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In *The Tempting of America: The Political Seduction of the Law*,[1] former Judge Robert H. Bork described the painful dilemma confronting judges who are asked to interpret the Constitution:

> In law, the moment of temptation is the moment of choice, when a judge realizes that in the case before him his strongly held view of justice, his political and moral imperative, is not embodied . . . in any provision of the Constitution. He must then choose between his version of justice and abiding by the American form of government.[2]

Judge Bork is primarily concerned with the judge who goes beyond the Constitution to intrude on legislative power. He does not speak of the judge who goes beyond the Constitution to subtract from established doctrines of individual freedom. It is this problem that is illustrated by the opinion of the Court in *Department of Human Services v. Smith (Smith II)*.[3] The Court's decision is a remarkable example of judicial willingness to distort precedents to destroy traditional concepts of individual liberty. Sadly, the case may only be a portent of things to come.

Smith II was a case initiated by two drug counselors who had been fired because of their sacramental use of peyote. In a case focusing on the constitutionality of Oregon's criminal laws as applied to peyote use in the rituals of the Native American Church, these members of the Church asked the United States Supreme Court to hold that their religious practice was protected by the free exercise clause of the first amendment.[4] The Court

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1. R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

2. *Id.* at 1.

3. 110 S. Ct. 1595 (1990).

4. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

refused. Five justices not only rejected the specific claim of the two litigants, but also revised the doctrines of religious liberty.[5] *Smith II* holds that the free exercise clause is never implicated when a superficially neutral law—that is, a law of general applicability—interferes with a religious practice.

In section I, the facts of the peyote case are discussed. Section II explores the implications of the Court's rule that a neutral, generally applicable law never violates the free exercise clause. The purpose of section III is to show that the Oregon peyote case is inconsistent with the precedents that the Court cites as justification for its new doctrine. In section IV, the essay examines the alleged dangers of close judicial scrutiny in free exercise cases. Section V concludes that the Court chose to substitute one narrower conception of religious liberty in place of the first amendment's traditional protection for religious privacy.

I. Facts

The constitutionality of Oregon's ban against peyote use came before the United States Supreme Court in an oblique manner. Oregon did not follow the example of other western states[6] which exempt religious use of peyote from criminal drug laws. Oregon prohibited intentional possession of all "controlled

5. For discussions of the historical origins of the free exercise clause, *see, e.g.*, T. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986) [hereinafter FIRST FREEDOMS]; W. MILLER, THE FIRST LIBERTY (1986); McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990) [hereinafter *Historical Understanding*]; Adams & Emmerich, *The Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559 (1989); Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986). For discussions of free exercise doctrine and the issue of religious exemptions from laws of general applicability, *see, e.g.*, McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989); Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1988); Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299; McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 1-3; Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984); Choper, *The Religious Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 676 (1980); Giannella, *Religious Liberty, Non-Establishment and Doctrinal Development, Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1391 (1967). *See also* Note, *Developments—Religion and the State*, 100 HARV. L. REV. 1605 (1987); Note, *Free Exercise: Religion Goes to "Pot,"* 56 CALIF. L. REV. 100 (1968).

6. *Smith II*, 110 S. Ct. at 1618 n.5 (Blackmun, J., dissenting) ("[Twenty-three] states, including many that have significant Native American populations, have statutory or judicially crafted exemptions in their drug laws for religious use of peyote.").

substances"—as defined by federal law[7]—unless the substance has been prescribed by a medical practitioner. One of these controlled substances was peyote.[8] Persons who violated the law were guilty of a felony.[9] Oregon's criminal laws were the primary justification for a private drug rehabilitation organization's decision to fire two members of the Native American Church—who admitted using peyote in religious rituals—from their jobs as drug counselors.[10] However, Oregon had only rarely attempted to enforce the law, so Oregon courts had not authoritatively decided whether its statutes banned ritual use of peyote by the Native American Church. The two employees did not challenge their dismissal, but sought unemployment benefits.

The Employment Division denied the counselors' application for unemployment compensation on grounds that they were ineligible because of work-related "misconduct."[11] However, the discharged employees had more success before Oregon courts in their effort to secure unemployment benefits. The Oregon Court of Appeals held that the denial of benefits violated respondents' rights under the first amendment to free exercise of religion.[12] On appeal, the Oregon Supreme Court affirmed.

The Oregon Supreme Court avoided the issue of whether sacramental peyote use could be punished under Oregon's criminal law, by focusing on whether unemployment compensation could be denied.[13] Citing several decisions of the United States

7. OR. REV. STAT. § 475.992(4) (1989). The state law incorporated federal definitions of "controlled substances." Schedules I through V of the Federal Controlled Substances Act, 21 U.S.C. §§ 811-812 (1982 & Supp. V 1987), as modified by the State Board of Pharmacy. OR. REV. STAT. § 475.005(6) (1989).

8. *See* 21 C.F.R. § 1308.11(a)(19) (1989) ("[Peyote] Meaning all parts of the plant assembly classified botanically as Lophophorawilliamsii Lemaire, whether growing or not, the seeds thereof, any extract from any part of such plant, and every compound, manufacture, salts, derivative, mixture, or preparation of such plant, its seeds or extracts.") (interprets 21 U.S.C. § 812(c), schedule I(c)(12)). *See also* OR. REV. STAT. § 475.005(6) (1989); OR. ADMN. R. 855-80-021(3)(s) (1988).

9. OR. REV. STAT. § 475.992(4)(a).14.

10. *See* Employment Div. v. Smith, 485 U.S. 600 (1988) (*Smith I*). The Court remanded the decision to the Supreme Court of Oregon for clarification of the legality of the use of peyote by members of the Native American Church.

11. *See* OR. ADMN. R. 471-30-038 (1988). Misconduct is a willful violation of the standards of behavior which an employer has the right to expect of an employee and is an act that amounts to a willful disregard of the employer's interests.

12. Black v. Employment Div., 75 Or. App. 735, 707 P.2d 1274 (Or. App. 1985); Smith v. Employment Div., 75 Or. App. 764, 709 P.2d 445 (1986).

13. Smith v. Employment Div., Dep't of Human Resources, 301 Or. 209, 218-19, 721 P.2d 445, 449-50 (1986). *See also* Black v. Employment Div., Dept. of Human Resources, 301 Or. 221, 224-25, 721 P.2d 451, 453 (1986).

Supreme Court,[14] the Oregon court concluded that the state violated the first amendment when it denied unemployment benefits because of the employee's religious practices.[15] In the view of the Oregon court, the purpose of the rule that employees could not obtain compensation after a discharge for "misconduct" was to preserve the financial integrity of the state's compensation fund. Disqualifications for "misconduct" were not designed to enforce the State's criminal laws. In the court's view, no compelling interest justified the burden imposed on respondents' religious practice.[16]

The U.S. Supreme Court granted certiorari.[17] The Supreme Court accepted a critical portion of the Oregon's Employment Division's analysis: "If a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct."[18] Nevertheless, the Supreme Court decided that resolution of the first amendment issue was premature, because Oregon had not authoritatively decided whether sacramental use of peyote was a violation of state law.[19] The Supreme Court vacated the judgment of the Oregon Supreme Court and remanded the case for further proceedings.[20]

On remand, the Oregon Supreme Court held that Oregon's law "makes no exception for the sacramental use" of peyote.[21] Therefore, the two counselors' use of peyote during Native American Church ceremonies violated Oregon's criminal law. However, the Oregon Supreme Court concluded that the prohibitions against sacramental peyote use were unconstitutional. On this new theory, the court reaffirmed its previous decision that the fired employees were entitled to unemployment benefits.[22]

For the second time, the United States Supreme Court granted certiorari.[23] In *Smith II*, the Court considered "whether the Free

14. Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Bd., Indiana Employment Sec. Div., 450 U.S. 707 (1981).

15. *Smith*, 301 Or. at 217-19, 721 P.2d at 449-50.

16. *Id.* at 218-19, 721 P.2d at 449-50.

17. 480 U.S. 916 (1987).

18. Employment Div. v. Smith, 485 U.S. 660, 670 (1988) (*Smith I*).

19. *Id.* at 673.

20. *Id.* at 674.

21. 307 Or. 68, 72-73, 763 P.2d 146, 148 (1988).

22. *Id.* at 76, 763 P.2d at 150.

23. 489 U.S. 1077 (1989).

Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug."[24]

II. Superficial Neutrality and the Free Exercise Clause

Justice Scalia's interpretation of the free exercise clause creates the illusion of precision. Beginning with principles not at issue, Justice Scalia defines rights of free exercise by emphasizing freedom of belief and by disparaging freedom of practice:

> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such." . . . The government may not compel affirmation of religious belief, . . . punish the expression of religious doctrines it believes to be false, . . . impose special disabilities on the basis of religious views or religious status, . . . or lend its power to one or the other side in controversies over religious authority or dogma[.][25]

The opinion concedes "'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts."[26] Yet, religious practice is only protected when government regulation is "specifically directed"[27] at religiously-inspired behavior.[28]

> [The dismissed counselors] contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, but that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "pro-

24. *Smith II*, 110 S. Ct. at 1599.
25. *Id.* at 1599 (citations omitted).
26. *Id.*
27. *Id.*
28. *Id.* "Under the no-exemptions view, the free exercise clause exists solely to prevent the government from singling out religious practice for peculiar disability. The evil to be prevented is . . . 'laws that directly and intentionally penalize religious observance.'" *Historical Understanding*, *supra* note 5, at 1418 (quoting Bork, *The Supreme Court and the Religion Clauses*, in "TURNING THE RELIGION CLAUSES ON THEIR HEADS": PROCEEDINGS OF THE NATIONAL RELIGIOUS FREEDOM CONFERENCE OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS 83, 84 (1988)).

> hibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax. . . . It is a permissible reading of the text . . . to say that if prohibiting the exercise of religion (or burdening the activity of printing) *is not the object of the tax but merely the incidental effect* of a generally applicable and otherwise valid provision[,] the First Amendment has not been offended.[29]

Using the Court's new standards, the critical factor is the government's motivation for a particular law. The italicized language by Justice Scalia echoes language in *Personnel Administrators v. Feeney*,[30] a case challenging a veterans' preference policy as purposeful gender discrimination in violation of the fourteenth amendment. *Feeney* held that if the state adopted the challenged veterans' preference law "because of, not merely in spite of, its adverse effects upon an identifiable group," heightened judicial scrutiny was appropriate. Likewise, under *Smith II*, the constitutionally-protected freedom for religious worship is threatened only if a government acts to disadvantage a religious practice "at least in part because of, rather than in spite of" the impact on religion. In this way the doctrines of religious liberty have been transformed to mirror the requirement of the equal protection clause that purposeful discrimination must be proved before a court will demand persuasive justification for a state law.[31]

Justice Scalia's opinion notes that no Supreme Court case has involved a governmental attempt "to ban . . . acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display."[32] He added,

29. *Smith II*, 110 S. Ct. at 1599-1600 (emphasis added).
30. 442 U.S. 256, 279 (1979).
31. *Smith II*, 110 S. Ct. at 1604 & n.4, 1606.
32. *Id.* at 1599.

"It would doubtless be unconstitutional, for example, to ban the casting of 'statutes that are to be used for worship purposes,' or to prohibit bowing down before a golden calf."[33] After *Smith II*, the free exercise clause prohibits little more.[34] According to the Court, the drug counselors sought "to carry the meaning of 'prohibiting the free exercise [of religion]' one large step further" than immunity for religious belief and protection against government discrimination.[35]

> Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. *There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs*, or the raising of one's children in those beliefs, the rule to which we have adhered ever since [*Reynolds v. United States*] plainly controls. "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government."[36]

One passage appearing late in Justice Scalia's opinion offers an entirely new theory to justify a newer, narrower free exercise jurisprudence. It can be read as a confession; it might be read as a proclamation of a newer judicial attitude toward the Constitution's explicit guarantees of individual liberty. Justice Scalia believes that "[v]alues . . . protected against government interference through enshrinement in the Bill of Rights are not

33. *Id.*

34. *Id.* at 1608 (O'Connor, J., concurring) ("[F]ew States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. . . . If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice"). *But see* De Hasque v. Atchison, 68 Okla. 183, 173 P. 73 (1918) (Oklahoma prohibition statute interpreted to exempt use of wine in Catholic Mass, despite failure of the legislature not to create an exemption for sacremental use). *See also* Brown, *Oklahoma's "Bone Dry Law,"* 52 CHRONICLES OF OKLA. 316 (1975) (describing national controversy over Oklahoma Legislature's deliberate 1917 refusal to exempt use of sacramental wine in Catholic Mass from prohibition statutes).

35. *Smith II*, 110 S. Ct. at 1602.

36. *Id.* (quoting Gillette v. United States, 401 U.S. 437, 461 (1971)) (emphasis added).

thereby banished from the political process."[37] He predicts that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."[38] Justice Scalia points out that many States "have made an exception to their drug laws for sacramental peyote use."[39] As a result, he denies that the courts have a special duty to determine when such accommodation is constitutionally required, despite the foreseeable consequences of judicial inaction.

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[40]

Though Justice Scalia defends the peyote decision as neutrality and equality in form, he acknowledges that the new doctrine will probably not be either neutrality or equality in substance. In plain words, Justice Scalia admits some unpopular religions without political influence will suffer because of the *Smith II* decision. Indeed, the peyote issue illustrates this acute problem. Many efforts to suppress peyote use began as laws "specifically directed" against Native American religions.[41] Now, in the aftermath of *Smith II*, the same policies may be adopted again, albeit the new laws must now be in superficially neutral form.

One problem with a purposeful discrimination standard is the extreme difficulty of proving improper governmental motivations. Justice Scalia himself pointed this fact out in a dissenting opinion in *Edwards v. Aguillard*,[42] a case which concerned a state statute requiring "balanced treatment" for the teaching of "creationism." Indeed, Justice Scalia's analysis clarifies the foreseeable—and foreseen—impact of the peyote standards.

