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The Demise of the First Amendment as a Guarantor of Religious Freedom

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THE DEMISE OF THE FIRST AMENDMENT AS A GUARANTOR OF RELIGIOUS FREEDOM

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .[1]

I. INTRODUCTION

While the free exercise clause obviously is designed to protect religious freedom, it is generally understood that the establishment clause is a "co-guarantor" of religious freedom because any "state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."[2] Assuming the two clauses were intended to be complementary in protecting religious freedom, there is tension between them because government efforts to promote free exercise

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1. U.S. Const. amend. I.

2. *Lee v. Weisman*, 505 U.S. 577, 592 (1992); *see also Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 232 (1963) (Brennan, J., concurring) ("The inclusion of both restraints upon the power of Congress to legislate concerning religious matters shows unmistakably that the Framers of the First Amendment were not content to rest the protection of religious liberty exclusively upon either clause."); *compare Zelman v. Simmons-Harris*, 536 U.S. 639, 679 (2002) (Thomas, J., concurring) (questioning whether the establishment clause should be applied to the states because they should be allowed to "pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest").

might appear to be an impermissible establishment of religion, while efforts to avoid the establishment of religion might be perceived as denying the free exercise of religion. For example, if government creates an exemption to a rule solely for religion, it may violate the establishment clause; and if government fails to create such an exemption, then it arguably interferes with free exercise.[3]

Assuming that protecting religious freedom is the primary goal of the religion clauses, several recent Supreme Court decisions prevent these clauses from achieving this goal for individuals whose religious beliefs are not in the mainstream. The point of this article is to show that the religion clauses in the First Amendment no longer serve as a source of religious freedom for those who most need the protection of the Constitution. When the decisions of the Supreme Court are combined with the reality of the political process, non-mainstream religions have very little protection unless provided by state constitutions or laws.

II. FREE EXERCISE CLAUSE

A. *CURRENT STATUS*

Whatever punch the free exercise clause had, it was lost when the Court decided *Employment Division, Department of Human Resources of Oregon v. Smith*[4] in 1990. Very briefly, in *Smith* the Court substituted rational basis review for strict scrutiny when application of a neutral law of general applicability, such as the Oregon controlled substance law, is challenged as inconsistent with the free exercise clause.[5] Applying rational basis, the Court rejected the free exercise

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3. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1454 (2d ed., Aspen 2005).

4. *Empl. Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990).

5. *Id.* at 885. Instead of explicitly overruling *Wis. v. Yoder*, 406 U.S. 205, 235 (1972), where it utilized strict scrutiny in holding that the state could not compel Amish children to attend school to age 16, the Court in *Smith* said *Yoder* can be distinguished as a "hybrid" case, i.e., one that includes a constitutional claim, such as parents' due process right to control the education of their children, which triggers strict scrutiny. *Smith*, 494 U.S. at 881-82. This interpretation is not obvious from the Court's opinion in *Yoder*. 406 U.S. at 214; *see Leebaert v. Harrington*, 332 F.3d 134, 143-44 (2d Cir. 2003) (*Smith*'s discussion of hybrid claims is dicta and not binding). Similarly, the attempt in *Smith* to distinguish the *Sherbert v. Verner*, 374 U.S. 398 (1963), line of cases as "stand[ing] for the proposition that where the State has in place

claims of two members of the Native American Church who were fired from their jobs because they ingested peyote at a religious ceremony. The two members were then found ineligible for unemployment compensation benefits. After *Smith*, the Court will apply strict scrutiny only where a law is actually aimed at a religious practice or belief,[6] as in *Church of the Lukumi Babalu Aye,Inc. v. City of Hialeah.*[7] While *Lukumi* protects non-mainstream religions from governments that are "out to get them," and do so in a fairly unsophisticated manner,[8] it may provide little protection where government is sophisticated enough to couch its hostility in religion-neutral terms. When the hostility or discrimination is couched in neutral terms, it may be difficult for the challenger to show that the regulation is really aimed at a particular religion.[9]

Prior to *Smith*, based on decisions such as *Sherbert v. Verner* and *Wisconsin v. Yoder*, it was assumed that free exercise clause claims were subject to heightened scrutiny if government substantially burdened the exercise of religion.[10] Heightened scrutiny appeared to

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a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason," is not convincing. *Smith*, 494 U.S. at 884.

6. *Smith*, 494 U.S. at 885.

7. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

8. The free exercise clause is not necessary to address such outrageous situations because government action that is motivated only by an interest in "getting someone" is not rational and therefore should not survive a challenge under the due process or equal protection clauses of the Fourteenth Amendment. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000); *Romer v. Evans*, 517 U.S. 620, 635-36 (1996).

