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THE LEGALITY OF THE RELIGIOUS USE OF PEYOTE BY THE NATIVE AMERICAN CHURCH: A COMMENTARY ON THE FREE EXERCISE, EQUAL PROTECTION, AND ESTABLISHMENT ISSUES RAISED BY THE PEYOTE WAY CHURCH OF GOD CASE

John Thomas Bannon, Jr.*

Introduction

In December 1980 the Peyote Way Church of God (Peyote Way) filed a lawsuit in the United States District Court for the Northern District of Texas; Peyote Way named as a defendant, in his official capacity, the Attorney General of the United States.¹ Peyote Way, represented by the Dallas, Texas Chapter of the American Civil Liberties Union, claimed, among other things, that it had a free exercise right to use the controlled substance peyote in its religious rituals, that the federal exemption² allowing the religious use of peyote by the Native American Church, and denying the exemption to Peyote Way, violated the equal protection principle, and that, in addition, the exemption constituted an establishment of religion.³ After ten years of litigation the United States Court of Appeals for the Fifth Circuit rejected Peyote Way's Free Exercise, Equal Protection, and Establishment Clause claims, and upheld the federal exemption.⁴

In essence Peyote Way's lawsuit was directed at the Native American Church, with its approximately 250,000 tribal members, most of whom live on reservations in the western United States.⁵ Peyote Way, with its five resident members and approximately 150 nonresident members, was incorporated in Arizona in 1979, and had as its place of worship a ranch in southern Arizona.⁶

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1. The writer handled the *Peyote Way Church of God* litigation for the United States Department of Justice from the lawsuit's inception in 1980 until its conclusion in 1991. The views expressed in this article are the writer's own, and do not represent the views of the Department of Justice.

2. The federal exemption provides in pertinent part: "The listing of peyote as a controlled substance in Schedule I does not apply to the use of peyote in the bona fide ceremonies of the Native American Church" 21 C.F.R. § 1307.31 (1990).

3. *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1213-17 (5th Cir. 1991).

4. *Id.*

5. *Id.* at 1212.

6. *Id.* at 1213.

None of Peyote Way's members were tribal Indians, although one of them claimed to have Indian blood, and none of them were members of the Native American Church.⁷ For the reasons set forth below, neither Peyote Way nor the Native American Church have a free exercise right to use the controlled substance peyote, and a decision holding the federal exemption unconstitutional would have been yet another blow to Native American culture and religion. Why? Because it is unlikely that Congress would expand the exemption to include non-Indians, or other controlled substances, given the considerable potential for abuse such an expansion would provide. For the reasons set forth below, the United States Court of Appeals was right to reject Peyote Way's Equal Protection and Establishment Clause challenges to the federal exemption. An historical sketch of this centuries-old aboriginal religion should provide some insight as to why the federal exemption is so important to Native American peyotists.

Aboriginal Peyotism: An Historical Sketch

Peyotism is centuries old; peyote has been used by Native Americans in their religious rituals for at least four hundred years, culminating in the present day Native American Church.⁸ Peyotism has its origins in pre-Conquest Mexico; Inquisition documents in sixteenth century Mexico describe the religious use of peyote by Mexican Indians.⁹ From Mexico peyotism spread into what is now Texas and Oklahoma; Oklahoma tribes practicing peyotism in the 1890s had lived in the Rio Grande Valley a century or more previously.¹⁰ Tribal Indians were using peyote in their religious ceremonies, in territory that would become part of the United States, at approximately the same time the Founding Fathers were in Philadelphia drafting the Constitution of the United States.

"Peyote is a small spineless cactus having psychedelic properties; it grows naturally in a limited area, principally in northern Mexico and southern Texas."¹¹ Peyote is a common ritual hallucinogen that is used in peyotist ceremonies to induce visions; this natural growing plant substance has the capacity to alter consciousness.¹² Peyotism is a noncreedal faith; its members accept a monotheistic deity, and use peyote as a mediator between the human and the divine.¹³ Personal psychic experiences of the supernatural, induced by

7. *Id.* at 1212.

8. OMER C. STEWART, *PEYOTE RELIGION: A HISTORY* 3 (1987).

9. *Id.* at 18.

10. *Id.* at 45.

11. *Id.* at 3.

12. HARPER-COLLINS DICTIONARY OF RELIGION 405-06 (Jonathan Z. Smith ed., 1995) [hereinafter *DICTIONARY OF RELIGION*].

13. *Id.* at 757.

this hallucinogenic cactus, shape the peyotist faith, its ethical norms, and its moral values.¹⁴

The principal ceremony of peyotism is an all-night ritual that consists of praying, singing, preaching, and testimonials, along with the ingestion of peyote.¹⁵ It is the ingestion of peyote that is the central ritual of peyotism, the ingestion producing a warm and pleasant euphoria.¹⁶ While the peyote religion is saturated with Christian values, representing the acceptance of new social values, "the rituals that remain the core of the cult are entirely native."¹⁷ The peyote ceremony as it developed in the mountains of north central Mexico is "remarkably similar" to the ceremony as it developed in the United States.¹⁸

Oklahoma was the cradle of peyotism in the United States; one reason for this was the federal government's establishment of reservations in the Indian Territory of Oklahoma.¹⁹ Different Indian peoples, different Indian cultures, and different Indian religions were thrown together on these reservations.²⁰ By 1874 the remnants of the Plains Indian tribes were sent to these reservations, along with the "Five Civilized Tribes" that earlier had been removed from the homelands east of the Mississippi River.²¹ With the coming together of so many diverse tribes, there arose the potential for a variety of pan-tribal or intertribal movements. By the 1880s, with the Indians conquered and in disarray, peyotism flourished on the reservations.²² Many of these tribal Indians found comfort in peyotism, and this traditional Indian religion was instrumental in bringing stability to life on the reservations.²³ By 1910 peyotism was flourishing among the tribal Indians of Oklahoma, and from there it spread to numerous other tribes in Kansas, Nebraska, Iowa, Minnesota, South Dakota, Montana, Wyoming, Colorado, Utah and New Mexico.²⁴

Indian defeat and disarray were important factors in the rise of peyotism. New religions tend to rise in times of crisis, and the crisis associated with the rise of peyotism, and other pan-Indian religions, was the encroachment of European culture.²⁵ New religions originate in situations perceived by their followers as a crisis in the life of the group, a crisis precipitated by contacts between two cultures.²⁶ As the tribes were forced from their homelands and

14. *Id.*

15. *Id.*

16. STEWART, *supra* note 8, at 36.

17. DICTIONARY OF RELIGION, *supra* note 12, at 757.

18. STEWART, *supra* note 8, at 25-26.

19. *Id.* at 53.

20. *Id.*

21. *Id.* at 57.

22. *Id.* at 61-65.

23. *Id.* at 68.

24. *Id.* at 148.

25. DICTIONARY OF RELIGION, *supra* note 12, at 761.

26. *Id.* at 762.

confined to reservations they contemplated the destruction of their traditional way of life.²⁷

Unlike other pan-Indian religions, peyotism was adaptive, putting old traditions to new uses; by the end of the nineteenth century peyotism had fused traditional aboriginal elements with Christian elements, and it was this fused peyotism that spread so rapidly among the numerous tribes of North America.²⁸ Peyotism endured by redefining the crisis of white encroachment, emphasizing the maintenance of indigenous values and identity over time.²⁹ Of all the pan-Indian religious movements, peyotism was the most popular and durable of all,³⁰ the most important pan-Indian institution in America.³¹

One should not forget the correlation between peyotism and the triumph of white civilization over the tribes.³² This religion of accommodation was a response to a shattered status, the response of a defeated people overwhelmed by waves of white settlers.³³ Peyotism, a religion of the oppressed, helped Indians cope with their subordinate status.³⁴ This aboriginal American religion was the last of the great pan-tribal religious movements.³⁵ Many Native Americans believe that peyotism represents the last strong link to an aboriginal past.³⁶ Indeed, in 1918, when tribal leaders decided to incorporate and to choose a name, they chose the name "Native American Church" to emphasize not only intertribal solidarity, but also aboriginality.³⁷ With this background in mind, a discussion of Peyote Way's constitutional claims is now appropriate.

*Even Before the Supreme Court's Decision in Employment Division v. Smith,
There Was No Free Exercise Right To Use a Controlled Substance in
Violation of Federal Criminal Law*

In its lawsuit Peyote Way claimed it had a free exercise right to use peyote in its religious ceremonies, and that 21 U.S.C. §§ 841 and 844,³⁸ which prohibits the possession and distribution of peyote, were unconstitutional as applied to Peyote Way's members. The question is whether the court of appeals

27. *Id.*

28. *Id.*

29. *Id.* at 763.

30. DAVID F. ABERLE, *THE PEYOTE RELIGION AMONG THE NAVAJO* 3 (2d ed. 1982).

31. STEWART, *supra* note 8, at 327.

32. WESTON LA BARRE, *THE PEYOTE CULT* 113 (5th ed. 1989).

33. ABERLE, *supra* note 30, at 15.

34. *Id.* at 352-53.

