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LET US PRAY (BUT NOT "THEM"!): THE TROUBLED JURISPRUDENCE OF RELIGIOUS LIBERTY

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Religious liberty antedated the Bill of Rights in theory, and occasionally even in practice.[1] The free exercise of religion clause of the first amendment places the protection of religious liberty at the heart of the Bill of Rights. Within the legal academic community, the jurisprudence of religious liberty recently has enjoyed a renaissance.[2] The United States Supreme Court, however, has

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We have valiantly endeavored, but miserably failed, to minimize footnotes. m. elisabeth bergeron, Executive Articles Editor of the *St. John's Law Review*, expressly encouraged all authors to pursue a colloquial, dialogic format for this Symposium. We commend her for her singularly courageous editorial efforts to militate against the turgid, grinding "style" that generally afflicts most law review scholarship.

[1] *See* Adams & Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1562-68 (1989); McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421-66 (1990).

[2] *See generally* Adams & Emmerich, *supra* note 1 (investigating history of religion clauses for animating principles helpful in deciding modern cases); Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375 (1990) (examining whether autonomy of modern religious institutions can survive pervasive government action typical of modern welfare state); McConnell, *supra* note 1 (citing inattention to original meaning of religion clauses as main factor behind modern Supreme Court decisions and reexamining historical, philosophical, and legal understanding of framers in area); Noonan, *The Constitution's Protection of Individual Rights: The Real Role of the Religion Clauses*, 49 U. PITT. L. REV. 717 (1988) (tracing historical link between religion clauses and rights of individual conscience); Smith, *Establishment Clause Analysis: A Liberty Maximizing Proposal*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 463 (1990) (arguing that where constitutional language is ambiguous Court should not defer to legislature but take activist role to maximize liberty); Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245 (1991) [hereinafter Smith, *Nonpreferentialism*] (examining historical and decisional support for nonpreferential approach to establishment clause analysis).

never been receptive to free exercise claims.[3] On the eve of the bicentennial celebration of the Bill of Rights, the Court has instead effectuated "a wholesale overturning of settled law concerning the Religion Clauses of our Constitution."[4]

Although expressly recognizing that it will disadvantage less common religious practices,[5] Justice Scalia nevertheless enunciated, in *Employment Division, Department of Human Resources of Oregon v. Smith*,[6] a startling and sweeping new standard, designed to vitiate the free exercise clause of all meaning: "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest."[7] Rather than enjoying a bicentennial maturation, the fundamental right of free exercise of religion has instead been severely debilitated by the Court. The free exercise rights of non-Christians have been rendered especially tenuous by the *Smith* decision. Concomitantly, although presented as an establishment clause case, the Court, in *Westside Community Schools v. Mergens*,[8] dramatically endorsed the free exercise

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[3] Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990), stands in glaring contrast to the line of cases that otherwise have protected free exercise of religion primarily in the realm of unemployment: specifically, the right not to be excluded from the receipt of unemployment compensation benefits when free exercise of religion results in loss of employment. *See* Frazee v. Dep't of Employment Sec., 489 U.S. 829, 833-35 (1989) (Christian worker refusing job requiring him to work Sundays could not be denied unemployment benefits under free exercise clause); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 146 (1987) (Seventh-day Adventist discharged for refusing to work on sabbath could not be denied unemployment compensation under free exercise clause); Thomas v. Review Bd., 450 U.S. 707, 719-20 (1981) (Jehovah's Witness quitting employment because religious beliefs prevented him from producing weapons entitled to unemployment benefits under free exercise clause); Wisconsin v. Yoder, 406 U.S. 205, 234-36 (1972) (Amish children freed from state compulsory education law); Sherbert v. Verner, 374 U.S. 398, 403-06 (1963) (Seventh-day Adventist need not agree to work on sabbath to be eligible for unemployment benefits). However, in virtually all other cases in the modern history of the free exercise clause, those asserting unconstitutional interference with free exercise rights have been unsuccessful before the Supreme Court, dating from Reynolds v. United States, 98 U.S. 145, 166-67 (1879), where the Court upheld the conviction of a Mormon for polygamy. *See* Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 938 (1989). It has been argued that "*Reynolds* drained the free exercise clause of its primary constitutional function." *Id.*

[4] *Smith*, 110 S. Ct. at 1616 (Blackmun, J., dissenting).

[5] *Id.* at 1606.

[6] 110 S. Ct. 1595 (1990).

[7] *Id.* at 1604 n.3.

[8] 110 S. Ct. 2356 (1990). There was a precursor to *Mergens* in the Supreme Court in 1986. In Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986), the Court avoided making any decision on the merits. In a 5-4 decision, the Court held that a former school

rights of Christian high school students to return organized group prayer to the public schools. This Essay will assess the troubled and bifurcated jurisprudence of religious liberty through the prism of these important but disturbing decisions from the 1989 Term.

I. *Westside Community Schools v. Mergens*

In *Mergens*, the Court upheld the controversial Equal Access Act (the "Act").[9] The Act permits student-initiated religious and political groups to meet in public secondary schools during non-instructional time on the same basis as any other student-organized noncurricular group.

In 1985, a group of Omaha high school students led by Bridget Mergens, a senior at Westside High School, brought suit under the Act against the Westside Community School District for its failure to permit the group's members from organizing a student Christian Bible study club. The district court in Nebraska upheld the school board's denial of access. The United States Court of Appeals for the Eighth Circuit, however, reversed the trial court's decision, reasoning that the presence of noncurriculum related clubs at Westside created a limited open forum triggering the Act. On appeal to the Supreme Court, the school district raised two challenges: whether Westside had become a limited open forum within the meaning of the Act; and whether the Act violated the establishment clause, if indeed a limited forum had been created.

Writing for the Court, Justice O'Connor examined the history of the Act. She pointed out that Congress explicitly intended the Act to extend the reasoning of *Widmar v. Vincent*[10] to secondary schools. Accordingly, if a school creates a limited open forum by permitting noncurriculum related groups to meet during non-in-

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board member lacked standing to appeal a district court decision which recognized a student religious group's right to hold prayer meetings on public school grounds during regular school hours. *Id.* at 548-49. The Williamsport schools had a student activity period open to any student club that contributed to the intellectual, physical, or social development of students. Bender v. Williamsport Area School Dist., 563 F. Supp. 697, 698 (M.D. Pa. 1983), *rev'd*, 741 F.2d 538 (1986), *vacated*, 475 U.S. 534 (1986). The school board, however, denied Petros, a Christian student prayer group, permission to meet. *Id.* at 701. It was the only club so denied. *Id.* at 698. The *Bender* litigation commenced prior to the passage of the Equal Access Act of 1984.

[9] 20 U.S.C. §§ 4071-4074 (1988). The Act was signed into law by President Ronald W. Reagan on August 11, 1984.

[10] 454 U.S. 263 (1981). In *Widmar*, the Court ruled that since the policy at a public university had created a generally open forum, denying students equal access to buildings for voluntary religious programs violated the right to free speech. *Id.* at 277.

structional time, then it is obligated to grant equal access to a student-sponsored Bible study club.

