

Public Funding and the Road to
Damascus: The Legacy of
Employment Division v. Smith

The loom of fate weaves human lives together for reasons we cannot understand. Consider that Alfred Leo Smith Jr., an alcohol and drug abuse counselor, Native American activist, and sobriety advocate, died on November 19, 2014, at the age of ninety-five;¹ less than six months later, Smith's most unyielding antagonist, former Oregon attorney general and University of Oregon president Dave Frohnmayer, died at seventy-four.²

Their direct conflict ended in 1990, when, having lost repeatedly below, Dave Frohnmayer on the second try persuaded a majority of the Supreme Court that the Free Exercise Clause of the U.S. Constitution did not require Oregon to pay unemployment compensation to two drug and alcohol abuse counselors (one of whom was Al Smith) who had taken part in a peyote ritual conducted by the Native American Church. In *Employment Division v. Smith*, Justice Antonin Scalia wrote for the Court that the “free exercise of religion” clause of the Constitution provided no protection for a minority religious group whose practice was burdened, or even outlawed altogether, by a “neutral, generally applicable law,” meaning one that did not target religion as such.³

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¹ Denise K. Lajimodiere, Obituary, *Alfred Leo Smith*, KLAMATH TRIBES NEWS & EVENTS (Dec. 23, 2014), <http://klamathtribes.org/news/alfred-leo-smith/>.

² Garrett Epps, *The Man Who Wrestled Death to a Draw*, ATLANTIC (Mar. 15, 2015), <http://www.theatlantic.com/politics/archive/2015/03/the-man-who-wrestled-death-to-a-drw/387760/>.

³ *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 881 (1990).

Majority hostility could not justify such a ban; simple ignorance or indifference, however, could. This was a surprising ruling. Neither party to the case had briefed or argued it,⁴ and the Court had given no hint it was considering it—displaced a test known as “the *Sherbert* test,” which stated that a governmental regulation that “substantially burdened” religious practice must be “narrowly tailored” to further a “compelling” governmental interest.⁵

Smith was a famous victory, but not since the Greek general Pyrrhus “won” the battle of Asculum in 279 BCE⁶ has a victory proved so hollow. Indeed, it may be that, in the long history of the U.S. Supreme Court, no case has been legislatively repudiated as many times as *Smith*. Frohnmayer was bitterly criticized in his home state for his insistence on pursuing the *Smith* case to this conclusion. The Oregon legislature almost immediately passed legislation protecting peyote worship from criminal prosecution.⁷ The U.S. Congress passed not one, not two, but three statutes to erase what were seen as the ill effects of *Smith*—the Religious Freedom Restoration Act of 1993, which reinstated the “compelling governmental interest” test for Free Exercise challenges to “neutral generally applicable law”;⁸ the American Indian Free Exercise of Religion Amendments of 1994, which threw a statutory blanket over Native American adherents of the

⁴ To be strictly correct, the State of Oregon did suggest a similar rule in its first petition for certiorari in the *Smith* saga, which suggested to the Court that the existing “compelling state interest” test for Free Exercise claims might need to be abandoned as a “false step.” See GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 149 (2001) (quoting Petition for Writ of Certiorari, Emp’t Div., Dep’t of Human Res. v. Smith, 485 U.S. 660 (1988) (Nos. 86-946, 86-947)). However, the State did not pursue that argument in its briefs for *Smith*. That change of strategy came as a result of urgent advice from Professor Jesse Choper, Frohnmayer’s former teacher and mentor, that the Court was not ready to abandon the “compelling state interest” test. See *id.* at 149–50. The State returned to that suggestion in its second petition for certiorari in *Smith*, suggesting that the Court hold that “[t]he Free Exercise Clause does not require government to exempt religious peyote or other drug use from valid and neutral criminal laws of general applicability.” Petition for Writ of Certiorari to the Supreme Court of the State of Oregon at *12, *Smith*, 494 U.S. 872 (No. 88-1213) 1989 WL 1174056. However, Oregon abandoned this argument again after the grant of certiorari and placed its case squarely within the “compelling interest” test. See *id.*

⁵ *Sherbert v. Verner*, 374 U.S. 398 (1963); see also *Hobbie v. Unemployment Comm’n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

⁶ DAVID MATZ, VOICES OF ANCIENT GREECE AND ROME: CONTEMPORARY ACCOUNTS OF DAILY LIFE xxiii (2012).