37. *Id.* at 1606.

38. *Id.*

39. *Id.*

40. *Id.*

41. *See, e.g., id.* at 1622 n.10 ("Oregon's attitude toward . . . religious peyote use harkens back to the repressive federal policies pursued a century ago") (quoting Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 OR. L. REV. 363, 370-71 (1986) ("In the government's view, traditional practices were not only morally degrading, but unhealthy")); P. LIMERICK, THE LEGACY OF CONQUEST 205 (1987).

42. 482 U.S. 578 (1987).

> [Although] it is possible to discern the objective "purpose" of a statute (i.e., the public good at which its provisions appear to be directed), or even the formal motivation of a statute where that is explicitly set forth, [discerning] the subjective motivation of those enacting a statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite. In the present case, for example, a particular legislator need not have voted for the Act either because he wanted to foster religion or to improve education. He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have hoped the Governor would appreciate his vote and make a fund-raising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and utterly unmotivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other considerations.[43]

This passage is one of the least stirring arguments for judicial deference to political judgments to ever appear in the Supreme Court reports. After digesting Justice Scalia's jaundiced—and realistic—view of legislative process, it is difficult to understand why he ever prefers to leave the fundamental value of religious freedom to the vagaries of the politics. Yet, in *Edwards*, Justice Scalia proceeds to conclude:

> To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist. Putting that problem aside, however, where ought we

43. *Id.* at 636-37 (Scalia, J., dissenting).

> to look for the individual legislator's purpose? We cannot . . . assume that every member present [agreed] with the motivation expressed in a particular legislator's pre-enactment floor or committee statement.[44]

Justice Scalia identifies other possible sources of evidence: staff-prepared committee reports, post-enactment floor statements, post-enactment testimony from legislators and media reports. His tone becomes mildly sarcastic as he outlines a series of rhetorical questions that reveal his hostility to a judicial search for covert unconstitutional motives.

> All these sources, of course, are eminently manipulable. Legislative histories can be contrived and sanitized, favorable media coverage orchestrated, and post-enactment recollections conveniently distorted. . . . Having achieved, through these simple means, an assessment of what individual legislators intended, we must still confront the question [how] *many* of them must have the invalidating intent. If a state senate approves a bill by vote of 26 to 25, and only one of the 26 intended solely to advance religion, is the law unconstitutional? What if 13 of the 26 had that intent? What if 3 of 26 had the impermissible intent, but 3 of the 25 were simply attempting to "balance" the votes of their impermissibly motivated colleagues? Or is it possible that the intent of the bill's sponsor is alone enough to invalidate it—on a theory, perhaps, that even though everyone else's intent was pure, what they produced was the fruit of a forbidden tree?[45]

The difficulty of discovering legislative intent is a sound reason for judicial reluctance to interpret a law in a way that departs from the plain meaning of the statutory text.[46] When applied to the problem of discriminatory intent, however, the refusal to look beyond the face of the statute becomes a formula for judicial tolerance of concealed bias. The implication of Justice Scalia's attack on legislative history as evidence of unconstitu-

44. *Id.* at 637 (emphasis in original).

45. *Id.* at 638 (emphasis in original).

46. *Compare, e.g.*, Public Employees Retirement Sys. of Ohio v. Betts, 109 S. Ct. 2854 (1989) (Kennedy, J., for the Court) (legislative history of federal statute aids in selection among plausible readings of text) *with id.* at 2872 (Marshall, J., dissenting) (review of legislative history is appropriate when "some ambiguity" in the text and structure of a statute exists).

tional motivation is that courts should make only a superficial examination of a statute's text for its "formal" purpose. If a statute is superficially neutral, then, as far as the Court ought to be concerned, it *is* neutral, no matter what the subjective intentions of the legislators might have been. If these two concepts are fused—first, a judge-made requirement that a specific and improper purpose be proved before judicial intervention, and, second, a judicial refusal to look beyond the face of a law for evidence of improper purpose—constitutional law is transformed from a protection of individual liberty into a thinly-disguised judicial abdication of responsibility for remedying any but the most obvious constitutional transgressions.[47] This would be the natural, inevitable, logical—and probably the intended—consequence, if the holding of the Oregon peyote case is reinforced by Justice Scalia's hostility to careful judicial scrutiny of legislative motivation.[48]

III. Misuses of Precedent

In Justice Scalia's formulation, the dispositive issue in the Oregon peyote case and most other cases involving free exercise

47. Justice Scalia's persistent emphasis on facial neutrality as a decisive factor in constitutional and statutory interpretation is inconsistent with the Court's past decisions. *Compare, e.g.*, Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (prohibitions of the commerce clause are not confined to "the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods") *and* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available") *and* Hunter v. Underwood, 471 U.S. 222 (1985) (Rehnquist, J., for a unanimous Court) (though inquiries into legislative motivation "is often a problematic undertaking," legislative history of state constitutional provision adopted in 1901 was persuasive to establish discriminatory purpose in a case challenging continuing discriminatory effects of disenfranchisement tactic) *with* Lorance v. A.T.T. Technologies, Inc., 109 S. Ct. 2261 (1989) (Scalia, J. for the Court). Justice Scalia stated it is a mistake

> to equate the application of a facially neutral but discriminatorily adopted system with the application of a system that is facially discriminatory. With a facially neutral system the discriminatory act occurs only at the time of adoption, for each application is nondiscriminatory[.] But a facially discriminatory system . . . by definition discriminates each time it is applied. This is a material difference for purposes of analysis . . . which focuses on the timing of discriminatory acts for purposes of the statute of limitations.

Id. See also, e.g., Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

48. *Smith II*, 110 S. Ct. at 1612 (O'Connor, J., concurring): "There is nothing talismanic about neutral laws of general applicability . . . for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.

claims is whether the first amendment creates a constitutional immunity for religion-inspired violations of neutral "generally applicable laws."[49] The opinion of the Court relies almost exclusively on precedent for its resolution of this issue. The Court says it has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[50] Indeed, the Court claims its jurisprudence consistently denies the proposition that the first amendment provides any immunity for religiously-inspired lawbreaking.

Justice Scalia's history of precedent is not trustworthy.[51] The first case Justice Scalia cites after he makes the statement quoted in the previous paragraph is *Minersville School District Board of Education v. Gobitis*,[52] in which the Court upheld Pennsylvania's power to compel all public school students—including children raised as Jehovah's Witnesses—to salute the flag and recite the pledge of allegiance. Justice Scalia quotes Justice Frankfurter's opinion for the Court:

> [C]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.[53]

Justice Scalia introduced this quotation by saying that it "succinctly described . . . more than a century of our free exercise jurisprudence."[54] To be sure, the Frankfurter quotation states Justice Scalia's thesis perfectly. Also, the quotation is the essence of the *Gobitis* rationale. Still, in passages not quoted by Justice

49. *Id.* at 1599.

50. *Id.* at 1600.

51. Justice O'Connor objected to Justice Scalia's majority opinion because it gave a "strained reading of the First Amendment" and it "disregard[ed] our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct." *Id.* at 1607. Justice Blackmun was less circumspect in his condemnation of Justice Scalia's work. He joined in the portions of Justice O'Connor's opinion that, Justice Blackmun wrote, "carefully detailed" Justice Scalia's "mischaracterizing" of precedent. *Id.* at 1616.

52. 310 U.S. 586 (1940).

53. *Id.* at 594-95, *quoted in Smith II*, 110 S. Ct. at 1600.

54. *Smith II*, 110 S. Ct. at 1600.

Scalia, Justice Frankfurter also took care to note his view that the case involved national security, "an interest inferior to none in the hierarchy of legal values."[55] Justice Frankfurter disdained absolutes; he cherished "the truth that no single principle can answer all of life's complexities."[56] Even in *Gobitis*, Justice Frankfurter stated that "every leeway should be given to the claim of religious faith" because the interests protected by the first amendment were "so subtle and so dear."[57] *Gobitis* can be read narrowly as a case that requires careful and sensitive balancing of competing interests, rather than as a defense of all neutral law. Justice Frankfurter's craftsmanship was cautious: He argued for a strong presumption in favor of the validity for general laws, but he did not declare that superficial neutrality was always sufficient for a law's constitutionality. In short, a full reading of *Gobitis* suggests that the Court made a narrow point and deliberately refrained from crafting a broader rule. If Justice Frankfurter had thought that religious liberty had utterly no claim against the enforcement of a superficially neutral law, much of his discussion of governmental interests in *Gobitis* was utterly unnecessary.

In any event, *Gobitis* was emphatically overruled by the Supreme Court in the middle of World War II, a mere three years after it was announced.[58] Justice Scalia does not mention he is relying on a discarded and discredited decision. His omission would not be satisfactory in a first year legal research and writing course. Dictates of candor should have compelled Justice Scalia to account for the singular fact that the Court turned away from *Gobitis*.[59] Surely, as a matter of elementary logic, the burden of proof is on one who claims that an explicitly overruled decision represents a principle that has prevailed throughout American constitutional history. Yet, the repudiated doctrine of *Gobitis* is the analytical beginning point for *Smith II*, an opinion that overturns almost the entirety of the Court's past work, even as it claims to be a decision justified by precedent.

55. *Gobitis*, 310 U.S. at 595.

56. *Id.* at 593-94.

57. *Id.* at 594.

58. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

59. Later in the *Smith II* opinion, Justice Scalia lists Barnette in a string citation among the cases which "involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." *Smith II*, 110 S. Ct. at 1601.

Justice Scalia offers analysis of two categories of cases for his bold misinterpretation of precedent: Cases in which free exercise claims failed, and cases in which free exercise claims prevailed. A close look at this body of precedent demonstrates that the Supreme Court never categorically excluded superficially neutral laws from judicial review based upon the free exercise clause. In short, precedent does not command—or justify—the new analysis articulated in Justice Scalia's opinion of the Court.

Justice Scalia pointed to six basic cases to support his view that the Supreme Court has "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[60] All are cases in which the Court rejected free exercise claims. However, Justice Scalia ignores the fact that all are also cases in which the Court openly and carefully weighed governmental interests against alleged interference with religious practices. He distills from these cases an absolute rule that was never stated in any of them: Neutral laws never implicate or violate the free exercise clause.

First, Justice Scalia discussed the 1879 decision in *Reynolds v. United States*,[61] in which the Supreme Court upheld the conviction of a practicing Mormon for violating federal criminal laws forbidding polygamy. The analysis of the Court in *Reynolds* does not follow the pattern of most civil liberties cases in recent years. The Court does not "balance" competing interests in so many words. As a result, *Reynolds* appears to be the strongest authority for Justice Scalia's analysis. Still, a careful reading of the entire case demonstrates that the *Reynolds* Court did not even begin to articulate an absolute rule that placed all laws of general applicability beyond the scope of the first amendment.

The majority began its analysis of the free exercise issue by examining the prevailing understanding of religious liberty at the time the first amendment was ratified. First, the Court described the movement to protect religious freedom before

60. *Id.* at 1600 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). *See id.* at 1600-01. Justice Scalia focuses on Reynolds v. United States, 98 U.S. 145 (1879); Minersville School District v. Gobitis, 310 U.S. 586 (1940); Prince v. Massachusetts, 321 U.S. 158 (1944); Braunfeld v. Brown, 366 U.S. 599 (1961); Gillette v. United States, 401 U.S. 437 (1971). Later in his opinion, after discussing the six basic cases, Justice Scalia cites additional cases in which he says the court rejected free exercise claims to support the narrower conception of religious liberty. *Smith II*, 110 S. Ct. at 1602-03.

61. 98 U.S. 145 (1879).

adoption of the Constitution.[62] The Court's primary focus was Virginia's enactment of Thomas Jefferson's proposed statute for religious freedom.[63] The Court quoted the preamble to the law: "[I]t 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."[64] The Court states that the fight for Virginia's statute influenced James Madison's draft of the first amendment. Finally, the Court concluded its brief look at the historical evidence by quoting Thomas Jefferson's famous reply to the Danbury Baptist Association, in which he argued that: "[L]egislative powers . . . reach actions only, and not opinions."[65] The Court accepted Jefferson's view "as an authoritative declaration of the scope" of religious liberty, "[c]oming as this does from an acknowledged leader of the advocates" of the first amendment.[66] On the basis of this evidence, the Court held that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[67]

Next, the *Reynolds* Court examined the traditions of monogamy in most civilized nations. This portion of the Court's opinion is devoted to the theme that regulation of marriage and legal prohibition of polygamy is of central importance to western culture.

> In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, . . . a sacred obligation, is nevertheless, in most civi-

62. *Id.* at 166-67.

63. Act for Establishing Religious Freedom, 12 HENING'S STAT. 84 (1785).

64. *Reynolds*, 98 U.S. at 163 (quoting Virginia's Act for Establishing Religious Freedom, 12 HENING'S STAT. 84 (1785)).

65. *Id.* at 164 (quoting letter from Thomas Jefferson to Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association (Jan. 1, 1802), *reprinted in* T. JEFFERSON, WRITINGS (M. Petersen, ed. 1984)).

66. *Id.* According to Professor McConnell, the *Reynolds* Court had an accurate understanding of Jefferson's position, but Jefferson's views of free exercise protections were not representative of the views of those who advocated the first amendment. *Historical Understanding*, *supra* note 5, at 1451. Indeed, "Jefferson's advocacy of a belief-action distinction placed him at least a century behind the argument for full freedom of religious exercise in America. . . . [W]hile Jefferson was one of the most advanced advocates of disestablishment, his position on free exercise was extraordinarily restrictive for his day." *Id.* at 1451-52.

67. *Reynolds*, 98 U.S. at 164.

