THE FREE EXERCISE CLAUSE: PAST, PRESENT AND FUTURE

HERBERT W. TITUS*

Less than one week after the Republicans took control of both houses of Congress in the 1994 elections, Representative Newt Gingrich, destined soon to become the new Speaker of the House, surprised most people when he announced that he would press for a vote on a constitutional amendment to restore prayer to the nation's public schools.[1] A month earlier, in a speech at the Washington-based Heritage Foundation, Gingrich claimed that his prayer amendment would not just allow for mindless prayers with no meaning.[2] Instead, he favored an amendment permitting prayers that would emphatically affirm that "life of the spirit and ... soul matter and that to be an American is to be aware of the fact that our power comes from a Creator."[3] With the ultimate restoration of prayer to the classroom, Gingrich hoped that "belief in the creator" would "once again [be] at the center of defining being an American."[4] This vision, he asserted, would replace the "radically different vision of America ... [held by] the secular, anti-religious ... left" that has dominated the nation since the mid-1960's.[5]

As surprising as Gingrich's bold proposal was, he was nevertheless shocked by the cool reception given to his plan by the so-called Christian Right. Gingrich predicted that the proposed amendment would trigger a national debate on the nature of the American polity. However, instead of sparking a national debate over the role of religion in the public life of the nation, Gingrich

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* B.S., University of Oregon; J.D., Harvard University; Editor and Publisher of THE FORECAST.

1. Richard L. Berke, *White House Tries to Clarify Stand on School Prayer*, N.Y. TIMES, Nov. 18, 1994, at A1, A30.

2. Herbert W. Titus, *The Good Ol'Days*, THE FORECAST, Dec. 1994, at 4.

3. Newt Gingrich, Address Before the Heritage Foundation, Washington, D.C. (Oct. 5, 1994), *reprinted in Religion and Politics: The Legitimate Role*, 507 THE HERITAGE LECTURES, 1, 12 (1994).

4. *Id.* at 1.

5. *Id.*

discovered the Republican Party's evangelical and fundamentalist constituency to be deeply divided and hesitant over the issue of prayer and Bible-reading in public schools. Many Christians have always expressed opposition to the idea of public school teachers indoctrinating children in religious matters. Now that the public schools are firmly in the hands of secularists, that number has increased.

Previous supporters of prayer in the classroom have shifted their support to voluntary student-led prayers at graduation exercises and extra-curricular events, such as ball games.[6] This change in political direction has come about primarily for two reasons: First, many Christian political activists have simply conceded the leadership of the nation's schools to non-Christians. They have concluded that America's culture has shifted irreversibly from a Christian consensus to religious pluralism. These Christians, therefore, oppose any constitutional amendment that would allow school officials to lead children in prayer, since that would "permit ... teachers and principals of every belief system to write and recite prayers," including everything from "New Age nonsense to Islamic rituals."[7]

Second, having conceded leadership of public education to non-Christians, these Christian activists have given up law and politics to secularists. Instead of seeking to restore America to the "laws of the Creator," for example, they press for a more limited goal, namely, that religious people be guaranteed the same rights as non-religious people in the political life of the nation. These activists, therefore, support a constitutional amendment assuring that religious people be allowed to express themselves in the "public square" on an equal basis with non-religious people.[8] This drive for equality of religious expression has been justified as a response to the hostility against religious people engendered by the United States Supreme Court's insistence that the Establishment Clause[9] requires the government to adhere to a position of strict religious neutrality.[10] While there is much

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6. *See, e.g.*, CHRISTIAN COALITION, CONTRACT WITH THE AMERICAN FAMILY 7 (May 1995).

7. Letter from James C. Dobson to Friends of Focus on the Family 4-5 (May 1995) (on file with author).

8. CHRISTIAN COALITION, *supra* note 6, at 5-7.

9. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion ....")

10. *See, e.g.*, Rosenberger v. University of Virginia, 115 S. Ct. 2510 (1995) (Souter, J., dissenting).

truth in this claim, there is also reason to believe that Christians, as well as other religious people, have helped to bring second-class citizenship upon themselves.

For years, many Christian policy groups have insisted that the Free Exercise Clause[11] guarantees to religious people exemptions from laws that non-religious people must obey.[12] To those who profess no religious convictions, or only moderate ones, the Free Exercise Clause appears to be a special privilege for a narrowly defined class, not a constitutional right for everyone. If Christians and other religious people have a constitutional exemption from civilly enforced duties not available to others, then it is understandable that non-religious people bristle when Christians and others rely upon their religious convictions to support laws non-religious people must obey. After all, non-religious people, unlike their religious counterparts, have no Free Exercise Clause exempting them from laws that they conscientiously oppose. If Christians insist on a special constitutional exemption, then they can expect non-religious people to react by insisting that Christians leave their religious convictions at home or in the church. And, when they do not, then non-religious people will continue to use the Establishment Clause as their constitutional weapon, requiring only secular reasons and goals to support public policy choices.[13]

The problem that Christians face is as much an issue of the free exercise of religion, as it is of an establishment of religion. It is the thesis of this article that the establishment problem cannot be solved until the Free Exercise Clause is restored to its original meaning. Once restored, the Free Exercise Clause will cease to serve as a special constitutional privilege available only to religious people. Instead, it will serve as a significant jurisdictional bulwark confining the state to its proper area of authority and thereby benefiting all people equally.[14]

Part I of this article explores the meaning of the Free Exercise Clause as set forth by the Supreme Court in America's first 170 years. Part II documents how the Court transformed

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11. U.S. CONST. amend. I ("Congress shall make no law ... prohibiting the free exercise [of religion].")

12. *See, e.g.*, Michael W. McConnell, *Accomodation of Religion*, 1985 SUP. CT. REV. 1 (1986).

13. *See* Herbert W. Titus, *The Establishment Clause: Public Policy*, THE FORECAST, Oct. 1994, at 10-13.

