The Free Exercise Clause: Past, Present, and Future

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THE FREE EXERCISE CLAUSE - THE FIRST 170 YEARS

Eighty-eight years after the First Amendment became a part of the United States Constitution, the United States Supreme Court decided the case of *Reynolds v. United States,* 98 U.S. 145 (1879). For the next 82 years, the *Reynolds* case determined the meaning and application of the clause forbidding laws "prohibiting the free exercise of ... [religion]."

Reynolds arose out of a prosecution for violation of the law prohibiting bigamy in the Territory of Utah. The defendant, a Mormon, claimed that he had married his second wife pursuant to a religious duty and, therefore, the statute as applied to him violated the Free Exercise Clause.

The Court rejected this contention. The Court began its analysis with a search for the meaning of religion. It acknowledged that the text of the First Amendment did not define the term. So, it launched an historical inquiry to determine its definition.

It found that definition in the history of the development of freedom of religion in America, which "culminate[d] in Virginia." *Id.,* 98 U.S. at 162-63. Relying upon the works of Madison and Jefferson, the Court defined the term in accordance with its original meaning.

First, it endorsed Madison's proposition that religion defined those duties that "we owe to the Creator" outside "the cognizance of civil government." From this general jurisdictional principle, the Court turned to Jefferson's Preamble to the 1785 Virginia Statute for Establishing Religious Freedom for more specific guidelines:

> *In the preamble of this Act ... religious freedom is defined; ... after a recital "That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." Id.,* 98 U.S. at 163.

On the basis of these statements, the Court concluded that the Free Exercise Clause of the First Amendment deprived Congress 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." *Id.,* 98 U.S. at 164.

In the case before it, the defendant had obviously not been prosecuted for having a wrong opinion about polygamy; rather, he had been convicted of the act. Just because Congress had outlawed the act, and not the opinion, however, did not resolve the Free Exercise Clause issue. According to the Jefferson formula, approved by the Court, the Free Exercise Clause also protected some acts from the jurisdiction of Congress.

The question, then, before the Court was whether polygamy was an overt act against the peace and good order of society or just an act contrary to the peace and good order of the church. The Court sought the answer, first, in the common law.

"At common law," the Court observed, "the second marriage was always void ... and from the

earliest history of England polygamy has been treated as an offense against society." *Id.* But, the Court conceded, the common law governing marriage and prohibiting polygamy had been enforced in England's ecclesiastical courts.

Did this mean that polygamy was an offense against the church only? The Court first noted that ecclesiastical courts had been given jurisdiction over civil, as well as church, matters. Then, it observed that, by the early 17th century a statute had been passed, making polygamy an offense "punishable in the civil courts." This statute, the Court discovered, had been reenacted in all of the American colonies. Of particular significance to the Court was that Virginia had enacted the same statute in 1788, after the adoption of Jefferson's Statute for Establishing Religious Freedom. *Id.,* 98 U.S. at 165.

This history enabled the Court to conclude that "there never has been a time in any State of the Union when polygamy has not been an offense against society, cognizable by the civil courts ...." *Id.*

The Court, then, turned its attention to the institution of marriage, itself. It found that, while marriage was "by its very nature a sacred obligation," it was also "in most civilized nations, a civil contract, and usually regulated by law." Furthermore, the Court claimed, a nation's law governing the marriage relationship was the primary determinant of the civil liberties of that nation:

> *[P]olygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Id.,* 98 U.S. at 165-66.

On the basis of this survey and analysis, the Court concluded that the statute prohibiting bigamy in the territory of Utah was "within the legislative power of Congress." *Id.,* 98 U.S. at 166. While this was all the Court was required to do to dismiss the defendant's Free Exercise claim, it went further to explain why it refused to apply the Free Exercise Clause to require an exception to the polygamy statute for religious conscientious objectors. The defendant in *Reynolds* had claimed that the Free Exercise Clause required an exception for those, like himself, who had taken two or more wives pursuant to a religious belief. This argument was dismissed by the Court as wholly illegitimate.

First, the Court said that such an argument, if allowed, would introduce "a new element into criminal law," discriminating between offenders solely on the basis of their personal religious beliefs and subordinating even the laws prohibiting murder to individual religious beliefs.

Second, the Court maintained that to allow an argument based upon a subjective definition of religion would "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." *Id.,* 98 U.S. at 167.

In summary, the Court in *Reynolds* decided that religion was an objective term that distinguished, on the one hand, those matters that belonged exclusively to God, outside the jurisdiction of the State, and, on the other, those matters that remained within the authority of the state. Until 1961, no one on the Court would question these principles, but there would be some lively differences of opinion as to their application.

It was not until the 1940's that the Court would have opportunity to apply the *Reynolds* doctrine, outside the context of the polygamy issue. {As for such cases, see *Davis v. Beason,* 133 U.S. 333 (1890).} Within the first four years of this decade, a number of cases involving Jehovah's Witnesses would test the vitality of the 60-year old precedent.

In *Cantwell v. Connecticut,* 310 U.S. 296 (1940), the Court was faced with a statute that authorized a government official to withhold a permit to solicit funds if that official determined that the cause for solicitation was "not a religious one." *Id.,* 310 at 305.

Beginning with the *Reynolds* principle, that "belief" was wholly outside the cognizance of the civil authorities, the Court stated as its Free Exercise premise "the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views." *Id.,* 310 U.S. at 304. Presumably, these activities were within the area of "opinion" and immune from the jurisdiction of the state. *Id.,* 310 U.S. at 303.

From this premise, the Court reasoned that no civil authority had jurisdiction to inquire into a person's beliefs when that inquiry determined whether or not the person would be issued a permit to solicit funds. While the state had jurisdiction to protect the public from fraud, it did not have any authority to protect the public from non-religious beliefs:

> *[T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what it is religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution. Id.,* 310 U.S. at 307.

From 1942 to 1944, a number of cases came to the Court testing the constitutionality of a license tax on "missionary evangelism." *Jones v. Opelika,* 319 U.S. 103 (1943); *Murdock v. Pennsylvania,* 319 U.S. 105 (1 943); *Follett v. Town of McCormick,* 321 U.S. 573 (1944). The license taxes at issue were of a general nature, levied on anyone who offered anything for sale. In the cases before the Court, the tax had been required of Jehovah's Witnesses who made sales of religious literature incidental to their primary activity of preaching and proselytizing.

Justice William O. Douglas, writing for a sharply divided court, ruled that the license tax as applied to the Jehovah's Witnesses was tantamount to the state's levying a license tax upon the preaching of the gospel inside a church. *Murdock v. Pennsylvania,* 319 U.S. at 108-10. The state, Justice Douglas stated, had no more jurisdiction to levy a tax upon "the privilege of delivering a sermon" than it did upon "the privilege of carrying on interstate commerce." Both were outside its jurisdiction. *Id,* 319 U.S. at 112-13.

Douglas conceded that had the Jehovah's Witnesses been engaged in a "commercial venture" rather than a "religious" one, the tax would have been valid. *Id,* 319 U.S. at 110-111. The dissenters claimed just that. They asserted that the activities engaged in by the Jehovah's Witnesses were primarily commercial in nature, and therefore, subject to the jurisdiction of the State. *Id,* 319 U.S. at 119.

It would be almost 20 years before the *Reynolds* doctrine would be tested again. In 1961, the Court

upheld state Sunday closing laws to be within the jurisdiction of the State. Such laws, the Court ruled, were within the state's power to provide a uniform day of rest for all citizens, relying, in part, on *Reynolds. McGowan v. Maryland,* 366 U.S. 420, 437-40, 450-51 (1961).

In a companion case, the Court denied that the Free Exercise Clause commanded that a religious Sabbatarian was entitled to an exception to the Sunday closing laws. Restating the formula set forth in *Reynolds,* the Court noted that the Sunday closing laws did not prohibit the religious Sabbatarian from honoring Saturday as a day of rest. Thus, the Sunday closing laws could not possibly infringe upon the Sabbatarian's freedom of belief. *Braunfeld v. Brown,* 366 U.S. 599,603-05 (1961).

As for action, the Court repeated its holding m *McGowan,* that the State has jurisdiction "to provide a weekly respite from all labor ... [by] set[ting] one day of the week apart from the others as a day of rest...." *Id,* 366 15 U.S. at 607. Having so ruled, the Court concluded that the Free Exercise Clause could not be construed in such a way as to require a religious conscientious objector exception lest the purpose of the uniform day of rest be thwarted. *Id,* 366 U.S. at 608-09.

Justice William J. Brennan filed a dissenting opinion in which he set forth an approach to the Free Exercise Clause that departed significantly from the *Reynolds* legacy. While he did not persuade his colleagues in 1961, he succeeded two years later in *Sherbert v. Verner,* 374 U.S. 398 (1963), an opinion that went largely unchallenged for the next 27 years.

THE FREE EXERCISE CLAUSE - 1961-1990

From 1791 through 1961, the United States Supreme Court subjected claims under the Free Exercise Clause of the First Amendment to a jurisdictional test: Was the duty imposed by the law in question within or outside the authority of civil government?

If the duty was a "religious one," that is, enforceable only by reason and conviction, then the Free Exercise Clause absolutely prevented the state from "prohibiting" its performance. This absolute immunity from state power could not be com- promised even upon a showing that the prohibited action threatened the peace of the community.

The leading case was *Cantwell v. Connecticut*, 310 U.S. 296 (1940). In *Cantwell*, the defendant - a Jehovah's Witness - claimed that the Free Exercise Clause prohibited his conviction for having breached the peace. At trial, the prosecution had introduced evidence that the defendant had threatened the public peace by his aggressive proselytizing activities on a public sidewalk. The Supreme Court reversed. Dissemination of one's religious views, the Court concluded, was an activity immune from civil rule, and therefore, protected by the Free Exercise Clause.

On the other hand, if the duty was a "civil" one, that is, enforceable by force or violence, then the Free Exercise Clause did not except any one from obedience to the law, even if the law required disobedience to a religious precept or practice.

The leading case was *Reynolds v. United States,* 98 U.S. 145 (1879). In *Reynolds,* the defendant in a criminal prosecution for violation of a statute prohibiting bigamy claimed that, because he had married his second wife out of obedience to a religious command, the Free Exercise Clause protected him from such prosecution.

The Court concluded that marriage was a "civil contract" and that civil government had authority to set the standards of eligibility to enter into that contract.

Having resolved the jurisdictional question in favor of the State, the Court refused even to consider a claim that the Free Exercise Clause carved out a religious exception.

In 1961, the Court applied this same jurisdictional test when it ruled that a Sabbatarian could not force a religious exemption to a state's Sunday closing laws on the ground that he was required by his religious belief to close his business on Saturdays. Having determined that the state had jurisdiction to impose a uniform day of rest, the Court would not allow any one to use the Free Exercise Clause to carve out an exception. *Braunfeld v. Brown,* 366 U.S. 599 (1961).

Just two years later, however, the Court repudiated its traditional jurisdictional test in favor of a balancing formula that would monopolize Free Exercise jurisprudence until 1990.

The Balancing Test: Invented

Justice William J. Brennan, Jr., laid the groundwork for change in his concurring and dissenting opinion in the 1961 *Braunfeld* case. Conceding that a state could require its people to rest "from worldly labor" one day a week, Justice Brennan nevertheless insisted that the Free Exercise Clause guaranteed to an Orthodox Jew the right to rest on Saturday, rather than Sunday as the law prescribed. *Id.,* 366 U.S. at 611.

Justice Brennan maintained that the Free Exercise Clause protected a person from having to suffer "substantial competitive disadvantage" occasioned solely because the state had not respected his religious conscience. Only if the state had a "compelling...interest" or an "overbalancing need" could it, wrote the justice, impose this kind of economic burden upon a religious conscientious objector. *Id.,* 366 U.S. at 613-14.

Two years later, Justice ·Brennan succeeded in persuading four of his colleagues to join him in ruling that the State of South Carolina could not deny unemployment benefits to a Sabbatarian solely because she refused, out of religious conscience, to work on Saturdays.