Although both sides agreed that Westside is a public secondary school receiving federal assistance within the meaning of the Act, neither the Act nor its opaque legislative history provided a definition of "noncurriculum related student groups." The Court's preliminary task, therefore, involved statutory construction. A majority of the Justices agreed that since the Act's legislative purpose was to end discrimination against religious speech in public schools, a "noncurriculum related student group" is "best interpreted broadly to mean any student group that does not *directly* relate to the body of courses offered by the school."[11] Such an approach, the Court reasoned, is in accord with congressional intent to provide a low threshold for triggering the Act. In reaching this interpretation, the Court rejected the school district's argument "that 'curriculum related' means anything remotely related to abstract educational goals";[12] to do so would virtually eviscerate the Act.[13] The Court examined several of the noncurriculum related groups at Westside and concluded that, through their presence, the school had created a "limited open forum."[14] The school board could not therefore deny the prayer club access to the school's facilities.

In addressing the core constitutional question—namely, whether the Equal Access Act violates the establishment clause of the first amendment—the Court splintered.[15] Writing for the plu-

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[11] *Mergens*, 110 S. Ct. at 2366 (emphasis in original). Even Justice Marshall, who did not join generally in the *Mergens* opinion, concurred on this point. *Id.* at 2378 (Marshall, J., concurring). "I agree with the majority that 'noncurriculum' must be construed broadly to 'prohibit schools from discriminating on the basis of the content of a student group's speech.'" *Id.* (Marshall, J., concurring).

[12] *Id.* at 2369.

[13] *See id.* The language of the Court here echoes that of Garnett v. Renton School Dist., No. 403, 865 F.2d 1121 (9th Cir. 1989), *vacated*, 110 S. Ct. 2608 (1990). In *Garnett*, however, the Ninth Circuit upheld the school district's refusal to allow a student organized religious group to meet on a public high school campus prior to the start of the school day. *Id.* at 1128. The court reasoned that since the school in question had not created a limited open forum, the Equal Access Act was not triggered. *Id.* at 1127-28.

[14] *Mergens*, 110 S. Ct. at 2369.

[15] *Id.* at 2361. Although eight Justices voted to uphold the Equal Access Act, four different rationales were proffered. The plurality opinion was delivered by Justice O'Connor, and was joined in Part I (facts) and Part II (statutory construction) by Chief Justice Rehnquist and Justices White, Blackmun, Scalia, and Kennedy. *Id.* at 2362. Joining her in Part III (establishment clause analysis) were Chief Justice Rehnquist and Justices White and Blackmun. *Id.* at 2370. Justice Kennedy, joined by Justice Scalia, concurred in part and

rality, Justice O'Connor noted that in *Widmar*, the Court upheld equal access under the test established in *Lemon v. Kurtzman*.[16] She reasoned that an extension of the Court's logic and precedent in *Widmar* should apply with equal force in *Mergens*. Consequently, she embarked on separate analyses under each of the three prongs of the *Lemon* test.[17]

First, Justice O'Connor found that the avowed purpose of the Act, to prevent discrimination against religious as well as other types of speech, satisfied the first prong of *Lemon*: it was undeniably secular. Moreover, she asserted that even if some members of Congress intended solely to protect *religious* speech, the Act must be upheld; the Court must consider the legislative purpose of the Act, not the subjective motives of the legislators.

Second, in a more detailed analysis, Justice O'Connor rejected the school district's contention that the Act has the primary effect of advancing religion. Perhaps in a play on the *Lemon* test itself, Justice O'Connor engaged in three related analyses. First, she rejected the notion that a prayer club could result in a symbolic union between government and religion in the minds of students. She reasoned, somewhat naively, that high school students, comparable to their counterparts in higher education, can readily distinguish a school's permitting a student prayer club on campus from an official endorsement of prayer.[18] While acknowledging the risk

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concurred in the judgment. *Id.* at 2376. Justice Marshall, joined by Justice Brennan, concurred in the judgment. *Id.* at 2378. Justice Stevens dissented. *Id.* at 2382.

Between the date that Lemon v. Kurtzman, 403 U.S. 602 (1971), was decided and the start of the Court's Fall 1989 Term, no less than 27 cases, encompassing almost 100 different opinions, have been handed down on the establishment of religion in and out of elementary and secondary schools. There were but three unanimous rulings, and in two of those rulings more than one opinion was filed; the third was a memorandum decision without opinion. *See* Underwood, *Establishment of Religion in Primary and Secondary Schools*, 55 EDUC. L. REP. 807, 809 n.7 (1989).

[16] *See Widmar*, 454 U.S. at 270-75; *see also Lemon*, 403 U.S. at 612-13. Under the standard set forth in *Lemon*, a governmental policy will not violate the establishment clause if it is motivated by a secular legislative purpose; if its principal impact is to neither promote nor restrain religion; and, finally, if the policy does not give rise to "excessive government entanglement with religion." *Id.*

[17] *See supra* note 16.

[18] *See Mergens*, 110 S. Ct. at 2372. The position adopted by Justice O'Connor and the plurality comports with the thinking of Congress, which relied on student testimony in its assumption that students are mature enough to perceive religious neutrality. *See* S. REP. No. 357, 98th Cong., 1st Sess. 8 (1984). Congress also made reference to, and apparently was influenced by, a Note in the *Yale Law Journal*, which asserts that high school students possess enough maturity to perceive religious neutrality. *See* Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 YALE L.J.

of peer pressure, Justice O'Connor emphasized that because the meetings were permitted only during noninstructional time, participation by school officials at prayer club meetings could not create the impression of official endorsement. She next asserted that if a school clarifies that a prayer club's presence on campus is solely in acquiescence to a student's request, then other students cannot reasonably infer any endorsement of the club.[19] Finally, she explained that since the prayer club was only one of a wide variety of student-initiated voluntary clubs, students should not perceive it as an official endorsement. Justice O'Connor thus concluded that the Act, both on its face and as applied in *Mergens*, did not have the primary effect of advancing religion.[20]

In considering the final prong of the *Lemon* test, Justice O'Connor refused to recognize excessive entanglement between the school and the religious club. She stressed that, although the Act does permit a school to assign supervisory personnel to ensure proper student behavior, it more significantly prohibits any monitoring, participation, or involvement by faculty, nonschool personnel (such as ministers), as well as school sponsorship of the meetings. In fact, she cautioned that any attempt to deny equal access might create a greater specter of excessive entanglement through the invasive machinery necessary to safeguard against religious speech.[21]

In a brief concurrence, Justice Kennedy agreed that the Act did not violate the establishment clause, although he would not have employed the *Lemon* test. Rather, he analyzed whether the Act either gave such a direct benefit to a religion that it verged on establishing a state religion, or so coerced student participation in

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499, 507-09 (1983). However, at least one empirical study casts doubt on the ability of high school students to perceive religious neutrality. *See* Rossow & Rossow, *High School Prayer Clubs: Can Students Perceive Religious Neutrality?*, 45 EDUC. L. REP. 475, 476-83 (1988) (psychological data supports notion that high school students cannot perceive neutrality). In addition, a number of psychological studies indicate both that peers exercise a great deal of influence in high school and that levels of maturity among adolescents may vary greatly. *See, e.g.*, Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 AM. SOC. REV. 385, 390-91 (1963) (although adolescents confronted with parent-peer cross-pressures generally opt towards peer group, tendencies vary greatly with type of choice to be made); Lasseigne, *A Study of Peer and Adult Influence on Moral Beliefs of Adolescents*, 10 ADOLESCENCE 227, 228-30 (1975) (studies demonstrate moral beliefs of adolescents increasingly influenced by peer groups and decreasingly influenced by parent pressure).