35. LA BARRE, *supra* note 32, at 121, 166.

36. *Id.* at 166.

37. *Id.* at 169.

38. Section 841 makes it unlawful for any person knowingly or intentionally to manufacture, distribute, or disburse a controlled substance; section 844 makes it unlawful for any person to knowingly or intentionally possess a controlled substance. Peyote is a controlled substance. See 21 U.S.C. § 812, Schedule I, (c)(12) (1990).

in *Peyote Way Church of God* properly rejected Peyote Way's free exercise claim.³⁹ A reading of the Supreme Court's free exercise opinions clearly suggests that the court of appeals properly rejected Peyote Way's free exercise claim.

In *Employment Division v. Smith*⁴⁰ the issue before the Supreme Court was whether the Free Exercise Clause permitted Oregon to include the religious use of peyote within the scope of its general criminal prohibition of controlled substance use, thereby permitting Oregon to deny unemployment benefits to persons fired from their jobs because of their religious use of peyote.⁴¹ In answering this question in the affirmative, the Court rejected respondents' claim that their religious motivation placed them beyond the reach of a criminal statute not specifically directed at their religious practice, a statute respondents conceded was constitutional as applied to those who used peyote for nonreligious purposes.⁴² The Court was adamant in its refusal to hold "that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from government regulation. We have never held that, and decline to do so now."⁴³

The respondents also contended that even if the State of Oregon refused to automatically extend an exemption to religiously motivated conduct from generally applicable criminal laws, the Court would have to evaluate the claim under the balancing test of *Sherbert v. Verner*,⁴⁴ under this test the government must justify any actions that substantially burden a religious practice by a compelling governmental interest.⁴⁵ In rejecting this contention, the Court stated that it had "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of employment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied . . ."⁴⁶ Moreover, said the Court, "[e]ven if we were inclined to breathe into *Sherbert* some life beyond the employment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."⁴⁷ In other words, *Sherbert's* compelling governmental interest requirement had no applicability whatever to a criminal statute of general applicability. In light of *Smith*, it is abundantly clear that the Court could not sustain Peyote Way's free exercise claim, and the court of appeals properly rejected Peyote Way's claim on the authority of *Smith*.⁴⁸ Even

39. *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1213 (5th Cir. 1991).

40. 414 U.S. 872 (1990).

41. *Id.* at 874.

42. *Id.* at 878.

43. *Id.* at 882.

44. 374 U.S. 398 (1963).

45. *Id.* at 406-07.

46. *Smith*, 414 U.S. at 883.

47. *Id.* at 884.

48. *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1213 (5th Cir. 1991).

if the *Smith* majority had not abandoned the *Sherbert* test, however, it is difficult to see how *Peyote Way*'s free exercise claim could have been sustained.

A number of commentators have been highly critical of *Smith* as insufficiently protective of religious liberty, arguing, in essence, that the new test makes accommodation of free exercise interests too dependent on the political process.⁴⁹ This widespread criticism is overstated. As one commentator has noted, the claim that *Smith* threatens religious liberty in some novel way justifies considerable skepticism given that the "generous promises of sensitivity to eccentric religious practices [in the pre-*Smith* rhetoric of free exercise discourse] were routinely betrayed."⁵⁰

While the pre-*Smith* test appeared highly protective of religious liberty, it clearly was not, for the Court generally has had only "the weakest commitment" to freedom of religious exercise.⁵¹ Since entering the field, the Court has done little to protect religious freedom against what some have seen as the most powerful governmental threat of all, that posed by the national government.⁵² While the Court has been portrayed as the champion of religious liberty, such portrayal is less than accurate.⁵³ This supposed champion of religious freedom has never once found that a congressional statute infringed on the Free Exercise Clause.⁵⁴ In short, the record of the pre-*Smith* regime was "rather dismal."⁵⁵ Just how dismal? Well, in the seventeen free exercise cases decided by the Supreme Court from 1963 to 1990, the free exercise claim prevailed in only four instances; moreover, three of the cases were employment compensation cases indistinguishable from *Sherbert*, the doctrinal source of pre-*Smith* free exercise law.⁵⁶ A brief examination of this body of law should prove instructive.

Since the Nation's founding, the Supreme Court has alternated between no-exemption and exemption standards for religiously motivated conduct.⁵⁷ In *Reynolds v. United States*⁵⁸ the Supreme Court rejected a free exercise claim involving a federal criminal statute prohibiting polygamy. After concluding that

49. See JESSE H. CHOPER, *SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES* 55 (1995); Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); Douglas Laycock, *The Remnants of Free Exercise* 1990 SUP. CT. REV. 1.

50. Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117-18.

51. FREDERICK M. GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* 3 (1995).

52. STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 125 (1995).

53. *Id.*

54. *Id.*

55. Tushnet, *supra* note 50, at 122.

56. *Id.* at 121.

57. J. Woodford Howard, Jr., *The Robe and the Cloth: The Supreme Court and Religion in the United States*, 7 J.L. & POL. 481, 487-88 (1991).

58. 98 U.S. 145 (1879).

the statute was within the legislative power of Congress, the Court went on to state:

[The remaining question] is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would introduce a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . .

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the laws of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.⁵⁹

Chief Justice Waite's opinion in *Reynolds* explicitly endorsed the Jeffersonian theory that the Religion Clauses of the First Amendment erected a wall of separation between church and state, restricting free exercise to religious belief.⁶⁰ Jefferson opposed religious exemptions because they conferred special privileges on believers.⁶¹ According to Jefferson, "the opinions of men are not the object of civil government, nor under its jurisdiction . . . and it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."⁶² This belief-action distinction, characterized as a "secular regulation rule," applied generally from the mid-nineteenth to the mid-twentieth century.⁶³

In *Sherbert v. Verner*,⁶⁴ the Supreme Court abandoned the belief-action distinction of *Reynolds*. *Sherbert* involved a member of the Seventh Day Adventist Church who was fired because she would not work on Saturday, the Sabbath Day of her faith; unable to find work because she would not work on

59. *Id.* at 166-67.

60. *Id.* at 163-64.

61. Howard, *supra* note 57, at 486.

62. THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1779), reprinted in THOMAS JEFFERSON: WRITINGS at 347 (Merrill D. Peterson, ed. 1984).

63. ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 59 (1990).

64. 374 U.S. 398 (1963).

Saturday, she filed for unemployment compensation.⁶⁵ The state denied her application because she would not accept suitable work when offered.⁶⁶

The Court held that the denial of Sherbert's application imposed a burden on her free exercise of religion.⁶⁷ The Court made a cryptic reference to the distinction between welfare and criminal legislation, noting that no criminal sanctions directly compelled Sherbert to work. Despite only an indirect burden on her right of free exercise, the indirect burden was unconstitutional.⁶⁸ Her ineligibility for benefits, said the Court, derived "solely from the practice of her religion."⁶⁹ The Court went on to consider whether some "compelling state interest" justified the "substantial infringement" of Sherbert's free exercise right, and concluded that "[n]o such abuse or danger has been advanced in the present case."⁷⁰

Sherbert suggested that the government could burden the free exercise of religion only if it could show a "compelling" regulatory interest that it could not protect in any less intrusive manner; this less restrictive alternative requirement seemed to impose upon the government the heavy burden of showing that the granting of the exemption would "substantially undermine" the government's compelling interest.⁷¹ This strict scrutiny test seemed to be heavily weighted toward personal freedom and the accommodation of minority religious practice.⁷² *Sherbert* implied that religious liberty was a value high in the hierarchy of constitutional values, and that accommodation was only a "marginal drag" on the government's regulatory authority, a "marginal drag" that would not justify the burdening of free exercise.⁷³ *Sherbert*, presumably, was a repudiation of the belief-action distinction holding out the promise that religious liberty would prevail over bureaucratic values.⁷⁴

With the Court's decision in *Wisconsin v. Yoder*,⁷⁵ the promise of *Sherbert* seemed fulfilled. In *Yoder* the Supreme Court sustained the claim of members of the Old Order Amish that application of the state's compulsory school-attendance law, as to them, violated their right to freely exercise their religion.⁷⁶ Acknowledging the state's responsibility for the education of its citizens, and its power to impose reasonable regulations in the field of education, the Court nonetheless noted that the state's responsibility "is not totally free from a

65. *Id.* at 399-400.

66. *Id.* at 401.

67. *Id.* at 403.

68. *Id.* at 403-04.

69. *Id.* at 404.

70. *Id.* at 406-07.

71. GEDICKS, *supra* note 51, at 102-03.

72. Howard, *supra* note 57, at 488-89.

73. GEDICKS, *supra* note 51, at 103.

74. *Id.*

75. 406 U.S. 205 (1972).