> lized nations, a civil contract, and usually regulated by law.[68]

It is difficult to be sure where the *Reynolds* Court placed its emphasis in the opinion. In the Oregon peyote case, Justice Scalia quoted *Reynolds*, apparently to show that *Reynolds'* concept of "overt acts" is critical:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . 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 law of the land, and in effect to permit every citizen to become a law unto himself.[69]

The quoted passage substantiates the view that religion is not always an excuse for lawbreaking. However, in context, the passage does not say that the free exercise clause is never a basis for an immunity for religiously-inspired conduct. The entirety of the *Reynolds* opinion embraces an argument that governmental regulation of marriage is of such compelling importance that religious inspiration cannot be an excuse for polygamy. Thus, the convicted Mormon lost because his practices were "overt acts against peace and good order."[70]

To put the matter in a different way, *Reynolds*, relying heavily on the words of Jefferson, does distinguish between beliefs and actions. However, while Jefferson sought to disable the government from any power over opinions, the Court in *Reynolds* did not infer that the first amendment allowed government to reach and regulate all actions. The *Reynolds* Court was content to hold that polygamy, a practice that violated the fundamental morality of this society, could be punished, because such a holding was all that was necessary to decide the case. Logically, there would have been no need to discuss the importance of marriage, if government could punish all overt acts.[71] Justice

68. *Id.* at 165.

69. *Id.* at 166-67, *quoted in Smith II*, 110 S. Ct. at 1600 (1990).

70. *Reynolds*, 98 U.S. at 163. "Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties." *Id.* at 165.

71. *Historical Understanding*, *supra* note 5, at 1462 ("[T]he free exercise right was not understood to be confined to beliefs. Beliefs without more do not have the capacity to disturb the public peace and safety. . . . If the basic right [of free exercise] did not extend to 'overt acts,' the provisos would be unnecessary"); *id.* at 1459 (state constitutional provisions adopted between 1776 and the ratification of the first amendment were not confined to beliefs, opinions and expression).

Scalia distorts and exaggerates *Reynolds* by claiming that the case distinguishes between absolute protection of religious belief and absolute tolerance for governmental regulation of overt behavior. Even if *Reynolds* had been the final word of the Court, the case does not establish the comprehensive rule that is announced in the Oregon peyote case.

Justice Scalia's next case is *Prince v. Massachusetts*,[72] in which the Court upheld the application of state child labor laws to a mother who had used her children to dispense religious literature in the streets. *Prince* involves the explicit constitutional right of religious liberty and the nontextual rights of parenthood. As a result, it should have been categorized as a "hybrid" case under Justice Scalia's analysis of prior free exercise cases.[73] Rightly or wrongly, the Court accepted Massachusetts' arguments that the child labor laws are the only reasonable means for the state to use to fulfill its duty to its children. The Court balanced competing interests, and decided that the government's objective to protect children against exploitation was paramount. *Prince* is not authority for the idea that all laws of general applicability comply with the free exercise clause.

In *Braunfeld v. Brown*,[74] the Court upheld Sunday-closing laws against the claim that they disadvantaged persons whose religions compelled them to refrain from work on other days. This is the third case cited by the Court as precedent for its narrowed interpretation of the free exercise clause. Again, however, the Court did not suggest that the first amendment was irrelevant merely because the state law was neutral in form. Chief Justice Earl Warren, speaking for a plurality of the Court, focused on the fact that no person was required to abandon their religious beliefs in order to comply.[75] Those who practiced their religion on Saturday suffered an economic disadvantage because they lost one additional day in their business week. The Sunday closing laws did not force a person to surrender one fundamental right—the right to worship God according to the dictates of their religion—in order to enjoy government benefits, legal privileges or other rights.[76] The law "impose[d] only an

72. 321 U.S. 158 (1944).

73. See *infra* notes 114-27 and accompanying text.

74. 366 U.S. 599 (1961).

75. *Id.* at 605.

76. *Id.* at 605-06. *Braunfeld* suggests another way to restrict the impact of the free exercise clause. Close scrutiny would be appropriate only in cases in which government interferes with religious practices that amount to "worship." *Id.* at 605. Prior to

indirect burden on the exercise of religion" and did not "make unlawful the religious practice itself."[77]

Braunfeld does not state or imply an absolute rule that states may regulate religious practices, if the regulations are neutral and generally applicable. A state, the Court indicated, can regulate or restrict religious activities if those activities are violations of "important social duties, or subversive of good order, even when the actions are demanded by one's religion."[78] The plurality opinion emphasized the continuing import of the free exercise clause in terms that cannot be reconciled with Justice Scalia's analysis of precedent:

> [T]o hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. . . . [if] the State may accomplish its purpose by means which do not impose such a burden.[79]

The plurality concluded that the State had no other way to achieve the legitimate goal of mandating a day of rest for all citizens.[80]

Justice Frankfurter wrote a single separate opinion addressed to both the *Braunfeld* and *McGowan* cases. His careful history of the traditions of religious liberty deserve special attention, because his work as the author of *Gobitis* was so prominent in Justice Scalia's attempt to summarize free exercise jurisprudence. As always, Justice Frankfurter refrained from absolute pron-

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ratification of the first amendment, eight states—New York, New Hampshire, Delaware, Massachusetts, New Jersey, North Carolina, Pennsylvania, and South Carolina—and the federal Northwest Ordinance of 1787 confined protection to "worship." *Historical Understanding*, *supra* note 5, at 1460. "The word 'worship' usually signifies the rituals or ceremonial acts of religion, such as the administration of the sacraments or the singing of hymns, and thus would indicate a more restrictive scope for the free exercise provisions" than suggested by the language adopted in the first amendment. *Id.* at 1460-61.

77. *Braunfeld*, 366 U.S. at 606.

78. *Id.* at 603.

79. *Id.* at 607 (emphasis added).

80. *Id.* at 607-08 (discussing McGowan v. Maryland, 366 U.S. 420, 450-52 (1961)).

ouncements. He began his analysis with the observation that "[i]nnumerable civil regulations enforce conduct which harmonizes with religious canons."[81] This fact was no basis for suspicion. Indeed, he continued, such laws do not "always support equally the beliefs of all religious sects."[82] Again, this inevitability does not present a substantial first amendment problem: "Because these laws serve ends which are within the appropriate scope of secular state interest, they may be enforced against those whose religious beliefs do not proscribe, and even sanction, the activity which the law condemns."[83] However, in dramatic and significant contrast to the absolutism of *Smith II*, Justice Frankfurter expressly denied "that government regulations which find support in their appropriateness to the achievement of secular, civil ends are invariably valid under the First or Fourteenth Amendment[s], whatever their effects in the sphere of religion."[84]

Frankfurter embraced the basic tradition of careful judicial scrutiny of laws interfering with religion, although he would require the religious claimant to show that the loss of freedom outweighed governmental interests. In this respect, Justice Frankfurter favored reversal of presumptions when a burden on religious liberty is proved. Even so, Justice Frankfurter advocated balancing:

> If the value to society of achieving the object of a particular regulation is demonstrably outweighed by the impediment to which the regulation subjects those whose religious practices are curtailed . . . or if the object sought by the regulation could with equal effect be achieved by alternative means which do not substantially impede those religious practices, the regulation cannot be sustained.[85]

Justice Frankfurter carefully assessed the reasons why a legislature "might choose not to make an exception" to Sunday closing laws, though his language and analysis were plainly more deferential to legislative judgments than strict scrutiny.[86] After concluding that "the legislative choice of a blanket Sunday ban applicable to observers of all faiths cannot be held unreasona-

81. *McGowan*, 366 U.S. at 462.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 514-20.

ble," Justice Frankfurter then proceeded to a new inquiry: He carefully assessed "whether the importance to the public of those ends is sufficient to outweigh the restraint upon the religious exercise . . . which the restriction entails."[87] Thus, Justice Frankfurter's approach bears little similarity to Justice Scalia's defense of an absolute immunity for all neutral laws. The author of *Gobitis* adhered to a presumption in favor of validity of state law, but he weighed the gains and pains of state statutes in light of the constitutional values secured by the free exercise clause, albeit with a respect for governments' rights to formulate rules for communities. The author of *Smith II* denies the courts should have any role whatever to review laws of superficial neutrality.

A national security case was the next precedent cited by the Court for its holding in the Oregon peyote case. In *Gillette v. United States*,[88] the Court refused to mandate exemptions from the nation's military selective service system for those who opposed a particular war on religious grounds. In *Gillette*, of course, the government's security interests were paramount.[89] The Court avoided the problem of religious pacifism—that is, religiously-inspired objection to all war—and held only that the free exercise clause does not require the national government to accommodate those persons who object—for whatever reason—to a particular war.[90] The essence of the Court's view was that it would be unreasonably burdensome on government to administer the law under any other interpretation.[91] Finally, in *Gillette*, the Court reaffirmed the traditional judicial approach: Even when considering neutral laws or regulations, first amendment rights will prevail if the demonstrated interference with religious freedom is not justified by overriding governmental aims.[92]

Finally, the last of Justice Scalia's six basic cases rejecting free exercise claims was *United States v. Lee*.[93] The Court rejected the theory of an Amish employer, who had sought exemption from the social security system because the Amish faith prohibited participation in governmental support programs.[94] The neutrality of the social security system was consid-

87. *Id.* at 520.
88. 401 U.S. 437, 461 (1971).
89. *Id.* at 461.
90. *Id.* at 459-60.
91. *Id.* at 460.
92. *Id.* at 463.
93. 455 U.S. 252 (1982).
94. *Id.* at 260.

ered by the Court as a basis for its decision, but neutrality was not the end of the analysis, as in the peyote case. Instead, the Court employed its traditional analysis.[95] First, the *Lee* majority sought to determine whether the federal law burdened or interfered with religious practices.[96] Second, it considered whether the burden on religion was necessary to achieve overriding governmental interests.[97] Finally, it examined whether accommodation of the religious practice would unduly interfere with achievement of the governmental interest.[98] The Court held that religious interest could and should be accommodated if state action required persons to choose between the state and their religion—but some beliefs must yield to the common good. As might be expected, the Court determined that a comprehensive social security system was an important governmental interest which outweighed the burden on the Amish.[99]

> There would be no way . . . to distinguish the Amish believer's objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempted from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.[100]

The common theme of these cases—the cases selected by Justice Scalia because claims of religious freedom were rejected—is that a balancing test of some nature is necessary. These six cases reinforce the long tradition supporting careful and sensitive judicial weighing of competing interests even when laws are challenged as violations of the free exercise clause.[101]

95. *Id.* at 258-61.
96. *Id.* at 256-67.
97. *Id.* at 257-58.
98. *Id.* at 259.
99. *Id.* at 260.
100. *Id.*
101. For lack of a more precise and more consistent terminology, this essay will refer to all of the various tests employed in free exercise cases as "close scrutiny." In *Smith II*, the Court referred to the *Sherbert* test as "strict scrutiny." Close scrutiny

Nevertheless, in *Smith II*, the Court discarded the traditional standards.[102]

In the majority opinion in *Smith II*, Justice Scalia claims that the traditional standards—articulated in such cases as *Sherbert v. Verner*[103]—never really applied to other free exercise cases. He bases this conclusion on the fact that even if the Court paid lip service to a balancing test, the Court always found the test satisfied, except for the unemployment benefits cases directly controlled by *Sherbert*.[104] In other words, close scrutiny was not the real test;[105] the actual attitude of past Justices was deferential toward neutral legislation and hostile toward demands for exemption. There is, of course, an implication that past Courts have been dishonest in their opinions. The majority's unspoken—but unmistakable—attack on the candor of predecessor courts suggests that traditional doctrine has been a lie. Justice Scalia's colleagues could not have missed the point. In her concurring opinion, Justice O'Connor responded:

> That we rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.[106]

To be sure, the principle announced in *Smith II* could not have been unexpected. Between 1972 and 1990, the Supreme

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requires that government justify its refusal to grant exemptions to a neutral law with evidence of overriding government objectives. *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 529-30 (1986) (O'Connor, J., dissenting) (summarizing the tests). See *infra* notes 135-39 and accompanying text for a more detailed discussion of the various types of close scrutiny.

102. In dissent, Justice Blackmun recalled the "painstaking" development of "a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion." *Smith II*, 110 S. Ct. at 1615. *See also, e.g.*, Hernandez v. Commissioner, 110 S. Ct. 16 (1989) (compelling interest test); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987) (compelling interest test); Bowen v. Roy, 476 U.S. 693, 732 (1986) (O'Connor, J., concurring in part and dissenting in part) (compelling interest test); United States v. Lee, 455 U.S. 252, 257-58 (1982) ("overriding governmental interest"); Thomas v. Review Bd. of Indiana Sec. Div., 450 U.S. 707, 718 (1981) (compelling interest); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("interests of the highest order"); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (compelling state interest).

103. 374 U.S. 398 (1963).

104. *Smith II*, 110 S. Ct. at 1603.

105. *Id.* at 1602-03.

106. *Id.* at 1610 (O'Connor, J., concurring).

Court "rejected every claim for a free exercise exemption to come before it, outside the narrow context of unemployment benefits governed strictly by *Sherbert*."[107] Nevertheless, none of these decisions announced the absolute immunity for laws of general applicability manufactured in *Smith II*. Thus, the one distinct characteristic of Justice Scalia's argument is its claim that the absolute immunity derives from past decisions of the Court. By contrast, Justice Rehnquist, dissenting in *Thomas v. Review Board of Indiana Employment Security*,[108] was more candid when he offered a conclusion that foreshadowed the holding of *Smith II*. Justice Rehnquist believed that when "a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not . . . require the State to conform that statute to the dictates of religious conscience of any group."[109] However, Justice Rehnquist defended this approach as a necessary change in doctrine because the Court's jurisprudence was "muddied,"[110] and because the Court had read "the Free Exercise Clause too broadly and . . . fail[ed] to acknowledge that such a reading conflicts with many of our Establishment Clause cases."[111]

Likewise, Justice Stevens had also announced his views prior to *Smith II*. In *United States v. Lee*,[112] Justice Stevens concluded that the Court's holding left "virtually no room for a 'constitutionally required exemption' on religious grounds from a valid . . . law that is entirely neutral in its general application."[113] Though Justice Stevens analyzed many of the cases discussed by Justice Scalia in a similar way, his summary of precedent acknowledged that efforts in *Lee* to distinguish the Court's prior

107. *Historical Understanding*, *supra* note 5, at 1417. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (a prison's refusal to change the work schedule of Muslim prisoners to accommodate Friday worship services does not violate the free exercise clause); Goldman v. Weinberger, 475 U.S. 503 (1986) (the free exercise clause was not violated when the military prohibited an Orthodox Jewish officer from wearing a yarmaluke while on duty and in uniform); Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (federal minimum wage laws apply to religious foundation); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (IRS may deny tax exempt status to a university that prohibits interracial dating and marriage because of the university's sincere religious convictions); United States v. Lee, 455 U.S. 252 (1982) (Amish must contribute to Social Security funds, despite sincere religious beliefs).