[19] *Mergens*, 110 S. Ct. at 2372.

[20] *Id.* at 2373.

[21] *Id.*

religious activity that it infringed on free exercise. Because Justice Kennedy perceived neither violation, he therefore would have upheld the constitutionality of the Act without the *Lemon* analysis.[22]

In a lengthier concurrence, Justice Marshall stated that the Act could withstand establishment clause scrutiny. However, he was concerned that schools take special care to avoid creating even the appearance of endorsing the goals of a prayer club. He offered suggestions on how schools such as Westside could avoid this situation.[23]

In many quarters, prayers seemingly have been answered;[24] in *Mergens*, the Court endorsed the constitutionality of the Equal Access Act of 1984,[25] and, with it, the successful effort by Congress and the Reagan-Bush administration to return organized vocal student prayer to public secondary schools.[26] The public hysteria and

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[22] *See Id.* at 2376-78 (Kennedy, J., concurring).

[23] *See Mergens*, 110 S. Ct. at 2382-83 (Marshall, J., concurring). Justice Marshall maintained that nonendorsement requires schools to disassociate themselves from any religious speech, perhaps including an affirmative discouragement of student participation in any club activity. *Id.*

[24] *Ruling Adds Zeal to Bible Students' Crusade*, N.Y. Times, June 11, 1990, at A1, col. 1.

[25] 20 U.S.C. §§ 4071-4074 (1988). For extensive commentary on the Equal Access Act, see generally Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1 *passim* (1986) (defending Act as consistent with need for absolute governmental neutrality towards religion and private speech); Stone, *The Equal Access Controversy: The Religion Clauses and the Meaning of "Neutrality"*, 81 NW. U.L. REV. 168, 172-73 (1986) (calling for less stringent substantial state interest test in equal access cases) Strossen, *A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free-Speech in the Wall Separating Church and State?*, 71 CORNELL L. REV. 143 *passim* (1985) (Act serves as actual or implicit endorsement of religion); Teitel, *When Separate Is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 NW. U.L. REV. 174 *passim* (1986) (arguing equal access provides governmental assistance to propagation of religion, and terming Professor Laycock's view "accomodationist"); Whitehead, *Avoiding Religious Apartheid: Affording Equal Treatment For Student-Initiated Religious Expression In Public Schools*, 16 PEPPERDINE L. REV. 229 *passim* (1989) (accommodation of religion has constitutional and historical roots); *see also* Note, *Student Religious Groups and the Right of Access to Public School Activity Periods*, 74 GEO. L.J. 205 (1985) [hereinafter Note, *Student Religious Groups*] (extensive inquiry into public forum creation and stressing its importance as threshold issue in any equal access analysis); Note, *The Equal Access Act: The Establishment Clause v. The Free Exercise and Free Speech Clauses*, 33 N.Y.L. SCH. L. REV. 447 *passim* (1988) (Act should not survive establishment clause analysis because its underlying purpose is to encourage religion).

[26] *See* Note, *Student Religious Groups*, *supra* note 25, at 206 (Act "might accomplish what no other approach by religious groups has achieved—the authorization of prayer in public schools").

gross misperceptions surrounding the school prayer[27] and Bible reading[28] decisions by the Court almost thirty years ago had festered through the controversial moment-of-silence case[29] of the past decade.

But in fact, as constitutional lawyers know, the Court never banished the Bible or prayer per se from public school. The Warren Court prohibited scripture readings and prayer when they were officially sponsored as part of the school regime by public school leadership; these government-sponsored actions are violations of the establishment clause. But, as the Court took pains to explain in those cases, the Bible could continue to be taught for comparative religion or literature classes, and students could continue to pray silently and individually in public schools. Of course, this frustrated those students and teachers (as well as parents and politicians) who wished to pray vocally and communally in public school. *Wallace v. Jaffree*,[30] which struck down Alabama's moment-of-silence statute in 1985, capped over two decades of vehement public outrage directed against the Court by those who advocated the return of organized vocal student prayer to public schools.

Facially, therefore, the *Mergens* decision ought to be cause for great rejoicing. The practical realities of *Mergens*, however, suggest that the decision ultimately may bitterly disappoint its current champions. Those now delighted with the return of organized vocal student prayer to public schools may come to rue *Mergens* and to yearn for a return to the contemplative quiet of the *Abington School District v. Schempp*[31] era. The age-old caution is once again proven true: Beware, lest your prayers be answered—or, at least, be certain of what you pray for!

The successful students at the Westside High School in

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[27] *See* Engel v. Vitale, 370 U.S. 421, 436 (1962) (New York Board of Regents' nondenominational prayer, which local school board ordered recited daily, violated establishment clause).

[28] *See* Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963) (Pennsylvania law requiring daily reading without comment of ten Bible verses violated establishment clause, even though children could be excused upon written parental request).

[29] Wallace v. Jaffree, 472 U.S. 38 (1985); *see* Comment, *School Prayer and the Constitution: Silence is Golden*, 48 MD. L. REV. 1018, 1030-43 (1989) (assessing potential impact of *Jaffree* on existing moment of silence statutes).

[30] 472 U.S. 38 (1985). The Court held that because the state legislature expressly designed the statute to encourage prayer it violated the establishment clause. *Id.* at 56-61.

[31] 374 U.S. 203 (1963).

Omaha, Nebraska were Christians. The salient immediate challenge is this: Will those now rejoicing over *Mergens* encourage its inevitable extension to protect student religious groups that are not mainstream Christian? If other student religious groups—for example, Muslims, Jews, or Buddhists—utilize *Mergens*, as they surely will, public high schools may become cacophonous discordant towers of Babel. And, if Christian proponents of *Mergens* find disconcerting the prospects of opening up schools to other mainstream religions, imagine what contretemps await *Mergens* initiatives by New Age devotees, Satanists, and religious racists.

Those school prayer champions who naively insist that America is a tolerant, ecumenical, and pluralistic society that will be able to thrive on *Mergens* are sadly mistaken. One need look neither far nor long to see the pernicious ramifications of *Mergens*. This nation has never met the full challenge and promise of the Bill of Rights. For instance, the bitter counterpoint to *Mergens* also lies in the same October 1989 Term of the Supreme Court, in a profoundly unsettling decision rendered only six weeks earlier.

II. *Employment Division, Department of Human Resources of Oregon v. Smith*[32]

Alfred Smith and Galen Black, members of the Native American Church, were drug and alcohol counselors at the Douglas County Council on Alcohol and Drug Abuse, a private, nonprofit rehabilitation center in Oregon. After ingesting peyote during a religious ceremony of their church,[33] they were, consistent with their

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[32] 110 S. Ct. 1595 (1990).

[33] For a discussion of Native American sacramental use of peyote, see Nelson, *Native American Religious Freedom and the Peyote Sacrament: The Precarious Balance Between State Interests and the Free Exercise Clause*, 31 ARIZ. L. REV. 423, 424-25 (1989).