76. *Id.* at 218.

balancing process when it impinges on fundamental rights and interests" such as the right to free exercise.⁷⁷ "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."⁷⁸ The Court noted the impact of the state's compulsory-attendance law on the Old Order Amish and the practice of their religion, finding that the impact was "not only severe, but inescapable, for the Wisconsin law affirmatively compel[led] them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."⁷⁹ The Court went on to reject the notion that religiously grounded conduct was outside the protection of the Free Exercise Clause, for in the context of free exercise jurisprudence "belief and action cannot be neatly confined in logic-tight compartments."⁸⁰ Finally, in dealing with the state's claim that "its interest in its system of compulsory education [wa]s so compelling that even the established practices of the Amish must give way," the Court expressed skepticism:

Where fundamental claims of religious freedom are at stake . . . we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age [sixteen] and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.⁸¹

Needless to say, the state failed to satisfy the Court's searching examination of its interests; the state's generalized "compelling" interest was not sufficient.

In *Sherbert* and *Yoder* the Court's actions matched its rhetoric. The era of the constitutionally compelled exemption seemed imminent. To *Sherbert's* requirement that the government justify, by a compelling interest, any law that burdens the free exercise of religion, *Yoder* added the requirement that the government justify by a compelling interest any refusal to grant an exemption to a religious objector.⁸² Under the doctrine of the constitutionally compelled exemption set forth in *Sherbert* and *Yoder*, the Free Exercise Clause mandated the relief of believers from the obligation of obeying any law requiring them to perform any act prohibited by their religious beliefs, or from the obligation of obeying any law prohibiting them from performing an act required by their religious beliefs, unless it would frustrate an overriding or compelling governmental interest by relieving religious believers of their obligation to obey

77. *Id.* at 214.

78. *Id.* at 215.

79. *Id.* at 218.

80. *Id.* at 220.

81. *Id.* at 221.

82. GEDICKS, *supra* note 51, at 104.

the law.⁸³ Undoubtedly, *Sherbert* and *Yoder* promised "extraordinary protection" for the free exercise of religion.⁸⁴ In the years that followed, however, *Sherbert* and *Yoder* would not fulfill their promise; there would be no extraordinary protection for the free exercise of religion. Since *Yoder* the Court has granted no free exercise exemptions outside the field of employment compensation.⁸⁵ The Court never extended the constitutionally compelled exemption beyond the facts of *Sherbert* and *Yoder*.⁸⁶

*United States v. Lee*⁸⁷ marked the beginning of the end of the constitutionally compelled exemption. *Lee* involved the Old Order Amish, who believed there was a religiously based obligation to provide for its members the type of assistance provided by the social security system; Lee, a member of the Old Order Amish, claimed that both the payment and the receipt of social security benefits was forbidden by the Amish faith, a claim the Court accepted.⁸⁸

In this conflict between the Amish faith and the obligations imposed by the social security system, the Court held that accommodating the Amish faith would unduly interfere with the government's compelling interest in administering a comprehensive social security system.⁸⁹ The broad public interest in maintaining a sound tax system was of such a high order, said the Court that religious belief in conflict with the payment of taxes afforded no basis for resisting the tax.⁹⁰

While purporting to apply a strict scrutiny test in *Lee*, the Court used something less than strict scrutiny in *Goldman v. Weinberger*.⁹¹ In this case, Goldman, an orthodox Jew and Air Force officer, contended that he had a free exercise right to wear a yarmulke while in uniform, notwithstanding an Air Force regulation mandating uniform dress for Air Force personnel.⁹² Even though the effect of the regulation was to restrict the wearing of the yarmulke required by Goldman's religious beliefs, the Court, utilizing an extremely deferential standard, held that the Air Force regulation was a reasonable one.⁹³

83. *Id.* at 98.

84. *Id.* at 105.

85. See *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989).

86. *GEDICKS*, *supra* note 51, at 98; Howard, *supra* note 57, at 499.

87. 455 U.S. 252 (1982).

88. *Id.* at 257.

89. *Id.* at 259.

90. *Id.* at 260; see also *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985) (purporting to apply strict scrutiny standard the Court refused to exempt a religious organization from minimum wage taxes); *Jimmy Swaggart Ministries v. California Bd. of Equalization*, 493 U.S. 378 (1990) (purporting to apply strict scrutiny standard the Court refused to exempt a religious organization from a sales tax).

91. 475 U.S. 503 (1986).

92. *Id.* at 506.

93. *Id.* at 507, 510.

Given the military context, nothing more than reasonableness was required.

In *O'Lone v. Estate of Shabazz*,⁹⁴ the Court once again used something less than a strict scrutiny standard in disposing of a free exercise claim. *Estate of Shabazz* involved prison inmates and members of the Islamic faith who claimed that prison policies prevented them from attending Muslim congregational services on Friday afternoons, thereby interfering with the free exercise of their religion.⁹⁵ While recognizing that the prison policies interfered with the sincerely held religious beliefs of the Muslim inmates, the Court nonetheless used an extremely deferential standard in holding that the prison policies were reasonable ones; given the prison context nothing more than reasonableness was required.⁹⁶

In *Bowen v. Roy*,⁹⁷ the Court held that the Free Exercise Clause did not compel the government to accommodate a religiously based objection to a federal statutory requirement that the states use social security numbers in administering the food stamp program.⁹⁸ Roy, a Native American, claimed, among other things, that the state's use of a social security number for his two-year-old daughter, "Little Bird of the Snow," violated his Native American religious beliefs.⁹⁹ In rejecting Roy's claim the Court stated that the Free Exercise Clause "cannot be understood to require the [g]overnment to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."¹⁰⁰ The Court concluded that use of Little Bird of the Snow's social security number did not by itself interfere with Roy's free exercise of religion.¹⁰¹ A Court plurality believed the rational relationship between the use of the social security number and the administration of the food stamp program was sufficient.

Finally, in *Lyng v. Northwest Indian Cemetery Protective Association*,¹⁰² the Court held that the Free Exercise Clause did not prohibit the government from constructing a road or permitting timber harvesting in a national forest that historically had been used for religious purposes by Native Americans. The Court forthrightly noted that the road-building and logging projects at issue "could have devastating effects on traditional Indian religious practices."¹⁰³ The Court also observed "that the threat to the efficacy of at least some religious practices was extremely grave."¹⁰⁴ Yet, said the Court:

94. 482 U.S. 342 (1987).

95. *Id.* at 344-45.

96. *Id.* at 345, 350.

97. 476 U.S. 693 (1986) (plurality opinion).

98. *Id.* at 700-01.

99. *Id.* at 695, 697.

100. *Id.* at 699.

101. *Id.* at 700.

102. 485 U.S. 439 (1988).

103. *Id.* at 451.

104. *Id.*

The building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a [s]ocial [s]ecurity number in *Roy*. In both cases, the challenged [g]overnment action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs. In neither case, however, would the affected individuals be coerced by the [g]overnment's action into violating their religious beliefs¹⁰⁵

One conclusion to be drawn from these Supreme Court cases is that the actual protection afforded the free exercise of religion is not nearly as great as the post-*Smith* rhetoric seems to suggest.¹⁰⁶ After reading these post-*Yoder* cases it is impossible to agree with one critic's view of *Smith* that, after *Sherbert* and before *Smith*, the Court required the granting of a religious exemption unless the government could show that the exemption undermined "an overriding, substantial, compelling, or important interest that could not be achieved by some narrower alternative means."¹⁰⁷ Such a view mistakes rhetoric for action. The Court's abandonment of the constitutionally compelled exemption doctrine in *Smith* simply made explicit what had been since *Yoder* the "functional law of free exercise."¹⁰⁸

Moreover, prior to *Smith*, the federal courts of appeals had unanimously refused "to create free exercise havens from violation of the national criminal laws"¹⁰⁹ Not only had the courts of appeals rejected all free exercise challenges to the federal criminal drug statutes,¹¹⁰ but also to federal criminal statutes generally.¹¹¹ Even if the *Smith* case had never arisen, *Peyote Way*'s free exercise claim seemed bound to fail.

105. *Id.* at 449.

106. Tushnet, *supra* note 50, at 121.

107. CHOPER, *supra* note 49, at 54.

108. GEDICKS, *supra* note 51, at 99.

109. *United States v. Merkt*, 794 F.2d 950, 954 (5th Cir. 1986).

110. *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, 1461-63 (D.C. Cir. 1989) (free exercise challenge to federal drug statutes rejected); *United States v. Rush*, 738 F.2d 497, 511-13 (1st Cir. 1984) (same); *United States v. Middleton*, 690 F.2d 820, 824-26 (11th Cir. 1982) (same), *cert. denied*, 460 U.S. 1051 (1983).

111. *Merkt*, 794 F.2d at 954-57 (free exercise challenge to criminal immigration statute rejected); *United States v. Allen*, 760 F.2d 447, 452-53 (2d Cir. 1985) (free exercise challenge to criminal destruction of property statute rejected); *United States v. Moon*, 718 F.2d 1210, 1226-27 (2d Cir. 1983) (free exercise challenge to criminal tax statute rejected), *cert. denied*, 466 U.S. 971 (1984); *United States v. Dickens*, 695 F.2d 765, 772-74 (3d Cir. 1982) (free exercise challenge to criminal racketeering statute rejected), *cert. denied*, 460 U.S. 1092 (1983); *United States v. Rasheed*, 666 F.2d 843, 847 (9th Cir. 1981) (free exercise challenge to criminal mail fraud statute rejected), *cert. denied*, 454 U.S. 1157 (1982).