9. This is similar to the problem in equal protection cases after *Washington v. Davis*, 426 U.S. 229, 239 (1976), in which the Court held that the equal protection clause guards against only intentional discrimination, not neutral acts with a discriminatory impact. Therefore, after *Davis*, the equal protection plaintiff must show that the government acted "at least in part 'because of,' not merely 'in spite of,' [a regulation's] adverse effects upon an identifiable group." *Personnel Adminstr. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

10. *Yoder*, 406 U.S. at 220-21; *Sherbert*, 374 U.S. at 404. In *Sherbert,* the Court referred to the "pressure" on the employee to "forego" the "practice of her religion" as a result of her ineligibility for unemployment compensation benefits. 374 U.S. at 404. Later, in *Thomas v. Rev. Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 717-18 (1981), the Court noted how conditioning "receipt of an important benefit upon conduct proscribed by a religious faith," or denying a "benefit because of conduct mandated by religious belief," places "substantial pressure on an adherent to modify his behavior and to violate his beliefs," thus imposing a burden upon religion. Further, the Court recognized that "[w]hile the compulsion may be indirect, the infringement upon free

govern cases where the burden was direct, i.e., the exercise of religion triggered a criminal or civil penalty,[11] as well as cases where the burden was indirect, i.e., the exercise of religion resulted in the forfeiture of a government benefit.[12] However, even before *Smith* when strict scrutiny presumably governed free exercise clause claims, with the exception of the unemployment compensation cases,[13] such claims enjoyed only limited success. The Court usually based its rejection of these claims on either a finding that the burden imposed on religion was not sufficient to trigger heightened scrutiny or a finding that the governmental interest was sufficient to survive heightened scrutiny.[14] After *Smith*, non-mainstream religions cannot rely on the free exercise clause for protection, except when challenging unsophisticated government action that is susceptible to a challenge based on *Lukumi*.[15] Presumably, this will be rare.[16]

In *Locke v. Davey*, the Court addressed the constitutionality of Washington's Promise Scholarship Program when challenged by a student whose state-funded scholarship was rescinded because he intended to pursue a devotional theology degree.[17] While allowing him to use the scholarship for this purpose would not violate the

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exercise is nonetheless substantial." *Id.* at 718. Thus, a burden, whether direct or indirect, is substantial if it discourages the exercise of religion by imposing substantial pressure on making decisions related to religion.

11. *See e.g. Yoder*, 406 U.S. at 218 (compulsory education law directly conflicted with Amish religious beliefs).

12. *See e.g. Sherbert,* 374 U.S. at 404 (refusal to accept work on Saturday, as a result of religious beliefs, resulted in the denial of unemployment compensation benefits; "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship").

13. *See Frazee v. Ill. Dept. of Empl. Sec.*, 489 U.S. 829, 833-35 (1989); *Hobbie v. Unempl. Apps. Commn. of Fla.*, 480 U.S. 136, 146 (1987); *Thomas*, 450 U.S. at 720; *Sherbert*, 374 U.S. at 408-09.

14. *See e.g. Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 398-99 (1990); *Lyng v. N.W. Indian Cemetery Protective Assn.*, 485 U.S. 439, 447 (1988); *Bob Jones U. v. U.S. Goldsboro Christian Schs., Inc.*, 461 U.S. 574, 604 (1983); *U.S. v. Lee*, 455 U.S. 252, 260 (1982).

15. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

16. If the "hybrid" cases, described in *Smith*, depend on a constitutional claim, other than free exercise, that triggers strict scrutiny, then the free exercise claim really adds nothing because strict scrutiny would be utilized without the free exercise claim.

17. *Locke v. Davey*, 540 U.S. 712, 715, 717 (2004).

establishment clause,[18] the State's decision to not fund Davey's course of study was not governed by *Lukumi*, because Washington's "disfavor of religion (if it can be called that) is of a far milder kind" in that "[t]he State has merely chosen not to fund a distinct category of instruction."[19] The Court recognized the tension between the two religion clauses, but found that this case involved the " 'play in the joints' " between the clauses.[20]

By making it more difficult to prevail on a free exercise clause claim, the Court has adversely affected non-mainstream religions because mainstream religions generally can protect themselves in the political process.[21] Justice Scalia recognized this in *Smith*:

> But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. 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.[22]

This leaves religious freedom for many in the hands of the political process, exactly where it would be if the religion clauses did not exist in the Bill of Rights. Like most protections found in the Bill of Rights, the religion clauses of the First Amendment are most important to those who cannot prevail in the political process.[23] The

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18. *Id.* at 719.

19. *Id.* at 720-21.

20. *Id.* at 718-19 (quoting *Walz v. Tax Commn. of N.Y.C.*, 397 U.S. 664, 669 (1970)).

21. *Contra* Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. Colo. L. Rev. 1021, 1021 (2005) (where the author found erroneous the hypothesis that minority religions are more likely to lose, and Christian religions are more likely to win, religious liberty claims in federal courts).

22. *Empl. Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872, 890 (1990).

23. *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The Court stated that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the

Court, as reflected in Justice Scalia's opinion in *Smith*, ignores the fact that the protections found in the Bill of Rights, as well as the Thirteenth, Fourteenth and Fifteenth Amendments, were deemed too important to leave to the political process.[24] Because mainstream religions generally have been successful in protecting their interests through the political process,[25] it is the non-mainstream religions that are adversely affected by *Smith*. In short, the Supreme Court has made it clear to such religions that they should not look to the First Amendment for religious freedom.

Shortly after *Smith*, the Court made it difficult for Congress to provide statutory protection for non-mainstream religions, similar to the protection it was assumed they enjoyed under the free exercise clause prior to *Smith*. Congress reacted to *Smith* by passing the *Religious Freedom Restoration Act of 1993* (*RFRA*), which provided a statutory free exercise claim to be governed by the strict scrutiny of *Sherbert*.[26] However, as noted above, *RFRA* was declared unconstitutional in *City of Boerne*. There, the Court determined that Congress lacked the power under section five of the Fourteenth Amendment to pass a law "so out of proportion" to any remedial or preventive object given the narrow interpretation of the free exercise clause in *Smith*.[27] A more limited federal statute, the *Religious*

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vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Id.*

24. Interestingly, when the political process responded to the decision in *Smith*, with the *Religious Freedom Restoration Act of 1993*, 42 U.S.C. § 2000bb (2000), the Court declared the Act unconstitutional in *City of Boerne*. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). Congress, according to the Court, exceeded its legislative power under section five of the Fourteenth Amendment. *Id.* at 536.