108. 450 U.S. 707, 720 (1981).

109. *Id.* at 723.

110. *Id.* at 720.

111. *Id.* at 727.

112. 455 U.S. 252, 263 (1982) (concurring).

113. *Id.*

cases, including *Wisconsin v. Yoder*,[114] were "unconvincing."[115]

Yoder and other cases in which neutral laws have been declared unconstitutional are a threat to the Court's newly-minted construction of the free exercise clause. Fully aware of the inconsistency between these cases and his absolutist thesis, Justice Scalia practices a form of denial. These cases were not really free exercise cases at all, he claims. They were really "hybrids," in which two or more fundamental constitutional rights trumped asserted governmental interests.[116] In his words, "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action . . . involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . ."[117]

Turning to the peyote case, Justice Scalia's opinion holds that *Smith II* "does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right."[118] This conclusion is offered without analysis. There is no consideration of the possibility that the sacramental ceremonies—including the ritual ingestion of peyote—might also be protected by rights of association or rights of religious expression.

Even apart from the possibility that the peyote case could be categorized as a "hybrid" case as persuasively as *Cantwell v. Connecticut*,[119] *West Virginia Board of Education v.*

114. 406 U.S. 205 (1972).

115. *Id.* at 263 n.3.

116. *Smith II*, 110 S. Ct. at 1601.

117. *Id.* at 1602.

118. *Id.*

119. 310 U.S. 296 (1940). *Cantwell* was decided primarily on the basis of principles that are distinctively rooted in the first amendment's protections of free speech. The fact that the speaker's words were religious in character is almost an irrelevancy. He could have been expressing almost any other type of provocative point of view, and the Court's analysis would have been similar.

However, *Cantwell* still does not support Justice Scalia's idea that two constitutional interests—free speech and free exercise of religion—trigger heightened scrutiny. One interest or the other would have been sufficient. Governmental infringement of either freedom needs justification. And so the Court carefully explained, "[n]o one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belong to another sect." The *Cantwell* facts demonstrate an overlap of free speech and free exercise interests; the rationale assumes that a similar judicial test will be applied to protect either interest when placed in jeopardy by

Barnette,[120] or *Yoder*, the fundamental problem with the majority's analysis is that each of these cases did articulate the test to be applied when litigants allege that superficially neutral laws interfered with religious liberty. These cases hold that a neutral law's undue burden on religious practices threaten fundamental constitutional rights,[121] and that such burdens must be persuasively justified by government as necessary to achieve governmental objectives "of the highest order."[122]

Wisconsin v. Yoder is the clearest case. Yoder, a member of the Old Order Amish, was fined because he refused to send his children, age fourteen and age fifteen, to public schools as required by the state's compulsory education law. The United States Supreme Court held that the application of this law burdened the religiously-inspired practices of Yoder. Chief Justice Burger's opinion for the Court is important for several reasons. First, in free exercise cases, the *Yoder* court held that "belief and action cannot be neatly confined in logic-tight compartments."[123] Thus, *Yoder* is one case that demonstrates that the Court did not endorse the deceptively and dangerously simple analysis of *Reynolds* and *Gobitis*—as interpreted by Justice

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governmental action. The case does not establish some sort of categorical distinction between speech and conduct, between belief and action or between religious expression cases and religious practice cases. For an argument that some free exercise issues are better treated as expression cases, see Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

120. 319 U.S. 624 (1943). *Barnette* did rely on principles of expressive liberty to overrule *Gobitis'* interpretation of religious liberty. Nevertheless, the fact that the Court felt that it was necessary to overrule *Gobitis* demonstrates that *Barnette* speaks to issues of free exercise of religion as well as to compelled speech. Moreover, in *Barnette*, Justice Jackson cited historic cases of superficially neutral laws that coerced affirmations of respect to secular, but governmental authority. The historic examples were, Justice Jackson noted, "well known to the framers of the Bill of Rights." *Id.* at 633 n.13.

> Early Christians were frequently persecuted for their refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority. The story of William Tell's sentence to shoot an apple off his son's head for refusal to salute a bailiff's hat is an ancient one. . . . The Quakers, William Penn included, suffered punishment rather than uncover their heads in deference to any civil authority.

Id.

121. *See Cantwell*, 310 U.S. at 311; *Barnette*, 319 U.S. at 638; *Yoder*, 406 U.S. at 214.

122. *Yoder*, 406 U.S. at 230-31. *See also Cantwell*, 310 U.S. at 311; *Barnette*, 319 U.S. at 639.

123. *Yoder*, 406 U.S. at 220.

Scalia.[124] Moreover, Chief Justice Burger's opinion denied that the neutrality of Wisconsin's compulsory education law was decisive: Such regulations "may offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."[125]

> [O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability . . . .[126]

The Court did not rely on additional constitutional interests—parental rights, for example—as special justification for close scrutiny. The Supreme Court conceded that the state's interests in public education were important. Still, in *Yoder*, the Court held that a more focused assessment of the state's interest showed that an exemption for the Amish was appropriate, if the principle of religious liberty was to be secured.[127]

124. *See, e.g.*, Bowen v. Roy, 476 U.S. 693 (1986) (five Justices state that the federal government could not compel conscientious religious objectors to provide such social security numbers for their children); *Smith II*, 110 S. Ct. at 1608 ("Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must therefore be at least presumptively protected by the Free Exercise Clause").

125. *Yoder*, 406 U.S. at 219-20.

126. *Id.* (citations omitted).

127. Despite Justice Scalia's deceptive account of a century of free exercise jurisprudence, lower federal courts decided cases based on *Sherbert-Yoder* principles. *See, e.g.*, Frank v. State, 604 P.2d 1068 (Alaska 1979) (conviction of Athabascan Indian for shooting a moose out of season was reversed, because the hunt and kill was an essential part of a religious funeral celebration, "the most important institution in Athabascan life"); Quaring v. Peterson, 728 F.2d 1121 (8th Cir. 1984) (Nebraska statute requiring a photograph on a driver's license was unconstitutional as applied to a conscientious religious objector to graven images); Callahan v. Woods, 736 F.2d 1269 (9th Cir. 1984) (the federal requirement that welfare applicants obtain Social Security numbers was unconstitutional as applied to a fundamentalist Christian who believed that such numbers were part of the Antichrist's plan to control mankind for Satan).

IV. The Balance of Anarchy, Politics, and Prejudice

After *Smith II*, government need not provide any explanation for a refusal to grant exemptions.[128] Any "conceivable" rationale will be strong enough to withstand a claim premised on interference with religious liberty.[129] In essence, except for laws specifically directed to religious practices, *Smith II* demotes previously protected free exercise rights from the categorical status of "fundamental rights" to the lesser level of "liberty interests."[130]

As Justice Scalia observed, the text of the free exercise clause is ambiguous: It neither compels nor forbids a judicial interpretation that mandates exemptions from generally applicable laws.[131] To justify its revised view that exemptions are not mandated—ever—by the clause, the Court attacked the compelling interest test of *Sherbert*. First, judicial hostility to a government's refusal to grant exemptions—embodied in a close scrutiny test—would lead to a constitutionalized "anarchy" in which the individual "by virtue of his beliefs, [would] '. . . become a law unto himself.'"[132] Second, close judicial scrutiny requires balancing of competing interests. This balancing undermines religious liberty by forcing court's to evaluate the "centrality" of a religious practice to a specified religious doctrine.[133] The inevitable consequence would be judicial discrimination against nontraditional and unpopular religions.[134]

128. *Historical Understanding, supra* note 5, at 1419:

> Both the exemption and no-exemption views . . . insist on neutral, 'secular' laws and governmental practices, but the no-exemption view makes that judgment exclusively according to the perspective of the government, while the exemption view takes the perspective of the religious claimant, as well as the countervailing interests of the government, into account.

129. *Smith II*, 110 S. Ct. at 1617-18 (Blackmun, J., dissenting). Justice Blackmun points out that in previous cases challenging neutral laws which burdened free exercise, the state was required to produce specific evidence to support its refusal to allow a religious exception. None was demanded of Oregon in *Smith II*, and, as noted by Justice Blackmun, none existed.

130. *Cf.* West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (overruling precedents that treated liberty of contract as fundamental, the Court held that the individual right to make contracts was only one component of all liberty interests to be secured from "arbitrary restraint").

131. *Smith II*, 110 S. Ct. at 1599. For a discussion of historical evidence respecting the original understanding of the free exercise principle, see *infra* notes 216-34 and accompanying text.

132. *Smith II*, 110 S. Ct. at 1600 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879)).

133. *Id.* at 1604-06.

134. *Id.* at 1604-05.

A. The Road Not Taken: Close Scrutiny of Oregon's Refusal to Exempt Sacramental Peyote Use from Drug Laws

It was necessary for the Court to denounce a compelling interest test, and other forms of close judicial scrutiny.[135] The only alternative to discarding the *Sherbert* test would be to find that Oregon's law was justified by overriding interests.[136] In this case, at a minimum, such a test would require Oregon to prove that the danger of peyote was real and substantial, not speculative.[137] Moreover, before *Smith II*, judicial doctrine required a sensitive case-by-case assessment of facts and circumstances[138]

135. Close judicial scrutiny usually requires that government prove that a policy is either necessary or closely tailored to state interests "of the highest order." Wisconsin v. Yoder, 406 U.S. 205, 230-31 (1972). However, the Court has varied its description of the principle that government must justify a refusal to grant exemptions from the duties to obey a neutral law to sincere religious objectors. At a minimum, however, the Court has asked that government articulate and show that overriding government objectives are at stake. *See, e.g*, Goldman v. Weinberger, 475 U.S. 503, 529-30 (1986) (O'Connor, J., dissenting) (summarizing the tests). The traditional formulation of "strict scrutiny" has usually been used in free exercise cases. A statute may "stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means." *Smith II*, 110 S. Ct. at 1615 (O'Connor, J., concurring).

136. When focusing on the value or worth of the government's objectives, the Court is deciding whether the government's purposes are of sufficient importance to "outweigh" the value of religious liberty (or whatever other fundamental right is at risk), This is the balancing component of the close scrutiny test. *See also, e.g.*, Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 330-31 (1969), *quoted in Smith II*, 110 S. Ct. at 1617 (Blackmun, J., dissenting):

> The purpose of almost any law can be traced back to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue. To measure an individual interest directly against one of these rarified values inevitably makes the individual interest appear the less significant.

137. *Smith II*, 110 S. Ct. at 1617 (Blackmun, J., dissenting) (government may not "rely on mere speculation about potential harms," but must present "evidentiary support for a refusal to allow a religious exception.") *See also, e.g.*, Thomas v. Review Board of Indiana Employment Security, 450 U.S. 707, 719 (1981) (the state failed to justify its refusal to allow a religious exemption when it failed to present "evidence in the record"); *Yoder*, 406 U.S. at 224-29 (rejecting the state's justifications as speculative and unsupported by evidence in the record); Sherbert v. Verner, 374 U.S. 398, 407 (1963) ("there is no proof whatever to warrant such fears . . . as those which the [State] now advance[s]").

138. *Smith II*, 110 S. Ct. at 1611 (O'Connor, J., concurring) ("[O]ur role as judges [is] to decide each case on its individual merits. . . . [T]he First Amendment . . . requires a case-by-case determination of the question, sensitive to the facts of each particular claim.").

to assess the need to refuse exemptions.[139] If the Court had followed its own pronouncements in free exercise cases decided prior to *Smith II*, it would have carefully examined the governmental interests that were at stake in the peyote case.

At the outset of the *Smith* litigation, Oregon courts had not authoritatively decided whether their law prohibited sacramental peyote use.[140] Oregon had not prosecuted the two drug counselors, and the state had never undertaken "significant enforcement efforts" against members of the Native American Church for peyote use.[141] It is difficult to conclude that Oregon's laws were necessary or even useful to achieve interests of importance, when Oregon itself was uncertain whether its laws prohibited the use of peyote in religious ceremony.

Justice Blackmun's dissent is the only opinion in *Smith II* to examine the particulars of sacramental peyote use by the Native American Church. Justice Scalia's opinion ignores all aspects of the practice, because the new deferential test requires no governmental justification of superficially neutral laws. Justice O'Connor's opinion defends close scrutiny in the abstract, but finds that the state's general interests in drug prohibitions to be sufficient.

Justice Blackmun attacks the common prejudice, which assumes that a nontraditional church's claim for a religious exemption is a pretext for evading drug laws. "Not only does the Church's doctrine forbid nonreligious use of peyote; it also generally advocates self-reliance, familial responsibility, and ab-

139. After concluding—or assuming—that the interest is sufficiently worthy, the courts carefully examine whether the specific policy and the refusal to grant exemptions are effective, essential or overbroad. If not, if there are effective alternatives, or if the impact of the law is not "narrowly tailored," a close scrutiny test will invalidate the deficient policy. *Smith II*, 110 S. Ct. at 1608-09 (O'Connor, J., concurring).