⁷ OR. REV. STAT. § 475.992 (1991) (currently codified at OR. REV. STAT. 475.752 (2015)).

⁸ Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

Native American Church, protecting it from federal and state law;⁹ and the Religious Land Use and Institutionalized Persons Act of 2000, which—after the Supreme Court had held that RFRA could not be applied against the states¹⁰—reimposed on state governments specific religious-freedom guarantees that protected both churches in zoning disputes and inmates in state prison seeking accommodation of religious practice.¹¹ Finally, the *Smith* decision triggered enactment of twenty-one state Religious Freedom Restoration Acts, requiring courts to use the “compelling interest” test in state courts when challengers seek exemptions to laws or regulations that burden their religion.¹²

Its aftereffects do not diminish with time, but rather grow. In fact, the current constitutional dialogue in many ways is a series of footnotes to *Smith*. Consider that the Court’s most consequential religious-freedom decision, *Burwell v. Hobby Lobby Stores, Inc.*, extended the “compelling interest” test of RFRA to give a for-profit corporation operating a chain of craft stores a “free exercise” right to refuse to give its employees statutorily mandated contraceptive coverage, on the grounds that the stockholders of the firm objected to some medically approved methods.¹³ Consider that *Zubik v. Burwell*, one of the most divisive cases on the Court’s October 2015 docket, seeks to employ RFRA to allow “religious corporations”—that is, nonprofit corporations with a distinctly religious mission—to refuse even to sign a government form that would allow their employees to receive contraceptive coverage at no cost to, and with no participation by, the nonprofit itself.¹⁴ And finally, consider that the decision in *Obergefell v. Hodges*, in which the Court held that states cannot refuse to recognize and celebrate the marriages of same-sex couples, has set off a new front in the culture wars—a claim that being required to treat same-sex couples as legally married is a “substantial burden” on the

⁹ American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (1994) (codified as amended at 42 U.S.C. § 1996a).

¹⁰ *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

¹¹ Protection of Religious Exercise in Land Use and by Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 806 (2000) (codified as amended at 42 U.S.C. §§ 2000cc to 2000cc-5 (2012)).

¹² *NCSL State Religious Freedom Restoration Acts*, NAT’L CONF. ST. LEGISLATURES (Oct. 15, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

¹³ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

¹⁴ Petition for Writ of Certiorari, *Zubik v. Burwell*, 778 F.3d 422 (3d Cir. 2015) (Nos. 14-418, 15-191).

religious freedom of business owners and employers.¹⁵ That claim, in fact, has now reached the point that government officials are demanding—and winning—the right to discriminate in the provision of services on the basis of sexual orientation.

In other words, the afterlife of *Smith* is a world in which individuals may wield at once the power of the state and the selectivity of individual conscience; the rights of conscience of minorities—women who seek contraception, or same-sex couples who seek marriage licenses—are to be subordinated to the religious practice of those who hold legal or economic authority.

It is a melancholy development, and one that I suspect Frohnmayer would not welcome.

Dave Frohnmayer was my friend, my dean, and my historical subject—an unusual and possibly explosive combination. My book, *To an Unknown God: Religious Freedom on Trial*, is a history of the case now known as *Employment Division, Oregon Department of Human Resources v. Smith*—but which in justice should have been entitled *Dave Frohnmayer v. Al Smith*.¹⁶ Before I published the book, I allowed each man to read its manuscript, in order to catch factual mistakes and permit them an opportunity to explain any of their actions that I might have misconstrued or misreported. This kind of review is often a tense proceeding. The subjects sometimes react badly to an outsider's assessment of their conduct. But Frohnmayer had only one modest cavil about the book. In the book's Prologue, I wrote of a moment just before oral argument in *Smith*, in which Frohnmayer realized that to the Native people in the audience at the Court, he and the State of Oregon were viewed as bitter, implacable enemies.¹⁷ "How did we get to be the Indian bashers?" he asked his cocounsel, Deputy Attorney General Bill Gary.¹⁸

