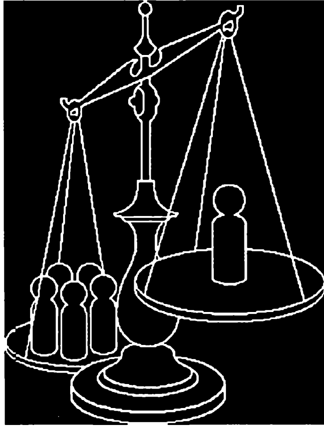

Solarz Is Right, The Court Is Wrong

Adele Sherbert, a Seventh-day Adventist, won a landmark case before the Supreme Court in 1963. The case established new frontiers for religious liberty from which this court is retreating.

by Mitchell A. Tyner

THE PRECEDING STATEMENT BY CONGRESSMAN Stephen J. Solarz would seem to indicate that the United States Supreme Court did something to raise his ire. The Court did: it ruled that if the State of Oregon can prohibit the use of peyote, it can also deny unemployment benefits to those fired for using it. But does this single decision really justify legislation to reverse the country's highest court? Yes, it does. To understand why, you must understand the background of the decision.

Alfred Smith is a Klamath Indian who lives outside Eugene, Oregon, with his wife, Jane, and their children, ages eight and three. The rites of the Native American Church are an integral part of his life. Those rites include the use of peyote.

Smith's peyote use is seen not as an aid or thrill but as a direct pipeline to God; it's a central part of his church. "I am not a drug dealer or a drug addict," Smith said. "I am trying to find my way on a spiritual path."

His path involves a cactus native to the southwestern United States. Cactus tops—peyote buttons—contain mescaline, a hallucinogen. Use of peyote is a sacrament for thousands of Native American Church members. It's also a drug with the same legal classification as heroin, LSD, and cocaine. The federal government and 23 states have made statutory exceptions for peyote use in Smith's church. Oregon has not.

When Smith went to work as a drug rehabilitation counselor for the Council on Alcohol and Drug Abuse Prevention Treatment (ADAPT), he signed a standard contract stipulating that he would not use drugs or alcohol. Smith thought an exemption would be made for his religious use of peyote, but ADAPT officials thought differently, and Smith was fired. When Smith applied for unemployment benefits, he was turned down. The State Employment Division said he had been fired for misconduct and therefore didn't qualify. Smith then turned to the court system.

Mitchell A. Tyner, both an ordained minister and an attorney, is Associate Director of the General Conference Public Affairs and Religious Liberty Department.

An Oregon appeals court reversed the decision of the Employment Division and, four years after Smith was fired, the Oregon Supreme Court ruled that the ceremonial use of peyote was protected by the Free Exercise Clause. State officials appealed that ruling to the U.S. Supreme Court in 1987, arguing that Smith wasn't entitled to benefits because peyote use was a crime in Oregon. Uncertain about that, the High Court sent the case back to the state supreme court to determine whether religious use of peyote was indeed a crime in Oregon.

The state court emphatically reaffirmed its earlier ruling, concluding that the Oregon statute against possession of controlled substances makes no exception for the sacramental use of peyote, but that outright prohibition of good-faith religious use of peyote by adult members of the Native American Church would violate the Free Exercise Clause of the U. S. Constitution. On that decision this case made its second trip to the nation's highest court.

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In its first major Free Exercise Clause opinion, in 1878, the Supreme Court ruled that the statutory prohibition of polygamy could be enforced against Mormons, for whom the practice was a religious requirement. Over the next half-century the Court restricted other practices, ruling the common good to be a proper barrier to some religious practices.

Beginning in the 1940s, the Supreme Court held that the freedoms of religion, speech, press, and assembly were "fundamental" freedoms—preferred and precious—unlike, for example, freedom of contract or economic freedoms. The latter were protectable, but not to the degree of First Amendment rights. The Court was moving toward so-called "strict scrutiny" of any governmental burden on fundamental rights, while employing a more lenient test in relation to nonfundamental rights.