In dissent, Justice Blackmun urged "it is important to articulate in precise terms the state interest involved. It is not the State's broad interest in fighting the critical 'war on drugs' that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote. *See also, e.g.*, Bowen v. Roy, 476 U.S. 693, 728 (1986) (O'Connor, J., concurring in part and dissenting in part) (government must show that "unbending application of its regulation . . . 'is essential to accomplish an overriding governmental interest'") (quoting United States v. Lee, 455 U.S., at 257-58); *Yoder*, 406 U.S. at 221 (In free exercise cases, courts "must searchingly examine [government] interests . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exception").

140. *Smith II*, 110 S. Ct. at 1598; Employment Div. v. Smith, 485 U.S. 660, 673-74 (1988) (*Smith I*).

141. *Smith II*, 110 S. Ct. at 1617 (Blackmun, J., dissenting).

stinence from alcohol."[142] Justice Blackmun concluded that peyote use could not be compared to the more familiar and frightening drug abuse in American society: "Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual code exemplifies values that Oregon's drug laws are presumably intended to foster."[143] Rates of drug use and alcoholism among Indian members of the Native American Church had dropped.[144] If fighting drug abuse is the "compelling," "important," or "overriding" objective, the practices of the Church, including sacramental peyote use, produced the desired results.

A second prejudice rests on the assumption that "a drug is a drug." More precisely, a general prohibition rests on fear that one hallucinogenic drug is no different than any other dangerous drug. Justice Blackmun noted Oregon offered no evidence that the religious use of peyote was harmful.[145] Unlike other unlawful drugs, "[t]he use of peyote is, to some degree, self-limiting. The peyote plant is extremely bitter, and eating it is an unpleasant experience, which would tend to discourage casual or recreational use."[146] Justice Blackmun also pointed out that "[t]here

142. *Id.* at 1619 (Blackmun, J., dissenting). *See also* Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1464 (D.C. Cir. 1989) (the Native American Church "for all purposes other than the special, stylized ceremony, reinforced the state's prohibition"); People v. Woody, 61 Cal. 2d 716, 721-22 n.3, 394 P.2d 813, 818 n.3, 40 Cal. Rptr. 69, 74 n.3 (1964) ("[M]ost anthropological authorities hold Peyotism to be a positive, rather than negative, force in the lives of its adherents. . . . [T]he church forbids the use of alcohol").

143. "The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs. The Native American Church's internal restrictions on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns." *Smith II*, 110 S. Ct. at 1618 (Blackmun, J., dissenting). *See also id.* at 1618-19; *Olsen*, 878 F.2d at 1464, 1467 (citing findings of the Drug Enforcement Administration that "use of peyote [by church members] outside the ritual is sacrilegious" and that "the Native American Church's use of peyote is isolated to specific ceremonial occasions"); *Woody*, 61 Cal. 2d at 721, 394 P.2d at 817 ("to use peyote for nonreligious purposes is sacrilegious").

144. *Smith II*, 110 S. Ct. at 1619-20 (Blackmun, J., dissenting).

145. *Id.* at 1618 n.4 (Blackmun, J., dissenting) (Oregon's inability to demonstrate the harm of peyote use or the need to refuse a sacramental peyote exemption was "not surprising, [because] the State never asserted this health and safety interest before the Oregon courts").

146. *Id.* at 1619 n.7 (Blackmun, J., dissenting). *See also* State v. Whittingham, 19 Ariz. App. 27, 30, 504 P.2d 950, 953 (1973) ("peyote can cause vomiting by reason of its bitter taste"); E. ANDERSON, PEYOTE: THE DIVINE CACTUS 161 (1980) ("[E]ating of peyote usually is a difficult ordeal. . . . Repeated use is likely . . . only if one is a serious researcher or is devoutly involved in taking peyote as part of a religious

is . . . practically no illegal traffic in peyote."[147] In summary, "peyote simply is not a popular drug; its distribution for use in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country." Apparently, for all of these reasons, twenty-three states and the federal government exempt sacramental peyote use from drug prohibitions.[148] In light of the choices made by other states, who presumably would feel just as compelled to fight drug abuse, it is difficult to conclude that a total, absolute, and unyielding ban of sacramental peyote use has overriding importance.

A persistent worry is that one religious exemption will lead to more. "Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe."[149] Justice Scalia exploits this fear by listing the kinds of governmental practices that might be imperiled if courts granted too many free exercise exemptions.[150] Justice Blackmun responded sensibly that exemptions for sacramental peyote use are as old as the attempts to suppress the supposedly "heathenish" practice. The exemptions that have been granted did not lead to other religious exemptions for other, more dangerous drug practices. In light of these facts, "[t]he State's apprehension of a flood of other religious claims is purely speculative."[151] There is little doubt that in many other

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ceremony"); Slotkin, *The Peyote Way*, in TEACHINGS FROM THE AMERICAN FAITH at 98 (D. Tedlock & B. Tedlock eds. 1975) ("[M]any find [peyote] bitter, inducing indigestion or nausea").

147. *Smith II*, 110 S. Ct. at 1620. *See also Olsen*, 878 F.2d at 1463, 1467 (DEA reports that total amount of peyote seized between 1980 and 1987 was 19.4 pounds; the total amount of marijuana seized during the same period was over 15 million pounds).

148. *Smith II*, 110 S. Ct. at 1618 n.5 (Blackmun, J., dissenting). *See also* 21 C.F.R. § 1307.31 (1989) ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration."); *Olsen*, 878 F.2d at 1463-64 (explaining DEA's rationale for the exception). *See also Whittingham*, 19 Ariz. App. at 30, 504 P.2d at 953 ("[T]he State failed to prove that the quantities of peyote used in the sacraments of the Native American Church are sufficiently harmful to the health and welfare of the participants so as to permit a legitimate intrusion under the State's police power"); *Woody*, 61 Cal. 2d at 722-23, 725, 394 P.2d at 818, 820 (California was unable to justify ban against sacramental peyote use when "as the Attorney General . . . admits, the opinion of scientists and other experts is 'that peyote . . . works no permanent deleterious injury to the Indian'").

149. Lupu, *supra* note 5, at 947.

150. *Smith II*, 110 S. Ct. at 1605-06.

151. *Id.* at 1620 (Blackmun, J., dissenting). As Justice Blackmun points out, courts

circumstances, typical government strategies to eradicate the plague of drugs could easily override the claims of religious sects. A decision in favor of sacramental peyote use could have been distinguished from use of heroin, cocaine, and the other more prevalent dangers to the fabric of society, as easily and as sensibly as sacramental use of wine could have been exempted during prohibition.[152]

A related suspicion is that aspiring lawbreakers will use religion as a pretext for criminal conduct. However, proof of sincere religious objection is an essential element for any successful free exercise claim.[153] "[J]udging credibility is a staple of the adju-

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committed to the principle that governmental interference with free exercise requires close and careful scrutiny have not had difficulty in drug cases. Many religious sects have raised free exercise claims regarding drug use. Justice Blackmun reports that no reported case, except those involving claims of religious peyote use, resulted in a victory for the religiously-inspired claimant. *See, e.g.*, Olsen v. Iowa, 808 F.2d 652 (8th Cir. 1986) (marijuana use by Ethiopian Zion Coptic Church); United States v. Rush, 738 F.2d 497 (1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985) (same); United States v. Middleton, 690 F.2d 820 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983) (same); United States v. Hudson, 431 F.2d 468 (5th Cir. 1970), *cert. denied*, 400 U.S. 1011 (1971) (marijuana and heroin use by Moslems); Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969) (marijuana use by Hindu); Commonwealth v. Nissenbaum, 404 Mass. 575, 536 N.E.2d 592 (1989) (marijuana use by Ethiopian Zion Coptic Church); State v. Blake, 695 P.2d 336 (Ha. App. 1985) (marijuana use in practice of Hindu Tantrism); Whyte v. United States, 471 A.2d 1018 (D. C. App. 1984) (marijuana use by Rastafarian); State v. Rocheleau, 142 Vt. 61, 451 A.2d 1144 (1982) (marijuana use by Tantric Buddhist); State v. Brashear, 92 N.M. 622, 593 P.2d 63 (1979) (marijuana use by nondenominational Christian); State v. Randall, 540 S.W.2d 156 (Mo. App. 1976) (marijuana, LSD, and hashish use by Aquarian Brotherhood Church). *See* Annotation, *Free Exercise of Religion as Defense to Prosecution for Narcotic or Psychedelic Drug Offense*, 35 A.L.R. 3D 939 (1971 & Supp. 1989).

152. Pepper, *supra* note 5, at 327-28 (" [O]ne can attempt to distinguish between situations [like Lee] in which 'strategic behavior' is likely to occur and those [like Yoder] in which it is less likely").

153. On this point, Oregon never disputed neither the sincerity of the Native American Church nor the drug counselors who initiated the Smith litigation. The Church believes that "the peyote plant embodies their deity, and eating it is an act of worship and communion. Without peyote, they could not enact the essential ritual of their religion." *Smith II*, 110 S. Ct. at 1622 (Blackmun, J., dissenting) (quoting Brief for Association on American Indian Affairs, et al., at Amici Curiae 5-6). The Brief states, in relevant part:

> To the members, peyote is consecrated with powers to heal body, mind and spirit. It is a teacher; it teaches the way to spiritual life through living in harmony and balance with the forces of the Creation. The rituals are an integral part of the life process. They embody a form of worship in which the sacrament Peyote is the means for communicating with the Great Spirit.

Brief at Amici Curiae 5-6.

dicatory and administrative processes, and there is no reason why the burden of proof on [the sincerity] issue ought not to be on the claimant."[154] Also, there is no reason why the threshold requirement of sincerity will not suffice to avoid most of the hypothetical horrors listed by Justice Scalia.[155]

Congress erected still another major obstacle to Oregon's claim of special need to refuse exemptions. The American Indian Religious Freedom Act (AIRFA) provides:

> [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.[156]

Because Justice Scalia addresses the problems of close scrutiny in all free exercise cases, the majority avoids the specific facts and circumstances of *Smith II*, as well as the significance of the AIRFA. The majority does not consider the fact that prosecution necessarily forces Native Americans "to migrate to some other and more tolerant region."[157] "This potentially devastating impact must be viewed in light of the federal policy—reached in reaction to many years of religious persecution and intolerance—of protecting the religious freedom of Native Americans."[158] At a minimum, the federal legislation suggests that judicial scrutiny should be sensitive to the Native American religions and cultures[159] and that Oregon's interest should be discounted. For all these reasons, if judicial scrutiny had been truly close, it is highly unlikely that Oregon could have proved that a refusal to exempt sacramental peyote use served paramount interests.

154. Pepper, *supra* note 5, at 327-28.

155. *Smith II*, 110 S. Ct. at 1613 (O'Connor, J., concurring): "The Court's parade of horribles . . . not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite; that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests."

156. Pub. L. No. 95-341, 92 Stat. 469, 42 U.S.C. § 1996 (1982).

157. Wisconsin v. Yoder, 406 U.S. 205, 218 (1972).

158. *Smith II*, 110 S. Ct. at 1622 (Blackmun, J., dissenting).

159. *See, e.g.*, Note, *The First Amendment and the American Indian Religious Freedom Act: An Approach to Protecting the Native American Religion*, 71 IOWA L. REV. 869 (1986) (the *Yoder* test must be integrated with the policies of the AIRFA).

B. Close Scrutiny and the Rule of Law

Nothing in Justice Scalia's opinion suggests that Oregon's law might have passed a close scrutiny test. As a result, the majority opinion cannot be viewed solely as an ad hoc sacrifice of Native Americans' religious liberty to the war on drugs. The doctrine of the case is broader, and more dangerous. In the opinion of the Court, any test that demands evidence of justification from government is a menace. Indeed, argues Justice Scalia, at stake in the peyote case is the primacy of law over individual conscience: "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself," . . . contradicts both constitutional tradition and common sense."[160] In a sense, Justice Scalia's opinion is an essay on the symbolic value of superficially neutral law. The Court knows better than to cite symbolism as a meaningful governmental interest, if a more particularized assessment fails to show a justification. "[A] government interest in 'symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs,'. . . cannot suffice to abrogate the constitutional rights of individuals."[161]

Of course, in Justice Scalia's view, more than symbolism is at stake. Justice Scalia fears that generous protection of religious liberty will subordinate law to the will of some individuals. He knows that logic and consistency require that a close scrutiny test must be "applied across the board, to all actions thought to be religiously commanded" if the test is to resemble the rigorous scrutiny required in race discrimination or free speech cases. Justice Scalia fears consistency and rigor. His predictions border on the apocalyptic. "Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them." America is in greater danger, Justice Scalia argues, "precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference.' . . . and precisely because we value and protect . . . religious divergence[.]"[162]

160. *Smith II*, 110 S. Ct. at 1603 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

161. *Id.* at 1617 (Blackmun, J., dissenting) (quoting Treasury Employees v. Von Raab, 109 S. Ct. 1384, 1401 (1989) (Scalia, J., dissenting)).

162. *Id.* at 1605 (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)).