14. *See* James R. Mason, Note, Smith's *Free Exercise Hybrids Rooted in Non-Free-Exercise Soil*, 6 REGENT U. L. REV. 201 (1995).

that meaning beginning in 1962. Part III addresses the current controversy on the Court over the meaning of the Clause. Part IV examines the constitutionality of the Religious Freedom Restoration Act. Part V reveals how that Act and the constitutional theory that inspired it, is contrary to the original free exercise principle. Part VI calls for a return to the original textual meaning of the free exercise guarantee. Finally, this article concludes that the religious and non-religious alike will benefit from a reading of the Free Exercise Clause according to its original meaning.

I. THE FREE EXERCISE CLAUSE: THE FIRST 170 YEARS

Eighty-eight years after the First Amendment became a part of the United States Constitution, the Supreme Court decided *Reynolds v. United States*.[15] For the next eighty-two years, *Reynolds* determined the meaning and application of the clause forbidding laws "prohibiting the free exercise [of religion]."[16] *Reynolds* arose out of a prosecution for violation of a law prohibiting bigamy in the Territory of Utah. The defendant, a member of the Mormon Church, 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. Beginning its analysis with a search for the meaning of "religion," the Court acknowledged that the text of the First Amendment did not define the term. It then launched an historical inquiry to determine its definition.

The *Reynolds* decision found the definition of "religion" in the developmental history of freedom of religion in America, which "culminate[d] in Virginia."[17] Relying upon the works of James Madison and Thomas Jefferson, the Court defined the term in accordance with its original meaning. The Court endorsed Madison's proposition that religion defined those duties that "we owe to the Creator" outside the "cognizance of civil government."[18] 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:

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15. 98 U.S. 145 (1878).
16. U.S. CONST. amend. I.
17. *Reynolds*, 98 U.S. at 162-63.
18. *Id.* at 163.

> 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."[19]

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 that were in violation of social duties or subversive of good order."[20]

In *Reynolds*, the defendant was not prosecuted for having a wrong opinion about polygamy; rather, he had been convicted of the very act. Although Congress had outlawed the act of polygamy, and not an opinion about it, this did not resolve the Free Exercise Clause issue. Implicit in the Jefferson formula, according to the Court, was the understanding that the Free Exercise Clause also excluded some acts from the jurisdiction of Congress. The question, then, before the Court in *Reynolds*, 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 first sought the answer in the common law.

The Supreme Court observed that "[a]t common law the second marriage was always void and from the earliest history of England polygamy has been treated as an offense against society."[21] But, the Court noted, 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 determined that ecclesiastical courts had been given jurisdiction over civil, as well as church matters. It then observed that by the early seventeenth century a statute had been passed making polygamy an offense "punishable in the civil courts."[22] This statute, the Court discovered, had been reenacted in all of the American colonies. Of

19. *Id.* (citation omitted).
20. *Id.* at 164.
21. *Id.* (citation omitted).
22. *Id.* at 165.

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. 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."[23]

The Court then turned its attention to the institution of marriage. 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."[24] 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."[25] 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."[26]

This analysis also served as the point of departure for the Court's refusal to apply the Free Exercise Clause to require an exception to a polygamy statute for religious conscientious objectors. The defendant in *Reynolds* claimed that the Free Exercise Clause required an exception for individuals, like himself, who had taken two or more wives pursuant to a religious belief. In response, the Court first stated that such an argument, if allowed, would introduce the "new element into criminal law" of discriminating between offenders solely on the basis of their personal religious beliefs, subordinating even the laws prohibiting murder to such beliefs.[27] 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 permit every citizen to become a law unto himself."[28] Having already 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, and having resolved that polygamy came

23. *Id.*
24. *Id.*
25. *Id.* at 166.
26. *Id.*
27. *Id.*
28. *Id.* at 167.

within the second jurisdictional category, the Court dismissed Reynolds's claim of religious conscientious objection as wholly illegitimate.

It was not until the 1940's that the Court would have an opportunity to apply the *Reynolds* jurisdictional principle outside the context of the polygamy issue. Within the first four years of this decade, a number of cases involving Jehovah's Witnesses would test the vitality of this sixty-year-old precedent. In *Cantwell v. Connecticut*,[29] 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."[30] Beginning with the *Reynolds* principle that "belief" was outside the cognizance of civil authorities, the Court prefaced its free exercise analysis with "the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views."[31] Presumably, the Court found these activities to be within the area of "opinion" and immune from the jurisdiction of the state.[32] From this premise, the Court reasoned that no civil authority had jurisdiction to inquire into a person's beliefs when that inquiry determined whether 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.[33]

From 1942 to 1944, a number of cases came to the Court testing the constitutionality of a license tax levied upon "missionary evangelism."[34] The license taxes at issue were of a general nature and 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 Douglas, writing for a sharply divided Court, ruled that

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29. 310 U.S. 296 (1940).
30. *Id.* at 305.
31. *Id.* at 304.
32. *Id.* at 303.
33. The Court found that:

> [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 is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.

Id. at 307.

34. Jones v. Opelika, 319 U.S. 103 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. Town of McCormick, 321 U.S. 573 (1944).