> [P]eyote has been accepted by thousands of Indians as the central element in the vibrant religious movement legally organized as the Native American Church. Peyote's principal ingredient is mescaline. When taken internally peyote produces a hallucinogenic effect. Church members consume peyote at "meetings" designed to give thanks for past good fortune or to find guidance for future conduct. Many users experience a heightened sense of comprehension and good feeling towards other people, coupled with extraordinary visions in which colors or animals are often seen. More importantly, peyote itself constitutes an object of worship for Native American Church members. Prayers are directed to peyote in much the same manner as some Christians pray to the Holy Ghost. Members regard peyote as a teacher which enables the participant to experience the Deity. Members also view peyote as a protector and often carry it in a beaded pouch for such purposes. Finally, the Native American Church strictly forbids the use of peyote for nonreli-

employer's policy, fired from their jobs. Because Oregon's penal law renders peyote a criminally prohibited drug, the state's Employment Division could deny unemployment compensation benefits to persons dismissed from their jobs due to their religiously inspired use of peyote. However, the state agency denied unemployment benefits to Smith and Black based on their termination for work-related misconduct, rather than for any violation of Oregon's criminal drug statutes.

The Oregon Court of Appeals, basing its judgment on the free exercise clause, reversed the agency's decision, but was, in turn, reversed by the Oregon Supreme Court. The United States Supreme Court vacated and remanded the state high court's ruling. On remand, the Oregon Supreme Court ruled against the unemployment claim on the ground that the sacramental use of peyote had violated, and was not exempt from, the prohibition of the drug under state penal law. However, since it also ruled that the prohibition was invalid under the free exercise clause, it found that the unemployment benefits could not be denied. On appeal once again, the Court neatly framed the issue as whether the prohibition of the religious use of peyote is permissible under the free exercise clause.

Writing for a divided Court,[34] Justice Scalia began his analysis with an examination of the meaning of free exercise. He defined the free exercise of religion as "the right to believe and profess whatever religious doctrine one desires."[35] This involves not only belief and profession, but also the performance of, or abstention from, a variety of acts including participation in liturgical services and adherence to dietary laws. Despite his lip service acknowledgment of conduct associated with free exercise, Justice Scalia later interpreted such precedent as *Wisconsin v. Yoder*[36] to be at odds with both the concurrence and dissent, and displayed little regard for the Court's traditional understanding of conduct in free exercise cases.

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gious purposes, considering such use sacrilegious.
Id. at 424 (footnotes omitted).

[34] *Smith*, 110 S. Ct. at 1597. Joining in Justice Scalia's opinion were Chief Justice Rehnquist, and Justices White, Stevens, and Kennedy. *Id.* Justice O'Connor concurred in the judgment of the Court but did not join in its opinion. *Id.* at 1606. Justices Brennan, Marshall, and Blackmun joined in Parts I and II of Justice O'Connor's opinion, but did not join in the judgment of the Court. *Id.* Rather, Justice Blackmun, joined by Justices Brennan and Marshall, dissented. *Id.* at 1615.

[35] *Id.* at 1599.

[36] 406 U.S. 205 (1972).

Faced with Smith and Black's claim that would, in his mind, carry free exercise one "large step further," Justice Scalia rejected the notion that an individual's free exercise rights should place one beyond the reach of a criminal law not specifically directed at one's religious practices.[37] Citing a number of earlier Supreme Court rulings, he argued that the Court never held that an individual's religious beliefs or practices relieved one of the duty to comply with a law prohibiting conduct that the state was free to regulate.[38]

The only cases, Justice Scalia contended, in which the Court found that the first amendment prohibits the application of a facially neutral statute are those in which the free exercise clause is interpreted in conjunction with other constitutionally protected rights such as freedom of speech or press, or the right of parents to direct the education of their children.[39] In *Smith*, by contrast, he found no such hybrid amalgamation of affected rights because Smith and Black did not contend that they presented anything "but a free exercise claim unconnected with any communicative activity or parental right."[40] Consequently, the Court was not about to hold that when an act subject to government regulation is accompanied by a religious conviction, both the belief *and* the conduct are free from regulation.

Turning to the second half of his rationale, Justice Scalia assessed the appropriate standard of review for a free exercise case. Smith and Black argued that even if their use of peyote was not automatically exempt from the generally applicable criminal statute, their claim for a religious exemption should at least be judged under the balancing test enunciated in *Sherbert v. Verner*.[41] In *Sherbert*, the Court ruled that any governmental actions that substantially infringe upon the free exercise of an individual's religion must be justified by a compelling governmental interest.[42]

Justice Scalia rejected the use of *Sherbert*, noting that the Court had, in recent years, refrained from applying it outside of unemployment compensation cases. Even if the Court were to expand the use of *Sherbert*, he indicated that it should not be applied to allow exceptions from generally applicable criminal laws.

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[37] *Smith*, 110 S. Ct. at 1599.
[38] *Id.* at 1600.
[39] *Id.* at 1601-02.
[40] *Id.* at 1602.
[41] 374 U.S. 398 (1963).
[42] *Id.* at 403.

Moreover, he contended that even when applied in free exercise cases, *Sherbert* had never been used to strike down an otherwise valid statute. Thus, he found that "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such [free exercise] challenges."[43]

Although Justice Scalia noted that the compelling interest test urged by Smith and Black appeared benign, he was inordinately concerned that its familiarity in producing "constitutional norms" in free speech and racial equality cases would be misplaced in free exercise cases.[44] He feared that free exercise's marked difference from free speech and racial equality would produce "a private right to ignore generally applicable laws"—a "constitutional anomaly."[45] Moreover, he voiced concern over the Court establishing the compelling interest test as the standard in free exercise cases because it might force a judge to determine inappropriately the significance of a particular religious tenet before deciding whether the test is applicable.[46]

Justice Scalia further reasoned that if the compelling interest test were to be applied in free exercise cases, then it must be applied to all actions considered religiously motivated; such a decision would, perhaps unwittingly, open the door to greater governmental regulation in the private lives of individuals. In a reduction to the absurd, he cautioned that the uniform application of the compelling interest test could open the door to religious exemptions from a wide variety of civic obligations, including military service, health and safety regulations (particularly child neglect laws),[47] and traffic laws. Justice O'Connor, however, sharply re-

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[43] *Smith*, 110 S. Ct. at 1603.

[44] *Id.* at 1604.

[45] *Id.* Justice O'Connor took strong exception to Justice Scalia's use of the term "constitutional anomaly." *Id.* at 1612 (O'Connor, J., concurring). She responded that "the First Amendment unequivocally makes freedom of religion, like . . . freedom of speech, a 'constitutional nor[m],' not an 'anomaly.'" *Id.* (O'Connor, J., concurring). Justice Blackmun also had great difficulty with Justice Scalia's use of the term. *Id.* at 1616 (Blackmun, J., dissenting).

[46] *Id.* at 1604.

[47] Justice Scalia's alarmist fears over the introduction of potentially large-scale religious exemptions from child neglect laws should be allayed by a report in *Newsday* detailing the criminal conviction of Christian Science parents in connection with the death of their two-year-old son. Newsday, July 5, 1990, at 3, col. 1; *see also* N.Y. Times, Aug. 6, 1990, at A1, col. 2 (Christian Science couple that relied on prayer to cure young son with obstructed bowel convicted of involuntary manslaughter). A related story recounts the cases of six other Christian Science couples who faced legal action over the death of their children since April of 1989: three were convicted of criminal violations ranging from murder to child endanger-

sponded to this threatened "parade of horribles." In her view, the cases relied on by the majority merely emphasize the Court's ability to strike consistently a sensible balance between the free exercise of religion and compelling state interests.[48]

Justice Scalia finally noted that states are permitted, but not required, to respond to the significance of free exercise claims by using the political processes to make accommodations for such religiously motivated acts as the sacramental use of peyote.[49] However, his vague reference that "several" states permit the sacramental use of peyote reflects a casuistry in jarring contrast to the dissent's observation that twenty-three states and the federal government have created such exceptions.[50] Nonetheless, Justice Scalia concluded that since Oregon's prohibition of the use of peyote does not violate the free exercise clause, the state was justified in denying unemployment compensation to Smith and Black. The Court thus reversed the ruling of the Oregon Supreme Court.