The application of strict scrutiny in Free Exercise cases was crystallized in the 1963 case of *Sherbert vs. Verner.* Adele Sherbert, a Seventh-day Adventist, lost her job because she refused to work on her Sabbath. Because her refusal was deemed misconduct, she was then denied unemployment compensation. She filed suit, alleging the denial to be a contravention of her right to the free exercise of her religion. The Supreme Court agreed. In an opinion written by Justice Brennan, the Court held that one may not be forced to choose between allegiance to sincerely held religious belief and the receipt of generally available governmental benefits. Brennan did more: he enunciated a three-part test for application of the Free Exercise Clause. The so-called "*Sherbert* Test" said that a governmentally imposed burden on free exercise must be justified by showing a compelling state interest that cannot be met by any method that is less intrusive on religious practice.

Since 1963, the *Sherbert* test has become the standard analytic tool for deciding cases of governmental burdens on religious practices. By the time of the *Smith* decision, *Sherbert* had been cited in 546 recorded federal court cases and 393 state court cases—a total of 939 applications over 27 years.

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On November 6, 1988, the parties argued *Employment Division vs. Smith* to the Court using the *Sherbert* analysis—the state contending that its interest was compelling, Smith contending that it was not. Court-watchers, as they had for the better part of three decades, debated how the Court would apply its standard analytic framework.

Then, on April 17, 1990, came the bombshell. The Court, through an opinion written by Justice Scalia and concurred in by Chief Justice Rehnquist and Justices Kennedy, Stevens, and White, held that the Free Exercise Clause does not bar a state from applying its general criminal prohibition of peyote consumption to individuals whose religion prescribes its sacramental use. But that wasn't all.

Scalia wrote that unless a law either singled out a religion or singled out an individual *because* of religion, the Free Exercise Clause would not require an exemption from a law of general applicability. In other words, if the law burdens religion incidentally (as opposed to intentionally) and that law is generally applicable and is otherwise valid as applied to secular subjects, the First Amendment is not violated. Reviewing courts need no longer engage in a search for a compelling public interest; strict scrutiny is not required.

Under the new standard, only burdens on religious *belief* get strict scrutiny. Religious practice receives much less protection. Laws that interfere with religious practices are just fine as long as the rule applies to everybody, the government has a palatable reason for the rule, and it doesn't single out religion for negative treatment. There is no need for balancing. States may *choose* to grant exemptions, but they may not be forced to do so.

According to Scalia, making an individual's obligation to obey a law contingent upon the law's coincidence with his or her religious beliefs, except where the state's interest is compelling, "contradicts both constitutional tradition and common sense." That would create "a private right to ignore generally applicable laws," which would be "courting anarchy." For Scalia, giving that much weight to individual opinion and conviction in a society as religiously diverse as ours is a "luxury" we can no longer afford.

Justice O'Connor concurred in the result, but not with the rationale of the decision. She argued that since (in her opinion) Oregon had a compelling interest in the enforcement of its drug laws, the Court could—and should—have reached the same result while retaining the *Sherbert* strict-scrutiny test. Said O'Connor,

> The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a "luxury" is to denigrate [the] very purpose of the Bill of Rights.

Justice Blackmun, joined by Justices Brennan and Marshall, went further. They argued not only against their fellow justices' near-total rejection of *Sherbert*, but that Oregon had *not* met its burden of showing a compelling interest, since it had not sought to enforce criminal penalties against Smith and had made virtually no effort to enforce the law against other Indian users of peyote. Blackmun wrote that the majority decision

> effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution. . . . I do not believe that the Founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty—and they could not have thought religious intolerance "unavoidable," for they drafted the Religion Clauses precisely in order to avoid that intolerance.