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.[35] The state, Douglas maintained, 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."[36] Both were outside its jurisdiction. 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.[37] The dissenting justices claimed just that, asserting that the activities engaged in by the Jehovah's Witnesses were primarily commercial in nature and therefore subject to the jurisdiction of the state.[38]

It was almost twenty years later before the *Reynolds* doctrine would be tested again. In 1961, in *McGowan v. Maryland*,[39] the Court held that a state's Sunday closing laws were within the state's jurisdiction. Relying in part on *Reynolds*, the Court ruled that such laws were within the state's power to provide a uniform day of rest for all citizens.[40] In the companion case of *Braunfeld v. Brown*,[41] the Court denied that the Free Exercise Clause entitled a religious Sabbatarian 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 would not infringe upon the Sabbatarian's freedom of belief.[42] The Court repeated its holding in *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."[43] The Court concluded, therefore, that the Free Exercise Clause could not be construed to require a religious conscientious objector exception lest the purpose of the uniform day of rest be thwarted.[44]

Also, in 1961, the *Reynolds* jurisdictional test was applied in *Torcaso v. Watkins*.[45] There the Court ruled that the State of

35. *Murdock*, 319 U.S. at 108-10.
36. *Id.* at 112-13.
37. *Id.* at 110-11.
38. *Id.* at 119 (Reed, J., dissenting).
39. 366 U.S. 420 (1961).
40. *Id.* at 420, 437-40, 450-51.
41. 366 U.S. 599 (1961).
42. *Id.* at 603-05.
43. *Id.* at 607.
44. *Id.* at 608-09.
45. 367 U.S. 488 (1961).

Maryland could not require a civil office holder to swear an oath that he believed in God. Such a "religious test," the Court ruled, was outside the jurisdiction of the civil government and prohibited by the Free Exercise Clause. Whether or not one believed in God was a "religious duty," enforceable only by reason and conviction. While a civil government could not require a religious test oath as a condition to holding a civil office, it could require a civil test oath, such as to uphold the constitution.[46] The latter duty was a "civil" one, enforceable by force or violence. The Free Exercise Clause did not exempt any one from obedience to the law, even if the law required disobedience to a religious precept or practice. Thus, the civil oath of office could not be avoided by anyone, even for religious reasons.

In summary, from *Reynolds* through *Torcaso* the Court refused to construe the Free Exercise Clause to require an exemption for a religious conscientious objector. Rather, that Clause protected all people from laws encroaching upon duties owed exclusively to the Creator.

II. THE FREE EXERCISE CLAUSE: FROM 1961 TO 1990

Then came the revolution. Engineered by Justice William Brennan, Jr., the seedbed was 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, 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.[47] Brennan maintained that the Free Exercise Clause protected an individual from having to suffer "substantial competitive disadvantage" occasioned solely because the state had not respected their religious conscience.[48] Brennan wrote that only if the state had a "compelling interest" or an "overbalancing need" could it impose this kind of economic burden upon a religious conscientious objector.[49] While he did not persuade his colleagues in 1961, his views would command a majority of the Court in 1963 in *Sherbert v. Verner*,[50]

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46. Herbert W. Titus, *The Establishment Clause: No Religious Test*, THE FORECAST, Sept. 1994, at 4-7.

47. Braunfeld v. Brown, 366 U.S. 599, 611 (1961) (Brennan, J., concurring and dissenting).

48. *Id.* at 613.

49. *Id.* at 613-14.

50. 374 U.S. 398 (1963).

an opinion that went largely unchallenged for the next twenty-seven years.

A. The Balancing Test: Invented

In *Sherbert*, 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."[51] Pursuant to this policy, state authorities ruled that a member of the Seventh Day Adventist Church had made herself "unavailable for work" for personal reasons when she refused employment that required her to work on Saturdays.[52] Justice Brennan ruled that South Carolina's action denied the Sabbatarian's constitutional right to free exercise of her religion.

Justice Brennan's decision in *Sherbert* introduced a new two-step analysis to free exercise jurisprudence. Under this approach, the category of cases in which the jurisdictional test was to be applied was narrowed to those involving "regulation of religious *beliefs*, as such," and to cases involving regulations discriminating against "religious views" or regulations inhibiting the "dissemination of particular religious views."[53] Outside the areas of religious belief and profession of those beliefs, 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."[54]

In cases beyond the area of religious belief and profession, Justice Brennan devised a new three-part balancing test for free exercise analysis. First, Brennan examined the religious practice to ascertain whether it posed a "substantial" threat to the public safety, peace, and order. In *Sherbert*, he summarily concluded that conscientious objection to Saturday work did not pose any such dangers.[55] Second, Brennan asked if the state action "imposed any burden on the free exercise of ... religion."[56] He concluded in the affirmative. By withholding unemployment ben-

51. *Id.* at 418-19 (Harlan, J., dissenting).
52. *Id.* at 419.
53. *Id.* at 402.
54. *Id.* at 402-03.
55. *Id.* at 403.
56. *Id.*

efits, the South Carolina policy requiring appellant to be available for Saturday work "pressure[d]" her to "abandon[] one of the precepts of her religion."[57] This pressure, 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."[58] Third, having determined that the South Carolina statute constituted a "substantial infringement of appellant's First Amendment right," Brennan called upon the State to demonstrate that it had "some compelling state interest" to do so.[59] All the State could muster on its behalf was a "possibility . . . of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work."[60] Such a "possibility," Brennan asserted, was hardly compelling.[61]

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 a state to establish a welfare program designed to protect its people from the hazard of involuntary employment. If he answered this question in the affirmative, as Harlan did, then the free exercise claim would have been rejected, as was the case just two years earlier when a Sabbatarian's plea to be exempt from the Sunday closing laws was denied.[62]

B. The Balancing Test: Revised

Nine years after *Sherbert*, the Court, in *Wisconsin v. Yoder*,[63] chose to discard the jurisdictional test altogether in favor of a revised balancing test. In *Yoder*, Old Order Amish parents were convicted of violating Wisconsin's compulsory school attendance law for failing to send their children to school after the eighth grade. The parents claimed that this criminal conviction violated their free exercise rights. They based their claim on the ground that their purpose in keeping their children out of high school

57. *Id.* at 404.
58. *Id.*
59. *Id.* at 406
60. *Id.* at 407
61. *Id.* at 407-09.
62. *Id.* at 418-21.
63. 406 U.S. 205 (1972).

was to preserve their religious faith.[64] If the Supreme Court had 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. Under the *Sherbert* rule, beliefs, and profession and dissemination of beliefs, were absolutely protected by the Free Exercise Clause. Justice Brennan had, in his decision, preserved that much of the *Reynolds* jurisdictional test.[65]

In *Yoder*, however, the Court did not apply the traditional jurisdictional test at all. Instead, 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."[66] The centerpiece of this test involved weighing the interest of the individual to exercise his religious conscience, against the interest of the state in maintaining public safety, peace and order. Only if the interest of the state was found to be compelling could an individual's religious conscience be nullified.