In a three part concurrence, whose first two sections were joined by the dissent, Justice O'Connor took the Court to task for its analysis of the doctrine of free exercise. She convincingly demonstrated the need to balance free exercise claims against the government's interest in enforcing the law. Hence, she would have employed the compelling interest test in a case by case analysis to determine whether the burden imposed by a particular facially neutral criminal law is constitutionally significant and, if so, whether its enforcement can be justified by a compelling state interest. However, in applying the test, she parted company with the dissent; she reasoned, not unlike the Court, that Oregon had a compelling interest in prohibiting the possession or use of peyote by its citizens.

Justice Blackmun, dissenting, would have applied the compelling interest standard to a different result. He presented a cogent and well-reasoned defense of an exemption permitting the continued use of peyote by members of the Native American Church. Unfortunately, Justice Scalia's opinion for the Court charted dan-

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ment, one entered a plea bargain, another was acquitted, and the final couple had its case dismissed on the basis of a state law (Minnesota) which permits parents to depend on prayer for health care. *See* Newsday, July 5, 1990, at 37, col. 1; N.Y. Times, July 5, 1990, at A12, col. 3.

[48] *Smith*, 110 S. Ct. at 1613 (O'Connor, J., concurring).

[49] *Id.* at 1606.

[50] *Id.* at 1618 n.5 (Blackmun, J., dissenting).

gerous new ground for free exercise cases.

III. CRITIQUE AND CONCLUSION

Smith reflects the incredible cultural imperialism, arrogance, and hostility of the Court toward the free exercise rights of indigenous people.[51] The answer to *Mergens* lies in *Smith*. Unless and until the dominant Christian mainstream fully respects the religious liberty of Native Americans, every person's fundamental first amendment right of free exercise of religion will remain a whited sepulchre.[52]

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[51] Throughout this Essay, the terms Indian, Native, and indigenous will be used interchangeably to refer to Native American Indian indigenous people. All of these terms are imperfect derivatives of dominant foreign linguistic and cultural imperatives; in this milieu, it seems pointless to quibble over the degree of "political correctness" of an essentially foreign terminology. Christopher Columbus mistakenly believed that he had reached India; hence, the term "Indians." "Native American" has more coherence, but it is an ironic term for nomadic cultures. The Native American Church, however, is the official title of an organized religious movement, and has approximately 300,000 members. *See* Nelson, *supra* note 33, at 424 n.4 (citing Kennedy v. Bureau of Narcotic & Dangerous Drugs, 459 F.2d 415, 416 (9th Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973)).

[52] *Smith* is the direct descendant of the Court's outrageous decision in Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). In *Lyng*, a 5-3 decision written by Justice O'Connor, the Court held that the free exercise clause did not bar the federal government from building a six-mile-long road through the heart of Indian religious grounds in a national forest, even though building the road "could have devastating effects on traditional Indian religious practices." *Id.* at 451. Justice O'Connor was utterly oblivious to the fact that the religious site in the national forest originally belonged to the Indians and had been, "treaty" euphemisms aside, stolen, as was all of America, from its original inhabitants. "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 453 (emphasis in original). In his dissent, Justice Brennan observed that the federal government's construction of the road would "virtually destroy a religion." *Id.* at 472 (Brennan, J., dissenting). *Lyng* completely vitiated the American Indian Religious Freedom Act. *See* 42 U.S.C. § 1996 (1988).

Lyng, in turn, is the direct descendant of the Court's pernicious decision in Bowen v. Roy, 476 U.S. 693 (1986). In *Bowen*, the Court found that certain Abenaki Indian parents were not entitled to government benefits of food stamps or aid to families with dependent children, because they failed to follow government requirements and did not obtain a social security number for their minor daughter, Little Bird of the Snow. *Id.* at 696. The Indians sincerely believed that the social security number would harm the child's spirit and deplete her spiritual power. *Id.* at 697. Rejecting the Indians' claim for government benefits due to the deliberate absence of the child's social security number, Chief Justice Burger stated:

> The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.
>
> . . . Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets.

The most insightful lessons in the troubled jurisprudence of religious liberty can be taught by examining the harsh history of native people. The bicentennial of the Bill of Rights coincides with an earlier centennial moment in American history, one especially washed in innocent blood. The massacre by the United States Army of three hundred starving Sioux men, and unarmed women and children at Wounded Knee, South Dakota occurred in late December of 1890.[53]

Of course, *Smith* does not rise to the level of Wounded Knee. It is significant, however, that the Sioux Ghost Dancers were slaughtered while messianically enraptured in their own last desperate free exercise of religion.[54] In this tragic and bloody history, *Smith* is but the most recent instance of cultural genocide.[55]

Id. at 699-700.

The Court's trivialization of Indian free exercise rights summed up the view of the "Imperial Court": Indian sacred sites are intrusions on the government's land, suffered solely at the government's pleasure and whim. An Indian's right to practice religion and to live with dignity are relegated to acquiescence, seemingly even to the government's office furniture decor.

Lyng, understandably, has been the target of well-deserved, scathing criticism. "The *Lyng* decision reeks of injustice." Comment, *The Scope of the Free Exercise Clause:* Lyng v. Northwest Indian Cemetery Protective Association, 68 N.C.L. REV. 410, 421 (1990); *see* Note, *Unjustified Interference of American Indian Religious Rights:* Lyng v. Northwest Indian Cemetery Protective Association, 22 CREIGHTON L. REV. 313, 326-31 (1988) (Court suddenly abandoned traditional balancing test and allowed fundamental liberty to be destroyed); Note, *Constitutional Law—First Amendment—Government Action Does Not Violate Free Exercise Clause of First Amendment When It Neither Coerces Action Contrary to Religious Beliefs Nor Prohibits Access to Practice Those Beliefs, But Merely Imposes an Incidental Burden on Religious Practice*, 20 ST. MARY'S L.J. 427, 450 (1989) (more sensitive approach would inquire into sincerity of belief, and centrality of practice to particular religion); *see also* Comment, Lyng v. Northwest Indian Cemetery Protective Association: *Government Property Rights and the Free Speech Clause*, 16 HASTINGS CONST. L.Q. 483, 484-85 (1989) (Court's traditional concern for indirect effects of government action on religious vitality inexplicably abandoned in *Lyng*); Comment, Lyng v. Northwest Indian Cemetery Association: *A Form-Over-Effect Standard for the Free Exercise Clause*, 20 LOY. U. CHI. L.J. 171, 187-90 (1988) (*Lyng* court abandoned precedent and ignored effect of government action); Comment, *The Sacred Public Lands: Improper Line Drawing in the Supreme Court's Free Exercise Analysis*, 60 U. COLO. L. REV. 601, 657 (1989) (as result of *Lyng*, Western religions "protected from even relatively minor burdens . . . while American Indians are not protected from government actions that essentially destroy entire religious traditions").

[53] D. BROWN, BURY MY HEART AT WOUNDED KNEE 413-18 (1970).