25. Justice Blackmun, dissenting in *Smith*, compared the use of peyote in the sacraments of the Native American Church to the sacramental use of wine by the Roman Catholic Church and noted that "the Federal Government exempted such use of wine from its general ban on possession and use of alcohol" in the *National Prohibition Act*. 494 U.S. at 914 n. 6 (emphasis omitted) (Blackmun, Brennan & Marshall, JJ., dissenting). Blackmun also stated that "[h]owever compelling the Government's then general interest in prohibiting the use of alcohol may have been, it could not plausibly have asserted an interest sufficiently compelling to outweigh Catholics' right to take communion." *Id.* (emphasis omitted).

26. 42 U.S.C. § 2000bb.

27. *City of Boerne*, 521 U.S. at 532. Courts of appeals have held that *City of Boerne* invalidated *RFRA* only as applied to state and local government, not the federal government. *See e.g. Christians v. Crystal Evangelical Free Church*, 141 F.3d 854, 858-59 (8th Cir. 1998); *Guam v. Guerrero*, 290 F.3d 1210, 1219-21 (9th Cir. 2002);

Exercise in Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[28] was passed after *City of Boerne* based on Congress' legislative power under the spending and commerce clauses.[29] Thus, religions without access to or influence in the political process may have to turn to religious freedom provisions in state constitutions.

While the state courts are not bound by *Smith* in interpreting their own constitutions, that does not mean they will apply the strict scrutiny standard adopted in *RFRA* or any other standard more demanding than *Smith*. Reasonable people can differ on whether free exercise clause cases should be governed by rational basis, strict scrutiny, or something in between. It may be that the strict scrutiny standard adopted in *RFRA* imposed too great a burden on government,[30] particularly in light of the religious diversity in our country today.[31] From the government's perspective, problems caused by application of strict scrutiny are exacerbated by the fact that the Court is reluctant to define "religion" as used in the First Amendment.[32] A few decisions discuss the issue.

Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 831-34 (9th Cir. 1999); *Kikumura v. Hurley*, 242 F.3d 950, 958 (10th Cir. 2001).

28. 42 U.S.C. § 2000cc (2000).

29. In *Cutter v. Wilkinson*, the Court held that this Act does not violate the establishment clause insofar as it increases the religious rights of incarcerated persons. 125 S. Ct. 2113, 2123-24 (2005).

30. In *Cutter*, the Court recognized this concern, but indicated it had "no cause to believe that *RLUIPA* would not be applied in an appropriately balanced way, with particular sensitivity to security concerns." *Id.* at 2123 (emphasis added).

31. In his concurring opinion in *Sch. Dist. of Abington Township, Pa. v. Schempp*, Justice Brennan stated:

> [O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.

374 U.S. 203, 240 (1963) (Brennan J., concurring). We are even more religiously diverse today than we were in 1963.

32. The most extensive discussion of the meaning of "religion" is found in two statutory interpretation cases, *Welsh v. U.S.*, 398 U.S. 333, 335 (1970), and *U.S. v. Seeger*, 380 U.S. 163, 173-85 (1965), both addressing claims of conscientious objectors under the *Universal Military Training and Service Act*. The statutory definition of religion was expanded, with the Court stating that "[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition." *Seeger*, 380 U.S. at 176; *see also Kaufman v. McCaughtry*, 419 F.3d 678, 680, 681-82 (7th Cir. 2005) (In addressing a free exercise clause claim by an inmate challenging the

In *Yoder*, the Court said it had to distinguish between faith and mode of life, indicating the latter may not be "interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations," because "to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[33] "[R]ejection of the contemporary secular values accepted by the majority" as a "philosophical and personal" choice, rather than religious, "would not rest on a religious basis."[34] The Court concluded that "the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[35] Later, in *Frazee*, the Court clarified *Yoder* by holding that the support of an "organized religious denomination" is not necessary, and by protecting an individual's observance of the Sunday Sabbath even though he arrived at his belief from his interpretation of the Bible rather than basing it on the tenet or teaching of an organized church or religious body.[36]

The absence of a clear definition of religion, combined with the fact that sincerely held beliefs that the believer claims are religious, generally will be treated as "religion" for purposes of applying the free exercise clause,[37] invites claims that may be perceived as people

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prison's refusal to give him permission to start a study group for atheist inmates, the court said "we have suggested in the past that when a person sincerely holds beliefs dealing with issues of 'ultimate concern' that for her occupy a 'place parallel to that filled by . . . God in traditionally religious persons,' those beliefs represent her religion. . . . We have already indicated that atheism may be considered, in this specialized sense, a religion.").

33. *Wis. v. Yoder*, 406 U.S. 205, 215 (1972).

34. *Id.* at 216.