While the Court incorporated into its analysis all of the elements of the three-part test devised by Justice Brennan in *Sherbert*, it revised the test significantly. First, the Court spelled out the specific criteria whereby it would determine if a claim was "rooted in religious belief."[67] If a claim was based solely on personal or philosophical views, the Court ruled that 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 con-

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64. The Court found that:

> The trial testimony showed that respondents believed, in accordance with the tenets of the Old Order Amish communities generally, 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 thecensure of the church community, but, as found by the county court, also endanger their own salvation and that of their children.

Id. at 209.

65. *See supra* text accompanying notes 53-55.

66. *Yoder*, 406 U.S. at 213-14.

67. *Id.* at 215.

formed 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."[68] Thus, the Court concluded that the Amish position qualified for protection under the Free Exercise Clause.[69]

The Court then 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."[70] Therefore, the compulsory attendance law imposed an unacceptable substantial burden on the Amish religious beliefs.

Finally, the Court concluded that substantial interference with the Old Amish way of life "unduly burden[ed]" their religious beliefs without proof of any overriding state interest.[71] In this portion of its opinion, the Court repeatedly emphasized that the Old Amish were law-abiding, "self-reliant and self-sufficient participants in society."[72] Hence, the Court found that the State's goal to produce a responsible citizenry by way of 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.[73]

The Court's new approach to Free Exercise claims met with widespread approval, especially by those who had hoped for more expanded protection of religious minorities from "oppressive" laws.[74] Soon, however, these hopes would be significantly dashed.

C. The Balancing Test: Diluted

Ten years after *Yoder*, another Old Amish plaintiff would not find the Court as hospitable, even though this Protestant Sect had remained just as law-abiding, self-reliant, and self-sufficient. In *United States v. Lee*,[75] an Old Order Amish farmer

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68. *Id.* at 216.
69. *Id.* at 215-17.
70. *Id.* at 217-19.
71. *Id.* at 218.
72. *Id.* at 221, 222, 224, 225, 226-27, 229.
73. *Id.* at 229-34.
74. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) [hereinafter McConnell, *Free Exercise*].
75. 455 U.S. 252 (1982).

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."[76] This time, however, the Court did not produce 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. Instead, 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 social security program. "The design of the system," the Court pronounced, "requires support by mandatory contributions from covered employers and employees."[77] The Court warned that such participation was "indispensable to the fiscal vitality of the social security system."[78] To allow anyone to opt out, even for reasons of religious conscience, would not only threaten the integrity of the social security tax, but all taxes.[79]

In the next eight years after *Lee*, the Supreme Court deferred to the government in every free exercise case, except in the area of unemployment compensation.[80] In 1986, in *Goldman v. Weinberger*,[81] the Court turned down a plea from an orthodox Jewish officer in the United States Air Force protesting his having been disciplined for wearing a yarmulke. In the same year, in *Bowen v. Roy*,[82] 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 Aid to Dependent Children benefits.

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76. *Id.* at 255.
77. *Id.* at 258.
78. *Id.*
79. The Court found that:

> 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. at 260.

80. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Frazee v. Illinois Dep't of Employment Security, 489 U.S. 829 (1989).
81. 475 U.S. 503 (1986).
82. 476 U.S. 693 (1986).

In 1987, in *O'Lone v. Estate of Shabazz*,[83] the Court rejected a Muslim prisoner's challenge to a prison policy preventing him from attending a weekly congregational service commanded by the Koran. One year later, the Court, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[84] refused 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.

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. O'Connor admitted that although carrying out the Forest Service plan "could have devastating effects on traditional Indian religious practices, [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 their religious beliefs, [do not] require the government to bring forward a compelling justification for its otherwise lawful actions."[85]

In all but three of the four cases, the insensitivity of the majority to the significant burdens imposed on the religious dissenters induced Justice Brennan, the architect of the compelling interest approach, to protest these decisions. Brennan's dissenting opinion in *Lyng* underscored the protest:

> [T]he Court today refuses even to acknowledge the constitutional injury respondents will suffer ....
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> Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land.... [L]and is itself a sacred, living being ... [and] like all other living things, is unique, and specific sites possess different spiritual properties and significance.
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> 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.[86]

This very high country, Brennan continued, would be transformed by the proposed Forest Service operations in such a way that it would be unusable by the Indians for religious services that could only be performed on that site. Brennan reasoned that the "threat

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83. 482 U.S. 342 (1987).
84. 485 U.S. 439 (1988).
85. *Id.* at 450-51.
86. *Id.* at 459, 460-61 (Brennan, J., dissenting) (citations omitted).

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."[87] But Brennan's views did not persuade his colleagues. With appointments to the Court by Presidents Ronald Reagan and George Bush, the justices were more sensitive to the interests of the state than of individual conscience.

D. The Balancing Test: Snubbed

Two years after *Lyng*, Justice Antonin Scalia dropped a bombshell in *Employment Division v. Smith*.[88] Writing for a five-to-four majority, 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. This constitutional immunity was extended beyond "belief and profession" to the "performance of (or abstention from) physical acts." Scalia 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, [and] abstaining from certain foods or certain modes of transportation.[89]

Smith, however, was a case of a different order. The Oregon law in dispute prohibited drug use, jurisdiction over which had been conceded to the state. The defendant's free exercise claim argued that those who used a drug, here peyote, for religious purposes were constitutionally exempted from its reach. Scalia rejected this claim as illegitimate. First, he noted that the text of the Free Exercise Clause proscribes only those prohibitions where the "exercise of religion ... is ... the object," not "generally applicable and otherwise valid" laws that only incidentally affect religious faith and practice.[90] 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."[91]

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87. *Id.* at 467-68.
88. 494 U.S. 872 (1990).
89. *Id.* at 877.
90. *Id.* at 878.
91. *Id.* at 878-79.