[54] *See id.* at 391, 406-16 (discussion of Ghost Dancing religion); *see also* J. NEWHARDT, BLACK ELK SPEAKS 241-51 (1932) (same).

[55] "Genocide" is an ugly historical reality. We use the term deliberately. It is a "new word for an old tragedy . . . . Policies of the Spanish, French, English, and the United States may have reduced the population of the new world by as many as 25 million. Genocide is the modern word for a long historic experience which is no stranger to the American continent." Strickland, *Genocide-At-Law: An Historic and Contemporary View of the Native*

Mergens and *Smith* reflect the unprincipled dichotomy between the free exercise rights of the Christian mainstream and the virtually nonexistent free exercise rights of all others. "[T]he law that has emerged thus far creates an intolerable risk of discrimination against unconventional religious practices and beliefs, and threatens to narrow the protection of religious liberty overall."[56]

This is especially intolerable when the legalistic minuet that has afflicted the jurisprudence of establishment and free exercise may finally be exhausted. The formalistic weaving of the multipart *Lemon* test, with its attendant rubric and ritual, is torn and frayed, perhaps beyond repair.[57] The tension between the estab-

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American Experience, 34 U. KAN. L. REV. 713, 713-14 (1986); *see also* Ball, *The Unfree Exercise of Religion*, 20 CAP. U.L. REV. 41, 51 (1991) (*Smith* "is one of a series of opinions in which the Court has carried out aggression against Indian religion").

Cultural genocide, while not nearly as dramatic or as tragic as literal genocide, still has a plethora of pernicious manifestations in dominant Anglo culture. Consider but one example: At St. John's University, the academic base and the alma mater, respectively, of the authors of this Article, the "Redman" remains the de facto symbol of the St. John's University student athletic teams, even to the extent that the peculiar "Lady Redmen" ("Redwomen"? "Redpersons"?) appellation was used until recently. The women's basketball team is currently called the "Express." Recently, much to the consternation of most non-Native American fans, students, athletes, and graduates, the large *papier maché* "Redman" team "mascot" (an idiotic exaggerated caricature of a bellicose Indian warrior, inspiring non-Indian fans to war-whoops) was finally officially repudiated by the University.

There are obvious risks in engaging in this particular form of scholarship and in asserting one's own Native American Indian heritage at an institution with this history. *See* Gregory, *Incremental Progress: A Study of American Indian Law* (Book Review), 1987 WISC. L. REV. 493 (reviewing C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW (1987)). Yet there is cause for hope. At the multi-cultural university that St. John's aspires officially to become, things have "progressed" to the extent that a senior university executive recently, solicited one of the authors' views on the appropriation of the term "Cherokee" for one of its automotive products.

[56] Lupu, *supra* note 3, at 936.

[57] Persuasive criticism of *Lemon* has emerged. "I am content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area." Allegheny County v. ACLU, 109 S. Ct. 3086, 3134 (1989) (Kennedy, J., dissenting in part); *see also* Edwards v. Aguillard, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting) (*Lemon*'s purpose test requires guesswork by courts); Aguilar v. Felton, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting) (current *Lemon* analysis greatly exaggerates danger of undue entanglement between church and state); Wallace v. Jaffree, 472 U.S. 38, 108-13 (1985) (Rehnquist, J., dissenting) (*Lemon* test "has simply not provided adequate standards for deciding Establishment Clause cases"). Justice O'Connor had earlier proposed a refined *Lemon* test, focusing on whether the challenged government action is intended or perceived to convey government endorsement or approval of religion. *See* Lynch v. Donnelly, 465 U.S. 668, 690-94 (1984).

Perhaps a substantial revision of our Establishment Clause doctrine is now in order. Roemer v. Maryland Public Works Bd., 426 U.S. 736, 768-69 (1976) (White, J., concurring); *see also Jaffree*, 472 U.S. at 110 (Rehnquist, J., dissenting) ("*Lemon* test has caused this

lishment and free exercise clauses[58] is lessening.[59] Perhaps even the

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Court to fracture into unworkable plurality opinions"); Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) ("Establishment Clause cases are not easy . . . and we are divided among ourselves"); *Lemon*, 403 U.S. at 614 (church-state separation "far from being a 'wall,' is a blurred, indistinct and variable barrier").

Criticism of *Lemon* has not been confined to the courts. *See* Esbeck, *The Lemon Test: Should It Be Retained, Reformulated, Or Rejected?*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 513, 543-48 (1990) (proposes supplanting *Lemon* altogether); Redlich, *Separation of Church and State: The Burger Court's Tortuous Journey*, 60 NOTRE DAME L. REV. 1094, 1107 (1985) (*Lemon* test breaks down into three separate tests which often neglect broader implications of government policies). *But see Lynch*, 465 U.S. at 713 (Brennan, J., dissenting) (Court's relaxed application of *Lemon* regrettable); *Recent Developments, The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175, 1201-03 (1984) (Court should reaffirm commitment to *Lemon* test and apply it strictly).

[58] Professor Laurence Tribe has noted the inherent conflict between the two clauses:

> [S]erious tension has often surfaced between the two clauses . . . . A pervasive difficulty in the constitutional jurisprudence of the religion clauses has accordingly been the struggle "to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1157 (2d ed. 1988) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970)). However, Professor McConnell has suggested that the Court's separate construction of the two clauses has exacerbated the tension.

> No one would suggest that the Justices have created the religion clauses muddle because they are unintelligent, or because they have devoted insufficient attention to the problem. Rather, there has been a fundamental mistake at the most basic level about the relationship between the free exercise and establishment clauses. The mistake arose, historically, from looking at the two clauses in isolation and giving them a different cast. Since then, the Court has worked out the logical implications of the divergent interpretations, to the point that today the clauses are read as if they meant opposite things—not simply that there is a "tension" between free exercise and establishment, which the Court has frequently stated, but that the two clauses of the first amendment are essentially at war with one another.
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> . . . .
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> This is more than evidence of tension between the clauses. What the free exercise clause requires the establishment clause forbids, and vice versa. This helps to explain the Court's doctrinal confusion: it is using legal constructs that are internally inconsistent.

McConnell, *The Religion Clause of the First Amendment: Where is the Supreme Court Heading?*, 32 CATH. LAW. 187, 195-97 (1989); *see also* Blackmun, *The First Amendment and Its Religion Clauses: Where Are We? Where Are We Going?*, 14 NOVA L. REV. 29, 32-33 (1989) (two fundamental, often conflicting, characteristics underlie first amendment: voluntarism and separatism); Hatch, *Foreword: The Tension Between the Free Exercise Clause and the Establishment Clause of the First Amendment*, 47 OHIO ST. L.J. 291, 291 (1986) ("idea of . . . tension existing between the two clauses is sound").

[59] Professor Tribe has proposed a unitary reading of the first amendment religion clauses to promote both church-state separatism and participatory voluntarism, with the latter principle prevailing whenever there is a conflict, and with free exercise prevailing in conflicts with the establishment clause. L. TRIBE, *supra* note 58, at 1160-62, 1201. In a dis-

intricate, elaborate divisions of the separatist,[60] neutral,[61] nonpref-

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senting opinion, Justice Rutledge dismissed the tension as a false dichotomy: " 'Establishment' and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom." Everson v. Board of Educ., 330 U.S. 1, 40 (1947). More recently, Justice Scalia has asserted that the clauses are not inherently conflictual. *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting) (no need to walk tightrope between clauses). His sentiments echo those of Justice Rehnquist.