In *Sherbert* v. *Verner,* 374 U.S. 398 (1963), the law of the State of South Carolina denied unemployment benefits to anyone who for personal reasons was unemployed. Such benefits were available only if one was "involuntarily" unemployed, that is, out of work because of the "inability of industry to provide a job" not because of "personal circumstances, no matter how compelling." *Id.,* 374 U.S. at 418-19 (Harlan, J. dissenting).

Pursuant to this policy, state authorities ruled that a Seventh-Day Adventist lady had made herself "unavailable for work" for personal reasons when she refused employment that required her to work on Saturdays.

Justice Brennan ruled that this action denied the lady's constitutional right to free exercise of her religion. In doing so, Justice Brennan introduced a new two-step analysis to Free Exercise jurisprudence. He narrowed the category of cases in which the jurisdictional test was to be applied to those involving "regulations of religious beliefs, as such," to regulations discriminating against

"religious views" or to regulations inhibiting "the dissemination of particular religious views." *Id.,* 374 U.S. at 402.

Outside the areas of religious belief and profession of those beliefs, Justice Brennan conceded that the civil authorities had general jurisdiction over "conduct or action," provided that the proscribed behavior posed "some substantial threat to public safety, peace or order." *Id.,* 374 U.S. at 402-03. As for these cases, Justice Brennan devised a new three-part balancing test.

First, Justice Brennan examined the religious practice to ascertain whether it posed a "substantial" threat to the public safety, peace, and order. In *Sherbert,* he quickly concluded that conscientious objection to Saturday work did not pose any such dangers. *Id.,* 374 U.S. at 403.

Next, Justice Brennan asked if the denial of unemployment benefits "imposed any burden on the free exercise of appellant's religion." He concluded in the affirmative. By withholding benefits, the South Carolina policy requiring appellant to be available for Saturday work "pressure[d]" her to "abandon ... one of the precepts of her religion." This pressure, Justice Brennan contended, "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.,* 374 U.S. at404.

Finally, having determined that the South Carolina statute constituted a "substantial infringement of appellant's First Amendment right," Justice Brennan called upon the State to demonstrate that it had "some compelling state interest" to do so. All the State could muster on its behalf was "a possibility ... of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work ...." Such a "possibility," Justice Brennan asserted, was hardly compelling. *Id.,* 374 U.S. at 407.

Had Justice Brennan followed the *Reynolds* formula, as did Justice John Marshall Harlan in his dissent, he would have addressed first whether the Free Exercise Clause permitted the State to establish a welfare program designed to protect its people from the hazard of involuntary employment. Had he answered this question in the affirmative, as Justice Harlan did, then the Free Exercise claim would have been rejected, as had been the case with Sabbatarian's plea to be exempt from the Sunday closing laws decided just two years before. *Id.,* 374 U.S. at 418-21.

The Balancing Test: Revised

Nine years after *Sherbert* v. *Verner,* the Court chose to discard the jurisdictional test altogether in favor of a revised balancing test, the centerpiece of which featured the weighing of the interest of the individual to exercise his religious conscience against the interest of the state in the public safety, peace and order. Only if the interest of the state was found to be compelling could the individual's religious conscience be nullified.

In *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), some Old Order Amish parents were convicted of violating Wisconsin's compulsory school attendance law for having failed to send their children to school after the eighth grade. The parents claimed that this conviction violated their Free Exercise rights. They bottomed their claim on the ground that their purpose in keeping their children out of high school was to preserve their religious faith:

> *The trial testimony showed that respondents believed, in accordance with the tenets of the Old Order Amish communities general, that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life. They believed that by sending their children to high school, they would not only expose themselves to the danger of censure of the church community, but, as found by the county court, also endanger their own salvation and that of their children. Id.,* 406 U.S. at 209.

Had the Court applied the traditional jurisdictional test, even as it had been preserved in Sherbert, it would have had

to reverse the conviction. Clearly, the Old Amish Order parents had disobeyed the compulsory attendance law in order to disseminate their religious beliefs to their children. That would have been absolutely protected by the Free Exercise Clause, no matter what showing the State might have made that such actions threatened the peace and good order of the community.

But the Court did not apply the traditional jurisdictional test. Rather, Chief Justice Warren Burger presumed state jurisdiction even over the "religious education" of children, and subjected the "State's interest in universal education" to "a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause ...." *Id.,* 406 U.S. at 213-14.

While the Court incorporated into its analysis all of the elements of the three-part test devised by Justice Brennan in Sherbert, it revised it significantly. First, the Court spelled out the specific criteria whereby it would determine if a claim was "rooted in religious belief." If a claim was based solely on personal or philosophical views, the Court ruled, it would not qualify for protection under the Free Exercise Clause.

The Court found, however, that the Old Amish position on education arose out of a "deep religious conviction ... in response to a literal interpretation of the Biblical injunction ... 'be not conformed to this world ...' [which] pervades and determines virtually their entire way of life" and that this way of life had endured relatively unchanged "for centuries." Thus, the Court concluded that the objection qualified for protection under the Free Exercise Clause. *Id.,* 406 U.S. at 215-17.

Having so decided, the Court turned to the second part of the test, namely, whether the compulsory attendance law had imposed a substantial burden on the Old Amish way of life. The Court found not only that the burden of criminal liability was substantial, but that exposure to "formal secondary education would gravely endanger if not destroy the free exercise of respondents' religious beliefs." *Id*., 406 U.S. at 217-19.

Finally, the Court concluded that this substantial interference with the Old Amish way of life "unduly burden[ed]" their religious beliefs without proof of any overriding state interest to do so. In this portion of its opinion the Court emphasized again and again that the Old Amish were law-abiding, "self-reliant and self-sufficient participants in society." *Id.,* 406 U.S. 221, 222, 224, 225,226-27,229. Hence, the Court concluded that the State's goals to produce a responsible citizenry through formal education through the high school years was in no way threatened by Old Amish drop-outs. Nor was there any evidence that the parents abused their children by taking them out of

high school. *Id. ,* 406 U.S. at 229-36.

The Balancing Test: Diluted

Ten years after *Yoder,* another Old Amish plaintiff would not find the Court as hospitable, even though the Old Amish had remained just as law-abiding, self-reliant, and self-sufficient.

In *United States v. Lee,* 455 U.S. 252 (1982), an Old Order Amish farmer and carpenter sued for a refund of social security and unemployment taxes that he had paid under protest, claiming the protection of the Free Exercise Clause. He supported his claim with proof that "the Amish religion not only prohibits the acceptance of social security benefits, but also bars all contributions by Amish to the social security system." *Id.,* 455 U.S. at 255.

This time the Court had no time for an inventory of the virtues of the Old Amish way of life. Nor did it pause even to note the substantial burden that imposition of the social security tax would have on the Amish religious conscience. Rather, the Court vaulted over the first two prongs of the three-part test, so carefully followed in *Yoder,* to an assessment of the government's interest in near universal participation in "the largest domestic governmental program in the United States today, distributing approximately $11 billion monthly to 36 million Americans." *Id.,* 455 U.S. 258.

"The design of the program," the Court pronounced, "requires support by mandatory contributions from covered employers and employees." Such participation, the Court warned, was "indispensable to the fiscal vitality of the social security system." *Id.,* 455 U.S. 258- 59.

To allow anyone to opt out, even for reasons of religious conscience, the Court continued, would not only threaten the integrity of the social security tax, but all taxes:

> *There is no principled way ... to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have similarly valid claim to be exempt from paying that percentage of the income tax. Id.,* 455 U.S. at 260.

In the next 8 years after Lee, the Supreme Court deferred to the government in every Free Exercise case, except in the area of unemployment compensation. See *Hobbie v. Unemployment Appeals Commission,* 480 U.S. 136 (1987); *Frazee v. Illinois Department of Employment Security,* 489 U.S. 136 (1989).

In 1986, the Court turned down a plea from an orthodox Jewish Air Force officer protesting his having been disciplined for wearing a yarmulke. *Goldman v. Weinberger,* 475 U.S. 503 (1986). In the same year, the Court refused to exempt religiously motivated parents from a federal law requiring their two-year old daughter to have a social security number as a condition precedent to their receiving ADC benefits. *Bowen v. Roy,* 476 U.S. 693 (1986).

In 1987, the Court rejected a Muslim prisoner's challenge to a prison policy preventing him from attending a weekly congregational service commanded by the Koran. *0 'Lone v. Estate of Shabazz,* 482 U.S. 342 (1987). One year later, the Court turned down an effort by various American Indian

tribes to save their sacred religious grounds from a United States Forest Service plan to permit timber harvesting and road construction. *Lyng v. Northwest Indian Cemetery Protective Association,* 485 U.S.439 (1988).

In each of these cases, the Court gave short shrift to the religious claim and the significant burden imposed on the dissenting religious adherent. Justice Sandra Day O'Connor's opinion in *Lyng* was typical. She admitted that carrying out the Forest Service plan "could have devastating effects on traditional Indian religious practices," but she ruled:

> *... [The] incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to the religious beliefs [do not] require government to bring forward a compelling justification for its otherwise lawful actions. Id.,* 485 at 450-51.

And in all but three of the four cases the insensitivity of the majority to the significant burdens imposed on the religious dissenters, brought Justice Brennan, the architect of the compelling interest approach, to protest in dissent. His opinion in *Lyng* was typical:

> *... [T]he Court today refuses even to acknowledge the constitutional injury respondents will suffer .... Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land .... land is itself a sacred, living being ... [and} like all other living things, is unique, and specific sites possess different spiritual properties and significance ... For respondent Indians, the most sacred of lands is the high country where, they believe, prehuman spirits moved with the coming of humans to the Earth .... Id.,* 485 U.S. at 459, 460-61, 467-68.

Here the threat posed by the desecration of sacred lands that are indisputably essential to respondent's religious practices is both more direct and more substantial than that raised by a compulsory school law that simply exposed Amish children to an alien value system.

The Balancing Test: Snubbed

Two years after *Lyng,* Justice Antonin Scalia dropped a bombshell in *Employment Division, Department of Human Resources v. Smith,* 494 U.S. 872 (1990). Writing for a slim majority of five, Justice Scalia jettisoned the compelling interest test in favor of a return to the jurisdictional test of *Reynolds.*

He reaffirmed that the Free Exercise Clause absolutely precludes any government exercise of jurisdiction over belief or profession of belief. He extended this constitutional immunity beyond "belief and profession" to "the performance of (or abstention from) physical acts." He then proceeded to name a few acts that he believed were constitutionally outside the jurisdiction of the government:

> *[A]ssembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. Id.,* 494 U.S. at 877.

But the case before the Court, Justice Scalia noted, was one of a different order. It involved an Oregon law prohibiting drug use, jurisdiction over which had been conceded to the state. The Free Exercise claim put to the Court was that those who used a drug, here peyote, for religious purposes were constitutionally exempted from its reach.

Justice Scalia rejected this claim as illegitimate. First, he noted that the text proscribes only those prohibitions where "the exercise of religion is ... the object," but not "generally applicable and otherwise valid" laws that only incidentally affect religious faith and practice. *Id.,* 494 U.S. at 878.

Second, he claimed that the Court's own precedents "have 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." He then rehearsed a number of cases from *Reynolds* to *Braunfeld,* to support that proposition. *Id.,* 494 U.S. at 878-80.

Third, he attempted to distinguish a number of cases, such as *Wisconsin v. Yoder,* that did not fit this pattern. He did so by emphasizing that the Free Exercise claim had been pressed into service in areas that were constitutionally protected by other clauses of the constitution, which was not the case here. *Id.,* 494 U.S. at 881-82. Therefore, Justice Scalia refused to apply the balancing test applied in *Yoder.*

As for those cases where the Court had applied the balancing test where only the Free Exercise Clause had been invoked, Justice Scalia noted that the Court had already confined such analysis to the unemployment field. *Id.,* 464 U.S. at 882-84. Hence, he concluded that the test would not be applied to a case involving a generally applicable criminal law.

Justice Scalia maintained that the balancing test had to be so limited lest it "make an individual's obligation to obey ... [the] 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.'" *Id.,* 494 U.S. at 884- 85.

From this observation, Justice Scalia launched into a wide-ranging critique of the "compelling state interest" test. Calling it a "constitutional anomaly," if it were applied in such a way as to create a "private right to ignore generally applicable laws," he warned that such a right "would be courting anarchy." *Id.,* 494 U.S. 886, 888.