It was a foretaste of the understanding that would come to him slowly, over the months and years after the Court's decision, that . . . [*Smith*] would become in a way the meaning of Frohnmayer's public career. It would be what lawyers and laypeople remembered when

¹⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

¹⁶ EPPS, *supra* note 4. The audio and video materials I collected, along with primary documents available nowhere else and transcripts of extensive interviews with principals of the case, are in the University of Oregon Library. They have not been processed or catalogued, but are available to scholars. Garrett Epps Papers (unpublished materials) (on file with University of Oregon Special Collections and University Archives, accession number 01.072.M) (four boxes).

¹⁷ *Id.* at 5–6.

¹⁸ *Id.* at 6.

they heard his name. Nothing he had done, nothing he would do, would loom larger in the memory of history than this day's work.¹⁹

Frohnmayr rather mournfully protested this passage. What about his work as president of the University of Oregon? He asked. His work as dean of the University of Oregon Law School, pulling the institution back from the verge of collapse?

What about his work during the Rajneesh crisis of 1981–1985?

I stood by my characterization of his career then; I think it is more than vindicated by subsequent events. *Smith* changed the course of the law in ways that no one at the time could have foreseen. Frohnmayr did not want these changes; he did not foresee them; but he set events in motion—and on several occasions kept them in motion when it seemed that they might stop—that at first tore a hole in the existing structure of Free Exercise doctrine and then replaced it with a fix that becomes more problematic every year.

But Frohnmayr was right to mention the Rajneesh affair. That episode did not rival his work in *Smith* in importance; properly viewed from the point of view of history, it was, instead, a *part of Smith itself*. Had there been no Rajneeshpuram, there might not have been the absolute determination on the part of the Oregon Attorney General's office to litigate and relitigate two modest unemployment claims until the dispute swelled into a landmark, and deeply problematic, decision.

Let us quickly review the Rajneesh affair.²⁰ In 1981, a Hindu holy man who styled himself Bhagwan Shree Rajneesh sent a disciple to buy a huge ranch near the town of Antelope in rural eastern Oregon. The cult had been driven out of its previous home, in Poona, India, by authorities who objected to Rajneesh's heterodox Hinduism and particularly to his permissive view of sexual activity by his European followers. (While the commune was still in Poona, the director of the Esalen Institute wrote to Rajneesh protesting its use of psychological manipulation and sexual license: "It is as if the worst mistakes of some inexperienced Esalen group leaders of many years ago had been systematized and given the stamp of 'God,'" he wrote.)²¹ The disciple—her commune name was Ma Anand Sheela—contracted to purchase Big Muddy Ranch near the tiny town of Antelope, Oregon,

¹⁹ *Id.*

²⁰ The account that follows is drawn largely from "East of Eden," Chapter Four of EPPS, *supra* note 4, at 66–89.

²¹ *Id.* at 68.

“on the west side of the John Day River as it passes through Wasco and Jefferson Counties in the Oregon high desert.”²²

The Rajneeshees, or “sanyassin,” apparently believed that the vast emptiness of their new 64,000-acre empire would offer them room to build a city of God in the desert. They are not the first pilgrims to the West to conclude that the wide open spaces there will allow them to live out their fantasies without human interference—to mistake, as I have written elsewhere, “distance for vacancy.”²³ In fact, in part because of the fragile nature of Oregon’s deserts and watercourses, the state has some of the strictest land-use regulations in the nation. When Rajneesh and his followers unveiled plans to build a conference center and a hotel, along with a permanent residential development, on the ranch, they were stopped dead by the state’s Land Conservation and Development Commission. Rural areas, they discovered, cannot be the sites of such development—unless they are within the “urban growth boundary” of an incorporated city. They responded by taking over the government of Antelope (thus gaining the benefit of its “urban growth boundary”), and by winning approval from the Wasco County Board of Commissioners to incorporate the ranch itself as another city, to be called “Rajneeshpuram.” That victory alarmed a member of the state legislature, who asked the Attorney General’s office for a formal opinion whether the town’s incorporation—and its unique organization—violated the state or federal constitutions.²⁴