> By broadly construing both Clauses, the Court has constantly narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny.
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> . . . .
>
> [Any tension between the clauses] is largely of [the Supreme Court's] own making, and would diminish almost to the vanishing point if the Clauses were properly interpreted.

Thomas v. Review Bd., 450 U.S. 707, 721-22 (1981) (Rehnquist, J., dissenting); *see also Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring) (solution to conflict between clauses lies "not in 'neutrality,' but rather in identifying workable limits to the government's license to promote the free exercise of religion"); Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 *passim* (1988) (effective limits on government action requires development of legally functional definition of religion); Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 313 (1986) (religion clauses merely "address a single, central value from two different angles"); Ward, *Reconceptualizing Establishment Clause Cases as Free Exercise Class Actions*, 98 YALE L.J. 1739 *passim* (1989) (reconceptualizing establishment clause suits as free exercise class actions will bring sharper focus on clauses' key underlying concern: protecting religious liberty). *But see* Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 411-12 (1990) (Court's current approach creates false dichotomy between secular and religious belief systems; by preferring latter it also "offends the equality-of-ideas notion . . . at core of constitutional law").

[60] L. TRIBE, *supra* note 57, at 1161.

> [Separatism] calls for much more than the institutional separation of church and state; it means that the state should not become involved in religious affairs or derive its claim to authority from religious sources, that religious bodies should not be granted governmental powers, and—perhaps—that sectarian differences should not be allowed unduly to fragment the body politic.

Id. Professor Esbeck has divided separatists into "secularists" (who believe the Establishment Clause takes precedence over the right of free speech) and the "institutional—separatists." *See* Esbeck, *Religion and a Neutral State: Imperative or Impossibility?*, 15 CUMB. L. REV. 67, 75-77 (1984).

[61] In the relationship between humanity and religion, "the State is firmly committed to a position of neutrality." Abington School Dist. v. Schempp, 374 U.S. 203, 226 (1963). Professor Tribe, however, has characterized neutrality as an "elusive and variable notion." L. TRIBE, *supra* note 58, at 1167. Neutrality flows from, but is distinct from, strict separatism. *Id.* at 1188-1201. Professor Kurland has been the primary proponent of a strict neutrality that is closely related to separatism.

> The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.

erential,[62] and accommodationist[63] camps of warring theoreticians

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Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961). Professor Laycock, however, is a primary proponent of a neutrality or nonpreferentialism that is much closer to accommodation.

> Defining neutrality in all the varied interactions between church and state is a major task for religion clause scholarship. I do not mean neutrality in the sense of a ban on religious classifications. Instead, I mean neutrality in the sense of government conduct that insofar as possible neither encourages nor discourages religious belief or practice. . . . The government must be neutral both in its own speech and in its treatment of private speech. It may not take a position on questions or religion in its own speech, and it must treat religious speech by private speakers exactly like secular speech by private speakers.

Laycock, *supra* note 25, at 3 (footnotes omitted); *see also* McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U.L. REV. 146 *passim* (1986) (strict neutrality approach may not exhaust all protections of religious liberty Constitution was intended to provide); Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83 *passim* (1986) (concept of neutrality too complex and ambiguous to be applied in principled substantive fashion).

[62] Professor Veltri has vigorously criticized the Court's nonpreferential approach:

> In recent years, a particular favorite in the search for a replacement [for *Lemon*'s three-part test] has been the nonpreferentialist approach to the establishment clause . . . . Under the nonpreferentialist approach, the establishment clause would be interpreted to permit public funding of the secular activities of religious groups, such as education, provided the government did not show preference to the activities of any particular sect or denomination . . . . At the core of the nonpreferentialist thesis lies an historical understanding of the original intent of the establishment clause; nonpreferentialists invariably cite historical examples from the early national period when both state and federal governments aided the activities of various religious denominations.

Veltri, *Nativism And Nonpreferentialism: A Historical Critique of the Current Church and State Theme*, 13 U. DAYTON L. REV. 229, 230-31 (1988). *But see* Smith, *Nonpreferentialism*, *supra* note 2 (although framers did not specifically intend to adopt nonpreferentialist view, theory retains historical legitimacy and underlies much modern case law).

[63] Chief Justice Rehnquist is the Court's most prominent advocate of accommodation. He would have upheld the moment-of-silence law in *Wallace v. Jaffree* because the law "affirmatively furthers the values of religious freedom and tolerance . . . . [I]t accommodates the purely private, voluntary religious choices of the individual pupils who wish to pray while at the same time creating a time for nonreligious reflection for those who do not choose to pray." *Jaffree*, 472 U.S. at 89 (Burger, C.J., dissenting).

The primary academic advocate of accommodation is Professor McConnell.

> The accommodationist option . . . offers the possibility of a unified theory of religious choice. The two religion clauses can be understood as complementary provisions guaranteeing that government action be conducted, as much as possible, so as to reduce effects on religious choice. . . .
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> . . . .
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> To return to this constitutional vision requires a reorientation of first amendment doctrine, away from secularism and separation, and toward religious choice as a unified interpretation of both free exercise and establishment. If one has any faith in the persuasive power of the constitutional vision, this must be the direction the Supreme Court is heading—if not now, then some day.

McConnell, *supra* note 58, at 198, 201-02. McConnell, however, sharply disassociated his

may eventually dissipate, although probably not before thousands of additional pages in law reviews have contributed to the cause.[64]

At this bicentennial, the hard-pressed separatist position is in retreat. Separatism, increasingly considered a modern aberration,[65]

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approach from anything remotely resembling neutrality.

> If perfect neutrality is what we want, we must eliminate public schools. The best we can do . . . is to foster pluralism and diversity . . . . That is not the same thing as secularism. But neither is it necessarily the same thing as neutrality. It requires the public schools to seek out ways to make room for religious elements by means that do not compel religious observances by students who are unwilling or indifferent . . . .
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> . . . .
>
> Neutrality often, indeed usually, serves the cause of religious liberty; but when it does not, a proper appreciation for the needs of religious practitioners requires something more.

McConnell, *supra* note 59, at 165-167; *see* McConnell, *supra* note 1, at 1513-16 (protecting smaller religious factions and sects promotes pluralism and achieves goal of avoiding religious oppression by majority); McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 8, 23 (terming strict neutrality "an attractively simple answer" and espousing pluralistic approach); McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940-41 (1986) (Supreme Court has ignored fact that even neutral aid to religion can be coercive); McConnell & Posner, *An Economic Analysis of Issues Arising Under the Religion Clauses*, 56 U. CHI. L. REV. 1 *passim* (1988) (giving neutrality economic definition to better judge when governmental action becomes intrusive and espousing free market approach to religion).

> "Permissible accommodation" may thus be defined as an area of allowable governmental deference to the religious requirements of a pluralistic society in which a variety of religious beliefs are deeply held. This kind of *voluntary* accommodation should not be confused with the judicial or scholarly references to accommodation *required* by the free exercise clause . . . ."
>
> Also distinguishable . . . is governmental action that violates the establishment clause, often referred to as "forbidden" or "impermissible" accommodation.

Adams & Gordon, *The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses*, 37 DE PAUL L. REV. 317, 319 (1988) (emphasis in original).