35. *Id.*

36. *Frazee v. Ill. Dept. of Empl. Sec.*, 489 U.S. 829, 833-35 (1989) (indicating "[s]tates are clearly entitled to assure themselves that there is an ample predicate for invoking the [f]ree [e]xercise [c]lause"; Frazee's refusal to work on Sunday was based on a "sincerely held religious belief[]"); *cf. Thomas v. Rev. Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 715-16 (1981) (While the state argued that Thomas' faith did not preclude him from working in the armaments plant making tank turrets, because other Jehovah's Witnesses worked in the plant and there was evidence that it was " 'scripturally' acceptable," the Court held it was beyond the judicial function and competence to examine whether Thomas or others more correctly understood the commands of their faith.).

37. *See e.g. U.S. v. Ballard*, 322 U.S. 78, 86-88 (1944) (holding the trial court properly withheld from the jury questions concerning the truth or falsity of the religious beliefs or doctrines of the individuals accused).

seeking "a law unto [themselves]."[38] It is understandable why the Court wants to stay out of the business of defining religion, however, the current approach, under which only the sincerity of a claimed religious belief is questioned, may have pushed the Court toward the use of rational basis review because any heightened standard of review would unduly hamper government.[39] For the large number of cases governed by *Smith*, use of the rational basis standard of review means most of the free exercise clause claims will be unsuccessful.

B. *REVIVING THE FREE EXERCISE CLAUSE*

Utilization of an intermediate standard of review, pursuant to which government would have to show that the challenged regulation substantially serves an important governmental interest, along with some guidelines for determining what constitutes religion, would restore some meaning to the free exercise clause. There are several sources of intermediate scrutiny analysis from which the Court could borrow, including cases addressing sex discrimination claims based on the equal protection clause[40] and, maybe more analogous, cases addressing a First Amendment challenge to a content-neutral regulation of speech.[41] In free speech cases, intermediate scrutiny is utilized when government regulates the time, place, or manner of speech,[42] as

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38. *Empl. Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872, 890 (1990).

39. Ironically, what appears to be a religion-friendly refusal to have the courts involved in determining the meaning of "religion," may actually dilute the protection provided by the free exercise clause.

40. *See e.g. U.S. v. Va.*, 518 U.S. 515, 532-33 (1996); *Miss. U. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (government must show an " 'exceedingly persuasive justification' " for a sex-based classification) (emphasis omitted); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (classifications based on gender "must serve important governmental objectives and must be substantially related to [the] achievement of those objectives"); *compare Nguyen v. Immig. & Naturalization Serv.*, 533 U.S. 53, 73 (2001) (upholding disfavored treatment of citizen fathers, compared to citizen mothers, when determining the citizenship of children born to unmarried parents, one a citizen and the other a non-citizen).

41. This raises a more basic question—whether future free exercise claims should be cast as freedom of expression or association claims, or at least as free exercise plus freedom of expression/association claims, as in *Yoder. Wis. v. Yoder*, 406 U.S. 205, 235-36 (1972).

42. *See e.g. Hill v. Colo.*, 530 U.S. 703, 725-26 (2000) (If a content-neutral regulation "does not entirely foreclose any means of communication, it may satisfy the

well as when government regulates expressive conduct.[43] The intermediate standard utilized in such free speech cases can be adapted to analyze free exercise cases.[44] First, the regulation affecting religion must be justified without reference to the religious activity, i.e., the regulation is religion neutral.[45] Any regulation that is aimed at religion, either generally or specifically, should trigger strict scrutiny based on *Lukumi*.[46] Second, the regulation should further a significant or substantial governmental interest in its application to religious activity. For example, the government should be required to show that a generally applicable law (like Oregon's controlled substance law at issue in *Smith*) applied to religious activity (like the sacramental use of peyote at a ceremony of the Native American Church) furthers a substantial governmental interest.[47] In effect, the question is whether government has a substantial interest in refusing an exemption for Native American religious services.[48] Justice Blackmun, in his dissent

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tailoring requirement even though it is not the least restrictive . . . means . . . .") (emphasis omitted).

43. *See e.g. U.S. v. O'Brien*, 391 U.S. 367, 376-77 (1968) ("[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (suggesting there is little, if any, difference in the standard governing these two types of cases; the key is that the regulation is "justified without reference to the content of the regulated speech," it is narrowly drawn or tailored, it furthers a substantial or significant government interest, and it leaves "open ample alternative channels for communication of the information").

44. Justice O'Connor, in her concurring opinion in *Smith*, argued for a case-by-case approach similar to that used in free speech cases. *Empl. Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872, 902 (1990) (O'Connor, Brennan, Marshall & Blackmun, JJ., joining as to parts I-II, and concurring in the judgment).

45. *Clark*, 468 U.S. at 293.

46. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

47. *See Smith*, 494 U.S. at 921 (Blackmun, Brennan & Marshall, JJ., dissenting) ("Oregon's interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents' right to the free exercise of their religion." (emphasis omitted)). Applying intermediate scrutiny, the question would be whether Oregon's interest is sufficiently substantial.