The only safeguard against this threat, he argued, would be for courts to sit in judgment over the nature and importance of the religious precept or practice relied upon. This, Justice Scalia, found unthinkable for it would, in his opinion, thrust the civil arm into matters of religious faith and practice which the religion clauses had removed from its reach. *Id.,* 494 U.S. at 887.

Calling the majority opinion a dramatic departure from "well-settled First Amendment jurisprudence," Justice Sandra Day O'Connor reiterated, on behalf of her three concurring colleagues, continued faith in the compelling state interest test and its balancing formula.

Justice O'Connor's critique focused primarily upon Justice Scalia's claim that the Free Exercise Clause only prohibited laws directly targeting religious practices:

> *... [F]ew states would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. Id.,* 494 U.S. at 894.

Justice O'Connor noted, however, that just because "a person's right to free exercise has been burdened ... does not mean that he has an absolute right to engage in the conduct." But it does mean that the government must furnish "a compelling state interest and ... [a] narrowly tailored [means] to achieve that interest" in order "to justify any substantial burden on religiously motivated conduct." *Id.*

Justice O'Connor then asserted that the Court had no other choice than to use a pragmatic "case-by-case" tool lest governments ignore the impact that their generally applicable laws might have on minority religious sects. *Id.,* 494 U.S. at 897-900.

Prompted by the O'Connor critique and by fears that the abandonment of the Court's balancing test would seriously undermine religious freedom in America, an unusual coalition of conservative Christian activists, liberal civil liberties advocates, and over one hundred constitutional law scholars filed a petition for rehearing. "Diverse Coalition Asks Supreme Court to Rehear Peyote Case," *Religious Freedom Alert II* (June 1990). On June 4, 1990, the Court denied the petition.

This denial set the stage for the next chapter in the history of the Free Exercise Clause, featuring continued conflict over the meaning of the Free Exercise Clause both on and off the Court and, most significantly, in Congressional enactment of the Religious Freedom Restoration Act.

THE FREE EXERCISE CLAUSE: 1990 - PRESENT (1995)

On April 17, 1990, the United States Supreme Court, in a 6 to 3 decision, ruled that the First Amendment Free Exercise Clause did not require a state to exempt the sacramental use of peyote from its general laws prohibiting the use of certain drugs. *Employment Division, Department of Human Resources v. Smith,* 494 U.S. 872 (1990).

To reach this result, Justice Antonin Scalia applied a jurisdictional test that had initially been framed by the Court 111 years before:

> *We have 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 ... We first had occasion to assert that principle in Reynolds v. United States, 98 U.S. 145 ... (1879) where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. Id.,* 494 U.S. at 878-79.

By so ruling, Justice Scalia refused to submit a law prohibiting the general use of certain drugs to the compelling state interest test that had been utilized by the Court in most Free Exercise cases since 1963. Justice Scalia claimed that this test- whereby the interest in protecting an individual's religious conscience is weighed against the interest of the state - was "inapplicable" to a free exercise challenge to "an across-the-board criminal prohibition on a particular form of conduct." *Id.,* 494 U.S. at 884.

Justices Sandra Day O'Connor, William Brennan, Jr., Thurgood Marshall, and Harry Blackmun disagreed. They maintained that the Free Exercise Clause demanded that religiously- motivated conduct be protected in every case "by requiring the Government to justify any substantial burden on ... [such] conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Id.,* 494 U.S. at 894.

The four justices preferred this balancing formula over the majority opinion's "categorical rule" because the balancing approach was "more consistent with our role as judges to decide each case on its individual merits" and more "sensitive to the facts of each particular claim." *Id.,* 494 U.S. at 899.

Justice Scalia countered this assertion, noting that the balancing formula invited judges to assess the importance of particular religious convictions, an area long considered outside the jurisdiction of civil authorities. *Id.,* 494 U.S. at 887.

In addition, he cautioned that requiring the government to prove a compelling interest in order to override an individual's conscience "would be courting anarchy." *Id.,* 494 U.S. at 886, 888.

Unpersuaded, the minority justices insisted that "the compelling interest test reflected the First Amendment's mandate of preserving religious liberty in a pluralistic society." *Id.,* 494 U.S. 903. Moreover, they asserted, abandonment of the compelling interest doctrine would sap the Free Exercise Clause of its vitality by limiting its coverage to "only the extreme and hypothetical situation in which a State directly targets a religious practice." *Id.,* 494 U.S. at 894.

Two and one-half years later, however, what the dissenters characterized as an "extreme and hypothetical" case actually came before the Court. The City of Hialeah, Florida enacted an ordinance prohibiting religious sacrifices of animals. The City Council openly acknowledged that it had enacted the ordinance in response to plans to establish in Hialeah a "church" that practiced the ritual of animal sacrifice. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. --, 124 L.Ed. 2d 472 (1993).

The Court unanimously held that the city ordinance violated the Free Exercise Clause. Justice Anthony Kennedy wrote the Court opinion, in which he applied the *Smith* jurisdictional test. He found the "object" of the city ordinance to be the religious sacrifices of animals, not the prevention of cruelty to animals. Having determined that the law was neither "religiously neutral" nor "generally applicable," Justice Kennedy found that the city ordinance had singled out a religious practice for condemnation, and therefore was presumptively an unconstitutional prohibition of the free exercise of religion. *Id.,* 124 L.Ed. 2d at 490-98.

Justice Kennedy invoked the compelling state interest test, but he did so for a very limited purpose, namely, to insure that the Court had correctly concluded that the purpose of the ordinance was not religiously neutral. *Id.,* 124 L.Ed. 2d at 498-500.

Only two justices, Blackmun and O'Connor - both of whom dissented in *Smith* - refused to apply the jurisdictional test in *Hialeah.* Justice Blackmun reiterated his view that *"Smith* was wrongly decided," and proceeded to analyze the case under the compelling state interest test:

When the State enacts legislation that intentionally or unintentionally places a burden upon religiously motivated practice, it must justify that burden by "showing that it is the least restrictive means of achieving some compelling state interest." Id., 124 L.Ed. 2d at 520.

While seven justices joined in Justice Kennedy's majority opinion, it would be a mistake to assume that the five to four vote in *Smith* had now widened to seven to two. To the contrary, Justice David Souter, in a concurring opinion, made it clear that he had "doubts about whether the *Smith* rule merits adherence." *Id.,* 124 L.Ed. 2d at 507.

Justice Souter maintained that the *Smith* rule was not at issue in *Hialeah* because the Hialeah ordinance violated the "noncontroversial principle" that the Free Exercise Clause demands that the civil government not single out religious practices, as such, and prohibit them. *Id.,* 124 L.Ed. 2d 507-10.

Justice Souter observed, however, that the *Smith* rule contained an additional controversial principle that a generally applicable law, that is, one that does not single out a religious practice, as such, is unquestionably constitutional under the Free Exercise Clause. This aspect of the *Smith* rule, in Souter's opinion, was not consistent with prior Court opinions and, consequently, had left the Court "with a free-exercise jurisprudence in tension with itself...." *Id.,* 124 L.Ed. 2d at 510-15.

For this reason alone, Justice Souter called for a reexamination of the *Smith* rule in an appropriate case. *Id.,* 124 L.Ed. 2d at 517. In calling for that reexamination, he recommended a review of that rule "in light not only of the precedent on which it rested but also of the text of the Free Exercise Clause and its origins." *Id.*

The Smith Rule Restated

In his *Hialeah* concurring opinion, Justice Souter stated the *Smith* rule as follows:

> *The proposition for which the Smith rule stands ... is that formal neutrality, along with general applicability, are sufficient conditions for constitutionality under the Free Exercise Clause. Id.,* 124 L.Ed. 2d at 509.

What Justice Souter meant by "formal neutrality" is that the *Smith* rule "secures only protection against deliberate discrimination" against religious practices or, in other words, "only bar[s] laws with an object to discriminate against religion." *Id.*

This is a crabbed reading of *Smith,* but one long held by its critics. In June 1991, three of its most influential academic critics summarized the *Smith* holding in much the same terms as Justice Souter:

> *The Court decided [in Smith] that a law forbidding a religious practice presents no issue to be decided under the Free Exercise Clause, so long as it is framed in terms that are ostensibly "neutral" and "generally applicable."* Gaffney, Laycock and McConnell, "An Open Letter to the Religious Community," *First Things* 44 (June 1991).

Earlier, in 1990 and 1991, three of Smith's most influential practitioner critics took a similar position:

The Smith decision held that there is no pure religious liberty defense to generally applicable laws. Whitehead and Knicely, "Religious Freedom Restoration Act: Wolf in Sheep's Clothing?" *Plymouth Rock Foundation Leadership Memo* 2 (1991).

> *Justice Scalia, writing for the majority of the court, declared that religious conduct cannot stand in the face of a generally applicable criminal law unless the conduct finds support in one of the other protected freedoms of the First Amendment.* Sharpe, "The Death of Religious Freedom," *Chalcedon Report* 2 (Nov. 1990).

What Souter and these critics have done is to ignore large chunks of Justice Scalia 's *Smith* opinion wherein he asserted that the Free Exercise Clause provided two substantial jurisdictional barriers to the exercise of civil power.

First, Justice Scalia clearly stated that the Free Exercise Clause protects "the right to believe and profess whatever religious doctrines one desires." *Employment Division* v. *Smith, supra,* 494 U.S. at 877. From this jurisdictional premise, he concluded that the Free Exercise Clause prohibits the enforcement of any law, even a generally applicable one, if that law "represents an attempt to regulate religious beliefs, [or] the communication of religious beliefs ...." *Id.,* 494 U. S. at 882.

This point can best be illustrated by *United States v. Ballard,* 322 U.S. 78 (1944), a case cited favorably by Justice Scalia. In that case, the defendants were indicted for mail fraud - a generally applicable, religiously neutral statute - based upon allegations that the defendants had defrauded people of their property by promising a divine cure for illnesses that medical doctors deemed incurable.

Justice William O. Douglas ruled that the Free Exercise Clause precluded any prosecution for mail fraud if based upon the allegation that the substantive religious claims made by the defendants were not true:

> *Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs ... [I]t would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations .... If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. Id.,* 322 U.S. at 86- 87.

In other words, a mail fraud statute, if construed to prohibit false statements about religious faith and belief, would not be a valid law under the Free Exercise Clause.

In contrast to *Ballard,* the religious claimants in *Smith* made no attempt to challenge the Oregon drug laws upon jurisdictional grounds. To the contrary, they conceded that the State had general jurisdiction to regulate the use of drugs and that this general regulation was not an infringement upon religion.

What they sought to establish was a constitutionally required exception to a concededly valid law based solely upon "their religious motivation," not upon an objectively determined jurisdictional ground limiting the application of a generally applicable law. Having failed to raise any Free

Exercise jurisdictional challenge, Justice Scalia had no occasion to address it. Instead, he simply ruled that an individual's religious convictions cannot constitutionally excuse him from compliance with "a generally applicable *and otherwise valid provision"* of law. *Employment Division v. Smith, supra,* 494 U.S. at 878. (Emphasis added.)

Justice Scalia did not, however, limit the Free Exercise Clause to jurisdictional limitations on the scope and application of specific statutes. He went one step further, affirming that the Clause absolutely immunizes certain conduct from state regulation:

> *[A]ssembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. Id.,* 494 U.S. at 877.

Here Justice Scalia emphasized that the jurisdictional ban imposed by the Free Exercise Clause was addressed to the conduct in question, not just to a statute and its interpretation. Later he stated that principle in propositional terms, albeit in the negative:

> *We have 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 Id.,* 494 U.S. at 878-79. (Emphasis added.)

To illustrate this jurisdictional barrier, Justice Scalia gave several examples of conduct that was within the exclusive governing power of the church, including acts of idolatry. *Id.,* 494 U.S. at 877-78. Such religious practices and their enforcement have always been considered outside the jurisdiction of civil authorities, even when they are relevant to the resolution of property disputes, which are ordinarily within the authority of the State. See *Presbyterian Church v. Hull Church,* 393 U.S. 440, 445- 452 (1969).