The Federal Exemption for the Religious Use of Peyote by the Native American Church was a Political Classification and Did Not Violate the Equal Protection Principle

In its lawsuit Peyote Way claimed the federal exemption¹¹² was a racial not a political classification, and thus a violation of the equal protection principle; Peyote Way's claim was rejected by the United States Court of Appeals for the Fifth Circuit.¹¹³ To understand why the Fifth Circuit properly rejected Peyote Way's claim one must start at the beginning with the Marshall trilogy of *Johnson v. Macintosh*,¹¹⁴ *Cherokee Nation v. Georgia*,¹¹⁵ and *Worcester v. Georgia*.¹¹⁶

The Marshall Trilogy

From the very beginnings of this Nation's history the Supreme Court of the United States has treated American Indians as a people apart. In *Johnson*, the primary issue before the Court was whether Indians could give, and non-Indians receive, a title to land that the United States courts would uphold.¹¹⁷ The Court took this occasion to announce the doctrine of discovery, the original foundation of titles to land on the American continent. This doctrine stated that "discovery gave title to the government . . . against all other European governments, which title might be consummated by possession."¹¹⁸ From the exclusion of all other European nations, there flowed to the discovering nation "the sole right of acquiring the soil from its natives and establishing settlements upon it."¹¹⁹ The Court noted that in the establishment of this relationship, the rights of the original inhabitants had been "necessarily," and "to a considerable extent, impaired;" but not "entirely disregarded."¹²⁰ The Court continued:

[the original inhabitants] were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original

112. The federal exemption provides in pertinent part: "The listing of peyote as a controlled substance in Schedule I does not apply to the use of peyote in the bona fide ceremonies of the Native American Church" See 21 C.F.R. § 1307.31 (1990).

113. *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1214-16 (5th Cir. 1991).

114. 21 U.S. (8 Wheat.) 543 (1823).

115. 30 U.S. (5 Pet.) 1 (1830).

116. 31 U.S. (6 Pet.) 515 (1832).

117. *Johnson*, 21 U.S. (8 Wheat.) at 572.

118. *Id.* at 573.

119. *Id.*

120. *Id.* at 574.

fundamental principle, that discovery gave exclusive title to those who made it.¹²¹

In short, the discovering nation asserted "ultimate dominion" in itself, while recognizing an "Indian right of occupancy."¹²² This ultimate dominion, noted Chief Justice Marshall, passed from Great Britain to the United States by the treaty that concluded the Revolutionary War.¹²³ This power, to grant land with valid title, now possessed by the government of the United States, "has never been questioned in our Courts. It has been exercised uniformly in territory in possession of the Indians."¹²⁴

In *Cherokee Nation* the tribe, claiming it was a foreign nation, sought to enjoin the State of Georgia from executing laws providing for the seizure of Cherokee lands.¹²⁵ The primary issue before the Court was whether "the Cherokee nation [was] a foreign state in the sense in which that term [wa]s used in the constitution?"¹²⁶ In answering this question in the negative, the Court noted that "[t]he condition of the Indians in relation to the United States [wa]s perhaps unlike that of any two people in existence," a relationship "marked by peculiar and cardinal distinctions which exist no where else."¹²⁷ The Court acknowledged that the Indians had "an unquestioned right to the lands they occupy" until "extinguished by a voluntary cession to our government."¹²⁸ Yet, said Chief Justice Marshall:

[I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.¹²⁹

Simply stated, the Cherokee Nation was a "domestic dependent nation" not a foreign one, a "nation" constitutionally confined to a paternalistic wardship under the tutelage of its guardian, the United States.

121. *Id.*

122. *Id.*

123. *Id.* at 584.

124. *Id.* at 587-88.

125. *Cherokee Nation*, 30 U.S. (5 Pet.) at 15.

126. *Id.* at 16.

127. *Id.*

128. *Id.* at 17.

129. *Id.*

In *Worcester*, the last of the Marshall trilogy, the primary issue before the Court was whether a Georgia statute prohibiting "white persons" from residing on Cherokee lands without a state license, and without taking an oath to defend the Georgia constitution, was a law "repugnant" to the Constitution, treaties, and laws of the United States.¹³⁰ Worcester was a missionary residing on Cherokee lands with tribal permission, and under the authority of a federal statute; Georgia authorities prosecuted and convicted Worcester of violating the state statute, and he was sentenced to four years imprisonment.¹³¹

In striking down the Georgia statute¹³² Chief Justice Marshall made several observations about Indian sovereignty vis-à-vis the states of the Union:

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from any other intercourse with any other European potentate than the first discoverer The very term 'nation,' so generally applied to them means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.¹³³

The Chief Justice suggested that Georgia had acquiesced "in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States with their consent"¹³⁴ The Chief Justice made explicit the proper relationships among the United States, the Indian nations, and the States of the Union:

The Cherokee nation . . . is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and [the Cherokee] nation is, by our constitution and laws, vested in the government of the United States.¹³⁵

130. *Worcester*, 31 U.S. (6 Pet.) at 541-42.

131. *Id.* at 536, 538.

132. *Id.* at 561.

133. *Id.* at 559.

134. *Id.* at 560.

135. *Id.*

In other words, under our constitutional system, it was the federal government and the federal government alone that was authorized to deal with these "domestic dependent nations."¹³⁶

A close reading of the Marshall trilogy demonstrates that while Indian tribes assert a measure of political sovereignty over persons and property within the boundaries of their reservations, Indian tribes are "strange sovereigns" in a constitutional sense.¹³⁷ One reason for this apparent strangeness is our constitutional system. The Supreme Court's primary struggles have been over the allocation of power between the federal and state governments, and between governmental power and individual rights; Indian tribal sovereignty does not fit comfortably into this matrix.¹³⁸ In addition, during the eighteenth century, the "individual-state dichotomy" became a powerful influence on Western thought, and this dichotomy leaves little room for "intermediate associational groupings."¹³⁹ The dichotomy simply does not lend itself to assigning such groupings rights not reducible to either the liberties of the individual or the prerogatives of the state.¹⁴⁰ Indian tribes or "nations" are an anomaly in the American constitutional system.

An understanding of the Marshall trilogy is important because in these opinions Chief Justice Marshall created much of our federal Indian law tradition.¹⁴¹ While these opinions certainly suggest that Marshall was more concerned with centralizing in the federal government power over Indians and their lands than with the "normative consequences" of colonization, one may also read the opinions as establishing a more "normatively attractive vision" of federal Indian law.¹⁴² Critics of the Marshall trilogy¹⁴³ often ignore Marshall's concern for the plight of the Indians. In *Cherokee Nation*, for example, Marshall stated:

If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no

136. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

137. Nell J. Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 197 (1984).

138. *Id.* at 196.

139. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW*, 13-14 (1996).

140. *Id.* at 14.

141. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1223 (1990).

142. *Id.* at 1224.

143. See, e.g., Newton, *supra* note 137, at 199-205.

more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application [for injunctive relief] is made.¹⁴⁴

Marshall could hardly ignore his role as the Chief Justice of the highest court of a colonizing nation.¹⁴⁵ Marshall forthrightly acknowledged that the doctrines of discovery, conquest, and original Indian title were somewhat "extravagant," and "opposed to natural right, and to the usages of civilized nations," yet, said Marshall, if these doctrines "be indispensable to that system under which the country has been settled, and be adapted to the actual conditions of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of Justice."¹⁴⁶

While Marshall was true to his high position in the colonizing government, he was not uncritical of the doctrines of discovery, conquest, and Indian land title; he attempted to accommodate the tribal perspective, especially in *Cherokee Nation* and *Worcester*.¹⁴⁷ In these opinions Marshall attempted to reconcile "the anomalous existence" of the Indians within the Nation's boundaries,¹⁴⁸ a difficult task given that the three opinions "were substantially framed by the question of the status of indigenous people within the Vattelian version of international law"¹⁴⁹ with its emphasis on the individual-state dichotomy.

As a formal matter Marshall assumed that he could not entertain fundamental challenges to colonization, yet as a functional matter, he allowed his qualms about colonization to lead him "to create a method of interpretation that presumed tribal sovereignty to be substantial as a matter of law even if weak as a matter of fact."¹⁵⁰ If the destruction of tribal sovereignty was the aim, then Marshall would have forced Congress to do it overtly.¹⁵¹ Marshall was adamant in his attempt to keep the states, who were "extraordinarily hostile" to tribal independence, out of the business of colonization altogether.¹⁵² It is difficult to see what more could have been expected from Marshall,¹⁵³ for his

144. *Cherokee Nation*, 30 U.S. (5 Pet.) at 15.

145. Frickey, *supra* note 141, at 1224.

146. *Johnson*, 21 U.S. (8 Wheat.) at 591-92.

