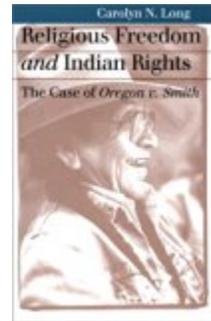


Carolyn N. Long. *Religious Freedom and Indian Rights: The Case of Oregon v. Smith*. Lawrence: University Press of Kansas, 2000. x + 317 pp. \$35.00 (cloth), ISBN 978-0-7006-1064-8.

Reviewed by Martha K. Robinson (Department of History, University of Southern California)
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Religious Freedom, Peyote, and the Law

Religious Freedom, Peyote, and the Law

In 1983 and 1984, Galen Black and Al Smith lost their jobs. As drug and alcohol rehabilitation counselors for the Douglas County (Oregon) Council on Alcohol and Drug Abuse Prevention and Treatment (ADAPT), they worked with people recovering from addiction. As members of the Native American Church (NAC) they took peyote, an illegal drug under Oregon law, in religious ceremonies. Fired for violating ADAPT's abstinence-only policy, they applied for unemployment benefits, but were turned down on the grounds that they had been appropriately dismissed for job-related misconduct. The lawsuit that followed, maintaining that this denial violated their First Amendment right to exercise their religion, would become *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), a landmark in religious freedom jurisprudence. In *Religious Freedom and Indian Rights: The Case of Oregon v. Smith*, Carolyn N. Long, assistant professor of political science and director of the Master of Public Affairs Program at Washington State University at Vancouver, analyzes the case that grew out of their firing.

To explain the significance, history, and probable impact of this complex case, Long explores many issues. On the broadest level, she addresses theoretical questions regarding the extent of religious freedom in American law, and provides an excellent history of court decisions that have wrestled with the distinction between the absolute right to believe whatever one wishes and the limited right to put those beliefs into practice. She also discusses the

relationship between state and federal courts, looks at the internal dynamics of the Supreme Court, and shows some of the nuts and bolts of the process of coalition-building and shepherding legislation through Congress. *Oregon v. Smith* is a landmark in Indian law as well as in religious freedom jurisprudence, and Long describes the special concerns of Indians regarding religious freedom, including the use of peyote, the protection of sacred sites, and the difficulties involved in protecting small, often misunderstood religions.

These analyses are clear and valuable in themselves, but Long also grounds them firmly in the individual circumstances of this case. She conducted interviews with many of the major figures in the case, from Al Smith and his lawyers to representatives of major Indian rights and civil liberties organizations. These interviews add depth and individuality to the work. Long's sympathy with Al Smith and his supporters is clear. From the opening pages that describe him as "a slender, dignified man" who "knew, deep in his heart, that he made the right decision to freely practice his religion" (p. 3) to the epilogue, set at his eightieth birthday party, Smith appears as a gentle, patient hero who seeks only to be left to practice his religion in peace. Nonetheless, despite Long's obvious sympathies, the book is not a screed against Smith's opponents. Long also interviewed Bruce Piper, the executive director of ADAPT and a proponent of ADAPT's abstinence-only policy, and Dave Frohnmayer, who as Oregon's attorney general opposed a peyote exemption to the state's drug laws. Long may not agree with Frohnmayer's fears that legalized peyote use would be the first

step toward making drug laws harder to enforce, nor with his contention that permitting peyote use only for members of one church would, in effect, be an unconstitutional establishment of religion, but she does present his arguments as sincere and rational.

In brief, *Oregon v. Smith* revolved around the question of exemptions, based on religion, to neutral, generally applicable laws. Oregon law (unlike the laws of various other states) regarded peyote as a Schedule I drug, like heroin or cocaine, with no legal use. Smith and his lawyers maintained that Native American Church members had a First Amendment free-exercise right to use peyote in religious ceremonies without interference from the state. The state, on the other hand, maintained that no such right existed. Since peyote was illegal, Smith could not claim the protection of the First Amendment. To require the state to grant him an exemption would, in effect, allow citizens to ignore whatever laws they might choose by claiming the First Amendment as a defense.