He then rehearsed a number of cases from *Reynolds* to *Braunfeld* to support that proposition.[92] Third, Scalia attempted to distinguish 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.[93] Therefore, Scalia refused to follow the balancing test applied in *Yoder*.

As for those cases where the Court had applied the balancing test in which only the Free Exercise Clause had been invoked, Justice Scalia noted that the Court had already confined such analysis to the unemployment field.[94] Hence, the test would not be applied to a case involving a generally applicable criminal law. 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.' "[95]

From this observation, Justice Scalia launched into a wide-ranging critique of the "compelling government 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."[96] 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 Scalia found unthinkable, for it would thrust the civil authority into matters of religious faith and practice which the religion clauses had removed from its reach.[97]

Calling the majority opinion a dramatic departure from "well-settled First Amendment jurisprudence," Justice O'Connor reiterated, on behalf of her three concurring colleagues, continued faith in the compelling state interest test and its balancing formula.[98] O'Connor's critique focused primarily upon Justice Scalia's claim that the Free Exercise Clause only prohibited laws

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92. *Id.* at 878-80.

93. *Id.* at 881-82. *See also*, James R. Mason, Note, Smith's *Free Exercise Hybrids Rooted in Non-Free-Exercise Soil*, 6 REGENT U. L. REV. 201 (1995).

94. *Smith*, 494 U.S. at 882-84.

95. *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

96. *Id.* at 886, 888.

97. *Id.* at 887.

98. *Id.* at 891 (O'Connor, J., concurring).

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."[99] O'Connor noted, however, that just because a "person's right to free exercise has been burdened ... [that] does not mean that he has an absolute right to engage in the conduct."[100] 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."[101] O'Connor asserted that the Court had no choice other 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.[102] O'Connor preferred this practical 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."[103]

Justice Scalia would have none of this. He claimed that the balancing formula invited judges to assess the importance of particular religious convictions, an area long considered outside the jurisdiction of civil authorities.[104] 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," not upholding the rule of law.[105] Hence, 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. He 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."[106] To justify his position, Scalia applied the jurisdictional test that had initially been framed by the Court over one hundred years earlier:

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99. *Id.* at 894.
100. *Id.*
101. *Id.*
102. *Id.* at 897-900.
103. *Id.* at 899.
104. *Id.* at 887.
105. *Id.* at 888.
106. *Id.* at 884.

> 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, where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice.[107]

Unpersuaded by this venerable precedent, Justice O'Connor insisted that the "compelling interest test reflect[ed] the First Amendment's mandate of preserving religious liberty ... in a pluralistic society."[108] Moreover, she asserted that a return to *Reynolds* and the abandonment of the compelling interest doctrine would sap the Free Exercise Clause of any vitality, limiting its coverage to "only the extreme and hypothetical situation in which a State directly targets a religious practice."[109] Two and one-half years later, however, what O'Connor and her fellow dissenters characterized as an "extreme and hypothetical" case actually came before the Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah.*[110]

III. THE FREE EXERCISE CLAUSE: 1990 TO THE PRESENT

In 1987, 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. The church members brought suit against the City of Hialeah, claiming that the ordinance violated their First Amendment rights. The Supreme Court unanimously agreed with the petitioners and 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 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," the Court held that the city ordinance had singled out a religious practice for condemnation and, therefore, was presumptively an unconstitutional prohibition of the free

107. *Id.* at 878-79 (citation omitted).
108. *Id.* at 903.
109. *Id.* at 894.
110. 113 S. Ct. 2217 (1993).

exercise of religion.[111] While Kennedy invoked the compelling state interest test, 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.[112]

Only Justices Blackmun and O'Connor, both of whom dissented in *Smith*, refused to apply the jurisdictional test in *Lukumi Babalu Aye*. Blackmun reiterated his view that "*Smith* was wrongly decided," and proceeded to analyze the case under the compelling state interest test.[113] He maintained that when the state enacts legislation that intentionally or unintentionally places a burden upon a religiously motivated practice, it must justify that burden by "showing that it is the least restrictive means of achieving some compelling state interest."[114]

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."[115] Souter maintained that the *Smith* rule was not at issue in *Lukumi Babalu Aye* because the city's ordinance violated the "noncontroversial principle" in which the Free Exercise Clause demands that civil government not single out religious practices, as such, and prohibit them.[116] 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, is unquestionably constitutional under the Free Exercise Clause. This aspect of the *Smith* rule, in Souter's opinion, was not consistent with prior decisions and, consequently, had left the Court "with a free-exercise jurisprudence in tension with itself."[117] For this reason alone, Souter called for a reexamination of the *Smith* rule in an appropriate case.[118] In seeking a reexamination, he recommended a review of that rule "in light not only of the precedent on which it was rested but also of the text of the Free Exercise Clause and its origins."[119]

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111. *Id.* at 2227-33.
112. *Id.* at 2233-34.
113. *Id.* at 2250 (Blackmun, J., concurring).
114. *Id.* (quoting Thomas v. Review Bd., 450 U.S. 707, 718 (1981)).
115. *Id.* at 2240 (Souter, J., concurring in part and in the judgment).
116. *Id.* at 2240-43.
117. *Id.* at 2243-47.
118. *Id.* at 2248.
119. *Id.*

A. *The* Smith *Rule Restated*

The *Smith* rule has been restated by several people in many different ways. In his concurring opinion in *Lukumi Babalu Aye*, 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."[120] What Souter meant by "formal neutrality" is that the *Smith* rule "secures only protection against deliberate discrimination" of religious practices or, in other words, "only bar[s] laws with an object to discriminate against religion."[121] This is a crabbed reading of *Smith*, but one long held by its critics. In June 1991, three of *Smith's* most influential academic critics summarized the holding in much the same terms as did 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.' "[122] Earlier, in 1990 and 1991, two 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."[123] Another contended that Justice Scalia had written 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."[124]

Justice Souter and these critics have ignored large portions of Justice Scalia's *Smith* opinion where he asserted that the Free Exercise Clause provided two substantial jurisdictional barriers to the exercise of civil power. First, Scalia clearly stated that the Free Exercise Clause protects the "right to believe and profess whatever religious doctrine one desires."[125] Second, from this jurisdictional premise he concluded that the Free Exercise Clause prohibits the enforcement of any law, even a generally

120. *Id.* at 2242.