147. Frickey, *supra* note 141, at 1225, 1227.

148. ANAYA, *supra* note 139, at 16.

149. *Id.*

150. Frickey, *supra* note 141, at 1228.

151. *Id.*

152. *Id.*

153. It is important to remember that Indian policy under the Jackson Administration was distinguished not only by its refusal to recognize Indian tribes as in any way sovereign, but by its favoring the removal of all Indians inhabiting lands east of the Mississippi River, and by its encouraging of the states in their taking of Indian lands. The *Cherokee Nation* and *Worcester* cases showed every sign of precipitating a political crisis, with Justice Story believing that state resistance to Indian claims and the nullification doctrine being two sides of the same coin. See G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE*, 711, 723 (1991).

opinions were an attempt to doctrinally curb the most likely excesses of state intrusions into Indian lands, an attempt to blunt the assault of colonization.¹⁵⁴

The Plenary Power Doctrine

The "mystique of plenary power" has pervaded the federal regulation of Indian affairs from the beginning.¹⁵⁵ The plenary power doctrine, as exemplified in *Worcester*, has become a fixture of American Indian law.¹⁵⁶ From the beginning of the Nation's history Congress has assumed "nearly unfettered authority to govern Indian affairs."¹⁵⁷ The Supreme Court has repeatedly stated that Congress has plenary power over Indian affairs, and has never struck down a federal statute directly regulating any aspect of Indian affairs on the ground that Congress had exceeded its authority.¹⁵⁸

A brief look at several early Supreme Court cases illustrate the sweep of the aptly named plenary power doctrine. *United States v. Rogers*¹⁵⁹ involved a federal criminal prosecution for murder in Indian country. The federal criminal statute, which Congress made applicable to Indian country, did not apply to crimes committed by one Indian against the person or property of another Indian.¹⁶⁰ The Court held the prosecution of Rogers, a white man who had been adopted by the Cherokee tribe, was proper in federal court for a murder committed in Indian country.¹⁶¹ More important than the holding was Chief Justice Taney's broad language regarding the discovery doctrine:

The native tribes that were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parceled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, subject to their dominion and control.

. . . .

[T]he Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the States,

154. FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LAW* 46 (1995).

155. Newton, *supra* note 137, at 199.

156. *Id.*

157. Frickey, *supra* note 141, at 1138.

158. *Id.* at 1139.

159. 45 U.S. (4 How.) 567 (1846).

160. *Id.* at 572.

161. *Id.* at 571-72.

Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian.¹⁶²

In *United States v. Kagama*¹⁶³ the issue before the Court was the constitutionality of the Major Crimes Act; this Act made murder, and several other serious offenses, federal crimes if committed by one Indian against another Indian in Indian country. In upholding the constitutionality of the Major Crimes Act, the Court noted that congressional power to enact laws governing Indian country originated in "the ownership of the country," and the right of "exclusive sovereignty," vis-à-vis the Indian tribes, which existed in the national government and was found nowhere else.¹⁶⁴ In *Kagama* the national government claimed ultimate title in the land itself, prohibiting Indian tribes from selling or transferring land to other nations or principals without its consent.¹⁶⁵ The Court concluded its opinion with sweeping language:

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else; because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.¹⁶⁶

In *Lone Wolf v. Hitchcock*¹⁶⁷ the issue before the Court was whether a congressional allotment statute, in conflict with a treaty banning allotments unless consented to by three-fourths of the adult male tribal members, was a valid exercise of congressional power.¹⁶⁸ In sustaining the federal allotment statute the Court stated that "[t]he power exists to abrogate the provisions of an Indian treaty," for when "treaties were entered into between the United States and a tribe of Indians, it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy"¹⁶⁹

Kagama and *Lone Wolf* became the "linchpins" of the plenary power doctrine, a doctrine subject to few judicial limitations.¹⁷⁰ After *Kagama* and *Lone Wolf* congressional authority over Indian tribes was so extensive that

162. *Id.* at 572.

163. 118 U.S. 375 (1886).

164. *Id.* at 380.

165. *Id.* at 381.

166. *Id.* at 384-85.

167. 187 U.S. 553 (1903).

168. *Id.* at 560-61.

169. *Id.* at 566.

170. Newton, *supra* note 137, at 222.

Congress had the final say as to who was a tribal member for purposes of distributing property, annuities, and trust money, including the final say as to how that money was spent.¹⁷¹ Not until the 1970s did the Court suggest some general constitutional limits on congressional power, and even then only under a highly deferential standard of review.¹⁷² The Supreme Court has "repudiated" the doctrine of plenary power only to the extent the doctrine suggests it is "unlimited."¹⁷³ Despite this theoretical narrowing of the plenary power doctrine it remains a potent force.¹⁷⁴ Congress continues to act with what is properly called "breathtaking authority."¹⁷⁵ The Supreme Court has defined congressional power over Indians in the broadest possible terms, and thus the application of a deferential standard of review to Indian legislation permits "almost any conceivable legislative action."¹⁷⁶

From Plenary Power to Minimal Scrutiny: Mancari and Its Progeny

In *Morton v. Mancari*¹⁷⁷ the Court upheld a congressionally mandated employment preference for Indians in the Bureau of Indian Affairs.¹⁷⁸ In rejecting the equal protection challenge to the preference, the Court emphasized that the preference "[wa]s not directed towards a 'social' group consisting of 'Indians'; instead, it applie[d] only to members of 'federally recognized' tribes. This operate[d] to exclude many individuals who [we]re socially classified as 'Indians.' In this sense, the preference [wa]s political rather than racial in nature."¹⁷⁹ Eligibility for the preference required the individual to have "one-fourth or more degree Indian blood," and claim membership in a federally recognized Indian tribe.¹⁸⁰ The Court again emphasized that the preference was granted to Indians "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities [we]re governed by the

171. *Id.* at 224.

172. Frickey, *supra* note 141, at 1139; see *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977) (stating that congressional power over Indian affairs may be of a plenary nature, but it is not absolute; the political question doctrine does not deter this Court from scrutinizing Indian legislation to determine whether it violates the equal protection principle); *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974) (stating that congressional legislation that singles out Indians for special treatment will be upheld if the special treatment "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians").

173. Newton, *supra* note 137, at 228.

174. See *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 594 (1977) (holding that congressional power to reduce the boundaries of a reservation without tribal consent or compensation will be upheld based upon the authority of *Lone Wolf*).

175. Newton, *supra* note 137, at 237.

176. *Id.* at 242.

177. 417 U.S. 535 (1974).

178. *Id.* at 551-57.

179. *Id.* at 553 n.24.

180. *Id.* at 554.

[Bureau of Indian Affairs] in a unique fashion."¹⁸¹ Noting that it had previously upheld legislation that singled out Indians for special treatment, the Court articulated a minimal scrutiny test:

As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates [the equal protection principle].¹⁸²

Two years later the Court decided *Fisher v. District Court*.¹⁸³ In *Fisher* a Cheyenne tribal member was denied custody of her child in tribal court; another tribal member was awarded temporary custody, with the child being made a ward of the tribal court; the tribal member who was awarded temporary custody by the tribal court sought permanent custody in state court.¹⁸⁴ The Court held that the state court lacked jurisdiction over an Indian adoption proceeding; the denial of access to the state court did not violate the equal protection principle, noted the Court, because the exclusive jurisdiction of the tribal court derived not from the race of the tribal member seeking access to the state court, but from the quasi-sovereign status of the tribe under federal law.¹⁸⁵ Citing *Mancari* the Court concluded that "such disparate treatment of the Indian [wa]s justified because it [wa]s intended to benefit the class of which he [wa]s a member by furthering the congressional policy of Indian self-government."¹⁸⁶

One year later the Court decided *United States v. Antelope*.¹⁸⁷ *Antelope* involved two tribal Indians who had been convicted in federal court of the felony-murder of a non-Indian on the reservation.¹⁸⁸ The defendants contended that their felony-murder convictions were racially discriminatory because a non-Indian charged with the same crime would have been subject to state law, which required proof of premeditation in a prosecution for first degree murder; premeditation was not required under the federal enclave murder statute.¹⁸⁹

In rejecting the racial discrimination argument, the Court cited *Mancari* and noted that federal legislation "expressly singling out Indian tribes" was supported by the federal government's special relationship with the Indians.¹⁹⁰ The Court noted that *Mancari* and *Fisher* involved preferences or disabilities directly

181. *Id.*

182. *Id.* at 555.

183. 424 U.S. 382 (1976).

184. *Id.* at 383.

185. *Id.* at 390.

186. *Id.* at 391.

187. 430 U.S. 641 (1977).

188. *Id.* at 642-43.

189. *Id.* at 643-44.