America's traditions of liberty, tolerance, and diversity may seem to prove why a generous free exercise protection is appropriate. In Justice Scalia's logic, these traditions have the opposite effect. A diverse republic, Justice Scalia holds, "cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[163] Justice Scalia concludes his predictions of anarchy by listing the policies that might be challenged, if the free exercise principle is guarded with a close scrutiny test:

> The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind — ranging from compulsory military service, . . . to the payment of taxes, . . . to health and safety regulation such as manslaughter and child neglect laws, . . . compulsory vaccination laws, . . . drug laws, . . . and traffic laws, . . . to social welfare legislation such as minimum wage laws, . . . child labor laws, . . . animal cruelty laws, . . . environmental protection laws, . . . and laws providing for equality of opportunity for the races. . . . The First Amendment's protection of religious liberty does not require this.[164]

Of course, many of these laws have been challenged, but not successfully.[165] It is not necessary to distort the Court's precedents to see that the capacity of government has never been threatened. To advocate a measure of freedom for religious practice—a qualified immunity—is not to advocate anarchy. Contrary to the shrill rhetoric of Justice Scalia, the Constitution's qualified immunities for religious practice have not threatened the social fabric or the integrity of law enforcement. Truly important state policies have been far less vulnerable than the essential practices of unpopular religious sects.[166] Justice Scalia's rationale for discarding the close scrutiny test, except in the unemployment benefits cases, relies on the cases in which judges were sympathetic to governmental interests and skeptical of the claims asserted in the name of religious freedom. The Court's claim that close judicial scrutiny is a menace to the rule of law

163. *Id.* at 1605.
164. *Id.* at 1605-06.
165. *Id.* at 1602-03.
166. See *supra* notes 51-106 and accompanying text.

sits uneasily with the claim that it has rarely been employed to strike down neutral laws.

Justice Scalia also objects to close scrutiny in free exercise cases because it is not an appropriate standard to review government's refusal to grant exemptions. Close scrutiny produces equality of treatment in race and gender cases, and an unrestricted flow of expression in press, speech, assembly, or petition cases. These benefits, Justice Scalia argues, are "constitutional norms." However, when close scrutiny is used in free exercise cases, the test produces "a private right to ignore generally applicable laws" which Justice Scalia denounces as a "constitutional anomaly."[167] In response, Justice O'Connor appreciates the differences among constitutional fundamental rights. Logically, equal treatment may be the norm produced by enforcement of one constitutional provision, while an exception that respects a constitutionally-sanctioned privacy is the result of another provision's enforcement.[168]

However, Justice Scalia's point may offer a clue as to why his list of defeated free exercise claims does not really impeach the Court's past doctrine. To be sure, strict scrutiny has never been "strict in theory, fatal in fact," in free exercise cases. The governmental interests accepted as "compelling" in free exercise cases seem less important than almost all of the interests that have been rejected as justifications for race discrimination or censorship. And yet, the cases in which the Supreme Court rejected free exercise claims involved important governmental interests: national defense, taxation, education, regulation of marriage and family, protection against exploitation of children.

Perhaps one reason similar interests have never been accepted as justifications when racial equality or expressive liberty were at stake has little to do with the "worth" of the interests; it is just not logically possible to figure out how excluding a black person or punishing an unpopular idea is truly "necessary" for promoting the identified value, except by embracing the false ideologies of racism and thought control. Disparity is more difficult to justify as effective, essential, and narrowly tailored, while consistent enforcement is always well-directed toward avoidance of a real danger, whether it is failure to pay taxes, a plague of drug use, or some other practice that might spread like a fad, with the possibility of a pretextual religious immunity. In a literal sense, an exemption is always possible; a refusal to

167. *Smith II*, 110 S. Ct. at 1604.
168. *Id.* at 1612 (O'Connor, J., concurring).

exempt is never necessary. In the more constructive and practical sense of constitutional "necessity," equal enforcement of the law is self-justifying, if the governmental objective is important enough.

C. Equality of Right and the Uncertainties of Judicial Balancing

The most fundamental concept of neutrality requires that a healthy, generous liberty exist for all, or it will surely exist for no one.[169] This concept links the constitutional themes of equality and liberty. Referring to the declarations of rights in state constitutions and the proposed bill of rights before the House, Madison commented the declarations do "no more than state the perfect equality of mankind."[170] One strategy is to define principles of liberty with sufficient breadth and generality so that the unpopular, the dissident, and the disfavored enjoy the freedom that the majority can guarantee for itself. In this respect, *Smith II* is an echo of another case, which also illustrates Justice Scalia's uses—or misuses—of the past. In a footnote in a plurality opinion in *Michael H. v. Gerald D.*,[171] Justice Scalia claimed that, when defining the scope and significance of a fundamental constitutional right, the Court must "refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[172] Distrustful of a constitutional methodology that allows judges to defend expansively defined traditions, Justice Scalia argued:

> Because [general] traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views. [Although] having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law.[173]

169. *See, e.g.*, Address by Abraham Lincoln at Edwardsville, Ill. (Sept. 11, 1858), *reprinted in* A. LINCOLN: SPEECHES AND WRITINGS 1832-1858, at 585 (D. Fehrenbacher ed. 1989).

170. Address by James Madison in the U.S. House of Representatives (June 8, 1789), *reprinted in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON at 210, 220 (M. Meyers ed. 1973) [hereinafter MIND OF THE FOUNDER]. *See also* FIRST FREEDOMS, *supra* note 5, at 199.

171. 109 S. Ct. 2333 (1989).

172. *Id.* at 2344-45 n.6.

173. *Id.* Justices O'Connor and Kennedy joined in a special concurring opinion to reject the observations of Justice Scalia's footnote 6 in *Michael H. Id.* at 2346-47.

Of course, in this case, Justice Scalia's method of examining a form of "specific" tradition—the traditions embodied in precedent—left Justice Scalia free to dictate a new vision of religious liberty, restricted not by the particular facts of the case, nor by the text of the Constitution, nor by original understanding, nor by previously announced jurisprudence. In reply to Justice Scalia's "specific tradition" test, Justice Brennan described the decidedly unneutral effect of allowing justices to define constitutional principle based on "society's views" of how rights of privacy are exercised.[174] Justice Brennan argued that the use of tradition as a guide to constitutional interpretation requires that the tradition be defined broadly enough to encompass a respect for diversity and a tolerance for the unusual:

> We are not an assimilative, homogenous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncracies. . . . In a community such as ours, "liberty" must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty.[175]

The peyote case misconstrues the problem of equality by distorting the concept of neutrality to rationalize the bias of majorities in free exercise cases. In some past cases, the free exercise clause

> has functioned primarily to protect what must be counted as discrete and insular minorities, such as the Amish, Seventh Day Adventists, and Jehovah's Witnesses. Whatever the original conception of the free exercise clause, its function during essentially all of its effective life has been one akin to the Equal Protection Clause.[176]

And yet, because the doctrine was not tied to purposeful discrimination, the clause operated differently. At its best, the

174. *Id.* at 2349-51 (Brennan, J., dissenting).
175. *Id.* at 2351.
176. J. ELY, DEMOCRACY AND DISTRUST 100 (1980).

clause prevented government from imposing undue burdens on religious practices or beliefs "whether the burden is imposed directly . . . or indirectly through laws that . . . make abandonment of one's own religion . . . the price of an equal place in the civil community."[177] This experience shows that only a broad and general definition of the free exercise clause serves true equality. After *Smith II*, expressive liberty and intellectual liberty are still protected, but cultural and religious diversity have been relegated to the tender mercies of a political process that is not trained or committed to respect the values, the beliefs or even the humanity of unpopular minorities.

To be sure, as Justice Scalia argues, judicial balancing can also threaten religious liberty. In *Smith II*, the Court rejects the idea that close scrutiny is appropriate "only when the conduct prohibited is 'central' to the individual's religion." The danger is that the court's balancing will involve judgments about the rationality and worthiness of religious doctrine. Doubtless, "it is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the Free Exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field."[178]

The majority discounts the possibility that a threshold requirement before use of a balancing test need not ask whether a particular practice is "central" to a particular faith. Justice Scalia is correct to point out that such inquiries into the "centrality" of a practice could often carry risks of theological censorship. Of course, it must quickly be added that a judicial abdication runs such risks also—and Justice Scalia admits that less favored religious practices are likely to be the victims.[179]

The centrality of a particular religious doctrine need not be the focus for a balancing analysis. Instead, the key is determining whether the degree of governmental interference rises to the level of a "prohibition" of a religiously-inspired practice. Alterna-

177. *Smith II*, 110 S. Ct. at 1610 (O'Connor, J., concurring).

178. *Id.* at 1604. On this issue, the majority's remarks in *Smith II* are an interesting endorsement of expressive liberty doctrines that are inconsistent with the Court's recent experiments to "value" speech prior to deciding whether government regulation violates the first amendment. *See, e.g.*, Young v. American Mini-Theaters, 427 U.S. 50 (1976) ("[T]here is surely a less vital interest in the uninhibited exhibition of material . . . on the borderline between pornography and artistic expression"); F.C.C. v. Pacifica Found., 438 U.S. 726 (1978) (content of "vulgar," "offensive," and "shocking" speech "is not entitled to absolute constitutional protection under all circumstances").

179. *Smith II*, 110 S. Ct. at 1606.

tively, the issue is whether a law imposes an "undue burden" on the exercise of religion.[180] As Justice O'Connor has pointed out in other contexts, this inquiry is a familiar one in a wide variety of cases.[181] If a religious practice has not been stopped—or banned—it is reasonable to say that the constitutional value of religious liberty has not been implicated. For example, sabbitarians are not prevented or stopped from honoring their day of rest on Saturday, when a law closes business on Sunday. True, they suffer an economic disadvantage. However, this consequence is not even a penalty, if the closing law is not devised to inconvenience those with a different day of rest. Likewise, fundamentalist Christians can and do object to some compulsory education strategies that expose their children to various ideas and concepts which they believe to be sinful and dangerous. Without doubting the painful nature of such a conflict, it is appropriate to recognize that a free society cannot guarantee that people will not be exposed to ideas they might find offensive. Indeed, government must often guarantee that such exposure will occur, if it is to remain faithful both to the dictates of the first amendment and to the central mission of educating the young.

Justice Scalia's attack on a judicial test that is tied to the centrality or importance of religious doctrine echoes the familiar objections to balancing as a method of defining constitutional right. Judicial balancing often allows "utmost latitude for eva-

180. *Compare id.* at 1611 (O'Connor, J., concurring) ("A neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, more burdensome than neutral civil statute placing legitimate conditions on the award of a state benefit") *with* Bowen v. Roy, 476 U.S. 693 (1986) (opinion of Burger, C.J., joined by Powell and Rehnquist, J.J.) (without proof of religiously discriminatory intent, "the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest."). *See also, e.g.*, McConnell & Posner, *supra* note 5, at 1 (an economic definition of governmental neutrality respecting religion demonstrates that the denial of unemployment compensation is not an undue burden on religious practice).

181. *See, e.g.*, Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3063 (1989) (O'Connor, J., concurring) ("a regulation imposed on a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion"); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 765-67 (1986) (O'Connor, J., dissenting) (undue burden on abortion choice must be established before heightened scrutiny is appropriate); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (O'Connor, J., dissenting) (same). *See also* University of Pennsylvania v. EEOC, 110 S. Ct. 577 (1990) (academic freedom is not violated by enforcement of federal law, when a university is unable to show direct burden, substantial burden, or interference with content of academic expression).

sion," and thus lacks the quality of a rule of law.[182] It often fails to protect liberty, when protection is most needed.[183] In free exercise cases, the test is often too responsive to preconceptions—prejudices—about the religious doctrine at stake.[184]

For example, *Yoder* has been criticized because its description of the Amish order and its role in American society reflects cultural bias. For example, in *Yoder*, the Justices displayed an obvious respect—even an affinity—for the quaint, nostalgic part of America's past exemplified by the Amish tradition. *Yoder* is one of a few successful recent free exercise lawsuits that make doctrine look like a series of political compromises animated by subjective judgments of the claimant's religion.[185] The fact that a focused and sensitive analysis was missing when similar free exercise claims were rejected is troubling evidence that federal courts give some religions and cultures one type of treatment, while other sects and denominations are "preferred." The history of these decisions look more like "prosecutorial discretion" than articulation of neutral constitutional principles.[186]

Lyng v. Northwest Cemetery Protection Association[187] was both an example of judicial insensitivity and a portent of judicial abdication. In *Lyng*, the Supreme Court did not give close scrutiny to a governmental decision to construct logging roads over Indian burial grounds. The case can be distinguished. The Court pointed out that the challenged action by the government did not prohibit worship and it did not coerce individuals into abandoning their religious beliefs. The building of the roads also did not deny any person the benefits, rights and privileges

182. *Compare, e.g.*, THE FEDERALIST No. 84, at 580 (A. Hamilton) (J. Cooke ed. 1961) ("Who can give ['liberty of the press'] any definition which would not leave the utmost latitude for evasion?") *with* J. ELY, DEMOCRACY AND DISTRUST 231 n.14 (1980) ("In any First Amendment situation, for that matter in any situation involving our liberties, it is desirable for courts to try to develop predictable and discretion-reining rules").

183. *Compare, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (Black, J., for the Court) ("Pressing public necessity" may justify "legal restrictions which curtail the civil rights of a single racial group") *with* Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 878-79 (1960) ("The great danger of the judiciary balancing process is that in times of emergency or stress, it gives Government the power to do what it thinks necessary. . . . And laws adopted in times of dire need are often very hasty and oppressive laws").

184. *See, e.g.*, Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817 (1984).

185. *Id.* at 841-42.

186. *Id.*

187. 485 U.S. 439 (1988).

enjoyed by other citizens by penalizing their religious activities. The Court characterized the building of roads through Indian burial grounds, which caused the destruction of those sacred places, as an "incidental interference with an individual's spiritual activities."[188] Because the Court determined that the building of the roads did not coerce individuals into abandoning their beliefs, government had not "prohibited" the free exercise of religion and no compelling governmental interest was necessary.[189] *Lyng* does not logically require the result in the Oregon peyote case.

Nevertheless, the harsh and insensitive spirit of the two decisions are of one piece. *Lyng* is only one in a long line of cases in which there has been a different standard applied by the Court when considering practices and beliefs of the Native American Church.[190] The Court's careful and respectful assessment of the Amish tradition in *Yoder* has not inspired a sensitivity to the claims of the Native American Church.[191] Justice Scalia understands the problem, and uses it as a way of attacking the close scrutiny test: "[I]t is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands . . . or its administration of welfare programs."[192]

Of course, the court's opinion in the peyote case not only tolerates past judicial bias; it actually rationalizes the right of the political process to enforce criminal sanctions even if such laws will fall more heavily on disfavored religious sects, provided only that the laws are defined in superficially neutral terms. The peyote case leaves the means to enact well-camouflaged, but prejudicial laws in the hands of state legislatures. This, Justice

188. *Id.* at 450.