In the opinion, Frohnmayer recapped the unusual status of the city of Rajneeshpuram. All the property inside the “city” limits was owned by a private nonprofit corporation controlled by the sect. Only members of the sect were permitted to live inside the city limits. The city maintained its right to close both private and public roadways inside city limits to all but residents and invited guests. In addition, the city maintained a state-funded police force under control of the corporation and entirely staffed by Rajneesh devotees.

The question, then, was whether payment of state funds to the city for police and other purposes was “in violation of Art I, § 5 and the Establishment Clause of the First Amendment.”²⁵ Frohnmayer’s answer was yes; and beyond that, fatefully, he wrote that “the very incorporation and continued existence of such a city under the facts

²² *Id.* at 69.

²³ Garrett Epps, *Meanness in This World*, 14 WIDENER L.J. 847, 847 (2005).

²⁴ 44 Op. Or. Att’y Gen. 20, 22 (1983).

²⁵ *Id.* at 21.

assumed is a violation of the Establishment Clause, and possibly also of the Oregon Constitution.”²⁶

The opinion brought Frohnmayer into the field as the most dangerous and tenacious enemy of the Rajneesh cult. From then until the dissolution of the city in 1985, Frohnmayer was, to Rajneesh and his followers, Public Enemy Number One. When I interviewed him a decade and a half later, he remained possessive and proud of the opinion.

Here is the important language:

American history chronicles the experience of lonely minorities seeking refuge from religious persecution. Liberty of conscience and belief is not merely an abstract icon of our constitutional guarantees, state and federal. The Mayflower Compact sealed the promises of a religious minority consenting to a system of civil government. Roger William[s] and other dissenters from the New England Puritan establishment fled to Rhode Island to protect their fundamental beliefs, and to establish a society without an established church. Brigham Young and his Mormon followers made history in a pilgrimage to a frontier affording protection from oppression. The spartan Amish lifestyle has been guarded from improper state intrusions. Thousands of Jewish refugees from Hitler’s death camps came to these shores and enriched our culture. The constitutional battle for private Catholic education—ultimately resolved by the United States Supreme Court—was fought against the governmentally enforced bigotry of the Ku Klux Klan five decades ago in this very state. All these experiences reinforce the commitment of this nation’s founders to protection of the free exercise of religion. Tolerance is not merely a moral virtue; it is a matter of constitutional policy.

But the very diversity of beliefs and convictions which led the authors of the Bill of Rights to protect religious liberty generated a parallel constitutional restriction. Neither the United States government nor that of the State of Oregon may create a state religion or an established government church. This restriction in favor of governmental religious neutrality obviously extends to political subdivisions such as cities, counties and school boards.

We need look no further than the contemporary civil strife of Ireland, Iran, and Lebanon to grasp the historic wisdom of the prohibition against state-sponsored religion. A tragic price in human bloodshed has been paid whenever government has claimed the right to construct the exclusive thoroughfare to spiritual redemption. Our legal system requires that the pathway to religion be private and internal to each pilgrim’s mind and soul. The state and federal

²⁶ *Id.*

constitutions do not permit the road to Damascus to be paved with public funds.²⁷

This is probably the best single statement of Dave Frohnmayer's view of church and state. The focus is the use of public authority by private religious individuals or groups. But state power, and state funding, were precisely what Rajneesh and his followers demanded. Having gotten a taste of it from the incorporation of Rajneeshpuram, they proceeded to act out a kind of cautionary drama depicting the hazards of religious power. In 1983, the Rajneesh took control of the Antelope City Council and changed the name of the town to Rajneesh. The new government

renamed all the city streets after Hindu holy men, raised taxes in an apparent attempt to drive out the old-line residents, and filed a lawsuit to gain control of an Episcopal church that had been restored by volunteers as a community center. . . . [T]he new council majority also contracted out the town's police service to the Rajneesh Peace Force from the ranch. Soon the streets were patrolled by pink-clad *sanyassin* toting assault rifles. The Peace Force was not passive—nightly patrols shone brilliant searchlights into the windows of non-*sanyassin* residents. On several occasions they forced their way inside the homes of outspoken critics of Rajneesh to make threats and even arrests.²⁸

In other words, public funds were not simply paving the road to Damascus—they were apparently funding a local version of the Spanish Inquisition.