190. *Id.* at 645.

promoting Indian interests in self-government; unlike those cases, the instant case dealt not with tribal self-government but "with federal regulation of criminal conduct within Indian country implicating Indian interests."¹⁹¹ The distinction mattered not, said the Court, for "the principles reaffirmed in *Mancari* and *Fisher* point[ed] more broadly to the conclusion that federal regulation of Indian affairs [wa]s not based upon impermissible classifications."¹⁹² Put more succinctly, all federal legislation affecting Indian tribes is "governance."¹⁹³ After *Antelope* "it [wa]s difficult to conceive of a federal statute regarding Indian tribes . . . that could be found to violate the requirements of equal protection."¹⁹⁴ While the "plenary power doctrine may have faded as the explicit analytical theory for justifying the exercise of congressional power . . . its doctrinal emanations [we]re still present. Whatever Congress want[ed], Congress g[ot], and *Mancari* and its progeny [we]re now increasingly impressed to serve that end."¹⁹⁵

The Federal Exemption and the Minimal Scrutiny Test of Mancari

As previously noted, the federal exemption¹⁹⁶ allows members of the Native American Church to use the controlled substance peyote in its bona fide religious ceremonies. The intertribal Native American Church is the latest manifestation of a centuries-old Native American peyotist religion; the Native American Church has approximately 250,000 Native American members, most of whom live on reservations west of the Mississippi River.¹⁹⁷ The members of the Native American Church are organized into chapters, with each chapter representing a tribe.¹⁹⁸ To qualify for membership, the bylaws of the Native American Church require that the member possess one-quarter Indian blood, and that he or she claim membership in a tribe.¹⁹⁹ When traveling to Texas to obtain peyote, Native American Church members carry a "certificate of authorization"; this certificate contains, among other things, a tribal enrollment number.²⁰⁰ In addition, the Church's articles of incorporation provide for the conducting of its religious rituals in Indian country.²⁰¹

In its lawsuit *Peyote Way* contended the federal exemption was a racial classification because it did not contain the words "tribal" or "reservation," and

191. *Id.* at 646.

192. *Id.* (emphasis added).

193. Newton, *supra* note 137, at 279.

194. *Id.* at 280.

195. *Id.* at 285.

196. See 21 C.F.R. § 1307.31 (1990).

197. *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1212 (5th Cir. 1991).

198. Federal Appellee's Brief at 3, *Peyote Way Church of God*, 922 F.2d 1210 (5th Cir. 1991) (No. 88-7039).

199. *Id.*

200. *Id.* at 4.

201. *Id.*

because it classified people only by their membership in the Native American Church.²⁰² Peyote Way's contention ignored the intertribal nature of the Native American Church, a pan-tribal church that required its members to have at least one-quarter Indian blood, and that they claim membership in a federally recognized tribe.²⁰³

In its essentials, the federal exemption is little different than the preference upheld in *Mancari*; the federal exemption, like the preference upheld in *Mancari*, requires at least a twenty-five percent blood quantum and membership in a federally recognized tribe. Moreover, the federal exemption is not unlike the various preferences for tribal Indians scattered throughout title 25 of the United States Code. Indeed, as the Court noted in *Mancari*:

Literally every piece of legislation dealing with Indian tribes and reservations . . . single out for special treatment a constituency of tribal Indians living on or near Indian reservations. If these laws derived from historical relationships, and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire title of the United States Code . . . would be effectively erased and the solemn commitment of the Government toward the Indian would be jeopardized.²⁰⁴

Given the "breathtaking authority"²⁰⁵ of Congress over Indian affairs, the federal exemption is easily justified as special treatment "tied rationally to the fulfillment of Congress' unique obligation to the Indians . . ."²⁰⁶ The federal exemption clearly meets the minimal scrutiny test of *Mancari* because the exemption merely recognizes the traditional and centuries-long history of peyote use in the religious ceremonies of tribal Indians.

The federal exemption shows a certain sensitivity to Native American religion and culture, not unlike the sensitivity shown by the Court in *Santa Clara Pueblo v. Martinez*,²⁰⁷ a case involving the equal protection clause of the Indian Civil Rights Act.²⁰⁸ Martinez, a tribal member, contended that the tribe's membership rules discriminated on the basis of sex; it did so, argued Martinez, by denying membership to the children of female tribal members marrying outside the tribe, while extending membership to children of similarly situated males.²⁰⁹ In rejecting this equal protection argument the Court held that the Indian civil rights statute prescribed a rule of decision for tribal courts;

202. *Peyote Way Church of God*, 922 F.2d at 1215.

203. *Id.*

204. *Mancari*, 417 U.S. at 552.

205. Frickey, *supra* note 141, at 1140.

206. *Mancari*, 417 U.S. at 555.

207. 436 U.S. 49 (1978).

208. See 25 U.S.C. § 1302 (8) (1990) ("No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

209. *Martinez*, 436 U.S. at 52-53.

an individual could not maintain a lawsuit against the tribe, said the Court, because the civil rights statute contained no explicit waiver of tribal sovereign immunity.²¹⁰ Despite its narrow construction of the statute, the Court, citing *Lone Wolf*, emphasized the expansive authority of Congress over Indian affairs.²¹¹ This narrow construction of the Indian civil rights statute was necessary, said the Court, because attempts to apply the equal protection principle in the Indian context might "substantially interfere with a tribe's ability to maintain itself as a *culturally* and politically distinct entity."²¹²

The Court interpreted the Indian civil rights statute as it did to protect "traditional values of patriarchy still significant in tribal life."²¹³ The Court stressed that Congress, in enacting the Indian civil rights statute, chose not to extend every provision of the Bill of Rights to tribal Indians so as to protect the "unique political, *cultural*, and economic needs of tribal governments."²¹⁴ The Court left no doubt, however, that if Congress wanted to authorize such civil actions it was perfectly free to do so, so long as it did so explicitly: "[U]nless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication in a federal forum would represent, we are constrained to find that [the Indian Civil Rights statute] does not impliedly authorize [civil actions] against either the tribe or its officers."²¹⁵

In *Martinez* the Court showed an "extraordinary sensitivity"²¹⁶ to the traditional tribal value of patriarchy; Congress, in authorizing the federal exemption, showed an "extraordinary sensitivity" to peyotism, a traditional Native American religion. In these circumstances the United States Court of Appeals properly concluded that the federal exemption did not violate the equal protection principle.²¹⁷

The Federal Exemption for the Religious Use of Peyote by the Native American Church Was Not an Establishment of Religion, Not Only Because It Was an Aspect of the Special Relationship Between the Federal Government and the Indian Tribes, but Also Because the Regulation Pertains to an Indian Religious Practice Deeply Embedded in the Nation's History

In its lawsuit Peyote Way claimed the federal exemption was an establishment of religion; in rejecting Peyote Way's claim, the United States Court of Appeals for the Fifth Circuit noted that the unique relationship between the federal government and Native American tribes "precludes the degree of

210. *Id.* at 59.

211. *Id.* at 72.

212. *Id.* (footnote omitted) (emphasis added).

213. *Id.* at 54.

214. *Id.* at 62-63 (emphasis added).

215. *Id.* at 72.

216. Newton, *supra* note 137, at 265.

217. *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991).

separation of church and state ordinarily required by the First Amendment. The federal government cannot at once fulfill its constitutional role as a protector of tribal Native Americans, and apply conventional separatist understandings of the establishment clause to that same relationship."²¹⁸

As previously noted, the federal exemption was "tied rationally to the fulfillment of Congress' unique obligation to the Indians,"²¹⁹ and for this reason alone the Court could not categorize it as an establishment of religion. Aside from this rationale, however, another perhaps exists. One can justify the federal exemption by using not a doctrinal approach but an historical one, an approach perfectly consistent with the actions of six Presidents of the United States — Presidents Washington, Jefferson, Monroe, Adams, Jackson, and Van Buren — who entered into treaties with various Indian tribes authorizing the use of federal funds for religious purposes.²²⁰

On Deism, Religious Centrism, and Evangelicalism: The Religious Views of the Founders

The Founders held a variety of religious views; America's tradition of religious liberty was not exclusively the work of Madison and Jefferson.²²¹ Three major groups contributed to the historical meaning of the Establishment Clause: Enlightenment Separationists, Political Centrists, and Pietistic Separatists.²²²

The Enlightenment Separationists, as the name implies, were deeply influenced by the Enlightenment; Paine, Jefferson, and Madison were part of this tradition.²²³ While the Court has generally emphasized the Enlightenment tradition of separation, this tradition was not the predominant one.²²⁴ Indeed, the Enlightenment tradition of separation as exemplified by Paine, Jefferson, and Madison was a radical one. The anticlerical views of the "Founding Deists" focused on insulating government from religious domination.²²⁵ Having achieved a complete victory in Virginia, a "severe separation" of church and state, these deists would have liked nothing better than for the rest of the Nation to follow Virginia's example.²²⁶ These men of the Enlightenment viewed

218. *Id.* at 1217.

219. *Mancari*, 417 U.S. at 555.

220. ADAMS & EMMERICH, *supra* note 63, at 51; not only did President Jefferson sign an Indian treaty that provided federal monies to serve the religious needs of a tribe, but he approved legislation underwriting missionary expenses to spread the Gospel among the Indians. LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE AND THE FIRST AMENDMENT* 248 (2d ed. rev. 1994).

221. WILLIAM LEE MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* 153 (paperback ed. 1988).

222. ADAMS & EMMERICH, *supra* note 63, at 22, 31.

223. *Id.* at 22.

224. *Id.* at 26.

225. *Id.* at 31.