The point here is that the Free Exercise Clause, according to *Smith,* absolutely precludes the application of a generally applicable law if to apply that law the civil authorities would be required to resolve a dispute over religious practices and church government. *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696,708-725 (1976).

Again, the claimants in Smith made absolutely no effort to prove that the Oregon drug laws interposed the State into a doctrinal dispute within the exclusive jurisdiction of the church. Hence, Scalia had no occasion to address whether their conduct was constitutionally immune from civil power under the Free Exercise Clause.

The Smith Rule Applied

Properly understood, then, the *Smith* rule provides significant Free Exercise protection to a variety of activities long considered immune from civil power. In fact, the *Smith* rule should afford even greater protection to those activities than the compelling state interest test because the *Smith* jurisdictional rule is an absolute or categorical one.

Before turning to the application of the *Smith* rule in these areas, however, one should first examine .the history of the application of the compelling state interest test to ascertain what protection that

test had provided for religious freedom claims during the 27-year period that it was applied by the Court.

University of Chicago law professor, Michael McConnell - a vigorous critic of *Smith*- has conceded that "after the last major free exercise victory in 1972, the Court rejected every claim requesting exemption from burdensome laws or policies to come before it except for those claims involving unemployment compensation, which were governed by clear precedent." McConnell, "Free Exercise Revisionism and the Smith Decision," 57 *U. Chic. L. Rev.* 1109, 1120,n.45,1122,n.56.

Professor McConnell found that religious conscientious objectors won only five times in the Supreme Court, whereas they lost almost double that number. He further noted that this losing record was especially significant when four of the five wins came in one subject matter area, unemployment benefits.

These observations prompted Professor McConnell to observe that the compelling state interest "doctrine was more talk than substance:"

> *In its language, it was highly protective of religious liberty. The government could not make or enforce any law or policy that burdened the exercise of sincere religious belief unless it was the least restrictive means of attaining a particularly important ("compelling") secular objective. In practice, however, the Supreme Court only rarely sided with the free exercise claimant, despite some very powerful claims. Id.,* at 1109-10.

What was really lost, with Justice Scalia's rejection of the compelling state interest test, then, was the "hope" of a formidable weapon, but no more. Again, Professor McConnell has documented this:

> *... [I]t must be conceded that the Supreme Court before Smith did not really apply a genuine "compelling interest" test .... In an area of law where a genuine "compelling interest" test has been applied ... no such interest has been discovered in almost half a century .... The "compelling interest" standard [in Free Exercise cases] is a misnomer. Id.* at 1127.

But the case against the "compelling state interest" test is even more telling than the one acknowledged by Professor McConnell. Not only had the test not protected religious conscience, it had been used to erode the jurisdictional barrier that had traditionally protected church government from civil intrusion.

For example, in *Snyder v. Evangelical Orthodox Church,* 264 Cal. Rptr. 640 (Cal. Ct. App. 1989) a church bishop and a parishioner sued their church and church officials "on a plethora of tort claims" for having taken action excommunicating them from the church and influencing church members to "shun" them. The trial court dismissed the claims for lack of jurisdiction because "the conduct complained of is ecclesiastical in nature." ld., 264 Cal. Rptr. at 642.

The appellate court reversed, holding that even if the church and its officials had acted "pursuant to church policy" and within the confines of their ecclesiastical authority they could still be held liable:

> *If the court concludes ... that this or any of the other alleged conduct on which appellants' claims are based qualifies as religious expression, the trial court must balance the importance to the state of the interest invaded against the burden which would result from posing tort liability for such a claim. Even if the burden is significant, appellant's claims will survive a motion to dismiss if the state's interests are significant, and no less restrictive burden than the possibility of eventual tort liability is available. Id.,* 264 Cal. Rptr. at 647.

Had the California Appellate Court applied the *Smith* rule, it would have dismissed the tort claims for lack of jurisdiction unless the plaintiffs could show that the action taken by the church officials was clearly outside their disciplinary authority in the church.

Not only does the compelling state interest threaten church autonomy over its internal affairs, but its traditional immunity in the proselytizing of outsiders. In *Maiko v. Holy Spirit Association,* 762 P.2d 46 (Cal. 1988), *cert. den.,* 490 U.S. 1084 (1989), the California Supreme Court allowed a tort suit for fraud and intentional infliction of emotional distress based upon allegations that the proselytizing activities of the Unification Church of Sun Myung Moon were deceptive and outrageous:

> *[A]lthough liability for deceptive recruitment practices imposes a marginal burden on the Church's exercise of religion, the burden is justified by the compelling state interest in protecting individuals and families from the substantial threat to public safety, peace and order posed by the fraudulent induction of unconsenting individuals into an atmosphere of coercive persuasion. Id.,* 762 P.2d at 60.

Under *Smith,* such reasoning would be forbidden as Justice Scalia specifically identified "proselytizing" as conduct that the Free Exercise Clause has excluded entirely from civil jurisdiction without regard to any alleged compelling state interest.

Having identified "proselytizing" as an activity within the constitutional protection of the Free Exercise Clause, Justice Scalia has opened the door to a reexamination of earlier cases where the compelling state interest test has allowed civil intrusions upon proselytizing activities outside the immediate confines of the church.

In *Bob Jones University v. United States,* 461 U.S. 574 (1983) the Court turned back a Free Exercise challenge to an I.R.S. ruling that a private religious school forfeited its tax-exempt status solely because its racial policies on dating and marriage ran afoul of a national policy prohibiting racial discrimination in education.

At no point did the Bob Jones attorneys contend that the Free Exercise Clause guaranteed tax immunity to the university in order to preclude Congress and the I.R.S. from using its taxing power to intrude upon its proselytizing activities. To the contrary, they rested their claim that the I.R.S. had no such jurisdiction solely on an appeal to statute.

Only after they lost their statutory argument, did they turn to the Free Exercise Clause, claiming an exception "on the basis of sincerely held religious beliefs." The Court rejected this claim on the

ground that the government's "fundamental, overriding interest in eradicating racial discrimination in education ... substantially outweighs whatever burden denial of tax benefits places on petitioner's exercise of their religious beliefs." *Id.,* 461 U.S. at 603- 04.

This kind of reasoning could be extended to deny tax-exempt status to a church that taught and promoted policies and practices that were deemed contrary to a "national policy against racial or sex discrimination ." The compelling state interest test would be no barrier to the state's using its power to tax to pressure churches to conform to such policies.

But the *Smith* rule should guarantee immunity on the ground that proselytizing is conduct that the Free Exercise Clause absolutely protects from government regulation. This point is especially significant in light of the growing number of cities and states that have added "sexual orientation" to their human rights ordinances. Under the compelling state interest test, traditional church teachings against sodomy could be used as evidence to justify the revocation of their tax-exempt status. Under *Smith,* however, the Free Exercise Clause should absolutely protect that tax status no matter how "compelling" the state interest might be to eradicate discrimination against homosexuals.

The Smith Rule Attacked

The *Smith* rule, then, if properly understood and applied, offers substantial protection to religious freedom under the Free Exercise Clause, and in areas where the compelling state interest offers less protection. The compelling state interest test, as it has been applied, offers the hope of more protection in the area of religious conscience, but it was largely an unrealized hope before *Smith.* Bradley, Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism, 20 *Hofstra L. Rev.* 245, 246-47 (1991).

Why then the almost unanimous outcry against *Smith?* From the day of its announcement until the present, foes coming from every part of the political spectrum have denounced the Court's rejection of the compelling state interest test.

First, an unusual coalition of organizations, often on opposite sides in the ongoing debate over the place of religion in public life, joined in a petition to the Court for a rehearing. Among the petitioners were the American Civil Liberties Union and the Rutherford Institute, the People for the American Way and the Christian Legal Society, the Americans United for Separation of Church and State and the National Association of Evangelicals, and the American Jewish Congress and the Baptist Joint Committee on Public Affairs.

Oliver S. Thomas, at that time general counsel to the Baptist Joint Committee, summarized the historic significance of this effort:

> *These individuals and organizations agree on very little. They all agree, however, that [the Smith] decision is disastrous for the free exercise of religion. The Religious Freedom Alert* 11 (June 1990).

Thomas did not overstate the depth and breadth of opposition. The Reverend Dean M. Kelley, director for the National Council of Churches, claimed that Smith "gutted" the First Amendment's free exercise clause. Amy Adelson, a lawyer with the American Jewish Congress, found the ruling

"devastating to the free exercise rights of all Americans." *Id.* at 11 and 9.

Jordan Lorence, then litigation director for Concerned Women for America said that he "cannot overstate how damaging it [Smith] is to religious freedom." John Whitehead, President of the Rutherford Institute claimed that "Justice Scalia's opinion rejects the notion that free exercise of religion is a preferred right." *Id.* at 7.

Following the Court's rejection of the petition for a rehearing, the Court's critics escalated their opposition to apocalyptic levels. Texas attorney J. Shelby Sharpe compared the *Smith* case to the Japanese attack on Pearl Harbor. Sharpe, "The Death of Religious Freedom," *Chalcedon Report* 2 (Nov. 1990). Samuel E. Ericsson, then Executive Director of the Christian Legal Society, likened it to an Iraqi Scud missile in the Persian Gulf War, one that "scored a direct hit... demolish[ing] a major barrier to government intrusion into religious affairs." Letter to Members and Friends of the Christian Legal Society 1 (May 1991).

To support their claims, these critics and their allies assembled an inventory of cases to demonstrate "the havoc that *Smith* has wreaked." Included were two cases denying religious conscientious objectors an exemption from the state autopsy laws, a case refusing to exempt a Quaker from having to pay income taxes based upon his opposition to war, and a case refusing to exempt the Salvation Army from having to operate residence facilities and programs consistent with a state Rooming and Boarding House Act. Thomas and Walker, "Religious Freedom is Not A Luxury," *Christian Legal Society Quarterly* 3-4 (Fall 1991).

These examples hardly support the outrage expressed against *Smith.* It is doubtful that any of them would have been decided differently under the compelling state interest test as the Court had been applying that test in recent years. For example, the Quaker case against having to pay taxes was the very example used by the Court in *United States* v. *Lee,* 455 U.S. 252 (1982) to support the proposition that under no circumstances could a religious conscientious objector sustain a Free Exercise claim of tax exemption under the compelling interest test. *Id.,* 455 U.S. at 260.

Nevertheless, the anti-Smith coalition persisted in their efforts to discredit *Smith,* taking their case to Congress where they finally succeeded in winning passage of the Religious Freedom Restoration Act (RFRA), signed into law by President Clinton on November 16, 1993.

According to Section 2 of the Act, RFRA has a twofold purpose:

> *(1) To restore the compelling state interest test as set forth in Sherbert* v. *Verner, 374 U.S. 398 (1963) and Wisconsin* v. *Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is burdened; and (2) to provide a claim or defense to persons whose religious exercise is burdened by government.* Pub. L. No. 103-141, 107 Stat. 1488.

By enacting RFRA, Congress has eliminated the absolute jurisdictional immunity previously enjoyed under the Free Exercise Clause as reaffirmed by *Smith,* and substituted the compelling state interest test as the measure of free exercise in every case. If constitutional, RFRA may ultimately prove a disaster to the Free Exercise of religion in America, not the restoration that its supporters

have promised.

THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

For three years after the Supreme Court handed down its decision in *Employment Division, Department of Human Resources* v. *Smith,* 494 U.S. 872 (1990), a coalition of religious and civil rights organizations labored in Congress to secure passage of a bill that would, in effect, overrule it.

At first, a number of religious groups actively opposed the proposed legislation on the ground that it would undermine their efforts to protect the lives of the unborn. The U.S. Catholic Conference and the National Right to Life Committee (NRLC) argued that the new bill, if enacted into law, would "create ... a new statutory basis for pro-abortion litigation."

Don Johnson, legislative director of the NRLC, called attention to the Religious Coalition for Abortion Rights' long-standing claim that "religious- liberty rights and 'reproductive rights' are inseparable." Johnson maintained that the proposed bill would allow a woman to challenge any law restricting abortions on the ground that it burdened her free exercise of religion, thereby requiring the State to prove a compelling interest for the restriction. "Abortion: A Religious Right?," *Christianity Today* 52-53 (June24, 1991).