48. As with other exemptions, this demonstrates the tension between the two religion clauses, i.e., would an exemption for religious services raise an establishment clause concern?

in *Smith*, said the State offers "no evidence that the religious use of peyote has ever harmed anyone."[49] Third, the regulation must be narrowly drawn or tailored to further the government's interest in applying the law to religious activity.[50] Assuming government can show a substantial interest in application of its regulation to religious activity, it must also show that the burden on the religious activity is no greater than necessary to achieve that interest.[51] Fourth, the Court should examine the availability of alternative channels for religious activity.[52] This inquiry resembles the threshold question in free exercise cases, i.e., whether the exercise of religion is substantially burdened. It also begins to ask how central the prohibited activity is to the religious belief asserted. For example, the use of peyote may be more central to the religious ceremony of Native Americans than refraining from producing armaments was to Jehovah's Witnesses.[53]

Subjecting religious freedom claims based on the free exercise clause to intermediate scrutiny would allow the courts more flexibility in evaluating government's interests than strict scrutiny allows; however, such heightened scrutiny would require government to affirmatively show that it has a substantial interest, instead of simply articulating a legitimate interest as required by rational basis review. Such an approach takes religious freedom seriously, but recognizes that it can be difficult for government to operate if it needs a compelling justification whenever it interferes with one or more of the many and diverse religious practices in this country. Obviously, the more diverse the religious beliefs and practices, the more likely it is that a religion-neutral law of general applicability will conflict with a religious practice.

Another way to reduce the impact of the free exercise clause on government, while retaining some meaning, is to define more narrowly

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49. *Smith*, 494 U.S. at 911-12 (footnote omitted) (Blackmun, Brennan & Marshall, JJ., dissenting). However, in her concurring opinion, Justice O'Connor said the state has a compelling interest in the uniform application of its law, as reflected in its "judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous." *Id.* at 905 (O'Connor, Brennan, Marshall & Blackmun, JJ., joining as to parts I-II, and concurring in the judgment).

50. *Clark*, 468 U.S at 293.

51. *Id.*

52. *Id.*

53. *Compare Smith*, 494 U.S. at 874 *with Thomas v. Rev. Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 709 (1981).

what constitutes religion for First Amendment purposes. Too broad a definition of religion tends to dilute protection for everyone; on the other hand, having the courts decide what constitutes a religious belief, aside from causing entanglement problems, also disfavors non-mainstream religions. Nevertheless, some narrowing of what constitutes a religion fitting within the protection of the free exercise clause might result in greater religious freedom. For example, the Supreme Court could create a presumption that one claiming governmental interference with religion fits within the scope of the free exercise clause, with the burden on government to rebut the presumption. While this may offend the principle that the courts should avoid deciding the legitimacy of one's religion, the need to make this determination is implicit in the religion clauses. In fact, because the religion clauses protect "religion," it seems implausible that the clauses could be meaningful without a definition of "religion," or a definition that includes anything one asserts is a religion. Even if it is offensive to religions to have the courts decide the meaning of a term in the Constitution, it is less offensive than having the courts interpret the free exercise clause in a manner that provides no meaningful protection to religion. Of course, any determination made by the courts would affect only the litigation in which the issue arises. So, for example, a determination in *Thomas* that producing armaments does not conflict with Mr. Thomas' religion would not have bound either Jehovah's Witnesses in general, or Mr. Thomas specifically, with regard to their religious beliefs, except in the context of an application for unemployment compensation benefits after a discharge or voluntary resignation because of a work assignment.[54] The point is simply that the trade off, the use of intermediate scrutiny with a limitation on the meaning of religion, will result in greater religious freedom than the post-*Smith* version of the free exercise clause.

As an alternative to intermediate scrutiny, the use of a balancing approach would expand religious freedom.[55] This would allow the courts to consider a number of factors, including the extent of the burden on religious freedom, whether the individual is forced to choose between a government benefit and violating a tenet of her religion, the

54. *Thomas*, 450 U.S. at 720.

55. To some extent, application of intermediate scrutiny requires balancing of governmental and individual interests but it is not a true balancing since the process is somewhat tilted in favor of the individual.

uniformity of members' interpretation of the religious doctrine, the government interest in its rule, and the extent of the burden on government caused by accommodation of the religious practice.[56] As to the latter, the number of individuals adhering to the challenger's religion or religious beliefs could be a factor in assessing the government's justification for infringing upon the religious practice at issue. Of course, this leaves non-mainstream religions at a disadvantage, when compared to mainstream religions, but this is true even if the Court says it is applying strict scrutiny.[57]

In short, there is a reasonable position between *Smith* and *RFRA* that would promote religious freedom without unduly hampering government.[58] This would revive the free exercise clause and allow it to play at least a limited role as a co-guarantor of religious freedom. Its role would be limited because, prior to *Smith*, when the standard for free exercise clause claims was supposedly strict scrutiny, few cases were successful in the Supreme Court, at least since 1960.[59] Most of the limited success was achieved in the unemployment cases, where the burden on government, i.e., payment of benefits, was rather insignificant.[60] In essence, the decision in *Smith* placed the legal standard for free exercise clause jurisprudence in conformity with the pre-*Smith* results. This history of an ineffective free exercise clause may be difficult to overcome, even if the legal standard is modified as

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56. *See Smith*, 494 U.S. at 883, 885.

57. Those on the "outside" are always at a disadvantage; for example, it is not a coincidence that pro-government speakers rarely have to resort to the First Amendment for protection.

58. Religious freedom claims relying on the free exercise clause do not have to be an all (*RFRA*) or nothing (*Smith*) proposition. With a case-by-case analysis, a court could reasonably distinguish between the following situations: (1) A Native American fired by the state because of a positive drug test resulting from the sacramental use of peyote at a religious ceremony, and (2) an individual fired by the state because of a positive drug test resulting from the use of marijuana at a "religious" ceremony based on twenty-five college students' sincerely held belief that a joint helps them better understand the mystery of the Trinity.