121. *Id.* at 2241-42.

122. Edward McGaffney, Douglas Laycock, and Michael McConnell, "An Open Letter to the Religious Community," 11 *First Things* Mar. 1991, at 44.

123. John W. Whitehead and James J. Knicely, "Religious Freedom Restoration Act: Wolf in Sheep's Clothing?" *Plymouth Rock Foundation Leadership Memo* 2 (1991).

124. J. Shelby Sharpe, *The Death of Religious Freedom*, THE CHALCEDON REP., Nov. 1990, at 2.

125. Employment Div. v. Smith, 494 U.S. 872, 877 (1990).

applicable one, if that law "represents an attempt to regulate religious beliefs, [or] the communication of religious beliefs."[126]

The Free Exercise Clause prohibition against enforcing such a law is best illustrated in *United States v. Ballard*.[127] In that case, the defendants were indicted for mail fraud, a generally applicable and religiously neutral statute, based upon allegations that they had defrauded people of their property by promising a divine cure for illnesses that medical doctors deemed incurable. Justice William 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.[128]

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 regulation was not an infringement upon religion. What they sought to establish was a constitutionally required exception to a valid law based solely upon "their religious motivation," not upon an objectively determined jurisdictional ground limiting the application of a generally applicable law.[129] 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.[130]

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126. *Id.* at 882.
127. 322 U.S. 78 (1944).
128. *Id.* at 86-87.
129. *Smith*, 494 U.S. at 878.
130. *Id.* (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.[131] Here, 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.*"[132] To illustrate this jurisdictional barrier, Scalia gave several examples of conduct that were within the exclusive governing power of the church, including acts of idolatry.[133] 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 that are ordinarily within the authority of the state.[134]

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.[135] The claimants in *Smith* made 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.

B. 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 since the *Smith* jurisdictional rule is absolute or categorical. Before turning to the application of the *Smith* rule in these areas, however, attention should first be

131. *See supra* text accompanying note 89.

132. *Smith*, 494 U.S. at 878-79 (emphasis added).

133. *Id.* at 877-78.

134. *See* Presbyterian Church v. Hull Church, 393 U.S. 440, 445-52 (1969).

135. *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-25 (1976).

focused upon the protection provided for religious freedom claims during the twenty-seven-year period that the compelling state interest test 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. The only exemptions the Court did not reject were those claims involving unemployment compensation, which were governed by clear precedent."[136] 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.[137] These observations prompted McConnell to conclude 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.[138]

What was really lost with Justice Scalia's rejection of the compelling state interest test, then, was the "hope" of a formidable weapon. Professor McConnell understood this when he wrote:

> [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.[139]

But the case against the "compelling state interest" test is even more telling than the one acknowledged by Professor McConnell. Not only has the test not protected religious conscience, but it has been used to erode the jurisdictional barrier

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136. McConnell, *Free Exercise*, *supra* note 74, at 1120 n.45, 1122 n.56.
137. *Id.* at 1122-24.
138. *Id.* at 1109-10.
139. *Id.* at 1127.

that had traditionally protected the church from civil intrusion. For example, in *Snyder v. Evangelical Orthodox Church*,[140] 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.[141] The trial court dismissed the claims for lack of jurisdiction because the "conduct complained of is ecclesiastical in nature."[142] 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 imposing 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.[143]

If the California Appellate Court had applied the *Smith* rule, it would have dismissed the tort claims for lack of jurisdiction, unless the plaintiffs could have shown that the action taken by the church officials was demonstrably outside the disciplinary authority of the church.[144]

A compelling state interest not only threatens church autonomy over its internal affairs, but also its traditional immunity in the proselytizing of outsiders. In *Molko v. Holy Spirit Ass'n*,[145] 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,

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140. 264 Cal. Rptr. 640 (1989).

141. *Id.* at 642.

142. *Id.*

143. *Id.* at 647.

144. For a careful discussion of the impact of the *Smith* "categorical" rule upon civil jurisdiction in church discipline matters see Paul Morken, *Church Discipline and Civil Tort Claims: Should Ecclesiastical Tribunals Be Immune?*, 28 IDAHO L. REV. 93, 158-65 (1991-92).

145. 762 P.2d 46 (Cal. 1988), *cert. denied*, 490 U.S. 1084 (1989).

> 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.[146]

Under *Smith*, such an outcome would be forbidden since Justice Scalia identified "proselytizing" as conduct that the Free Exercise Clause has excluded entirely from civil jurisdiction. Having identified "proselytizing" as an activity within the constitutional protection of the Free Exercise Clause, 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*,[147] the Court turned back a free exercise challenge to an Internal Revenue Service 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 Bob Jones University attorneys contend that the Free Exercise Clause guaranteed tax immunity to the university in order to preclude Congress and the IRS from using its taxing power to intrude upon its proselytizing activities. To the contrary, they rested their jurisdictional claim solely upon the contention that Congress had not authorized the IRS to impose a racial discrimination policy in the administration of its authority to police tax-exempt entities.[148] Only after they lost this statutory argument did the university attorneys turn to the Free Exercise Clause. Even then, they limited Bob Jones University to a claim for an exemption "on the basis of sincerely held religious beliefs."[149] 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."[150] This line 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 dis-

146. *Id.* at 60.
147. 461 U.S. 574 (1983).
148. *Id.* at 585-86.
149. *Id.* at 602 (footnote omitted).
150. *Id.* at 604 (footnote omitted).

crimination."[151] The compelling state interest test would be no barrier to a state's using its power to tax to pressure churches into conformity with such policies.