226. MILLER, *supra* note 221, at 234.

revealed religion as a major impediment to the truths on which the Nation rested; indeed Paine publicly, and Jefferson and Madison privately, viewed evangelical Christianity as a "particularly murky section of the swamp of unreason."²²⁷

The spread of Enlightenment philosophy and natural religion reached its apogee during the Revolutionary period and began to decline by 1800.²²⁸ It was during this period that deism, or rational religion, enjoyed popularity and prestige just as it had in France; deism was the "cult of reason," the "republican religion," and Jefferson was its "St. Paul."²²⁹

Jefferson was aware that Americans would not accept his theology of religious freedom and separation of church and state unless persuaded that traditional Christian doctrine was false; in this endeavor Jefferson found his ally in Paine.²³⁰ Jefferson believed that when the falsity of Christian doctrine was shown and its falsity accepted by the mass of mankind, it would then be possible for mankind to firmly attach itself to the "God of the Declaration of Independence," that is, to "Nature's God."²³¹ When the Nation accepted the Jeffersonian theology, the "religious problem" would achieve a resolution and free government be secured.²³²

Many of the Founders had more moderate views. These political and religious centrists were as committed to liberty of conscience as the Enlightenment separationists, but they viewed organized religion as a positive and necessary social cohesive.²³³ George Washington, John Adams, John Marshall, Oliver Ellsworth, and the Carrolls of Maryland, for example, believed organized religion was an essential cornerstone of morality, civic virtue, and democratic government.²³⁴ These political and religious centrists approached the issues of church and state pragmatically, and were less concerned than the Enlightenment Separationists with the specific means of attaining religious liberty; they regarded organized religion as an essential source of personal and

227. *Id.* at 236.

228. SIDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 364 (1972).

229. *Id.* at 366-67.

230. There is nothing in Paine's notorious *The Age of Reason* that does not find a place in the thoughts Jefferson committed to paper; Jefferson generally concealed his radical religious views from the public, unlike the rabidly anticlerical Paine who openly attacked Christianity. WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 24-25 (paperback ed. 1988); see THOMAS PAINE, *THE AGE OF REASON* (1794), reprinted in PAINE: *COLLECTED WRITINGS* 665 (Eric Foner ed., 1995); see also SMITH, *supra* note 52, at 20 (finding that skeptics have long suspected that Jefferson's secret intent in promoting religious freedom was to undermine traditional Christianity).

231. BERNS, *supra* note 230, at 24.

232. AHLSTROM, *supra* note 228, at 368; BERNS, *supra* note 230, at 24.

233. ADAMS & EMMERICH, *supra* note 63, at 26.

234. *Id.*

social morality, and, when in office, repeatedly recognized the importance of organized religion in the Nation's public life.²³⁵

This centrist position was the predominant one; the centrist position recognized that adoption of the separation principle did not require a secular society, for one could view separation in institutional terms only.²³⁶ It did not occur to these political and religious centrists to view society and religion as separate, and if the thought had occurred to them, it would have met with "uniform disapproval."²³⁷ The centrist view recognized the connection between religion and morality, and intuitively understood that religion was an essential pillar of civil society; the same Congress that drafted the Religion Clauses requested President Washington to proclaim a day of public thanksgiving, and approved congressional and military chaplains.²³⁸ These political and religious centrists affirmed the importance of religion to the new Republic, demonstrating, by their words and deeds, that the separation of church and state did not mean the separation of religion and politics.²³⁹

Pietistic separationists also believed that the separation of church and state did not mean the separation of religion and politics; pietistic separationists worked to separate church and state only in an "institutional sense."²⁴⁰ The pietistic tradition looked to the thought of Roger Williams and William Penn in aggressively defending religious liberty, a principle they viewed as vital to the purity of the organized church.²⁴¹ This tradition emphasized the corrupting effect of government interference.²⁴²

The most important of the eighteenth century pietistic separationists was the Baptist leader, Isaac Backus, who worked to disestablish Congregationalism in New England; Backus attacked the Congregationalist establishment, believing it was corrupt because of its direct link to the state.²⁴³ While Backus was a sometime ally of Jefferson, he certainly did not desire the secular state envisioned by Jefferson.²⁴⁴ The reasons Backus and the pietistic separationists had for supporting the separation of church and state were markedly different from those of Jefferson, Paine, and the Enlightenment separationists.²⁴⁵ Jefferson and company believed separation would lead to the casting off of superstitions and shackles on the mind, and would free men for Enlightenment ideas; Backus and company believed separation was

235. *Id.* at 31.

236. *Id.* at 51.

237. *Id.*

238. *Id.*

239. *Id.* at 51-52.

240. *Id.* at 31.

241. *Id.*

242. *Id.*

243. MILLER, *supra* note 221, at 211, 214; ADAMS & EMMERICH, *supra* note 63, at 29.

244. ADAMS & EMMERICH, *supra* note 63, at 30.

245. MILLER, *supra* note 221, at 214.

necessary so that men would be free to accept the "freely given grace of God."²⁴⁶

Backus found in Roger Williams an expounder of a theological or evangelical reason for separation.²⁴⁷ The most widely held early American idea of the separation of church and state flowed from religious pietism, not from Enlightenment rationalism.²⁴⁸ While Backus was a fierce opponent of state establishments, he was not opposed to Sabbath laws, or to the teaching of Calvinistic doctrine in the public schools, or to the proscribing of blasphemy, or to the promulgation of official days of fasting and prayer.²⁴⁹ The pietistic separatism of Backus was a world apart from the anticlerical deism of Jefferson.²⁵⁰

Enlightenment separationists, political and religious centrists, and pietistic separationists, all contributed to the historical meaning of the Religion Clauses, and thus the views of each are relevant to constitutional interpretation; any attempt to reduce the Founders' views to one position, or to read the beliefs of selected Founders into the First Amendment, is "indefensible."²⁵¹

Everson's Misuse of History: The Tainted Source of Establishment Clause Jurisprudence

In *Everson v. Board of Education*²⁵² the Supreme Court held that the liberty protected by the Due Process Clause of the Fourteenth Amendment included the nonestablishment principle.²⁵³ Invoking Jefferson's wall of separation metaphor the Court announced its expansive and historical reading of the Establishment Clause, setting forth "a thoroughly Jeffersonian and Madisonian position."²⁵⁴ The Court's "incorporation" of the Establishment Clause turned the clause on its head, transferring it into a vehicle for federal interference with state religious matters.²⁵⁵ In *Everson*, the first modern Establishment Clause case, the Court turned in a "dismal historical performance,"²⁵⁶ a performance that "dishonored the arts of the historian."²⁵⁷

246. *Id.*

247. ADAMS & EMMERICH, *supra* note 63, at 29; MILLER, *supra* note 221, at 215.

248. MILLER, *supra* note 221, at 215.

249. ADAMS & EMMERICH, *supra* note 63, at 30.

250. *Id.* at 22.

251. *Id.* at 31; SMITH, *supra* note 52, at 11-12 (finding that there are many versions of religious liberty that are both "attractive and defensible").

252. 330 U.S. 1 (1947).

253. *Id.* at 18.

254. MILLER, *supra* note 221, at 131.

255. ADAMS & EMMERICH, *supra* note 63, at 34; SMITH, *supra* note 52, at 17-21 (stating that the Religion Clauses were purely jurisdictional in nature, and did not adopt any substantive principle of religious freedom; those who drafted, proposed, and ratified the Religion Clauses understood them to be an exercise in federalism; the clauses were simply an assignment of jurisdiction over matters of religion to the states).

256. SMITH, *supra* note 52, at 5.

257. MARK DE WOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND*

The Court's interpretation of history in *Everson* was "superficial and purposive,"²⁵⁸ its historical inquiry focusing almost exclusively on the Virginia disestablishment, thereby simplifying that which was complex.²⁵⁹ Displaying a remarkable unconcern for historical truth and methodology, the Court read Jefferson's Statute for Religious Freedom and equated it with the Establishment Clause; the Court took no note of the obvious objections to equating the two, and took no notice that the statute and the clause were two very different texts, adopted by very different bodies, for very different purposes.²⁶⁰ By ignoring the views of the political and religious centrists and the pietistic separationists, the Court flattened and distorted a complex history.²⁶¹ When Jefferson's metaphor of the "wall of separation between church and state" appeared in *Everson*, the metaphor came clothed in Jeffersonian garb sparkling "with the anticlerical presuppositions of the Enlightenment."²⁶² To the extent the Establishment Clause codifies a figure of speech, the clause embraces the "believing affirmations" of Roger Williams and Isaac Backus, no less than the questioning doubts of Thomas Jefferson and James Madison.²⁶³ Since the Court ignored this elementary truth, Establishment Clause jurisprudence was tainted at the source. *Everson* gave rise to opinions like *Lemon v. Kurtzman*,²⁶⁴ premised on "an historical separation of church and state."²⁶⁵ In *Everson* the Court laid down historically biased principles for interpreting the Establishment Clause, principles it has never abandoned, often using the three-pronged test of *Lemon* to enforce its *Everson* interpretation.²⁶⁶ On rare occasions, however, the Court ignores its historical *Everson* approach and concerns itself with historical practice.