From the ranks of religious bodies, legal scholars, and civil-rights groups came a grand chorus of voices agreeing with either O'Connor or Blackmun. The petition asking the Court to rehear the case (denied) was joined by the American Jewish Congress, the

Baptist Joint Committee on Public Affairs, the Christian Legal Society, the National Council of Churches, the Evangelical Lutheran Church of America, the Seventh-day Adventist Church, the Presbyterian Church (USA), and the Worldwide Church of God, as well as by a long list of legal scholars including Gerald Gunther of Stanford, Lawrence Tribe of Harvard, Michael McConnell of the University of Chicago, Norman Redlich of New York University, and Robert Drinan of Georgetown University. The National Conference of Christians and Jews expressed "profound disquiet" with the *Smith* decision; the National Council of Churches called it "a decision of disastrous significance"; and the American Jewish Congress called it "devastating to the free exercise rights of all Americans, particularly those of minority faith."

Those opposing the *Smith* decision range from the American Civil Liberties Union to the Rutherford Institute—an amazing spectrum of voices not infrequently at odds with one another. What has produced this remarkable unanimity? Their disquietude centers on three points.

Those opposing the Smith *decision include an amazing spectrum of voices frequently at odds with one another. What has produced this remarkable unanimity?*

First, this decision moves the Free Exercise Clause to the back of the bus. It no longer merits the same strict scrutiny given to alleged violations of other fundamental rights. The Supreme Court deems free exercise to be a free-standing right only in that highly improbable situation where government singles religion out for regulation.

Second, the decision is patently majoritarian, a phenomenon laudable in the legislative and executive branches, but disquieting in the judicial branch, whose responsibility is to enforce the constitutional rights of individuals, not majorities. Scalia wrote,

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

In response, Justice O'Connor noted that "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority."

Third, as a practical matter, this decision makes any legal action challenging a governmental burden on religion much more difficult, if not impossible. Previously, one need only show that a law or governmental action burdened a sincerely held religious belief. The evidentiary burden then shifted to the government to justify its action. Now the plaintiff must not only demonstrate the burden on belief, he must also show that the act complained of is not generally applicable, not facially neutral, or fits into some other narrow exception to *Smith*. The amount of evidence that the plaintiff must bring in order to shift the burden to the government has been greatly increased.

The other obvious fallout of this decision is that churches will now be subject to all sorts of regulations. Zoning, landmarking, taxation of various types, day care and church school licensing and regulation, home schools, medical care for children, attendance at graduation ceremonies on one's day of worship, academic or professional examinations on one's Sabbath—these are all arguably facially neutral

and generally applicable laws. And they will fall with added force on those groups who do not change their teaching to accommodate every shift in social and political styles.

So that's what Congressman Solarz, quite rightly, finds so disturbing. And he's prepared to do something about it. He has introduced a bill—The Religious Freedom Restoration Act—which requires that any governmental burden on religion be justified by a compelling interest and a showing that no less-intrusive means exist to further that interest. In effect, it would reestablish the *Sherbert* test.

The reason why Solarz' bill hasn't yet been passed is sad but simple: although virtually all the rest of the religious community supports it, the bill is opposed by the anti-abortion group, who fear it could be used to justify a religiously-mandated abortion. The number of abortions that might be so justified would be minute.

Yet on that basis this group is sabotaging the most effective means in sight of restoring some meaning to the protection of religious practice.

There's more. While Solarz and his colleagues wait for the religious community to find alternate wording to satisfy the anti-abortionists, the Supreme Court is on a roll. It has accepted for review another case, *Lee vs. Weisman*, to be heard in the fall of 1991. In this case the Department of Justice is asking the Court to reverse the traditional understanding of the Establishment Clause—just what it did to the Free Exercise Clause in *Smith*. The chances are that the Court will do what the Justice Department is requesting.

Under the Free Exercise Clause, one asks, "What can I do to keep government from burdening my religious practice?" Under the Establishment Clause, one asks, "What can I do to prevent government from aiding and giving preference to religion?" After the decision in *Smith* and the anticipated decision in *Weisman*, the answer to both questions will be the same: Not very much.