[64] There are literally hundreds of law review articles examining the first amendment religion clauses, including such recent symposia as *Religion and the State*, 27 WM. & MARY L. REV. 833 (1986) and *The Religion Clauses of the Constitution*, 4 NOTRE DAME J.L., ETHICS & PUB. POL'Y (1990). One can get a sense of the huge volume of scholarly literature by a Lexis search. On February 15, 1991, a search in the "Allrev" law review Lexis file for "free exercise clause" yielded 449 citations; "establishment clause" yielded 719 citations. For a comprehensive bibliography of sources, see Payne, *Uncovering the First Amendment: A Research Guide to the Religion Clauses*, 4 NOTRE DAME J.L., ETHICS & PUB. POL'Y 825 *passim* (1990).

[65] *See* Everson v. Board of Educ., 330 U.S. 1 (1947). The modern shift away from separatism was evident in *Everson*, where the Court continued to maintain that the wall between church and state "must be kept high and impregnable," yet nevertheless managed to sustain a New Jersey statute reimbursing parents for transportation of children attending sectarian schools. *Id. But see* Pfeffer, *The Establishment Clause: An Absolutist's Defense*, 4 NOTRE DAME J.L., ETHICS & PUB. POL'Y 699, 704-27 (1990) (historical defense of strict separationism); Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 249 (1990) ("Madison stated his own position on religious liberty most explicitly in his *Me-*

at least theoretically, must inexorably yield to the primacy of religious liberty. To expand on Professor Carter's insight,[66] law faces no greater challenge than dealing with, and being renewed by, the resurgence of religious belief.[67] Is the Court ready for the renaissance of the jurisprudence of religious liberty now feted in prominent legal academic circles? Apparently not yet!

If religious liberty is the true core of religious jurisprudence, then the Court should have rendered a decision diametrically opposite to that of *Smith*. If the Court, the political elite, and the citizenry no longer countenance the imagery or the reality of a wall of separation between church and state,[68] then, concomitantly, neither can it countenance the dichotomy between the scope of core constitutional rights enjoyed by the dominant Christian mainstream and the truncated rights of indigenous people. Religious liberty protects everyone, or it protects no one. Professor Richard Epstein most perceptively has suggested that religious liberty eventually will teach painful lessons, to the consternation of the

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morial and Remonstrance Against Religious Assessments of 1785. . . . No one reading the *Memorial* could conclude intelligently that its author was anything but a strict separationist"); Teitel, *supra* note 25, at 185 ("religious equality . . . is best preserved . . . by nonintervention").

[66] *See* Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 977.

> Contemporary liberalism faces no greater dilemma than deciding how to deal with the resurgence of religious belief. On the one hand, liberals cherish religion, as they cherish all matters of private conscience, and liberal theory holds that the state should do nothing to discourage free religious choice. At the same time contemporary liberals are coming to view any religious element in public moral discourse as a tool of the radical right for the reshaping of American society, and that reshaping is something liberals want very much to discourage.

Id.

[67] The United States has had a history of religious tradition, which may be intensifying. "Religion occupies a unique and intensely personal place in the lives of many Americans. About ninety-five percent of Americans believe in God or some universal spirit; more than 1200 primary religious groups and their innumerable individualized variations help to define perceptions of ourselves and our relationship to others." Note, *Burdens on the Exercise of Religion: A Subjective Alternative*, 102 HARV. L. REV. 1258, 1258 (1989); *see also* Benson, *Religious Liberty in America*, 41 RUTGERS L. REV. 883, 891 (1989) ("Not until I went to the churches of America and heard her pulpits aflame with righteousness did I understand the secret of her genius and power") (quoting Alexis de Tocqueville) (footnotes omitted). *See generally* Pangle, *Religion in the Thought of Some of the Leading American Founders*, 4 NOTRE DAME J.L., ETHICS & PUB. POL'Y 37 (1989) (examining religious philosophies of various founding fathers).

[68] *See* Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (wall of separation "based on bad history . . . should be frankly and explicitly abandoned"); Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state").

orthodox Christian mainstream:

> The conclusions here are not always to the liking of religious people whose own codes can be as authoritarian as those contrived by secular parties. Thus, in my view, state prohibition of polygamy on religious grounds is as incorrect as state toleration of sacrifice. . . . Judicial decisions that 'invent' state interests opposed to polygamy reflect the same authoritarian tradition that holds that the dominant political forces know better what is right for others than others know for themselves. . . . Our baseline throughout is that religious liberty ends where force and fraud begin, not before.[69]

Religious liberty and the necessary concomitant repudiation of unconstitutional burdens[70] on the free exercise of religion should have begun with the Court's reexamination of *Smith*, as a broad spectrum of lawyers had urged.[71]

As long as the Court views the free exercise rights of native people with condescension and denies them full cognizance, the heart of the Bill of Rights will remain impoverished. The beliefs and practices[72] of conventional Christian orthodoxies are not fully

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[69] Epstein, *supra* note 2, at 385-86.

[70] *See, e.g.*, Lupu, *supra* note 3, at 934-35 (discussing which burdens on religious beliefs are constitutionally cognizable); Marshall, *Toward a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 SAN DIEGO L. REV. 243 *passim* (1989) (no one uniform baseline by which to judge whether conditions on religion are unconstitutional); McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255, 275 (1989) ("Supreme Court has applied a crude understanding of 'subsidy' under which receipt of their fair share of government benefits by religious persons is said to constitute 'aid' to religion").

[71] *Court is Urged to Rehear Case on Ritual Drugs*, N.Y. Times, May 16, 1990, at A16, col. 1. The Court denied the petition for rehearing.

[72] The unhelpful distinction between permitted belief and prohibited practice has been repudiated. *See* Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1390-92 (1981). The separation of conduct from belief exists primarily as an analytical construct. Moreover, the belief-practice dichotomy is especially inapplicable to *Smith*. The ingestion of sacramental peyote (or Eucharistic wine, for that matter) is intimately and inextricably tied to the deepest manifestation of belief through prayer.

Congress explicitly recognized the integrity of conduct and belief when it exempted from Prohibition the sacramental wine used by Christians in the ritual of communion. *See infra* note 73. Why is ingestion of one chemistry-altering drug regarded as acceptable religious conduct, while the consumption of another, under essentially the same religiously inspired conditions, perceived as an instance of drug abuse? *See* Ball, *supra* note 54, at 54. More importantly, how can those who experience Eucharist as a foundational sacramental encounter with God deny (or allow the Court to deny) that same experience to others who choose but a different substance? The Court's adherence to an arbitrary intellectual distinction bespeaks both a profound illogic and, more sadly, a distrustful rejection of human experience.

secured;[73] *Mergens* augers Babel, and the Court thus has postponed, regrettably, the full flowering of the first amendment.

This comparative assessment of *Mergens* and *Smith* reflects upon the troubled jurisprudence of religious liberty at this less-than-celebratory bicentennial. For, as the dissent in *Smith* expressly cautioned, the Court "effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution. One hopes that the Court is aware of the consequences . . . ."[74]

Indeed.

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[73] Powerful religions generally have received sufficient political protections for their religious practices. *See* Volstead Act, 41 Stat. 305, 308-09 (1919) (exempting sacramental wine from prohibition), *repealed by* U.S. CONST. amend. XXI (1933).

[74] *Smith*, 110 S. Ct. at 1616 (Blackmun, J., dissenting).