The Federal Exemption and the Historical Approach of Walz and Chambers

As previously noted, peyotism is a religious practice that is centuries-old; as also noted, the federal relationship between the tribal Indians and the federal government is centuries old. The Supreme Court has on occasion used an

GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 4 (1965).

258. *Id.*

259. *Id.* at 3.

260. SMITH, *supra* note 52, at 46.

261. MILLER, *supra* note 221, at 311.

262. HOWE, *supra* note 257, at 1-2.

263. *Id.* at 9.

264. 403 U.S. 602 (1971).

265. ADAMS & EMMERICH, *supra* note 63, at 56.

266. LEVY, *supra* note 220, at 150, 157; *see also* Lee v. Weisman, 505 U.S. 557 (1992) (holding that in reliance on *Lemon*, including a clergyman who offered a prayer as part of a public school graduation ceremony, constituted a violation of the Establishment Clause). As the dissent stated, however, the majority opinion "lays waste to a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally." *Id.* at 632 (Scalia, J., dissenting).

approach that takes into consideration an "historical frame of reference"; it is to this approach that we now turn.

In *Walz v. Tax Commission*²⁶⁷ the Court held that a legislative tax exemption for property used exclusively for religious purposes did not violate the Establishment Clause. In upholding the property tax exemption, the Court took note of the historical practice of providing churches with such exemptions, stating that "two centuries of uninterrupted freedom from taxation ha[d] [not] given the remotist sign of leading to an established church or religion . . ."²⁶⁸ "If tax exemption can be seen as the first step toward 'establishment' of religion," said the Court, "the second step has been long in coming."²⁶⁹ Quoting Justice Cardozo the Court noted the "tendency of a principle to expand itself to the limit of its logic," and stated that "such expansion must always be contained by the *historical frame of reference* of the principle's purpose . . ."²⁷⁰

In *Lemon v. Kurtzman*²⁷¹ the Supreme Court held that a state statute providing for a salary supplement for teachers in religious schools violated the Establishment Clause; the teachers were to teach only those courses offered in the public schools, and to use only those materials used in the public schools.²⁷² In striking down the state statute, the Court announced its three-prong test for determining an establishment of religion; to avoid constitutional infirmity, the government would have to show that the program in question had a secular purpose, that its principal or primary aim neither advanced nor inhibited religion, and that it did not foster an entanglement of religion.²⁷³ Distinguishing *Walz* the Court stated:

In *Walz* it was argued that a tax exemption for places of religious worship would prove to be the first step in an inevitable progression leading to the establishment of state churches and state religion. *That claim could not stand up against more than 200 years of virtually universal practice embedded in our colonial experience and continuing into the present.*

The progression argument, however, is more persuasive here [in *Lemon*]. We have *no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches.* Indeed, the state programs before us today represent *something of an innovation.*²⁷⁴

267. 397 U.S. 664 (1970).

268. *Id.* at 676-78.

269. *Id.*

270. *Id.* at 678-79 (emphasis added).

271. 403 U.S. 602 (1971).

272. *Id.* at 619-20.

273. *Id.* at 612-13.

274. *Id.* at 624 (emphasis added).

In *Lemon* the Court distinguished between a "virtually universal practice" and "innovation," devising a three-part test for determining the validity of a non-historical and innovative program.

More than a decade after *Lemon*, the Supreme Court decided *Larson v. Valente*,²⁷⁵ striking down a state statute that exempted from reporting requirements those churches that received more than one-half of their total contributions from their memberships. The Court noted that the *Lemon* test applied to all statutes that afforded, "a uniform benefit to all religions," and not to statutes, like the one before it, that "discriminate[d] among religions."²⁷⁶ When faced with a statute granting a "denominational preference," said the Court, it would view the statute as "suspect," and apply "strict scrutiny" to it.²⁷⁷ The Court would invalidate such a statute unless justified by a "compelling governmental interest," and "closely fitted to further that interest . . ."²⁷⁸

One year after *Valente* the Court decided *Marsh v. Chambers*,²⁷⁹ holding that the Nebraska legislature's chaplaincy practice did not violate the Establishment Clause. In upholding the practice — a practice that included the Nebraska legislature beginning each of its sessions with a prayer offered by a Presbyterian minister who had been on the public payroll for sixteen years — the Court stated that "the opening of sessions of legislative and other deliberative public bodies with prayer is *deeply embedded in the history and tradition of this country*."²⁸⁰ Quoting from *Walz*, the Court emphasized the "weight to be accorded history," noting that an "unbroken practice . . . [wa]s not something to be lightly cast aside."²⁸¹ Relying on the historical practice approach of *Walz*, the *Chambers* majority made no mention of *Lemon* or *Valente*. The dissent, however, did.

The dissent asserted that the Nebraska chaplaincy practice was inconsistent not only with *Lemon*, but also with *Valente*:

The *Lemon* tests do not, of course, exhaust the set of formal doctrines that can be brought to bear on [establishment clause issues]. Last term . . . we made clear that a state program that discriminated *among* religious faiths . . . 'must be invalidated unless it is justified by compelling governmental interest, and unless it is closely fitted to further that interest.' In this case, the appointment of a single chaplain for 16 years, and the evident impossibility of a Buddhist monk or Sioux Indian religious worker being appointed for a similar period . . . might well justify application of the

275. 456 U.S. 228 (1982).

276. *Id.* at 252.

277. *Id.* at 246.

278. *Id.* at 247.

279. 463 U.S. 784 (1983).

280. *Id.* at 786 (emphasis added).

281. *Id.* at 790 (quoting *Walz*, 397 U.S. at 678).

[*Valente*] test I have little doubt that the [Nebraska chaplaincy] practice . . . would fail the [*Valente*] test.²⁸²

As the dissent aptly noted, the *Lemon* and *Valente* tests were easily applicable to the facts presented in *Chambers*. The *Chambers* majority, however, ignored the *Lemon* and *Valente* tests because the Nebraska chaplaincy practice represented a two-hundred-year-old historical practice, an historical practice as old as the Nation.

Indian peyotism is a centuries-old religious practice, and, as such, fits comfortably into the unstructured historical approach of *Chambers* and *Walz*. Also, the expansive power of the federal government over the Indian tribes is centuries-old, and this too fits comfortably into this unstructured historical approach. Given this history, it is difficult to see the relevance of either *Lemon* or *Valente* to a federal exemption allowing members of the intertribal Native American Church to use peyote in their traditional religious ceremonies. These Indian religious practices predated not only the adoption of the Constitution, but also the first English settlements in America. Applying the *Lemon* or *Valente* tests to a factual setting awash in history, a factual setting rich in historical nuance, makes little sense. Given *Chambers* and *Walz*, there is no need to apply the *Lemon* or *Valente* tests to such an historical setting. Establishment Clause jurisprudence is sufficiently elastic²⁸³ to allow the *Chambers* and *Walz* approach, an approach that brings no dishonor to the arts of the historian.²⁸⁴

Conclusion

Given the opinions of the Supreme Court in the free exercise and "Indian equal protection" areas, the court of appeals was on solid ground in rejecting Peyote Way's free exercise and equal protection claims. Given the disarray of the Supreme Court's Establishment Clause opinions,²⁸⁵ the court of appeals was arguably on less solid ground in rejecting Peyote Way's Establishment Clause claim.²⁸⁶ Nevertheless, the court of appeals properly rejected Peyote Way's Establishment Clause claim.

When deciding issues that touch upon Indian affairs judges and legislators should take into consideration the tribal context, and should avoid undermining

282. *Id.* at 800-01, 801 n.11 (citation omitted) (emphasis added).

283. SMITH, *supra* note 52, at 3.

284. HOWE, *supra* note 257, at 4.

285. GEDICKS, *supra* note 51, at 2 (stating that documenting the inconsistencies of the Court's Establishment Clause opinions is "a natural cliché in constitutional scholarship"); SMITH, *supra* note 52, at 45 (stating that Establishment Clause scholarship "a spectacle of frustration"); MILLER, *supra* note 221, at 316 (stating that the Court's Establishment Clause jurisprudence continues to sit "partly undigested on the Nation's stomach").

286. *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1216-20 (5th Cir. 1991) (one member of the three judge panel dissented finding the federal exemption to be a violation of the Establishment Clause).

that context when it conflicts with other values.²⁸⁷ Regardless of historical circumstances, Indians are committed to remaining "indelibly Indian," to remaining "a people apart," and to resisting incorporation into the dominant society.²⁸⁸ It is important to understand this "indigenous vision," this "reservation perspective," before deciding issues touching upon Indian affairs.²⁸⁹ Reservations are "islands of Indianness" within an ever-encroaching society, a place that continues to hold for American Indians the promise of a "measured separatism."²⁹⁰ The cultural, spiritual, and physical context is important in understanding why Indians are committed to Indian life, and why non-Indians should respect that commitment.²⁹¹ The federal exemption for the religious use of peyote by the Native American Church respects this commitment.

287. Frickey, *supra* note 141, at 1220.

288. *Id.*

289. POMMERSHEIM, *supra* note 154, at 2-3.

290. *Id.* at 18.

291. *Id.* at 8.