The case, as Long demonstrates, was similar to *Sherbert v. Verner*, 374 U.S. 398 (1963), a decision in which the U.S. Supreme Court adopted a new standard for the evaluation of free exercise claims. Sherbert, a Seventh-Day Adventist, was fired from her job for refusing to work on Saturday, her Sabbath. Like Smith and Black, she was denied unemployment benefits. The Supreme Court ruled in her favor, maintaining that forcing her to choose between her faith and her job, in effect, penalized her for practicing her religion. After *Sherbert*, the courts used the “*Sherbert* standard,” a three-tier test to evaluate free-exercise challenges to neutral, generally applicable laws. Under this standard, the court must first determine if the law burdens the claimant’s ability to exercise his or her religion. If it does, the court must then decide whether or not the law serves a “compelling government interest.” If the law does serve such an interest, the court must find whether or not an exemption to the law would undermine that interest. In the absence of a compelling government interest, the claimant must be granted an exemption from the law.

Sherbert would be a crucial precedent for *Oregon v. Smith*. Smith and his lawyers maintained that the state had no compelling interest strong enough to override the right of members of the NAC to practice their religion. The state initially argued that its compelling interest lay in protecting the integrity of the unemployment fund. Both the Oregon Court of Appeals and the Oregon Supreme Court rejected this claim, ruling that the state’s stated interest in protecting the fund was insuffi-

cient. The courts ruled that to deny unemployment compensation to Smith and Black would be to punish them for practicing their religion. The courts also rejected the state’s claim that the illegality of peyote was relevant to the issue of unemployment compensation. Neither Smith nor Black had been charged with or convicted of peyote use. They were fired for violating an employer’s rule, the courts said, and the state could not use its unemployment regulations to enforce criminal law against peyote use.

Even at this point, the case gave few signs of becoming a landmark. The participants, as Long shows, expected the case to revolve around *Sherbert*-inspired questions, particularly the question whether the state of Oregon had demonstrated a sufficiently compelling interest, whether in protecting the integrity of the unemployment fund or in preventing illegal drug use, to overcome Smith’s First Amendment claim. The Supreme Court made the case a landmark by overturning the *Sherbert* standard and establishing a new rule of law. A divided Court held that states were not required to grant religiously-based exemptions to neutral, generally applicable laws. Writing for the majority, Justice Antonin Scalia maintained that only when a law specifically targeted religion, or implicated both religious exercise and such freedoms as press, speech, or assembly, could a free-exercise challenge succeed. Otherwise, if “prohibiting the exercise of religion . . . [is] merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”^[1] In effect, Long argues, the Court rejected its own twentieth-century precedents protecting individual religious freedom against state claims. It returned to a standard of law laid down in *Reynolds v. United States*, 98 U.S. 145 (1878), in which the Supreme Court rejected a religiously-based defense of polygamy, maintaining that to provide such exemptions to neutral laws “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself” (p. 48).

Chief Justice William H. Rehnquist and Justices Byron R. White, John Paul Stevens, and Anthony Kennedy agreed with Scalia’s reasoning. Justice Sandra Day O’Connor concurred with the decision, but not the reasoning by which it had been reached. She argued that it was both unnecessary and unwise for the Court to abandon the *Sherbert* standard. She rejected Scalia’s reading of the force of neutral laws, observing that “[A] law that prohibits certain conduct - conduct that happens to be an act of worship for someone - manifestly does prohibit that person’s free exercise of his religion. A person who

is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. . . . regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons. It is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns.”[2] O’Connor then used the *Sherbert* standard to evaluate the case. She determined that Oregon had a compelling interest in prohibiting illegal drug use, and could therefore refuse to grant an exemption to the law without violating the First Amendment.