189. Lupu, *supra* note 5, at 933.

190. *See, e.g.*, Barsh, *The Illusion of Religious Freedom for Indigenous Americans*, 65 OR. L. REV. 363 (1986).

191. In contrast to the Supreme Court's approach in *Yoder*, which evaluates the interrelationship between Amish culture and religion, federal courts continue to treat Native American culture and Native American religion separately in free exercise cases involving American Indians. *See* Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1164-65 (6th Cir. 1980); Badone v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983). *See, e.g.*, Note, *The First Amendment and the American Indian Religious Freedom Act: An Approach to Protecting the Native American Religion*, 71 IOWA L. REV. 869 (1986) (the *Yoder* test must be integrated with the policies of the AIRFA).

192. *Smith II*, 110 S. Ct. at 1603-04 n.2.

Scalia admits—even proclaims—is to be preferred to close judicial scrutiny. Presumably, the only recourse would be to the equal protection clause, which would require proof of unconstitutional prosecutorial bias,[193] or intended adverse effects.[194]

Justice Scalia's response to the deficiencies of balancing is odd, to say the least. In cases involving other aspects of the first amendment, there have been at least two responses, when the Court finds balancing to be inadequate. One is to resort to a different and more categorical approach—sometimes labeled, misleadingly, an absolutist test. This is the approach of the better efforts to explain expressive liberty secured by the first amendment.[195] The other, unsatisfactory response is to complete the process of hand-wringing, and to abdicate judicial responsibility altogether. It is the latter alternative which is selected by the Court in *Smith II*.

Truly, the jurisprudence of the first amendment has not always provided generous protection for religious practices of those who are "different." Justice Scalia knows this fact, admits it, and proclaims it as a justification for *Smith II*.[196] Still, oppressions in the past show the need for care and sensitivity in the present and future. Judicial failures do not justify judicial abdication, a cure that is worse than the disease.

When a court is asked to define the dimensions of human freedom, a sensitivity to the plight of the victims of America's past and present is a duty imposed by history,[197] not a cold and impersonal logic. As Felix S. Cohen wrote:

> It is a pity that so many Americans today think of the Indian as a romantic or comic figure in American history without contemporary significance. In fact, the Indian plays much the same role in our American society that the Jews played in Germany. Like the

193. Yick Wo v. Hopkins, 118 U.S. 356 (1886) (proof that laws were administered and enforced "so exclusively against a particular class . . . with a mind so unequal and oppressive" establishes "a practical denial by State of [equal] protection of the laws.").

194. Hunter v. Underwood, 471 U.S. 222 (1985) ("where both impermissible . . . motivation and . . . discriminatory impact are demonstrated," a superficially neutral law violates equal protection).

195. See *supra* notes 182-83.

196. *Smith II*, 110 S. Ct. at 1605-06.

197. *Cf.* Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (Blackmun, J., dissenting) (title VII challenge to Alaskan cannery's alleged employment discrimination against Eskimo and Filipino workers) ("One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was").

> miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians . . . reflects the rise and fall in our democratic faith.[198]

The results of politics—all too often and all too tragically—have been laws that cannot be realistically viewed as "neutral." "The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish."[199] If truly "strict" scrutiny has never been the real test for religious freedom—and it probably never was—an immunity for the superficially neutral decisions of the political process is a formula for a democratic totalitarianism that can extend its influence to all aspects of human life, if only laws are drafted with a "chaste affection for legal formalities."[200]

V. Religious Privacy

Jefferson's famous metaphor of a "wall of separation between church and state" has provoked endless controversy.[201] Obvi-

198. Cohen, *The Erosion of Indian Rights, 1950-53*, 62 YALE L.J. 348, 390 (1953). I am indebted to my colleague, Professor Rennard Strickland, for directing me to this passage.

199. *Smith II*, 110 S. Ct. at 1613 (O'Connor, J., concurring).

200. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA at 312 (J.P. Mayer & M. Lerner eds. 1966). Tocqueville was appalled by the effects of United States policy on the culture of the Native American in 1835, even before the depredations of later years. Tocqueville's words were ironic, and yet he captures the delusions of legal formalities:

> The Spaniards let their dogs loose on the Indians as if they were wild beasts; they pillaged the New World like a city taken by storm, without discrimination or mercy; but one cannot destroy everything, and frenzy has a limit; . . . .
>
> . . . [T]he conduct of the United States Americans towards the natives was inspired by the most chaste affection for legal formalities. As long as the Indians remained in their savage state, the Americans did not interfere in their affairs and treated them as independent peoples; they did not allow their lands to be occupied unless they had been properly acquired by contract; and if by chance an Indian nation cannot live on its territory, they take them by the hand in brotherly fashion and lead them away to die far from the land of their fathers.
>
> The Spaniards, by unparalleled atrocities which brand them with indelible shame, did not succeed in exterminating the Indian race and could not even prevent them from sharing their rights; the United States Americans have attained both these results with wonderful ease, quietly, legally, and philanthropically, without spilling blood and without violating a single one of the great principles of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity.

Id. See also 1 *id.* at 368-69 (P. Bradley ed. 1945). Again, I am indebted to my colleague, Professor Rennard Strickland, for pointing this passage out to me.

201. Letter from Thomas Jefferson to Nehemiah Dodge and Others, a Committee

ously, if his language is taken literally, the churches of America are to enjoy absolute immunity. Of course, this extremity was never intended by anyone, particularly Jefferson. Nevertheless, Jefferson's metaphor is useful. It captures the sense that Americans wanted to preserve a zone of privacy for religion by minimizing the government's ability to control religious doctrine, expression, worship, and practice. The incompetence of government in matters of religious belief was to be reinforced with a parallel principle that minimized government interference with religious practice. If separation is a misleading label, perhaps privacy—religious privacy—is a better term.

The famous cases of *Meyer v. Nebraska*[202] and *Pierce v. Society of Sisters*[203] play a minor role in the peyote case. In *Smith II*, Justice Scalia uses these cases to maintain that the free exercise claim in *Yoder* was respected by the Court only because it was reinforced with an additional liberty interest. Both *Meyer* and *Pierce* are decisions that protect the broader, but less explicit "liberty" that a person may not lose without due process of law. In this regard, the cases are portents of modern privacy doctrine.[204]

At issue in *Meyer* and *Pierce* were superficially neutral laws of general applicability. In *Meyer*, a teacher was convicted for violating a Nebraska statute[205] because he taught a ten-year-old boy some Biblical stories in the German language. The instruction occurred at the parochial school operated by the Zion Evangelical Lutheran Congregation.[206] The Supreme Court of Nebraska upheld the conviction. The state court held that the statute did not conflict with the fourteenth amendment, but was a valid exercise of the police power.[207] The Supreme Court of the United States overturned the conviction and the statute as a violation of the due process clause of the fourteenth amendment. Traditions of religious freedom influenced the Court's

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of the Danbury Baptist Association (Jan. 1, 1802), *reprinted in* T. JEFFERSON, WRITINGS (M. Petersen ed. 1984).

202. 262 U.S. 390 (1923))

203. 268 U.S. 510 (1925).

204. Griswold v. Connecticut, 381 U.S. 479 (1965) (Connecticut birth control statute violates right of privacy secured by fourteenth amendment).

205. 1919 Neb. Laws ch. 249, at 1019 ("No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language.").

206. *Meyer*, 262 U.S. at 396.

207. *Id.*

description of liberty interests secured by the due process clause: "[T]he liberty guaranteed by the due process clause . . . denotes not merely freedom from bodily restraint but also the right of the individual . . . to acquire useful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of his own conscience."[208]

The Court focused on the rights of parents who sent their children for religious training and foreign language study, despite the wishes of Nebraska, which desired a homogeneous political community.[209] The Court conceded "[t]hat the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally."[210] Still, the Court held, "the individual has certain fundamental rights which must be respected."[211] The Court alluded to the writings of Plato and the practices of ancient Sparta to describe a totalitarian impulse "to submerge the individual and develop ideal citizens."[212]

> Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.[213]

The neutrality of the challenged law was of no significance. The Court did not merely require an exemption; it overturned the statute. Still, the doctrine of the case is that constitutional law must respect and foster diversity, individuality, and nonconformity. *Meyer* holds that American law must cherish these qualities, not because there will be anarchy, but because there will be liberty. Of course, the religious inspiration of the teacher, parents and children was not an explicit basis for the Court's reasoning. Still, mechanical categorization of cases by topic or label must not dominate analysis.[214]

208. *Id.* at 399 (emphasis added).
209. *Id.* at 400-01.
210. *Id.* at 401.
211. *Id.*
212. *Id.* at 401-02.
213. *Id.* at 402.
214. Though *Meyer* and *Pierce* are today more frequently analyzed as privacy cases, they can be understood as "liberty interest" cases under the fourteenth amendment. *Cf.* Cruzan v. Missouri Dep't of Health, 110 S. Ct. 2841, 2851 n.7 (1990).

Meyer, and its sequel, *Pierce*,[215] must be seen as authority for a general liberty, with roots and inspiration in the original values of the free exercise clause. These cases illuminate the close intellectual link between traditions of religious freedom and an evolving, expanding liberty. The evolving principles of individual liberty show that the free exercise clause might be better understood as a guarantee of religious privacy. Even Judge Bork agrees that, in this respect, the Constitution commands a "privatization of morality."

> The Constitution does protect defined aspects of an individual's privacy and it does privatize specified areas of moral behavior. The fourth amendment's protection of the privacy of the home from unreasonable searches is an illustration of the former, as is the first amendment's protection of the free exercise of religion of the latter.[216]

Preferring the ambiguity of text to the lessons of history, Justice Scalia does not trace the origins of the phrase "free exercise" of religion. The omission may be a tactic of convenience. After a careful review of ambiguous and often conflicting evidence, Professor Michael McConnell concludes that "the modern doctrine of free exercise exemptions is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation."[217]

The words of the first amendment were—and are—ambiguous. "[T]he reported debates [of Congress], brief though they were, cast a modicum of light on the meaning of what would become the religion clauses of the First Amendment."[218] A simple, sensible interpretation of Congress' choice of language for the religion clauses emphasizes style, not substance.

> Congress approached the subject in a somewhat hasty and absent-minded manner. To examine the two clauses . . . as a carefully worded analysis of Church-State

215. In *Pierce*, two corporations operating private schools obtained injunctive relief against Oregon's superficially neutral compulsory education law because the statute violated the fundamental rights of parents who wished to have their children attend private schools. *Pierce*, like *Meyer*, is formally tied only to the broader "liberty" of the due process clause, so that the cultural and intellectual liberty of parents would not be unduly restricted by the definition of "religion."

216. R. BORK, *supra* note 1, at 246-47 (emphasis added).

217. *See, e.g.*, *Historical Understanding*, *supra* note 5, at 1512.

218. FIRST FREEDOMS, *supra* note 5, at 199.

> relations would be to overburden them. Similarly, to see the two clauses as separate, balanced, competing or carefully worked out prohibitions designed to meet different eventualities would be to read into the minds of the actors far more than was there. . . . The [religion] clauses represented a double declaration of what Americans wanted to assert about Church and State. Congress settled on the wording of the Amendment because it probably found the phrases the most felicitous-sounding of those proposed; but any of the other formats would have served its substantive purpose equally well.[219]

Even if the outer boundaries of religious freedom were not charted, the central purpose of the first amendment is more evident. James Madison did not share the religious sentiments of his friend, Thomas Jefferson. The deeply religious Madison believed that a person's duty to God is "precedent both in order of time and degree of obligation, to the claims of Civil Society."[220]

> The Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . . It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.[221]

219. *Id.* at 216-17.

220. Madison, *Memorial and Remonstrance, reprinted in* MIND OF THE FOUNDER, *supra* note 170, at 9, *quoted in Historical Understanding, supra* note 5, at 1453.

221. *Id.* Professor McConnell argues that Madison's views illustrate the fact that constitutionally-mandated exemptions were anticipated by both the proponents and the opponents of the free exercise clause. The movement for guarantees for free exercise of religion were influenced by an "evangelistic movement," *Historical Understanding, supra* note 5, at 1438, which doubted that "government support is necessary or even useful, to religion." *Id.* at 1442. In particular, evangelicals did not accept the view that religious liberty was a method of solving a primarily political problem of "religious divisions and discord." *Id.* at 1445. Instead, religious enthusiasts feared government and sought to define "free exercise . . . in the first instance, by what matters God is concerned about, according to the conscientious belief of the individual." *Id.* at 1446. To be sure, "[p]roponents did attempt to minimize the practical consequences of . . . exemptions . . . by stoutly declaring their fealty to almost all of the laws." *Id.* at 1447. Referring to the writings of William Penn, the leader of the Pennsylvania Quaker community, and John Leland, a leader of the Virginia Baptists, Professor McConnell concludes that both anticipated that the duty to obey law would be limited—in an indefinite way—by the paramount duty to obey the dictates of God. *Id.* at 1447-48.

Thus, in direct conflict with Justice Scalia's assumption, it appears that in some respects, at least one of the framers—the principal sponsor of the amendment—advocated a broad free exercise principle so that law would not always override the individual conscience. While Americans generally agreed "with the necessity of virtue and religion for civil society," many, including Madison and the legislators of Virginia, "reasoned that if religion were to remain healthy, it had to remain free from the interfering hand of government."[222]

In this perspective, Madison's theories of religious liberty were influenced by the evangelical understanding of religious liberty.[223] Freedom for religious worship, like freedom of thought and freedom of expression, was designed to keep the minds of men unencumbered by government-proscribed orthodoxy. The point here is that it was not enough for Madison and the evangelicals to convince government to "tolerate" religion.[224] In the words of George Washington, "[i]t is now no more that toleration is spoken of, as if it was by indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights."[225] The important words are "inherent" and "natural." Rights of religious belief and practice belonged to all human beings because such rights sprang from a duty to God "precedent both in order of time and degree of obligation, to the claims of Civil Society";[226] it followed that these rights could neither be granted by government nor denied by government.