59. *See e.g. Jimmy Swaggart Ministries v. Bd. of Equalization. of Cal.*, 493 U.S. 378, 398-99 (1990); *Lyng v. N.W. Indian Cemetery Protective Assn.*, 485 U.S. 439, 447 (1988); *Bob Jones U. v. U.S. Goldsboro Christian Schs., Inc.*, 461 U.S. 574, 604 (1983); *U.S. v. Lee*, 455 U.S. 252, 260 (1982).

60. *See e.g. Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963); *see also Frazee v. Ill. Dept. of Empl. Sec.*, 489 U.S. 829, 835 (1989); *Hobbie v. Unempl. Apps. Commn. of Fla.*, 480 U.S. 136, 146 (1987); *Thomas v. Rev. Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 718-20 (1981).

suggested, because the voice of those who need the protection of the clause is often ineffective in both the political branches and the judicial branch. However, the modified standard would allow the Supreme Court to rule in favor of a plaintiff without the fear that such a decision would strengthen the presumption of unconstitutionality under strict scrutiny review.

III. ESTABLISHMENT CLAUSE

The Court's interpretation of the establishment clause compounds the effect of a limiting interpretation of the free exercise clause. With a few exceptions, it appears the Court will rarely find a violation of the establishment clause. Based on the decision in *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*,[61] there is some constitutional limit on government displays of religious symbols.[62] However, government can circumvent quite easily the holding that the creche display was unconstitutional by simply avoiding religious displays that stand alone, i.e., make sure the message is not exclusively religious.[63] More recently, the Court's Ten Commandments decisions demonstrate that government will be allowed to display religious symbols as long as it is a bit careful.[64] Based on these two decisions, it appears a majority of the Justices will allow a display of the Ten Commandments that has a secular purpose, particularly if their historical meaning is apparent from the context of

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61. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). The creche display was unconstitutional because, unlike the menorah, there was nothing in the display (the creche stood alone) to detract from its religious message. *Id.* at 598, 621.

62. *See also Glassroth v. Moore*, 335 F.3d 1282, 1284, 1297 (11th Cir. 2003) (holding that the display of the Ten Commandments as the centerpiece of the rotunda in the Alabama State Judicial Building fails both the purpose and effects prongs of the *Lemon* test).

63. *See e.g. Freethought Socy. of Greater Phila. v. Chester County*, 334 F.3d 247, 266 (3d Cir. 2003) (holding that the county commissioners' refusal to remove a plaque, placed on the façade of the courthouse in 1920, displaying the Ten Commandments did not violate the establishment clause because of its historical context).

64. *Van Orden v. Perry*, 125 S. Ct. 2854, 2858 (2005) (without a majority opinion, the Court allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds, among seventeen monuments and twenty-one historical markers, that had been there for forty years (plurality)); *but see McCreary County v. ACLU*, 125 S. Ct. 2722, 2739-40 (2005) (counties' displays on the walls of their courthouses are unconstitutional because of their predominantly religious purpose).

the display.[65] Aside from the minor restrictions on government displays of religious symbols, only the school-sponsored prayer cases, most recently *Santa Fe Independent School District v. Doe*[66] and *Lee v. Weisman*,[67] suggest the establishment clause still imposes any meaningful restriction on government.[68] In the important area of government financial aid to religion, the barrier imposed by the establishment clause is slight, at best.

It is useful to divide the various types of financial aid into two broad categories, direct and indirect, with the former going directly from government to the religious institution and the latter going initially to private individuals who direct it to the religious institution. After the decision in *Zelman v. Simmons-Harris*, upholding a school voucher program,[69] there is virtually no establishment clause check on indirect financial aid to religious institutions. Stating that the Court's "jurisprudence with respect to true private choice programs has remained consistent and unbroken,"[70] the Court said it is:

> clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private

65. Justice Breyer, who provided the crucial fifth vote in *Van Orden*, found it to be a "borderline" case but was persuaded that the state intended the tablets' secular message to predominate and the forty-year history showed that this had been the monument's effect. 125 S. Ct. at 2869-70 (Breyer, J., concurring).

66. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315-16 (2000) (prayers before varsity football games).

67. *Lee v. Weisman*, 505 U.S. 577, 580, 587 (1992) (prayers as part of middle and high school graduation ceremonies).

68. The establishment clause is still a factor when government facially discriminates among religions, as in *Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994), and *Larson v. Valente*, 456 U.S. 228, 255 (1982). Presumably, such obvious discrimination would violate the equal protection clause of the Fourteenth Amendment, so the establishment clause is not necessary to address it. However, if government becomes more sophisticated in its discrimination by adopting religion-neutral rules with a discriminatory impact on certain religions, then it may be able to avoid both the religion clauses and the equal protection clause.

69. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002).

70. *Id.* at 649. The Court referred to three cases involving "true private choice" programs: *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12-14 (1993); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 489-90 (1986); *Mueller v. Allen*, 463 U.S. 388, 403 (1983).

