does not prohibit Oregon from denying unemployment compensation to claimants who were fired for drug use prohibited by the Oregon criminal statute. Under prior precedents, the denial of unemployment benefits would have been subject to strict scrutiny, since it penalized conduct prescribed by claimants' religion. But the Court did not apply strict scrutiny in *Smith II*. Instead, it held that penalizing conduct prescribed by claimants' religion does not even trigger free exercise clause scrutiny where the conduct is prohibited by a valid state criminal law. As the Court put it, "Even if we were inclined to

5. 374 U.S. 398 (1963). *Sherbert* is the landmark case in which the Court held for the first time that government coercion of religious conduct is subject to strict scrutiny under the free exercise clause.

6. 485 U.S. 660 (1988).

7. 110 S. Ct. 1595 (1990).

breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."[8]

In short, *Smith II* created a huge new exception to the free exercise clause by holding that state sanctions on conduct required by religion but prohibited by a generally applicable criminal statute are not subject to the clause at all.

The scope of the new exception is unclear. The major question left open by *Smith II* is whether the exception also applies to state sanctions on religiously prescribed conduct where such sanctions are authorized by a generally applicable civil (noncriminal) law. The Court's precedents in the unemployment compensation field certainly suggest that, at least in some cases, the answer is no. In its prior unemployment compensation cases, the Court applied strict scrutiny even though the denial of benefits was authorized by generally applicable unemployment compensation laws providing that benefits should be denied where claimant voluntarily quit or was discharged for good cause.[9] But *Smith II* shows that the current Court is willing to change free exercise law substantially, so those precedents may not be worth much. Moreover, the Court may decide that some noncriminal rules (such as those enforced by civil fines) should be treated like criminal prohibitions, while others (such as those granting benefits) should not.

III. THE AFTERMATH OF SMITH II: THREE MODELS OF FREE EXERCISE LAW

Smith II has, no doubt, dramatically unsettled free exercise law,[10] leaving it unclear whether the old model of free exercise clause analysis is still valid and, if not, what the new model will be. There seem to be at least three possibilities: (1) that,

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8. *Id.* at 1603. The Court acknowledged that strict scrutiny would still apply when the government singles out religious conduct for special burdens and in "hybrid situations," *id.* at 1602, when the government coercion infringes not only religious freedom but also some independent fundamental right.

9. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

10. "[T]oday's holding dramatically departs from well-settled First Amendment jurisprudence . . . ." *Smith II*, 110 S. Ct. at 1606 (O'Connor, J., concurring in the judgment). "In short, it effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution." *Id.* at 1616 (Blackmun, J., dissenting).

subject to the new *Smith II* exception, the old model is still valid, (2) that a new two-track model of free exercise clause analysis will emerge, or (3) that a new model will be used in which rationality review is the general rule for government coercion of religious conduct and strict scrutiny the exception.

A. *Model 1. The Old Model with a New Exception*

Perhaps the Court intends to retain the traditional model of free exercise clause analysis. Under this model, government coercion of religious belief is absolutely banned, while government coercion of religious conduct is subject to strict scrutiny unless it occurs in a prison or military context.[11] This model is sufficient to accommodate *Smith II* if it is adjusted to recognize a single additional exception, namely that coercion of religious conduct prohibited by a generally applicable criminal law is not subject to the clause at all.[12]

In other words, the general rule under Model 1 is that coercion of religious belief or conduct is a cognizable burden triggering free exercise scrutiny, but the exception is that coercion of religious conduct prohibited by a criminal statute is not.

The difficulty with this model is that the *Smith II* exception almost swallows the general rule. Moreover, if the *Smith II* exception is extended to government coercion authorized by a generally applicable civil law, the exception really does swallow the general rule, and Model 1, the traditional model, will no longer accurately describe the realities of free exercise clause law. This is because most cases involving government coercion of religious conduct involve government action pursuant to generally applicable criminal or noncriminal laws. In such a situation, to say that strict scrutiny is still the general rule would be downright misleading.[13]

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11. This is the model described in Galloway, *supra* note 3.

12. *See* Galloway, *supra* note 3, at 871 ("Moreover, even in cases where the government punishes a person for conduct required by religion, the burden does not trigger free exercise scrutiny if the conduct is validly prohibited by statute.").

13. Model 1 would still be logically correct, but it would conceal rather than reveal the realities of revised free exercise clause law.

B. *Model 2. A New Two-Track Model of Free Exercise Clause Law*

A second approach is to recognize that strict scrutiny is no longer the "general rule" for analyzing government coercion of religious conduct. Instead, a two-track model would recognize that government coercion of religious conduct may be subject either to rationality review or strict scrutiny.

Several "switching questions" would determine whether the analysis proceeds on track one (rationality review) or track two (strict scrutiny). If the religiously motivated conduct is prohibited by a generally applicable criminal or perhaps civil law, rationality review would be used. Similarly, if the conduct occurs in a prison or military context, rationality review would apply. In contrast, strict scrutiny would apply if the government coercion involves the denial of unemployment benefits or perhaps other benefits involving individualized hearings, singles out religious conduct for special burdens, or infringes hybrid religious/fundamental rights. Given the scope of the *Smith II* exception, the two-track model may be more accurate than the traditional model, since strict scrutiny may now be the "general rule" in name only.

C. *Model 3. Rationality Review the General Rule; Strict Scrutiny the Exception*

If the Court does extend the *Smith II* "exception" to include government coercion of religious conduct where the government action is authorized by a generally applicable civil law,[14] then it might as well be frankly recognized that strict scrutiny has become the exception rather than the general rule. Since, in the vast majority of cases, government coercion of religious conduct is imposed pursuant to generally applicable criminal or civil law, rationality review will be the new general rule.

The Supreme Court dropped a not very veiled hint that it is heading in that direction when it said:

> We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemploy-

14. Numerous recent lower court decisions have applied the *Smith II* exception to coercion of religious conduct authorized by generally applicable civil laws.

> ment compensation . . . . In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all . . . . Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.[15]

This strongly suggests that the Court is planning to confine strict scrutiny to cases involving denials of unemployment compensation.[16] If that happens, it would indeed be a mockery to say strict scrutiny is the general rule; the new general rule would be rationality review.

This comment does not analyze which model of free exercise clause analysis will ultimately prevail. Suffice it to say that the future of the free exercise clause is up for grabs. However, if the Rehnquist Court has decided to convert strict scrutiny into a narrow exception and adopt a new general rule that government coercion of religious conduct is exempt from free exercise scrutiny and subject only to substantive due process rationality review, then we have indeed had a counter-revolution in free exercise clause law.

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15. Employment Div. v. Smith, 110 S. Ct. 1595, 1602-03 (1990). As stated above, *Sherbert* is the landmark case that adopted the strict scrutiny test as the general rule in free exercise law.

16. As stated above, the Court would also continue to apply strict scrutiny to government action that singles out religiously motivated conduct for special burdens and in "hybrid situation[s]," where the government coercion of religious conduct burdens an independent fundamental constitutional right. *Id.* at 1601-02.