The bill's religious supporters countered that the concerns expressed were '"sufficiently remote and the concrete advantages sufficiently high, that those who .support both religious freedom and the pro-life cause should support this legislation ."' Notwithstanding this appeal, Congressman Henry Hyde (R. Ill.), a key early sponsor of the bill dropped his support, and a number of evangelical lobby groups - including the Christian Action Council and Concerned Women for America - backed off. *Id.* at 53.

With the religious community divided, the House of Representatives Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, held hearings on May 13 and 14, 1992 "to shed light and to hear both sides ... of this important issue." Representative Hyde opened the hearings, announcing that he could not support the bill in its present form "based on the bill's predictable impact on abortion law." *Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives on H.R. 2797* 7 (1 02d Cong., 2d Sess. May 13 and 14, 1992).

Citing a recent ACLU challenge to Utah's new more restrictive abortion law as a violation of a woman's religious free exercise rights, Representative Hyde noted that the trial judge had dismissed the claim solely on the basis of the *Smith* rule. He, for one, was unwilling to risk the threat that the proposed bill posed to the unborn no matter what benefit it might be to religious freedom.

In the dialogue that followed the first panel of witnesses, Michael J. Kopetski (D. Or.) seized the opportunity to ask Dallin H. Oaks of the Quorum of the Twelve Apostles of the Mormon church and Robert Dugan, Jr., Director of the Office of Public Affairs, National Association of Evangelicals, where they stood on this issue:

> *[Are] you ... saying that the free exercise of religion is so fundamental, it is so important*

> *that when you have a choice of a possible abortion-related issue ... that you are [still] willing to support this piece of legislation.*
>
> *Mr. OAKS. That is correct, a good statement of the position.*
>
> *Mr. KOPETSKI. Mr. Dugan.*
>
> *Mr. DUGAN. And, absolutely, without religious freedom there wouldn't be much of a pro-life movement; there would be some but not a great deal.*
>
> *Mr. HYDE. But without life there wouldn't be any need for religious freedom. Id.* at 59.

Representative Hyde's appeal to life carried the day and the Religious Freedom Restoration Act of 1991 died in the 102d Congress.

Then, on June 29, 1992, the United States Supreme Court shocked the country when three Reagan/Bush appointees joined with Justices Harry Blackmun and John Paul Stevens to reaffirm the essential holding of *Roe v. Wade. Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. --, 120 L.Ed. 2d 67 (1992).

And, in November 1992, the people elected William Jefferson Clinton to the presidency. With the Court and the Presidency lined up against the pro-life cause, the pro-life opposition to the Religious Freedom Restoration Act in Congress crumbled.

Congressman Hyde dropped his opposition to the bill, claiming that his pro-life concerns had been addressed by changes in the language of the statute and in the Committee report:

> *Because the bill now clearly imposes a statutory standard that is to be interpreted as incorporating all "federal court cases" prior to Smith, and free exercise challenges to abortion restrictions were ultimately unsuccessful prior to Smith, we are confident that although such claims may be brought pursuant to the Act, they will be unsuccessful. H.R. Rep. No. 88,* 103d Cong., 1st Sess. (May 11, 1993).

With concessions like these from the pro-life camp, the House of Representatives, on May 11, 1993, unanimously passed the Religious Freedom Restoration Act of 1993 (RFRA). On October 27, 1993, the Senate - by a vote of 97 to 3 -followed suit. On November 16, 1993, President Clinton signed RFRA into law.

Lost in the bipartisan euphoria, however, were several constitutional questions, including what right Congress has to substitute its interpretation of the Free Exercise Clause for that of the Supreme Court. Congressman Hyde had asked that question at the May 1992hearings, but he did not return to it in 1993. Contrast *Hearings on H.R. 2797, supra,* at 7 with *H.R. Rep. No. 88, supra.*

No Legislative Authority

The threshold constitutional question raised by RFRA is not whether Congress has the "power to overrule" a Supreme Court opinion. Rather, it is whether Congress has any authority at all to pass legislation to protect religious freedom.

Congress is a legislature of enumerated powers. Before it can act it must find in the written constitution a grant of power over the subject matter covered by the statute and it must state an object or purpose conferred upon Congress by that grant of power. *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824); *United States v. Darby,* 312 U.S. 100 (1941).

In the alternative, if the subject matter of a statute is not one of the enumerated powers, Congress must demonstrate that the statute enacted is a "necessary and proper means" to regulate a subject matter over which Congress has power and that the purpose of the statute is within the scope of that grant of power. *McCulloch v. Maryland,* 17U.S. (4 Wheat.) 316 (1819); *Katzenbach v. McClung,* 379 U.S. 294 (1964).

According to Section 2(a) of RFRA, the subject matter of the Act is the "unalienable right" of the "free exercise of religion." According to Section 2(b), the purpose of RFRA is to "restore" the free exercise of religion to its position before the *Smith* case and to provide a religious freedom claim or defense in every case where government has burdened it.

The Constitution does not confer upon Congress any power over the subjects of religious freedom or of religion generally. The First Amendment addresses the subject matter, but does not grant any power to Congress. To the contrary, the First Amendment denies to Congress any power whatsoever to pass a "law respecting .an Establishment of religion or prohibiting the Free Exercise thereof.... "

Given this textual evidence, neither the House nor the Senate claimed that Congress had specific authority to regulate religious freedom, as such. Both claimed, however, that RFRA was an exercise of power under Section 5 of the 14th Amendment. See *H.R. Rep. No. 88,* 1 03d Con g., 1st Sess. (May 11 1993) and *S. Rep. No. 111,* 103d Cong., 1st Sess. (July 27, 1993).

Section 5 authorizes Congress to enact "appropriate legislation" to enforce the provisions of the 14th Amendment. Those provisions, in turn, prohibit certain actions by the States. Thus, in order to sustain a claim of authority under Section 5 of the 14th Amendment, Congress must demonstrate that it is protecting the Free Exercise of religion from adverse action by state governments or their political subdivisions. E.g., *Katzenbach v. Morgan,* 384 U.S. 641 (1966).

The text of RFRA is not so limited.

First, RFRA applies to action by the federal government as well as to action by the states. See Sections 3(a), Section 5, and Section 6. Therefore, the subject matter of RFRA is not within the grant of power contained in Section 5 of the 14th Amendment.

Second, RFRA does not state its purpose to be the protection of religious freedom from infringement by the states. Instead, it states its purpose to provide a uniform rule governing religious freedom litigation arising out of cases against both the federal and the state governments. See Section 2(a) and Section 5(1). Section 5 of the 14th Amendment grants no such power to Congress.

{A federal district judge so ruled in a recent case in Texas, although a contrary ruling had been made by a federal trial judge one month previously in Hawaii. Contrast *Flores v. City of Boerne,* - F. Supp. --, 63 USLW 2572, 2573, n. 1 (W.D. Tx Mar. 15, 1995) with *Belgard v. Hawaii,* No. 93-00961 (D.

Haw. Feb. 3, 1995).}

Nor can Congress parlay the Necessary and Proper Clause of Article I, Section 8 with Section 5 of the 14th Amendment in order to justify enactment of~. The Judiciary Committee of the House of Representatives, but not of the Senate, attempted to do just that:

> *... [T]he Committee believes that Congress has the H.R. 1308. Pursuant to Section 5 of the Fourteenth Amendment and the Necessary and Proper Clause embodied in Article I, Section 8 of the Constitution, the legislative branch has been given authority to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority. The Supreme Court has repeatedly upheld such congressional action after declining to find a constitutional protection itself. H.R. Rep. No. 88.*

Not one case cited in support of this claim of power addressed a statute that imposed "a constitutional value" upon the federal government. All were addressed to denials of such constitutional norms by state law. See *South Carolina v. Katzenbach,* 383 U.S. 301 (1966); *Oregon v. Mitchell,* 400 U.S. 112 (1970); *City of Rome v. United States,* 446 U.S. 156 (1980); *Thornburgh v. Gingles,* 478 U.S. 30 (1986).

Even when Congress has acted to protect the constitutional rights of citizens apart from the actions of States, the Court has been careful to lodge that power either as necessary and proper to secure those rights from unconstitutional state action or as necessary and proper to secure a right that arises out of a power granted to the federal government. See, e.g., *United States v. Guest,* 383 U.S. 745 (1966). *Cf Oregon v. Mitchell, supra.*

Therefore, the Necessary and Proper Clause coupled with Section 5 of the 14th Amendment cannot support RFRA's comprehensive coverage of both state and federal infringements upon the Free Exercise of religion.

The only possible power that Congress could claim to impose a uniform rule of Free Exercise on both the state and national governments is its authority over the federal courts. The Necessary and Proper Clause refers not only to powers expressly granted to Congress, but also to powers granted to other departments of the federal government, including the judiciary. The power of Congress over the judiciary, however, is carefully circumscribed by Article m. Section 1 vests the judicial power of the United States in one Supreme Court and in whatever lower federal courts that Congress from time to time creates. Section 2 confers judicial power on certain kinds of cases, mandating that such judicial power extend to all cases arising under the Constitution.

By its terms, Article ill limits Congressional authority to the creation of lower federal courts and to the allocation of jurisdiction within the federal court system.

On its face, RFRA does not purport to be a regulation of federal court jurisdiction. Rather, it contains a substantive rule defining the meaning of Free Exercise of religion as provided for in the First Amendment. (Sections 2 and 3.) The Senate Judiciary Committee Report contains ample evidence that RFRA was not contemplated as a limit on the jurisdiction of the federal courts.

First, the Report observed:

> *... [T]he right to observe one's faith, free from Government interference, is among the most treasured birthrights of every American. That right is enshrined in the free exercise clause of the first amendment .... This fundamental right may be undermined not only by Government actions singling out religious activities for special burdens, but by governmental rules of general applicability which operate to place substantial burdens on individuals' ability to practice their faiths. Sen R. No. 111, 103d Cong., 1st Sess.*

Second, the Report claimed that throughout history the courts failed to protect this view of religious freedom until 30 years ago "with the Supreme Court's landmark decision in *Sherbert v. Verner."*

But, the Report continued, that protection has been removed when the Court in *Smith* abandoned the compelling state interest test of the *Sherbert* case.

So, the Report concluded, in order to implement its view of religious freedom, the Senate is enacting RFRA, utilizing the compelling state interest test as the defining substantive rule of free exercise of religion.

Instead of limiting jurisdiction of the federal courts in Free Exercise cases, Congress has commanded the courts to apply RFRA as the substantive rule of law in those cases. Section 3©. Not only does the Constitution not authorize Congress to act in this manner, it explicitly forbids it.

Usurpation of Judicial Power

Article III, Section 1 of the Constitution vests the "judicial power of the United States ... in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish."Article III, Section 2 extends this judicial power to "all cases ... arising under this Constitution" and provides that "the Supreme Court shall have appellate jurisdiction, both as to law and fact" over such cases "with such exceptions, and under such regulations, as the Congress shall make."

What is most remarkable about RFRA is the naked claim that Congress has supervisory jurisdiction over the Supreme Court. Congressman Henry Hyde and six of his House Judiciary colleagues expressed the claim most bluntly:

> *The purpose of H.R. 1308 is to overturn the 1990 decision of the United States Supreme Court in Oregon Employment Services Division v. Smith, 494 U.S. 872. H.R. Rep. No. 88.*

Senator Alan Simpson agreed:

> *S. 578 is intended to overturn Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) and O'Lone v. Estate of Shabazz, 478 U.S. 342 (1987). All claims in federal and state courts decided pursuant to these two bills [sic] can be relitigated and some will succeed under the bill's standard which favors the claimant.* S. Rep. No. 111.

The Senate Report reads like an appellate opinion. It conducts a review of Justice Scalia's majority opinion and Justice O'Connor's concurring opinion in *Smith.* It then examines Justice Souter's

concurring opinion on *Smith* in the *Hialeah* case. Finally, it concludes that the *Smith* case was wrongly decided and that the true rule of Free Exercise of religion is that found in the compelling state interest test as applied by the Court before *Smith.* Having adopted that test, the Report instructs the courts that they must follow Congress's ruling, not the Supreme Court's in *Smith.*

The House behaved in like manner, being careful to advise the courts that "the purpose of this Act is to overcome the effects of the Supreme Court's decision in Smith" and not to overrule cases decided under the Establishment Clause. *H.R. Rep. No. 88.*

None of this would be constitutionally objectionable if Congress were amending a statute in order to reverse an erroneous interpretation of that law. But here Congress is revising a court opinion which it perceives to be an erroneous interpretation of the Constitution and imposing that revised interpretation upon the courts.