> choice, the program is not readily subject to challenge under the [e]stablishment [c]lause.[71]

The Court dismissed what it described as the "incidental advancement of a religious mission, or the perceived endorsement of a religious message," as "reasonably attributable to the individual aid recipients, not the government, whose role ends with the disbursement of benefits."[72] Theoretically, parents could "spend" the vouchers at public schools, private nonreligious schools or private religious schools, however, none of the public schools in adjacent districts participated and forty-six of the fifty-six private schools participating had a religious affiliation. Over ninety-six percent of all voucher recipients attended religious schools, including "schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension."[73] Thus, it now appears that government aid to religious institutions will not violate the establishment clause as long as there is a secular purpose, the program is neutral with respect to religion, i.e., it is available to both religious and nonreligious institutions, and the assistance is provided "directly to a broad class of citizens who, in turn, direct [the] government aid to religious [institutions] wholly as a result of their own genuine and independent private choice."[74] In short, any "indirect" aid is likely to be upheld, even though most of the aid goes to institutions that are "pervasively sectarian," and it is used to subsidize religious instruction and proselytizing.

The most recent case addressing direct aid is *Mitchell v. Helms*, in which a four-justice plurality, with Justices O'Connor and Breyer concurring in the judgment, noted the distinction between direct and indirect aid but found it of little significance because there was still private choice, i.e., in a per capita school aid program the aid reaches religious schools by virtue of the fact that parents made the choice to send their children to a private religious school.[75] As in *Zelman*, the

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71. *Zelman*, 536 U.S. at 652.

72. *Id.* at 640, 652.

73. *Id.* at 687 (Souter, Stevens, Ginsburg & Breyer, JJ., dissenting).

74. *Id.* at 652 (majority).

75. *Mitchell v. Helms*, 530 U.S. 793, 816 (2000) (plurality). In *Helms*, the federal program at issue provides for federal distribution of funds to state and local governmental agencies; those agencies "lend educational materials and equipment to public and private schools, with the enrollment of each participating school

aid at issue in *Helms* could go to schools that are "pervasively sectarian," and therefore would be used to subsidize religious education and proselytizing.[76] Justice O'Connor, joined by Breyer, wrote separately because "the plurality announce[d] a rule of unprecedented breadth for the evaluation of [e]stablishment [c]lause challenges to government school aid programs."[77] She stated:

> Reduced to its essentials, the plurality's rule states that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content. The plurality also rejects the distinction between direct and indirect aid, and holds that the actual diversion of secular aid by a religious school to the advancement of its religious mission is permissible.[78]

She was particularly troubled by two aspects of the plurality opinion: Its "treatment of neutrality comes close to assigning that factor singular importance" and its "approval of actual diversion of government aid to religious indoctrination."[79] Nevertheless, she concurred in the judgment because the program at issue in *Helms* was very similar to the program at issue in *Agostini v Felton*:[80]

> [The] aid is allocated on the basis of neutral, secular criteria; the aid must be supplementary and cannot supplant non-Federal funds; no [federal] funds ever reach the coffers of religious schools; the aid must be secular; any evidence of actual diversion is *de minimis*; and the program includes adequate safeguards.[81]

Financial support of the religious work of religious institutions seems to be the most egregious government "establishment" of religion, yet the Court appears willing to uphold nearly any government program providing such support.[82] Once that barrier is

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determining the amount of aid that it receives." *Id.* at 801 (plurality). In her concurring opinion, Justice O'Connor indicated this is not a "true private-choice program," and also noted that the difference between the two "is significant for purposes of endorsement." *Id.* at 842 (O'Connor & Breyer, JJ., concurring).

76. *Id.* at 826-29 (plurality).

77. *Id.* at 837 (O'Connor & Breyer JJ., concurring).

78. *Id.*

79. *Id.*

80. *Agostini v. Felton*, 521 U.S. 203 (1997) (Title I program).

81. *Helms,* 530 U.S. at 867 (O'Connor & Breyer, JJ., concurring).

82. While most Supreme Court cases address financial aid to schools, a facial

broken, the establishment clause means little. Government can subsidize the religious work of religious institutions by choosing to fund services provided by both secular and religious institutions, even though the religious institutions' religious work pervades the secular work. Worse, government can effectively favor certain religions by choosing to fund only those services provided primarily by "favored" religions. Such disguised discrimination, when based on race or sex, is insulated from the equal protection clause of the Fourteenth Amendment by the *Washington v. Davis*[83] line of cases, unless the challenger can prove intentional discrimination, and it appears disguised religious discrimination will survive First Amendment scrutiny.

When the government is allowed to pay for religious instruction and proselytizing, the establishment clause provides very little protection against government support of religion. Clearly there is no longer " 'a wall of separation between Church and State' ";[84] a more appropriate metaphor would be a "growing partnership" between church and state. The wall had been substantially eroded before *Zelman* and *Helms,* because the Court held in several cases that religious speakers cannot be excluded when government decides to make available funds and facilities for speech.[85] In each of these cases, the Court held that allowing the religious groups and speakers to participate in the government subsidy would not offend the establishment clause.[86] Therefore, as a result of these cases, if government chooses to subsidize speech, it cannot exclude institutions

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challenge to the *Adolescent Family Life Act*, which authorized grants to organizations, including religious organizations, to provide counseling and care to pregnant adolescents and their parents, was rejected in *Bowen v. Kendrick*, 487 U.S. 589, 593, 618 (1988).

83. *Washington v. Davis*, 426 U.S. 229 (1976).