At the same time, the cult underwent a remarkable overnight transformation. Rajneesh had preached for years that religion itself, and its rituals and rules, did not exist. He had asked the Immigration and Naturalization Service (INS) for a permanent U.S. visa under a program to license “religious workers.” The INS refused the application—since Rajneesh stated that religion did not exist, they argued, he could not be a “religious worker.” Almost at once, Rajneesh revised his doctrine. From now on, there would be a formal sect entitled the Religion of Rajneeshism, complete with designated scriptures, a seminary, and a three-level hierarchy of clergy.²⁹ The change proved unnecessary—Rajneesh won reversal of the deportation order on procedural grounds³⁰—but the dizzying revision of doctrine and order, I suspect, made an impression on Frohnmayer.

²⁷ *Id.* at 23–24.

²⁸ EPPS, *supra* note 4, at 75.

²⁹ *Id.* at 76.

³⁰ *Id.*

The entire story of the unraveling of Rajneeshpuram is beyond the scope of this essay. But a few key points should be noted. First, the cult conducted the first (and so far as I know, only) germ-warfare attack ever within the United States, when its members attempted to sway a local election by poisoning a local salad bar with salmonella bacilli that might sicken anti-Rajneesh voters and keep them away from the polls.³¹ Second, once state authorities obtained a search warrant for Rajneeshpuram, they found not only extensive illegal eavesdropping tools but also a fully equipped biological-warfare laboratory, with some forensic evidence suggesting attempts to weaponize the AIDS virus. And, third, during the cult's death throes, Ma Anand Sheela and others commissioned *sanyassin* assassination teams that were to kill the U.S. Attorney Charles Turner, prominent investigative reporter Leslie Zaitz,³² and Frohnmayer himself.

Never having been the target of a criminal assassination conspiracy, I cannot make the following statement dogmatically. But I do think being such gets the potential victim's attention and perhaps might spur some hard thinking about how the situation arose. From my conversations with Frohnmayer, I think that after the Rajneeshpuram incident, he reached several unshakeable conclusions about religion and public life. First, protestations of goodwill from religious bodies and their adherents are to be taken with several grains of salt. Second, religion is not a static but a dynamic phenomenon, subject to rapid, unpredictable, and sometimes dangerous change. And third, state power ceded to the religious leads, more quickly than we might imagine, to the potential for blood in the streets.

The three lessons are, one by one, unassailable. However, as a system for evaluating religious freedom claims, they are incomplete. That is because Rajneeshpuram involved a specific type of religious freedom: a claim by an institutional religious body for privileges under and exemptions from the law. Rajneeshpuram was a corporation, with enormous wealth behind it and the services of its own in-house law firm, headed by a former partner in the Los Angeles superfirm Manatt,

³¹ See JUDITH MILLER ET AL., *GERMS: BIOLOGICAL WEAPONS AND AMERICA'S SECRET WAR* 15–23 (2001).

³² Three decades later, the irrepressible Zaitz became nationally prominent during the forty-one-day standoff between law enforcement and a group of self-styled "militiamen" who had taken control of the Malheur National Wildlife Refuge. *E.g.*, Les Zaitz, *Burns Residents Confront Militia Over Fears of Violence*, OREGONIAN (Jan. 2, 2016, 6:45 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/burns_residents_confront_milit.html.

Phelps, Rothenberg & Tunny.³³ It was in many ways the equivalent of the Church of Jesus Christ of Latter-Day Saints, or Hobby Lobby Stores. Regulatory and legal concessions to such bodies imbue them, in effect, with the force of law to work their will on those subject to their authority. Usually they do so in a way slightly less malign than did the Rajneesh commune; but the reality of institutional power, reinforced by legal exemption and tolerance, is formidable.