Since 1803, it has been settled that "it is ... the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803). It is not the province of Congress to say what the law is, but only to "prescribe ... rules by which the duties and rights of every citizen are to be regulated." *Federalist* No. 78 It is for the judiciary, not the legislature, to interpret and apply the rule.

Relying on both the legislative history and upon the *Marbury* case, a federal district judge has held that RFRA is an unconstitutional exercise of judicial power. *Flores v. Boerne, supra.* And rightfully so~

With the passage of RFRA, Congress did not purport to have enacted a rule of law. Rather, it simply claimed that its interpretation of the Free Exercise Clause was superior to that of the Supreme Court's. Yet, the Senate Report conceded that Congress had no power to interpret and apply that clause or on any other provision of the Bill of Rights:

> *As the Supreme Court said: 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 officials and to establish them as legal principles to be applied by the courts.* S. *Rep. No. 111.*

By the very passage of RFRA, Congress has contradicted itself. How can the legal principles of the Bill of Rights be insulated from "the vicissitudes of political controversy" if Congress has the final authority to define those principles?

The answer is unmistakably clear. If Congress can define Free Exercise of religion in an "expansive" way, as it claims to have done in RFRA, then it can define Free Exercise in a miserly way should it be dissatisfied with RFRA's results or if the political climate becomes more hostile to religious dissenters.

Even the Senate recognized that its effort in RFRA put it on a collision course with the essential purpose of the Bill of Rights:

> *One's right to life, liberty, and property, to free speech, a free press, freedom of worship*

> *and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.* S. *Rep. No. 111.*

America's founders embraced this principle when it established an independent judiciary, separated from the legislative and executive powers. Alexander Hamilton, writing in defense of this constitutional separation, quoted the great Montesquieu:

> *[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers. Federalist No. 78.*

Hamilton took this point a step further, claiming that there is no government of laws, if "the legislative body are themselves the constitutional judges of their own powers:"

> *[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning .... Federalist No. 78.*

The very purpose of a written constitution, wrote Chief Justice John Marshall in *Marbury* v. *Madison, supra,* was to create a "superior paramount law, unchangeable by ordinary means." If Congress has the authority to determine what that superior paramount law means, then it can by defining that law do whatever it chooses. How can a written constitution limit the power of a legislature if that body has authority to decide for itself what those limits are? The answer is that no legislative body may say what the law of the constitution is, that is the province of the judiciary.

This does not mean that Congress has no power when it disagrees with a judicial application of a constitutional norm. It may, for example, make factual findings demonstrating that the factual picture before the courts was not a complete or accurate one, justifying a legislative remedy that goes beyond what the courts might have ordered to enforce that same constitutional norm. E.g., *Oregon* v. *Mitchell, supra.*

The House Judiciary Committee tried its best to slip RFRA into this category of cases when it stated in its report that all RFRA did was "to provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority." H.R. Rep. No. 88.

But the Court's refusal in *Smith* to apply the compelling state interest test was not based upon a lack of judicial will to enforce the full scope of the Free Exercise Clause. Nor was it based upon an incomplete or inadequate factual picture. To the contrary, the Court in *Smith* rejected the compelling state interest test as incompatible with the substantive Free Exercise guarantee.

Both the Senate and the House adopted RFRA in order to repudiate the constitutional norm in *Smith.* Some may argue that such a repudiation is within the power of Congress, if the legislative repudiation enhances the people's constitutional rights. Such a position has found some support on the Court, but only in relation to the special role granted to Congress to enforce the Civil Rights Amendments. See, e.g., *Katzenbach* v. *Morgan, supra.*

As noted previously, RFRA cannot be justified as such an exercise of power, because the object of the legislation is not limited to the actions of the States and their political subdivisions. Moreover, upon closer examination RFRA does not enhance Free Exercise rights, but diminishes them.

The First Amendment absolutely protects the free exercise of religion from any law that prohibits it. In contrast, RFRA subordinates the free exercise of religion to any law which the government "demonstrates" to be "in furtherance of a compelling governmental interest" so long as it is "the least restrictive means of furthering that compelling governmental interest." Section 3.

RFRA Guarantees Toleration, Not Free Exercise

In Section 2(a) of the Religious Freedom Restoration Act of 1993 (RFRA), Congress found that "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution." (Emphasis added.)

By definition, an unalienable right is one that cannot be given or taken away. If the free exercise of religion is an unalienable right, then it cannot be prohibited no matter how strong the civil society's interest.

That was the opinion of James Madison, one of the chief architects of the First Amendment. In 1785, Madison wrote:

> *We maintain ... that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance Memorial and Remonstrance Against Religious Assessments* (1785). (emphasis added.)

Accordingly, the First Amendment reads simply that "Congress shall make no law ... prohibiting the free exercise ... [of religion]." The text allows for no exceptions, no matter how compelling and no matter how limited.

Congress has not followed this text in RFRA. After having found that the free exercise of religion is an unalienable right, it then found that there can be good reasons for alienating it:

> *[G]overnments should not burden religious exercise without compelling justification .... [T]he compelling interest test ... is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.* Section 2(a)(3) and (5). (Emphasis added.)

Such findings are directly antithetical to the legal and political philosophy undergirding the First Amendment. That Amendment lays down a categorical rule of immunity based upon the legal and political presupposition that one's duties to God are *prior* to one's civil duties, not the other way around.

Again, James Madison got it right when he wrote:

> *"[T]hat Religion or the duty we owe to our Creator" ... is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered*

> *a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving allegiance to the Universal Sovereign. Memorial and Remonstrance, supra.*

It was Madison's view of the relation between God and man, and man and civil society, that informed the First Amendment. And that view was presented to the House Subcommittee on Civil and Constitutional Rights in its hearings on RFRA' s predecessor, only to be rejected by Congress.

Relying on Madison, and upon the Virginia legacy of both Madison and Jefferson, members of the Subcommittee received both written and oral testimony on the unalienability of the right to free exercise of religion:

> *No government interest, no matter how compelling it may be, is sufficient to justify a burden upon a person's free exercise of religion. One's duties to God are defined by the Creator, not by the State, and, if enforceable, only by reason and conviction as prescribed by the Creator, ... such duties are unalienable rights toward men. If they are to remain unalienable, they must be completely and absolutely free from any government regulation, no matter how compelling the interest or necessary the regulation. Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee of the Judiciary, House of Representatives, on H.R. 2797* 89 (102d Cong., 2d Sess., May 13-14, 1991).

This testimony, however, was hotly contested. Nadine Strossen, President of the National Board of Directors of the American Civil Liberties Union, attempted to belittle it;

> *Ms. STROSSEN. ... As I understand the testimony ... I gather that Dean Titus supports absolute freedom for a very narrow definition of religious activity - namely, belief -but when it gets to practice, he believes in the ... nonprotection that the Supreme Court has mandated in the Scalia opinion in the* 1 *Smith case ....*
>
> *Mr. TITUS. Do I have the privilege as a witness to correct her remarks? She mischaracterized my position.*
>
> *Mr. WASHINGTON. OK Well, I will accept your assertion that she mischaracterized it, because I don't think it is necessary to the point where I am taking you.*
>
> *Mr. TITUS. Well, it is absolutely crucial, because I did not say that religion was confined to merely belief ... And I think it is unfair to the witness to mischaracterize my remarks in response to a question that you directed to me. Id.* at 96.

Congressman Craig A. Washington (D-Tx) made a valiant attempt to discredit the proposition that religion was an objective term defined by the Creator. Characterizing *Smith* as just another example of white European males' imposing their religion on a native people "here long before Columbus," Mr. Washington insisted that religion was a subjective term defined by each individual for himself. He asked the witness for agreement on that point:

Mr. TITUS. No, I do not agree with that.

Mr. WASHINGTON. You don't agree that people have the right to define their religion for themselves.

Mr. TITUS. No, that is not the American tradition.

Mr. WASHINGTON. Wait I minute. Who defines the American tradition sir? You?

Mr. TITUS. No. I quoted to you from the Constitution of Virginia and I think that every legal scholar will indicate to you ... that the first amendment rests upon the Virginia legacy. I d. at 97.

Congressman Henry Hyde (R-11) later gave the witness an opportunity to explain the constitutional significance and difference between a First Amendment based upon the Creator's definition of religion not man's:

Mr. HYDE. Dean Titus, what about LSD - the League for Spiritual Development? Timothy Leary -.... Don't you think that there was a compelling state interest in prosecuting him for the proliferation of a hallucinogenic drug under the guise of religion?

Mr. TITUS. ... I think that the issue is ... whether or not the State has authority to deal with drug abuse or drug use. I think that traditionally in America the assumption is that that is a matter for the civil ruler, and therefore if someone comes along with some subjective religious conscience claim it is really at the discretion of the legislature whether to accommodate that claim.

Mr. HYDE: Supposing it is objective rather than subjective? Supposing it has all the trappings of a temple and robes and the whole 9 yards ....

Mr. TITUS. I don't think it makes a bit of difference whether it has all of the "trappings" of a religious order ... [T]here are many people who have claimed to take the lives of babies or taken the lives of young children or taken the lives of adults in the name of religion.

Mr. HYDE. Human sacrifice.

Mr. TITUS. Precisely. And that, of course, is not religion within the meaning of the first amendment .... But that is a matter that is subject to the jurisdiction of the civil authorities, and the civil authorities don't have to demonstrate in every case that they have a compelling state interest with regard to protecting innocent human life ....

[W]hat is important is to recognize the question whether or not that is a duty owed to your Creator enforceable only by reason and conviction as contrasted to force or violence, or whether that is a matter of subjective religious conscience. The American tradition constitutionally has been to protect those objective duties owed to the Creator by reason and conviction .... Id. at 101-02.

But this effort came to nought as the ACLU's Strossen, and others like her, prevailed with their view that religion was a subjective term defined by each individual for himself. Strossen claimed that such a definition was necessary to give everyone's religion the same protection under the First Amendment. *Id.* at 104-05.

Recognizing that her egalitarian notions would lead to a state of anarchy, Strossen conceded that the First Amendment - although containing "absolutist language" - could not "ever be interpreted literally as being an absolute protection for religious freedom." Hence, she opted for the compelling state interest test as a necessary compromise for the good of an "orderly society." *Id.* at 103.

This political compromise found its way into RFRA two years later. Section 3 allows the government to burden a person's exercise of religion if the government "demonstrates that application of the burden ... is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."

THE RELIGIOUS PLURALISM THESIS

Religion: The Modern Definition

Having adopted the compelling interest compromise in RFRA, Congress made no effort to define "religion" or the "exercise of religion" to govern the Act. Because its purpose is to restore the compelling state interest test of *Sherbert* v. *Verner* and *Wisconsin* v. *Yoder,* RFRA has presumably embraced the definition of religion found in them.

In those cases, the Court held that religion means those beliefs and practices that are rooted in "deep religious conviction," not in merely "philosophical and personal" views. To qualify, one must demonstrate that one's beliefs and practices are based upon some holy book or holy tradition that has remained constant over a considerable period of time. *Wisconsin* v. *Yoder,* 406 U.S. at 215-16. Or, one must demonstrate that one's convictions are comparable to such obviously religious faiths. *Cf. United States* v. *Seeger,* 380 U.S. 163, 176 (1965).

What the Court has done over the years is to proffer a modem sociological definition of religion as governing the meaning of that term in the First Amendment. To sustain its position the Court has oftentimes cited the works of contemporary theologians.

For example, in its interpretation of the religious conscientious objector exemption to military service, the Court relied upon the works of Paul Tillich to justify its conclusion that "belief in a Supreme Being" could include faith in "'the power of being, which works through those who have no name for it, not even the name God.'" *Id.,* 388 U.S. at 180.