84. *Everson v. Bd. of Educ. of Ewing TP.*, 330 U.S. 1, 16 (1947) (citing *Reynolds v. U.S.*, 98 U.S. 145, 164 (1878).

85. *See e.g. Good News Club v. Milford C. Sch.*, 533 U.S. 98, 112 (2001); *Rosenberger v. Rector & Visitors of U. of Va.*, 515 U.S. 819, 845-46 (1995); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 769 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993); *Bd. of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226, 253 (1990); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (These decisions are based on the free speech clause of the First Amendment.).

86. *See id.*

or individuals who will use the subsidy to promote religion;[87] if government chooses to subsidize education, and presumably social services, it is allowed to make the funds available to religious institutions, even those that are pervasively sectarian, so long as the funds get to the religious institution as a result of some private choice by the beneficiaries. The fact that the service being purchased by the government will be provided in conjunction with religious instruction and proselytizing does not, according to the Court, invalidate the subsidy.

While both *Zelman* and *Helms* involved government aid to schools, the rationale appears broad enough to encompass the current administration's "Faith-based and Community Initiatives,"[88] pursuant to which federal funds are available to a variety of religious institutions providing social services.[89] Although Congress appears to have misgivings about the administration's faith-based initiatives,[90] today there appears to be considerable support in society for government subsidy of religion. This support can be traced to the fact that mainstream religions are the primary beneficiaries of such programs,

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87. In *Bronx Household of Faith v. Bd. of Educ. of N.Y.C.*, 331 F.3d 342, 350, 354-55 (2d Cir. 2003), the plaintiff church's request to rent space in a school was denied pursuant to a board of education policy that prohibits " 'religious services or religious instruction' " in school facilities. Based on *Good News Club*, the trial court issued a preliminary injunction and this was affirmed on appeal. *Id.* at 353. In discussing *Good News Club* and whether teaching moral values is different than religious worship, the court indicated it may not be "able to identify a form of religious worship that is divorced from the teaching of moral values." *Id.* at 355. The court suggested that after *Good News Club*, it may not be possible to exclude religious worship from a government facility opened for private speech. *Id.*

88. *See* Exec. Or. 13280, 67 Fed. Reg. 77145, 77145-46 (Dec. 12, 2002); Exec. Or. 13279, 67 Fed. Reg. 77141, 77141-44 (Dec. 12, 2002); Exec. Or. 13199, 66 Fed. Reg. 8499, 8499-8500 (Jan. 29, 2001); Exec. Or. 13198, 66 Fed. Reg. 8497, 8497-98 (Jan. 29, 2001); *see also Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 882 (7th Cir. 2003) (rejecting an establishment clause challenge to Wisconsin's funding of a halfway house that incorporates Christianity into its treatment program, based on *Zelman*, even though the state agency dispensed with the vouchers and paid the provider directly after the recipient selected the provider).

89. Jill Goldenziel, *Administratively Quirky, Constitutionally Murky: The Bush Faith-Based Initiative*, 8 N.Y.U. J. Legis. & Pub. Policy 359, 360 (2005).

90. *See e.g.* Mike Allen & Alan Cooperman, *Bush Backs Religious Charities on Hiring: Hill Is Urged to Ease Bias Rules on Groups That Get U.S. Funds*, 202 Wash. Post A1, A4 (June 25, 2003); Dana Milbank, *Bush Legislative Approach Failed in Faith Bill Battle: White House Is Faulted for Not Building a Consensus in Congress,* 139 Wash. Post A1, A14 (Apr. 23, 2003).

because they tend to be the religions that have branched out into providing education and social services.[91]

IV. CONCLUSION

As a result of the Supreme Court's interpretation of the religion clauses, the non-mainstream religions lose under both the free exercise clause and the establishment clause; religion-neutral, generally applicable laws are much more likely to interfere with the practices of non-mainstream religions, due to their lack of representation and clout in the political process, and mainstream religions are much more likely to benefit from government subsidies because of their representation and clout in the political process.[92] Members of non-mainstream religions must feel like "outsiders" when they observe government practices and regulations hindering their religious practices while at the same time observing government subsidizing mainstream religions. This is precisely what the religion clauses were supposed to guard against. But, as interpreted by the Supreme Court, neither of the religion clauses promotes religious freedom and, as a result, government is free to prefer and subsidize mainstream religions.

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91. A legitimate question is whether there would be such political support for government subsidies of religious institutions if more non-mainstream religions were in the business of providing education and social services, thus making them eligible for the subsidies.

92. This does not mean that all members of mainstream religions support what is happening; fortunately, enlightened members of mainstream religions understand the danger of diluting the free exercise clause, as well as the danger of government subsidy of religion. They realize that without constitutionally protected religious freedom, their religions may one day fall into disfavor in the political process. This is demonstrated by, for example, the support of the U.S. Catholic Conference and National Conference of Catholic Bishops for *RFRA* when it was under consideration in Congress. *See* Sen. Jud. Comm., *The Religious Freedom Restoration Act of 1992: Hearing on S. 2969,* 102d Cong. 99-115 (Sept. 18, 1992) (statement of Mark E. Chopko, legal advisor to the Nation's Roman Catholic Bishops); H.R. Subcomm. on Civ. & Constitutional Rights of the Comm. on Jud., *The Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797*, 102d Cong. 33-47 (May 13-14, 1992) (statement of Mark E. Chopko, legal advisor to the Nation's Roman Catholic Bishops).