Religious freedom claims, however, come in two forms.³⁴ There is no question that “the free exercise” of religion must protect, to some degree, church bodies. The term itself originally meant a dispensation granted by a prince to religious bodies to hold their services—their “exercises”³⁵—publicly without fear of reprisal. But there is a second form, and it is the form that, until after *Smith*, almost entirely shaped the American constitutional concept of “free exercise.” That second form arises when a solitary citizen faces the power of the state with nothing—often, as in Al Smith’s case, not even the support of his own church structure—but the power of his or her conscience, which counsels resistance to some social norm. The quintessential case involved unemployment compensation—the very issue presented by the facts of *Smith*—and involved claimants whose faith would not allow them to conform their conduct to the dictates of their employer.

Frohnmayr’s cautions, however well taken with regard to institutional claims of free exercise, are best applied warily to individual claims. In the latter cases, there is no demand for cession of state power to an organized body that will apply it to others. The individual simply wants to practice his faith without being overwhelmed or penalized by the demands of an unsympathetic minority. Such claimants do not seek power at all; they seek protection from the power of the state.

This was the posture of *Smith* when the Oregon Attorney General’s office became involved in it. But the state reacted to Smith and Black’s claims as if they were demanding a four-lane state highway to Damascus. The state’s opposition to their claims was unyielding. When the Oregon Board of Pharmacy sought to defuse the case by changing

³³ *Rajneeshee Antics Raise Eyebrows in Legal Arena*, OREGONIAN (July 11, 1985, 4:10 PM), http://www.oregonlive.com/rajneesh/index.ssf/1985/07/rajneeshee_antics_raise_eye_bro.html.

³⁴ These ideas about “the free exercise of religion” are explored in Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563 (1998).

³⁵ *Exercise, n.*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/66088?rskey=JOvL9L&result=1#eid> (last visited Apr. 21, 2016) (see definition 10).

the language of the state's regulations to render religious use of peyote non-criminal, Frohnmayer convened a special meeting and insisted they reverse it. When the case was nearly settled before oral argument in *Smith*, the state insisted on terms that were rejected by the claimants as humiliating and punitive. Whether more generous terms might have permitted the settlement to succeed we will never know. What we do know is that by the time the case reached the Supreme Court twice, it had bypassed a lot of off-ramps.

The reason why, I think, is that the attorney general, and the state's legal and law enforcement apparatus itself, had come to think in terms of the kind of challenge represented by Rajneeshpuram. Certainly that conceptual backdrop explains one of the most important moments in the state's preparations for the case. Frohnmayer, during our interviews, explained it with great relish; for him it was a fond memory.

“Why can't you argue that the internal controls of the religion are sufficient for the state to cede over regulatory authority to the religion itself rather than retaining it with the government?” Frohnmayer recalls asking himself. “The answer is this—that religions change. Once authority to regulate practices is ceded out of government hands for all eternity, you have ceded away the possibility of regulating something that could become very dangerous. That is a killer argument. All of us heard it at the same time and said, ‘That's a killer.’”³⁶

Frohnmayer built the conclusion of his argument around this trope:

And there is a final and critical point here related to our health and safety interest. That is that denominational practices, and indeed individual believers, even in long-standing religions, can and do change. They change the nature of their religious beliefs, they change the nature of their doctrine, and that is the very essence of freedom of religion and belief. So a constitutional exemption that is bound in time and place is very risky. If we exempt a practice, even if we are presently satisfied by its safety, control passes forever into private hands. And that is proper. But then we must ask, before we let that control pass in the form of a constitutional exemption, denomination specific or not, now and in the future, what are the contours of that exemption and how will it be conferred. Because if the denominational or church controls weaken or change, there are still enshrined in the Bill of Rights a permanent exemption for the practices of that religion.³⁷

³⁶ EPPS, *supra* note 2, at 209.