But the Court has not limited itself to theologians. It has also turned to contemporary ethicists where it has found an even more expansive definition of religion:

> *"Religion ... must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow man." Id.,* 380 U.S. at 183.

Such religious egalitarianism dispenses with the judicial duty to define religion with any specificity at all.

This has been welcomed by many as the only legitimate approach that the Court can take in order to disentangle itself from religious controversy and to recognize the changing religious landscape in America since the Constitution was written.

Laurence Tribe of Harvard is a leading voice embracing this legal realism:

> *... [I]n order to realize the goals of religious liberty, "religion" must be defined broadly enough to recognize the increasing number and diversity of faiths. Furthermore, "religion" must be de fined from the believer's perspective. Excessive judicial inquiry into religious beliefs may, in and of itself, constrain religious liberty. Thus, the Court held in Thomas* v. *Review Board, beliefs are adequately religious even if they are not "acceptable, logical, consistent, or comprehensible"....* L. Tribe, *American Constitutional Law* 1181 (2d Ed. 1988).

The Court and Professor Tribe simply ignore the constitution al text and First Amendment history in arriving at their definition of religion and its free exercise. They have made no effort whatsoever to prove why a twentieth century theologian's or ethicist's views should determine the meaning of an 18th century text. Nor have they made any effort to explore the historical conflict leading to the adoption of that text.

Recently, Justice David Souter has called this failure to the Court's attention. Faulting Smith for failure "to consider the original meaning of the Free Exercise Clause," Justice Souter acknowledged that Justice Scalia' s "overlooking the opportunity was no unique transgression:"

> *Save in a handful of passing remarks, the Court has not explored the history of that Clause since its early attempts in 1879 and 1890 .... The curious absence of history from our free-exercise decisions creates a stark contrast with our cases under the Establishment Clause, where historical analysis has been so prominent. Church of the Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. --, 124 L. Ed. 2d 472,517-18 (1993).

Justice Souter urged the Court in an appropriate case "to explore the history that a century of free-exercise opinions have overlooked." He called the Court's attention to recent scholarship that provides "strong argument... that the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God, unless those activities threatened the rights of others or the serious needs of the State." *Id.,* 124 L.Ed. 2d at 518.

Among the scholarly articles cited by Justice Souter, none has been more widely quoted and relied upon than the lengthy historical account of religious freedom in America's founding era written by University of Chicago law professor, Michael W. McConnell. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," 103 *Harv. L Rev.* 1409 (1990).

Religion: The Historical Definition

The McConnell thesis is based upon a study of the history of the struggle for religious freedom in

America, culminating with the adoption, in 1791, of the Bill of Rights, including the Free Exercise Clause. His is a freewheeling and broad-based assessment of the colonial experience, the early state constitutions, state legislative action, and state ratification debates leading to the formulation of the Bill of Rights. His reading of the text of the Free Exercise Clause comes near the end of the historical drama and is colored by it.

By beginning with an open-ended survey of history, McConnell is free to explore a number of possible meanings of free exercise of religion outside the discipline of the text. This is a questionable methodology to say the least.

In the legal analysis of a written document, whether it be a contract, a statute, or a constitution, one does not engage initially in an historical survey of the subject matter addressed in the document. Instead, one begins with the language of the document, turning to history only for the purpose of giving meaning to the text or resolving an ambiguity. In this way, one's historical inquiry is limited to those events that are arguably relevant to the textual issues.

Two specific examples illustrate the dangers of McConnell's methodological choice. He devotes considerable space to a chronicle of legislative actions exempting religious conscientious objectors from certain civil duties. *Id.* at 1466-1473. But of what relevance are legislatively granted exemptions? Do they not smack of legislative discretion, rather than of universal constitutional obligation?

Many of the examples given by McConnell are clearly political "accommodations" to avoid conflicts with certain religious groups, not resolutions based upon the free exercise principle. Hamburger, "A Constitutional Right of Religious Exemption: An Historical Perspective," 60 *Geo. Wash. L. Rev.* 915, 929-30 (1992). By not phrasing his historical inquiry in the rigorous fashion required by a pre-existent textual framework, McConnell lumps all of the legislative action, discretionary and obligatory, into a single proposition about the meaning of the free exercise of religion.

While McConnell admits that his historical account of legislative exemptions for religious dissenters is ambiguous, he nevertheless suggests that "the exemptions were granted because legislatures believed the free exercise principle required them." *Id.* at 1473.

Had McConnell begun with the constitutional text, he would have been required to give concrete evidence that the legislatures had acted out of duty, not out of discretion, before he could recount them at all. Without the discipline of a textual framework, he is able to create a stronger impression favoring the notion that free exercise means liberty of individual conscience.

A second example is even more telling. McConnell claims that the state constitutional treatment of religious freedom contains that strongest evidence of the meaning of "free exercise of religion" in the First Amendment. McConnell, "Free Exercise Revisionism and the Smith Decision," 57 *U. Chi. L. Rev.* 1109, 1118 (1990).

In his review of these texts, however, McConnell gives equal weight to state constitutional provisions that do not contain the phrase "free exercise" and to those that do. McConnell, *Origins* at 1456- 58. As for the state constitutions that do refer to "free exercise," he pays little attention to

the fact that all but one of them deny "free exercise" to activities that threaten the peace and safety of the community. *Id.* at 1455-58. See Hamburger, *supra.*

As for the one state constitution -Virginia's- that, like the First Amendment, contains the free exercise language without limitation, McConnell goes to great lengths to explain away the text in order to make it conform with those texts that express1y include an exception. *Id.* at 1462-63. What McConnell does with the various disparate state constitutional texts is to ignore their differences in order to extract a common theme from them.

There was, in fact, no common theme, but significant differences among the eleven original states which adopted constitutions before 17 87. Six of them guaranteed protection to specified acts of religious freedom so long as they did not disrupt the peace and safety of the civil society. *E.g.*, N.Y. Const. of 1777, Art. XXVIII; N.H. Con st. of 1784, Part I, Art. V; Del. Decl. of Rights of 1776, Sections 2, 3; Md. Decl. of Rights of 1776, Art. XXXIII; Mass. Const. of 1780, Art. II; S.C. Const. of 1790, Art. VIII, Sect. 1. Three others extended absolute protection to certain specified acts of religious worship, but no protection to any other religious acts. N.J. Const. of 1776, Art. XVIII; Pa. Const. of 1776, Art. II; Vt. Const. of 1777, C. I, Art. Ill. Only two, Georgia and Virginia, extended constitutional protection to "religion" generally. Georgia expressly limited its guarantee with the proviso that one's free exercise of religion not be "repugnant to the peace and safety of the State." An earlier draft of the Virginia free exercise clause contained a similar qualification, but that was eliminated at the behest of James Madison.

These textual differences and similarities were of little, if any, concern to McConnell. But they should have been primary. For the task at hand is to determine the meaning of the free exercise of religion clause in the First Amendment, not of religious freedom generally. By approaching the question in the way that McConnell did, he not only ignored the text, but he forced an interpretation upon it that wrenches it from its plain meaning.

Religion: The Textual Definition

By the time that McConnell reaches the text of the First Amendment, he has laid the groundwork for construing "free exercise of religion" to mean "rights of religious conscience." ld. at 1488- 1500. Having previously used the terms interchangeably in describing the history of religious freedom, McConnell runs into a snag as he recounts the history of the text as it moved through the First Congress.

Madison initially proposed that religious freedom be protected as follows: "no religion shall be established by law, nor shall the equal rights of conscience be infringed." By the time the proposal passed the House the text was substantially changed to read:

> *Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.*

While this text passed the House, it failed in the Senate. The latter body struck the conscience provision altogether, opting for the free exercise guarantee linked to the prohibition against the establishment of religion.

McConnell laments that there is no record extant to explain the Senate's action. So he spends a good deal of energy examining the various dictionary definitions of "religion" and "conscience," noting their differences. He finally concludes:

> *The reference to conscience could have been dropped because it was redundant, or it could have been dropped because the framers chose to confine the protections of the free exercise clause to religion.* Id. at 1495.

As for the possibility of redundancy, McConnell previously acknowledges that the version containing both "religion" and "conscience" had been drafted by Fisher Ames, "a notoriously careful draftsman and meticulous lawyer." ld. at 1483. If so, then rights of conscience must have meant something different from free exercise of religion or Ames would not have placed both of them in his draft.

As for religion, McConnell claims that what was really meant by the word was "religious conscience." He comes to this conclusion on the ground that "conscience" was too broad a term and that "religion" was necessary to confine the free exercise clause's protections to "religious claims" as contrasted to nonreligious ones. *Id.* at 1495-96.

If that is what the drafters meant to say, would it not have been more likely for Congress to have modified the "rights of conscience" terminology that appeared in the Ames draft, rather than to have eliminated it altogether? McConnell does not ask this question, much less answer it.

But the textual difficulty for the McConnell view is far more serious. If "religion" means "religious conscience" for Free Exercise purposes, then it must mean the same thing for Establishment Clause purposes. For the text reads: "Congress shall make no law respecting an Establishment of religion or prohibiting the free exercise thereof...."

As Justice Wiley B. Rutledge pointed out in *Everson* v. *Board of Education,* 330 U.S. 1, 32 (1947), the single word, "[r]eligion ... governs two prohibitions and governs them alike ... 'Thereof' brings down religion with its entire and exact content, no more and no less, from the first into the second guaranty ...."

The McConnell definition of religion would mean that the First Amendment forbids any law respecting an establishment of "individual judgment" or "the inner faculty of judgment." McConnell, Origins, at 1490. How absurd! What would be prohibited would be the very freedom that the Establishment and Free Exercise Clauses were designed to preserve, namely, freedom from the power of the state in the performance of one's religious duties.

Had McConnell done a straight textual analysis he would have discovered that the First Amendment religion clauses were derived specifically from Section 16 of the 1776 Virginia Constitution and from the disestablishment of religion in that state through the 1786 Act for Establishing Religious Freedom. See *Everson v. Board of Education*, *supra*.

Like the Virginia constitution, the First Amendment used the phrase "free exercise" and like that same pro vision, the First Amendment allowed for no exceptions in the interest of the peace and safety of the community. And like Virginia, the First Amendment used the word, religion, to define

the scope of both the no Establishment and Free Exercise principles.

The Virginia constitution, however, contained a definition of religion that the First Amendment omitted altogether. Given the similarities between them, however, one can safely conclude that the definition in the Virginia document applies equally to the federal one.

This was certainly the inference drawn by the Supreme Court in 1879 and 1890 · when it decided the Mormon polygamy cases. See *Reynolds* v. *United States,* 98 U.S. 145, 162-63 (1879) and *Davis* v. *Beason,* 133 U.S. 333, 342 (1890).

Article I, Section 16 of the Virginia Constitution defined religion as "the duty which we owe to our Creator" and which "can be directed only by reason and conviction, not by force or violence." In other words, religion is a jurisdictional term designed to exclude from the power of the State any duty, the nature of which can only be enforced by reason and conviction.

If a duty is subject only to reason and conviction, then its performance or nonperformance was subject to "the dictates of conscience," not to the coercive power of the state. This principle held true even if the state could show that it had a compelling state interest in subordinating individual conscience to the interests of civil order. The protection afforded free exercise was absolute.

If, on the other hand, a duty by its nature may also be enforced by force and violence, then it is within the coercive power of the state. No constitutional protection was available to anyone who because of religious conscience could not obey. His only appeal was to legislative grace.

In the early history of enforcement of the Free Exercise Clause the Supreme Court adhered to the jurisdictional test reflected in its text. In *Smith,* the Court has opted to return to that textual principle. If *Smith* is true to the jurisdictional principle then we should see an expansion of free exercise rights for there are a number of duties owed exclusively to God that are now subject to the rule of the State. See the Forecast (April 1995).

RFRA departs from this principle, affording the free exercise of religion less protection than available under the jurisdictional test for it concedes total jurisdiction to the government, permitting liberty of conscience only when the government cannot show a compelling necessity to act. As can be seen from the operation of that test before *Smith,* the compelling interest test will be used by the government to intrude upon areas of activities long held immune from civil power.

RFRA, however, is unconstitutional and should be struck down (See the Forecast {May 1995}), opening up the opportunity to extend the *Smith* jurisdictional principle to a number of areas now dominated by civil government, but by nature subject only to individual conscience.