Justices Harry A. Blackmun, William J. Brennan, Jr., and Thurgood Marshall, also using the *Sherbert* standard, dissented. Blackmun’s opinion held that the state had shown no compelling reason to refuse to grant an exemption. It could not claim that its interest in enforcing the drug laws was compelling, since it had shown no evidence that it consistently attempted to enforce its laws against peyote use. Nor had it shown that peyote harmed those who used it or threatened public safety. Therefore, Blackmun argued, the state could safely grant an exemption to the drug laws for the religious use of peyote.

As Long demonstrates, the decision in *Oregon v. Smith* was immediately controversial. Opponents of the decision, fearing restrictions on religious practice, united to form the Coalition for the Free Exercise of Religion (CFER). This coalition included groups as diverse in outlook as the American Civil Liberties Union, the National Association of Evangelicals, and Americans United for Separation of Church and State. CFER viewed the Court’s decision as hostile to the free exercise of religion and its members devised a strategy to overturn the decision legislatively. In 1993, its remedy, the Religious Freedom Restoration Act (RFRA) became law. In essence, with RFRA, Congress attempted to return to the *Sherbert* standard. It required local, state, or federal governments, when defending laws infringing on the free exercise of religion, either to demonstrate a compelling government interest or to provide an exemption to religious claimants. But the new law was short-lived. In 1997, the Supreme Court found that Congress had exceeded its power by attempting to tell the Court how to interpret the law. Another proposed law, the Religious Liberty Protection Act (RLPA), died in the Senate. These national attempts failed, but as Long demonstrates, other efforts succeeded. Religious Freedom Acts passed in several state legislatures, and in 1994, a new section of the American Indian Religious Freedom Act (1978) exempted

the ceremonial religious use of peyote by Native Americans from state and federal drug laws.

As a whole, *Religious Freedom and Indian Rights* is a well-argued analysis of a complex and important case. The book’s very strengths, however, sometimes lead to its weaknesses. Long’s determination to present the circumstances of the case as fully as possible shows both the case and its context in their true complexity – surely a strength of the work. It also makes for an enormous cast of characters and a bewildering number of acronyms. The book already contains two useful appendices: a chronology and a bibliographic essay. These might be supplemented by a list of acronyms and the names and titles of major actors in the case.

Similarly, although the many interviews she conducted enrich and enliven the book, it sometimes seems that the people with whom she spoke appear in a more favorable light than others. While most of Smith’s lawyers appear as dedicated people with a strong belief in social justice and Indian rights, one, Suann Lovendahl, is consistently described in negative terms – as overly sensitive to criticism, as rejecting help offered by Indian rights groups, and as unwilling to share her work. But are these accurate characterizations, or merely reflective of personal or professional clashes among the lawyers? Since it appears that Long did not interview Lovendahl, it is impossible to determine which is the case.

The book is also stronger in arguing that *Oregon v. Smith* was a bad decision than in suggesting a remedy. Long discusses the constitutional problems with both RFRA and RLPA, but towards the end of her work adopts a crusading tone inconsistent with her more measured statements earlier in the book. For example, Congress found authority for the Religious Freedom Restoration Act in section five of the Fourteenth Amendment: “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.” Although Long explains that Congress had used this section successfully in finding authority for the 1964 and 1990 Civil Rights Acts, as well as for the 1965 Voting Rights Act, she also admits that “the extent of Congress’ substantive power under the enforcement guarantees of the Civil War Amendments was less than clear” (p. 208). This limited and measured acknowledgment of the tension between judicial and legislative power, however, gives way later to the claim that in overturning RFRA, the Court “thus tries to silence Congress, essentially divesting a coordinate branch of government of its right to participate in a discussion about the protection of religious liberty in

America” (p. 262).

These criticisms, however, should not seriously detract from Long’s achievements. Her clear analysis of religious freedom claims, her discussion of the process of crafting legislation, her understanding of the special challenges faced by members of smaller religions, and her lively writing style combine to make *Religious Freedom and Indian Rights* a fine contribution to the study of religious freedom in America. It will be useful to students

and scholars with an interest in religious freedom, legal history, and modern Native American issues.

Notes

[1]. *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872, 878 (1990).

[2]. *Id.*, 893-894 (O’Connor, J., concurring in the judgment).

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