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. Using 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.

C. *The* Smith *Rule Attacked*

The *Smith* rule, then, if properly understood and applied, promises substantial protection to religious freedom under the Free Exercise Clause even in areas where the compelling state interest test has failed in the past. The compelling state interest test, as it has been applied, offers the hope of greater protection in the area of religious conscience, but it was largely an unrealized hope before *Smith*.[152] Why then the firestorm of protest 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. 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.[153] The petition, however, was denied. Among the petitioners were the following strange bedfellows: The American Civil Liberties Union and the Rutherford Institute; People for the American Way and the Christian Legal Society; Americans United for Separation of Church and the State and National Association of Evangelicals; and the American Jewish Congress and the Baptist Joint Committee on

151. *Id.* at 601.

152. Gerald V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 246-47 (1991).

153. "Diverse Coalition Asks Supreme Court to Rehear Peyote Case," *Religious Freedom Alert*, June 1990, at 11.

Public Affairs. Oliver 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."[154]

Thomas did not overstate the depth and breadth of opposition to the *Smith* decision. The Reverend Dean Kelley, director for the National Council of Churches, claimed that *Smith* "gutted" the First Amendment's Free Exercise Clause.[155] Amy Adelson, a lawyer with the American Jewish Congress, found the ruling "devastating to the free exercise rights of all Americans."[156] Jordan Lorence, then litigation director for Concerned Women for America, said that he "cannot overstate how damaging [*Smith*] is to religious freedom."[157] 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."[158]

Following the Court's rejection of the petition for a rehearing, *Smith's* critics escalated their opposition to apocalyptic levels. Texas attorney J. Shelby Sharpe, compared the *Smith* case to the Japanese attack on Pearl Harbor.[159] Samuel Ericsson, then Executive Director of the Christian Legal Society, likened it to an Iraqi Scud missile in the Persian Gulf War that "scored a direct hit ... demolish[ing] a major barrier to government intrusion into religious affairs."[160] To support their claims, these critics and their allies assembled an inventory of cases to demonstrate the "havoc that *Smith* has wreaked."[161] Included were two cases denying religious conscientious objectors an exemption from 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.[162]

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154. *Id.*
155. *Id.*
156. *Id.* at 9.
157. *Id.* at 7.
158. *Id.*
159. Sharpe, *supra* note 124, at 2.
160. Letter from Samuel Ericsson, Executive Director, Christian Legal Society, to Members and Friends of the Christian Legal Society 1 (May 1990) (on file with author).
161. Oliver S. Thomas and J. Brent Walker, *Religious Freedom is Not a Luxury*, Q. CHRISTIAN LEGAL SOC'Y, Fall 1991, at 3.
162. *Id.* at 3-4.

These examples hardly support the outrage expressed against *Smith*. It is doubtful that any of the cases 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* 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.[163] Nevertheless, the anti-*Smith* coalition persisted in their efforts to discredit it, taking their case to Congress where they finally succeeded in winning passage of the Religious Freedom Restoration Act (RFRA).[164]

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

IV. THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

After the Supreme Court handed down its decision in *Smith*, a coalition of religious and civil rights organizations labored in Congress for three years 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 United States 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."[165] Doug Johnson, legislative director of the NRLC, called attention to the Religious Coalition for Abortion Rights's

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163. *See supra* note 79.

164. 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993). According to Section 2, RFRA has a twofold purpose:

> (1) To restore the compelling interest test as set forth in Sherbert v. Verner, and Wisconsin v. Yoder, and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is burdened by government.

Id. § 2000bb (citations omitted).

165. *Abortion: A Religious Right?*, CHRISTIANITY TODAY, June 24, 1991, at 52.

long-standing claim that "religious-liberty rights and 'reproductive rights' are inseparable."[166] 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.[167] 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 prolife cause should support this legislation.' "[168] Notwithstanding this appeal, Congressman Henry Hyde, a key early sponsor of the bill, dropped his support, as did a number of evangelical lobby groups, including the Christian Action Council and Concerned Women for America.[169]

With the religious community divided, the House of Representatives Subcommittee on Civil and Constitutional Rights, held hearings on May 13 and 14, 1992, "to shed light [on] and to hear both sides ... of this important issue."[170] Representative Hyde opened the hearings, announcing that he could not support the legislation in its present form "based on the bill's predictable impact on abortion law."[171] Citing a recent ACLU challenge to Utah's new, more restrictive abortion law as a violation of a woman's religious free exercise rights, Hyde noted that the trial judge had dismissed the claim solely on the basis of the *Smith* rule. Hyde, however, was unwilling to risk the threat that the bill posed to the unborn, no matter what benefit it might be to religious freedom.[172] Hyde's appeal to life carried the day and

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166. *Id.* at 52.

167. *Id.* at 52-53.

168. *Id.* at 53.

169. *Id.*

170. *Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 before the Subcomm. on Civil and Constitutional Rights of the Committee on the Judiciary House of Representatives*, 102d Cong., 2d Sess. 7 (May 13 and 14, 1992) [hereinafter *Hearings on H.R. 2797*] (statement of Don Edwards, Chairman).

171. *Id.* at 7 (statement of Henry Hyde, Representative from Illinois).

172. In the dialogue that followed the first panel of witnesses, Congressman Michael Kopetski seized the opportunity to ask Dallin Oaks of the Quorum of the Twelve Apostles of the Mormon Church and Robert Dugan, Jr., Director for the Office of Public Affairs, National Association of Evangelicals, where they stood on this issue:

Mr. KOPETSKI.	[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.

the Religious Freedom Restoration Act of 1991 died in the 102d Congress.