THE JURISDICTIONAL PRINCIPLE

For years civil authorities in the United States have breached the jurisdictional wall separating church and state. By establishing tax-supported welfare, the state has encroached upon the religious duty of the people to care for the poor (James 1:27) according to rules established by the church, not by the state (II Thess. 3:10; 1 Tim. 5:8-16). Titus, 'The Establishment Clause: Welfare," *The Forecast 5 (Sept.1,* 1994).

By establishing tax-supported education, the state has secured a near monopoly in providing for the education of the children, wresting control from their parents who are duty bound to teach their children (Eph. 6:3), aided and guided by the church, not by the state (Mt. 28: 18-20). Titus, "The Establishment Clause: Education," *The Forecast* 5 (July 1, 1994).

While the state has not yet outlawed private charity and education, it has through its taxing power exerted significant control over those endeavors. This has been accomplished primarily through the administration of the federal tax laws conferring tax-exempt status upon "[c]orporations ... organized and operated exclusively for religious, charitable ... or educational purposes."

In *Bob Jones University v. United States,* 461 U.S. 574 (1983), the United States Supreme Court affirmed that the Internal Revenue Service was authorized to deny tax-exempt status to Bob Jones University because the University's rules governing interracial dating violated the government's public policy prohibiting racial discrimination in education.

Congress had conferred this authority upon the IRS, the High Court concluded, by statute which, in turn, was rooted in the "common law standards of charity -namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy." *Id.,* 461 U.S. at 586.

While attorneys for Bob Jones challenged this interpretation of the Code, claiming that Congress had intended that the IRS grant tax-exempt status to any bona fide charitable, educational, or religious organization, they did not challenge this interpretation as contrary to the Free Exercise Clause of the First Amendment of the Constitution.

Instead, they conceded that Congress had the authority to control tax exemptions "for the benefit of society" but that the benefit claimed in the particular case before the court was not so compelling that it justified encroaching upon the religious conscience of the university. *Id.,* 461 U.S. at 602-03.

The High Court rejected this claim with a single paragraph:

> *The governmental interest at stake is compelling ... [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education .... That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. Id.,* 461 U.S. at 604.

By yielding the jurisdictional point, the attorneys for Bob Jones made a strategic mistake, one that has led to the near demise of the Free Exercise Clause.

A Strategic Error

The First Amendment, according to the arguments of BJU's attorneys, does not protect "nonreligious private schools" but only "schools that engage in racial discrimination on the basis of sincerely held religious beliefs." *Id.,* 461 U.S. at 602.

First, by making this distinction, the Bob Jones attorneys played right into the hands of those in America who have claimed that the Establishment Clause requires the separation of the "secular"

from the "religious." If the Free Exercise Clause protects only an individual's "religious" conscience, then the Establishment Clause must protect the state's "secular" domain from "religious" intrusions.

Any other rule would allow religious people to use the state to impose their morals and values upon nonreligious people who have, by definition, no Free Exercise protection. The only comparable protection that nonreligious people have is an Establishment Clause that demands that all laws be strictly "religiously neutral."

Second, the Bob Jones attorneys weakened the Free Exercise Clause. By limiting it to the protection of "religious conscience," the Free Exercise Clause takes on the political baggage of a "special privilege." If only "religious people" are protected by the Free Exercise Clause, nonreligious people will either be indifferent towards its guarantees or seek to narrow them in order to see that all people are treated "equally."

Moreover, limiting the Free Exercise Clause protection to only "religious objectors" invites all kinds of phony "religious conscience" claims. In order to avoid "passing judgment" on such claims, courts will dignify them with such comments as "sincerely held" and seek other ways to deny constitutional protection. See, e.g., *Bowen v. Roy,* 467 U.S. 693 (1986) (Petitioners sought welfare benefits from the state but refused to accept a social security number for their child on the ground that assigning the number to the child would "rob the spirit" of the child).

Reducing the Free Exercise Clause to a matter of subjective religious conscience inevitably leads the courts to overinflate the significance of the interest of the state. If a person may disobey a civil rule solely on the basis of his private religious belief, then the entire civil order is at stake. Not surprisingly, the High Court has found few state interests insufficiently compelling to override such claims of conscience. McConnell, "Free Exercise Revisionism and the Smith Decision," 57 *U. of Chic. L. Rev.* 1109, 1120, n. 45, 1122, n. 56. See Titus, "The Free Exercise Clause: 1990-Present," *The Forecast* 11, 14 (April 1995).

Such weakening, in turn, stimulates people who qualify for Free Exercise protection to seek greater protection, such as has recently occurred in the enactment of the Religious Freedom Restoration Act of 1993. See Titus, "The Free Exercise Clause -The Religious Freedom Restoration Act of 1993," *The Forecast* 8 (May 1995). Acts like these -exempting people from civic duties for "religious conscience" sake- reinforce those who claim that the Establishment Clause demands strict religious neutrality in the formulation of public policy. After all, why should religious people have any hand in making public policy if they, and they alone, have significant statutory and constitutional exemptions from obedience to it?

Indeed, why should religious people have the right to bring their religious views into the political arena at all? Some have argued just that {See Titus, 'The Establishment Clause: Public Policy," *The Forecast* 12, 14 (Nov. 1994)}, prompting many in the Christian community to call for a constitutional amendment to restore "equality" for religious speech in the marketplace of ideas. Hooten, "Religious equality: Putting it in Writing," 9 *Citizen* 1-3 (June 19, 1995).

What is needed, however, is not a constitutional amendment but a return to the original jurisdictional

principle of the Free Exercise Clause.

The Jurisdictional Principle

In *Bob Jones,* Chief Justice Warren Burger had no difficulty accepting the claim of the United States that the Government had jurisdiction over charity. He quoted with approval the House Report supporting the enactment of the charitable deduction provision of the Revenue Act of 1938:

> *The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds, and by benefits resulting from the promotion of the general welfare. Id.,* 461 U.S. at 590.

The Court, then, reinforced Congress with its own theory conceding total jurisdiction over charity to the Government:

> *When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious "donors." Charitable exemptions are justified on the basis that the exempt entity confers a public benefit ... [T]o warrant exemption ... an institution ... must demonstrably serve and be in harmony with the public interest. The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred. Id.,* 461 U.S. at 591.

Having surrendered jurisdiction completely, the High Court put its imprimatur on the IRS:

> *Guided ... by the Code, the IRS has the responsibility, in the first instance, to determine whether a particular entity is "charitable" ... This in turn may necessitate later determinations of whether given activities so violate public policy that the entities involved cannot be deemed to provide a public benefit worthy of "charitable" status. Id.,* 461 U.S. at 597.

By relying upon English common law, a law developed in an established church state, the Supreme Court never asked whether the First Amendment, which had disestablished the church, made any difference in the continued relevance of the common law tradition governing charities and education. This is surprising in light of the Court's consistent refusal, in the name of the First Amendment religion clauses, to honor the common law tradition punishing a number of "offenses against God and Religion," including heresy and blasphemy. See, e.g., *Everson* v. *Board of Education,* 330 U.S. 1 (1946).

A careful look at the writings of James Madison and Thomas Jefferson, in support of the free exercise of religion, reveals that the English traditions governing education and charities would not prevail in their native Virginia.

As for education, both Jefferson and Madison denied to the state any authority to educate or to tax the people to support an educational program. "[T]o suffer the civil magistrate to intrude his powers

in the field of opinion," wrote Jefferson in his 1786 Statute for Establishing Religious, "is a dangerous fallacy, which at once destroys all religious liberty, because he being of course the judge ... will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with his own."

"The opinions of men," wrote Madison in his 1785 Memorial and Remonstrance against Religious Assessments, "depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men."

Therefore, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves," wrote Jefferson in his statute, "is sinful and tyrannical":

> *[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 ....*

The very nature of tax-supported public education violates these principles of the Free Exercise Clause, for as Madison put it the formation of opinions is "Religion" and, therefore, "is wholly exempt from ... [the] cognizance" of Civil Society.

Likewise, so is welfare. As Article I, Section 16 of the Virginia Constitution of 1776 put it, charity is a "mutual" not a "civil" duty.

To extend the taxing power of the state to "educational, religious, and charitable" organizations, except when those institutions demonstrate to the civil authorities, that their activities are consistent with public policy is a violation of the Free Exercise Clause. Any ruling to the contrary would ignore the maxim made famous by Chief Justice John Marshall: "The power to tax is the power to destroy."

No Taxation

Recently, the historic tax immunities enjoyed by the church and other religious groups have been challenged as violating the Establishment Clause. These assaults have continued even though the Supreme Court ruled by a vote of 8 to 1 that such tax immunities do not violate that provision. *Walz* v. *Tax Commission,* 397 U.S. 664 (1970).

In that case, Chief Justice Warren Burger refused to consider whether the Free Exercise Clause commanded tax immunity. Instead, he treated the issue as one of tax exemption, thereby limiting his assessment of constitutionality to the Establishment Clause concerns raised by state subsidization. On that point, he concluded that exempting the church from taxation was not the equivalent of supporting that church with tax revenues:

> *The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. Id.,* 397 U.S. at 675.

In dissent, Justice William 0. Douglas disagreed. He found no constitutionally significant difference between a tax subsidy and a tax exemption. *Id.* 397 U.S. at 704. On the other hand, he found a constitutional difference between tax immunity and tax exemption. As to the former, Justice Douglas

acknowledged that the Free Exercise Clause prohibits a tax levied on "the privilege of delivering a sermon." *I d.,* 397 U.S. at 706-07.

As to such a privilege, Douglas assumed that the government had no jurisdiction, even to levy a general license tax for the privilege of selling goods when that tax was imposed on a person selling religious tracts in conjunction with his preaching the gospel. Titus, "No Taxation or Subsidization: Two Indispensable Principles of Freedom of Religion," 22 *Cumberland L. Rev.* 505, 518 (1992).

The question is: What are those privileges that are immune from the jurisdiction of the civil authorities? For if an activity is outside the civil jurisdiction, then the state may not tax it period. Refraining from exercising a power that it does not have could, by definition, not be a subsidy, because a subsidy itself presupposes jurisdiction.

Madison proposed that this question could be answered only by identifying those duties that all men owed exclusively to the Creator as the Governor of the universe:

> *Before any man can be considered as a member of any particular Civil Society, he must be considered a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with the saving of his allegiance to the Universal Sovereign.* Madison, *Memorial and Remonstrance* (1785)

With regard to such duties, the Governor of the Universe is to the United States and the States as the United States is to the States: The Supreme and Only Law Giver and Enforcer. As is true of an instrumentality of the United States, so it is true of an instrumentality of the Universal Sovereign: It is immune from the taxing power of an inferior governing official. Titus, "No Taxation or Subsidization," 22 *Cumberland L. Rev.* at 516.

If this jurisdictional principle were applied, the Free Exercise Clause would immunize the first ten percent of every person's "increase" (income) because that percentage, being the tithe, belongs exclusively to God and subject solely to His jurisdiction (Gen. 14:20).

The Free Exercise Clause would also immunize from taxation all property and employment relations of organizations and institutions dedicated and engaged in education, charity, and worship. For those activities arise out of a person's duty to the Creator and are subject solely to His jurisdiction. See Titus, "The Social Security Amendments of 1983: A Tax on Religion," 1 *Benchmark* 10 (Jan/Feb 1984).

CONCLUSION

The Free Exercise Clause was designed to work a dramatic change in the relationship between the church and the state. The church would be freed from the power of the state. The Establishment Clause, in turn, would prevent the state from enforcing the rules of the church or from usurping her role in Civil Society.

In modern America, we see only a remnant of the promise of these two great guarantees. The church

remains free of the taxing power of the state, but knows that any significant misstep could bring its tax exempt status crashing down. The state has refrained from enforcing or usurping the evangelical mission of the church, but has undermined it with its near monopolies on education and welfare.

The original vision of a free church and a limited state can only be realized by a return to the jurisdictional principle that united the Free Exercise and Establishment Clauses in the first place: To secure those duties that are owed exclusively to the Creator - the ones enforceable only by reason and conviction - from any and all encroachments by the civil authorities.

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