³⁷ Oral Argument at 25:47, *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) (No. 70-18), <https://www.oyez.org/cases/1989/88-1213>.

There is only one problem with this argument. While it applied strongly to the Rajneeshpuram situation, it did not apply at all to the case at hand. Smith and Black had not asked the Court to exempt peyote religion from governmental regulation for all time. First, they were seeking only their unemployment compensation—the challenge to the criminal penalty for peyote use had been injected into the case by the Supreme Court. Second, peyote religion is in fact almost certainly the most tightly regulated religious tradition in the United States. The growth, harvesting, sale, distribution, and use of peyote takes place comfortably inside a web of state and federal regulations—ones that no one has challenged in this or any other case.

The “killer argument” found an echo in the eventual opinion written by Justice Scalia in *Smith*, in which he said that “Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation.”³⁸ Of course the flesh-and-blood respondents, Smith and Black, made no such “simpl[e]” claim for blanket exemption. Governmental regulation was not their target. It was, in the first instance, governmental *discrimination* in benefits against those who practice their religion, and, after the Court itself had forced the issue, some measure of *protection* by the Constitution when the power of the state decided their religious practice should be destroyed by operation of the law.

In effect, *Smith* is the last skirmish in the battle of Rajneeshpuram. And it has landed us here, in 2016, as the nation tries to make sense out of social change—social change that many religious traditions have strenuously opposed and indeed have (some at least) vowed to reverse. These claimants of religious freedom, by and large, are of the first type—bodies such as the Catholic Church—who seek to be able to maintain discriminatory treatment of same-sex married couples because they object to the laws that allow them to marry; and for-profit corporations who wish to deprive their employees of full contraceptive coverage because their owners’ religion teaches that some methods are sinful. These are demands by the economically powerful that additional power be ceded to them by the state, to be wielded over parties not represented in the dispute. And in the final irony, the new demand being put forward is that state officials themselves must not be required to provide state services to same-sex couples if the officials have

³⁸ *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 882 (1990).

religious objections to the couples' lawful, constitutionally protected union.

The demand today is not so much for public funding of the road to Damascus as it is that religious bodies be allowed to close the public highway altogether and divert objectors onto private roads to salvation—or at least to hinder and humiliate and shame, if not prevent altogether, from taking a path dictated by their own consciences and opened to them by the law and the Constitution.

What would Frohnmayer make of our situation today? Would he say that this is exactly the sort of situation that must arise once we begin carving an exempt place in law for religious belief? He would not be crass enough to say, “I told you so.” But neither would he be too retiring to point out that the sharp response to *Smith* may have led at least in part to our current dilemma.

God knows I wish that I could talk to him about it. We disagreed on every aspect of *Smith* and its aftermath. I criticized his conduct of the case. I told him his ideas on religion were flawed. And being Dave Frohnmayer, he heard me out not simply with tolerance but with delight. He was the best legal interlocutor I have ever had—creative, good-humored, dispassionate, and energetic. I have used this essay to put before you, the reader, thoughts I have had since Frohnmayer became unavailable. If I present my views on how his own experience may have shaped, or even skewed, his legal judgment during briefing and argument of *Smith*, I know he would forgive and even welcome my continuation of our long, placid, passionate argument.

Because he was well acquainted with the finality of death, Frohnmayer had complex ideas about the idea of the afterlife. When in 1999 he suffered a sudden, near-fatal cardiac arrest, he told me later, he had no experience of a bright light or spiritual welcome—just blackness until he was revived; after which his first thought was that he could not die until a cure for Fanconi anemia was found.³⁹ But the idea of life after death is not valued as a boon for the dead, but as an imagination of the living, and I resist imagining that Dave Frohnmayer has disappeared. I suspect that wherever he may be, he is still arguing amiably with Blackstone, Vattel, and Chief Justice John Marshall. He may, in fact, be serving a term as Attorney General of the Republic of Heaven.⁴⁰

³⁹ EPPS, *supra* note 4, at 260–62.

⁴⁰ See PHILIP PULLMAN, *THE AMBER SPYGLASS: HIS DARK MATERIALS* 465 (2003).