> [T]he free exercise clause . . . makes an important statement about the limited nature of governmental authority. While the particular conception of the divine is authoritative, the free exercise clause stands as a

222. FIRST FREEDOMS, *supra* note 5, at 220.

223. *Historical Understanding*, *supra* note 5, at 1446.

224. When George Mason proposed the term "toleration" for the religious liberty clause of the Virginia Bill of Rights, Madison objected on the ground that the word "toleration" implies an act of legislative grace, which in Locke's understanding it was. Madison proposed, and the Virginia assembly adopted, the broader phrase: "the full and free exercise of religion.

Historical Understanding, *supra* note 5, at 1443 (citing Hunt, *James Madison and Religious Liberty*, 1 ANN. REP. AM. HIST. A. 163, 166 (1901)).

225. *Id.* at 1443-44 (quoting 31 G. WASHINGTON, THE WRITINGS OF GEORGE WASHINGTON 93 n.65 (J. Fitzpatrick ed. 1939)).

226. Madison, *Memorial and Remonstrance*, *reprinted in* MIND OF THE FOUNDER, *supra* note 170, at 9, *quoted in Historical Understanding*, *supra* note 5, at 1453.

> recognition that such divine authority may exist and, if it exists, has a rightful claim on the allegiance of believers who happen to be American citizens . . . .[227]

Professor McConnell concludes that the framers' anticipation of exemptions[228] from the operation of ordinary laws for religious practice speaks to the essential attributes of liberty in American culture.

> If government admits that God (whomever that may be) is sovereign, then it also admits that its claims on the loyalty and obedience of the citizens is partial and instrumental. Even the mighty democratic will of the people is, in principle, subordinate to the commands of God, as heard and understood in the individual conscience. In such a nation, with such a commitment, totalitarian tyranny is a philosophical impossibility.[229]

Unfortunately, many of the practical implications of these principles were unresolved. The free exercise principle was never thought to establish an absolute immunity. The defenders of free exercise rights were searching for a limiting principle to balance individual rights against the needs of society. Madison apparently believed that the rights of free exercise should not be denied "unless under the color of religion the preservation of equal liberty and the existence of the State are manifestly endangered."[230] Madison's arguments persuaded the Virginia assembly not to adopt broader language proposed by George Mason that would have allowed legislation to protect "the peace, the happiness or safety of society."[231] Neither version of the proposed language was included in the final enactment.[232]

Obviously, as Professor McConnell concludes, the whole argument between Madison and Mason was superfluous if all "overt acts" could be regulated by law. Oliver Ellsworth, a member of the Constitutional Convention of 1787 and later Chief Justice of the United States, echoed Jefferson's concern for "overt acts against peace & good order" when he stated a limit on religious liberty in familiar terms: "[C]ivil power has a right, in some cases to interfere in matters of religion. It has

227. *Historical Understanding*, *supra* note 5, at 1516-17.
228. *Id.* at 1443.
229. *Id.* at 1516-17.
230. *Id.* at 1463.
231. *Id.*
232. *Id.*

a right to prohibit and punish gross immoralities and impieties because the open practice of these is of evil example and public detriment."[233] Madison adhered to such views until late in life, when he reaffirmed his conviction that the rights of religious liberty should prevail "in every case where it does not trespass on private rights or the public peace."[234]

> In a few specific areas . . . Americans did during the revolutionary period work out specific practical applications of their theories on Church and State. The inhabitants of all the states decided that government had no power to prohibit the free exercise of peaceable religion. All states agreed with Jefferson that civil government could interfere when "principles break out into overt acts against peace & good order"; but otherwise, citizens had a right to practice the religions of their choice, even the hated Catholicism, which had been proscribed in colonial America.[235]

In short, even if the framers were not specific about what rule should guide the decision to weigh claims of religious liberty against the claims of society, they were specific that the claims of society should not always prevail over the individual's conscience.

The law of religious privacy, like the broader concepts of privacy, should be linked to a sense that what is done behind closed doors in private religious communities is less likely to be a matter of government concern.[236] No one argued for absolute immunity for religiously-inspired behavior; no one argued for an absolute governmental power to interfere with religious worship through laws of neutral form. And yet, in the descriptions of the framers' sense of religious freedom, references to government's need to deal with "overt acts" or "open" impieties suggest that government's need to act is less when worship was covert or private. The concept of privacy also embraces the privacy of thoughts and beliefs, premised on the overriding conviction that the relation between a person and that person's God is a private matter, a matter beyond the competence of the

233. Connecticut Courant (Dec. 17, 1787), *quoted in* Braunfeld v. Brown, 366 U.S. 599, 604 n.2 (1961). *See also* FIRST FREEDOMS, *supra* note 5, at 218.

234. Letter from James Madison to Edward Livingston, (July 10, 1822), *reprinted in* MIND OF THE FOUNDER, *supra* note 170, at 432, *quoted in Historical Understanding*, *supra* note 5, at 1464.

235. FIRST FREEDOMS, *supra* note 5, at 219.

236. *Historical Understanding*, *supra* note 5, at 1464-65.

state, and involving duties—real or imagined—that precede the obligations to civil society.[237] The framers developed a plan for limited government, not a totalitarian regime in which the paramount duty would be to render unto Caesar that which Caesar demands. In a civil society with limited government, the absence of a Caesar would allow the individual to render unto God that which the individual believed was owed to God, unless and until it was critically important that the individual's conscience be subordinated to the interests of the state.[238]

One application of the framers' attitude is suggested by the facts in *West Virginia State Board of Education v. Barnette*.[239] There is little doubt that the framers believed that government could not compel persons to express respect for secular authority, when such expression violated a person's religious convictions.[240] *Barnette* was announced during World War II, America's first and greatest struggle against a hideous totalitarianism. Justice Jackson, writing for the Court, spoke for limited government, freedom of the mind, and the privacy of religious scruple. It is this passage that illustrates the finer traditions of "a century of our jurisprudence," and not the older, overruled and discredited compulsory flag salute case, *Gobitis*,[241] that Justice Scalia preferred to remember:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[242]

Justice Scalia, no doubt, believes that nothing in the peyote case contradicts this theme of liberty. First amendment principles of expressive liberty explain the result in *Barnette* and much of Justice Jackson's eloquent plea for intellectual diversity. The case struck down compulsory flag salutes, because the Court

237. *Id.*

238. *Id.* at 1517 ("To [the proponents of religious liberty], the freedom to follow religious dogma was one of this nation's foremost blessings, and the willingness of the nation to respect the claims of a higher authority than 'those whose business it is to make laws' was one of the surest signs of its liberality").

239. 319 U.S. 624 (1943).

240. *Id.* at 633 n.13.

241. 310 U.S. 586 (1940). See *supra* notes 52-59 and accompanying text.

242. *Barnette*, 319 U.S. at 642.

understood that "a Bill of Rights which guards the individual's right to speak his own mind, [does not allow] public authorities to compel [an individual] to utter what is not in his mind."[243] So, it is probably true that the expansive definitions of expressive liberty in the twentieth century solve many problems which the framers and ratifiers of the first amendment understood as free exercise issues.[244] And, as Justice Scalia points out, each of the other opinions upholding free exercise claims alluded to constitutionally-protected liberty interests in addition to rights of religious autonomy. Still, none of these additional factors create a distinction; the presence of additional liberty interests only demonstrates that principles of religious privacy parallel—even inspire—the newer conceptions of individual liberty and personal privacy.

The Americans of the revolutionary and founding periods "passed to subsequent generations the task of working out the consequences of the principle that the state had no competence in religious matters."[245] Even a judiciary that goes beyond original understanding of constitutional text to redefine the balance of power and liberty in the modern era should be reluctant to dismantle the core protections of an explicit liberty. If courts are to continue the framers' search for principles of religious liberty, the courts have no choice but to weigh competing interests and to give close scrutiny to the reasons for governmental intrusion on private religious practice.

Moreover, the framers also understood that such issues were matters for the courts. Justice Scalia's statement that the values of the Bill of Rights—and the values of the first amendment, in particular—should be left to political institutions is directly inconsistent with evidence of original understanding that is quite specific and pertinent. James Madison, the principal sponsor of the Bill of Rights in the House of Representatives, believed that the real danger to religious liberty and the other important freedoms of the individual lay in the power of majorities.[246] In correspondence with Thomas Jefferson, Madison had expressed doubt that "parchment barriers" would be effective, if the

243. *Id.* at 634.

244. *See, e.g., id.* at 633-35. James Madison, for one, was profoundly moved by the spectacle of "5 or 6 well meaning men," Baptist preachers who had been jailed for publishing their religious views. "The usually soft-spoken Madison described such persecution as a "diabolical Hell-conceived principle . . . ." *Historical Understanding, supra* note 5, at 1452-53.

245. FIRST FREEDOMS, *supra* note 5, at 221.

246. *Id.* at 205.

people chose to violate a specifically declared right.[247] Virginia's experience with the issues of religious liberty was the source of Madison's skepticism.[248] Jefferson, still in Paris as he had been during the federal convention, replied that Madison had overlooked the special power vested in the courts if a bill of rights were adopted.[249] Jefferson's analysis was an important factor in Madison's conversion to the cause of a bill of rights, as Madison's own remarks before the House indicated:

> It has been said that it is unnecessary to load the Constitution with [a declaration of rights], because it was not found effectual in the constitution of the particular States. It is true, there are a few particular States in which some of the most valuable articles have not, at one time or other, been violated; but it does not follow but they may have, to a certain degree, a salutary effect against the abuse of power. If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will naturally be led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[250]

These familiar discussions between Jefferson and Madison underscore the most persuasive interpretation of the first amendment's reason for being. If the views of Madison and Jefferson diverged on some matters,[251] on this point they agreed, and their views are crucial evidence of the original understanding that the values of the first amendment, including the free exercise clause, were not to be relegated to the vagaries of the political process.[252]

247. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* MIND OF THE FOUNDER, *supra* note 170, at 206.

248. *Id. See also* Madison, Speech in the House of Representatives (June 8, 1789) *reprinted in* MIND OF THE FOUNDER, *supra* note 170, at 210, 219-20.

249. Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), *reprinted in* T. JEFFERSON: WRITINGS 943 (M. Petersen ed. 1984).

250. James Madison, Speech in the House of Representatives (June 8, 1789), *reprinted in* MIND OF THE FOUNDER, *supra* note 170, at 210, 223-24.

251. See *supra* notes 66, 220-23 and accompanying text.

252. *See, e.g.*, West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and

VI. Conclusion

Self-government is the rule in our society. Judicial intervention is, and ought to be, the exception. The peyote case enforces the rule, and narrows the exception, because of a faith that the people's representatives will reinforce the values of the Bill of Rights. It is a faith we dare not lose; but it is an expectation we dare not trust. The issues of morality and religion produce a self-righteousness not easily cabined with appeals for civic virtue and democratic self-restraint.[253] Zealous religious factions represent the same sort of danger to cultural and political stability as factions defined by class status, economic self-interest, and political philosophy.[254] Still, such factions must be guaranteed the same expressive and political liberty as skeptics and others with more secular philosophies. To restrain the deleterious effects of these factions, the Constitution provides not only the political safeguards of the original, unamended document, but also the substantive limits of the Bill of Rights.

The Constitution was designed to prevent the accumulation of excessive power.[255] This overriding objective requires that the Court not only protect specific liberties and privacies, but a general liberty from the innovative assaults of ambitious political

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officials and to establish them as legal principles to be applied by the courts."); *Smith II*, 110 S. Ct. at 1613 (O'Connor, J., concurring) ("[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility").

253. *Compare, e.g.*, THE FEDERALIST No. 10, at 61 (J. Madison) (J. Cooke ed. 1961) ("If the impulse and opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together.") *with* Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting) ("If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition").

254. THE FEDERALIST No. 10, at 58-59 (J. Madison) (J. Cooke ed. 1961). Madison states:

> The latent causes of faction are . . . sown in the nature of man; and we see them every where brought into different degrees of activity. . . . A zeal for different opinions concerning religion [is one cause that has] divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to cooperate. . . . So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their most unfriendly passions, and excite their most violent conflicts.

255. THE FEDERALIST No. 47, at 324 (J. Madison) (J. Cooke ed. 1961).

leaders. There is no warrant in logic, history, tradition, precedent, or original understanding for surrendering or compromising this most fundamental principle. It is trite, but true that the Constitution seeks to strike a balance: The majority's liberty to govern must not be extinguished, but the minority's liberty to live, to think, to speak, and to worship must enjoy a respect that is best promoted with a qualified constitutional immunity.[256] Close and careful judicial scrutiny is an attempt to preserve a role in society for individual religious conscience. It is a balancing test designed to preserve and protect an ideal of liberty. The compelling interest test reflects the first amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a "luxury" is to disparage "[t]he very purpose of a Bill of Rights."[257]

In the aftermath of the peyote case, unless the "better angels of our nature"[258] receive quick, effective lessons in the tactics of politics or in the skills of instilling civic virtue—a self-restraint and a respect for the rights of others—the tragic echoes of past American repressions will resonate; they will again assume form and substance as law beyond the Court's resolve to check and balance.

256. THE FEDERALIST No. 10, at 58 (J. Madison) (J. Cooke ed. 1961) ("It could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.").

257. *Smith II*, 110 S. Ct. at 1613 (O'Connor, J., concurring).

258. First Inaugural Address by Abraham Lincoln (Mar. 4, 1861), *reprinted in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 224 (D. Fehrenbacher ed. 1989).