One year later, however, two events occurred that dramatically affected the future of the Act. First, on June 29, 1992, the United States Supreme Court shocked the country when three appointees of Presidents Reagan and Bush joined with Justices Harry Blackmun and John Paul Stevens to reaffirm the essential holding in *Roe v. Wade*[173] of a woman's right to an abortion.[174] Second, in November 1992, pro-choice presidential candidate Bill Clinton was elected to the Presidency. With the Supreme Court and the Presidency on the pro-abortion side, 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. Hyde reasoned that because the bill now clearly imposes a statutory standard that is to be interpreted as incorporating all federal court cases prior to *Smith*, and since free exercise challenges to abortion restrictions were ultimately unsuccessful prior to *Smith*, "although such claims may be brought pursuant to the Act, they will be unsuccessful."[175]

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.[176] On October 27, 1993, the Senate, by a vote of ninety-seven-to-three, followed suit.[177] President Clinton signed RFRA into law on November 16, 1993.[178] 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 ques-

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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.

173. 410 U.S. 113 (1973).

174. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

175. H.R. REP. No. 88, 103d Cong., 1st Sess. 6 (1993).

176. *House votes on Religion*, ST. PETERSBERG TIMES, May 15, 1993, at A1.

177. *Senate Votes to Protect Religion*, WASH. TIMES, Oct. 28, 1990, at A8.

178. David E. Anderson, *Signing of Religious Freedom Act Culminates 3-Year Push*, WASH. TIMES, Nov. 20, 1993, at C6.

tion at the May hearings in 1992, but he did not return to it in 1993.[179]

A. No Legislative Authority

The threshold constitutional question raised by RFRA is not whether Congress has the power to overrule a Supreme Court opinion, but whether Congress has any authority to pass legislation to protect religious freedom. Congress is a legislature of enumerated powers. Before Congress 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.[180] 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.[181]

According to Section 2(a) of RFRA, the subject matter of the Act is the "unalienable right" of the "free exercise of religion."[182] 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."[183]

Given this textual evidence, neither the House nor the Senate claimed that Congress had specific authority to regulate religious freedom, as such. However, both claimed that RFRA was an exercise of power under Section 5 of the Fourteenth

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179. Contrast *Hearings on H.R. 2797, supra* note 170, at 7.

180. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); United States v. Darby, 312 U.S. 100 (1941); Herbert W. Titus, *Corralling Congress*, THE FORECAST, June 1995, at 1-5.

181. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Katzenbach v. McClung, 379 U.S. 294 (1964).

182. 42 U.S.C. § 2000bb-2(a) (Supp. V 1993).

183. U.S. CONST. amend. I.

Amendment.[184] In order to sustain a claim of authority under this provision, Congress must demonstrate that it is protecting the free exercise of religion from adverse action by state governments or their political subdivisions.[185] After all, the text of the Fourteenth Amendment is limited to actions taken "under color of *state* law"[186] or where there is evidence that states have failed to protect the Amendment's guarantees.[187]

The text of RFRA is not so limited. First, and foremost, RFRA applies to action by both the federal and state governments.[188] Therefore, the subject matter of RFRA is not within the grant of power contained in Section 5 of the Fourteenth Amendment. Second, RFRA does not state its purpose to be the protection of religious freedom from infringement by the states. Instead, it indicates that its purpose is to provide a uniform rule governing religious freedom litigation arising out of cases against both the federal and the state governments.[189] Section 5 of the Fourteenth Amendment grants no such power to Congress. Nor can Congress parlay the Necessary and Proper Clause of Article I, Section 8 with Section 5 of the Fourteenth Amendment in order to justify enactment of RFRA. The Judiciary Committee of the House of Representatives attempted to do just that:

> [T]he Committee believes that Congress has the constitutional authority to enact 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.[190]

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

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184. U.S. CONST. amend. XIV, § 5 ("Congress shall have power to enforce this article by appropriate legislation."); *See* H.R. Rep. No. 88, *supra* note 175; S. Rep. No. 111, 103d Cong., 1st Sess. (1993).

185. *E.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966).

186. Screws v. United States, 325 U.S. 91, 135 (1945) (emphasis added).

187. *See* Civil Rights Cases, 109 U.S. 318 (1883).

188. *See* 42 U.S.C. §§ 2000bb-3(a),-5,-6 (Supp. V 1993).

189. *See* 42 U.S.C. §§ 2000bb-2(a),-5(1).

190. H.R. Rep. No. 88., *supra* note 178, at 9.

norms by state law.[191] 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.[192] Therefore, the Necessary and Proper Clause coupled with Section 5 of the Fourteenth 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 in order to impose a uniform rule of free exercise on both 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 III of the Constitution. 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."[193] 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 these cases] with such exceptions, and under such regulations, as the Congress shall make."[194] By its terms, Article III 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. Instead, it contains a substantive rule defining the meaning of free exercise of religion as provided for in the First Amendment.[195] The Senate Judiciary Committee Report contains ample evidence that RFRA was not contemplated

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191. *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); Thornburg v. Gingles, 478 U.S. 30 (1986).

192. *See, e.g.*, United States v. Guest, 383 U.S. 745 (1966). *Cf.* Oregon v. Mitchell, 400 U.S. 112 (1970).

193. U.S. CONST. art. III, § 1.

194. *Id.* art. III, § 2, cl. 1.

195. *See* 42 U.S.C. §§ 2000bb-1 (Supp. V 1993).

as a limit on the jurisdiction of the federal courts. First, the Committee 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 constitutional 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.[196]

Second, the Report claimed that throughout history the courts failed to protect this view of religious freedom until thirty years ago "with the Supreme Court's landmark decision in *Sherbert v. Verner*."[197] But, the Report continued, that protection was removed when the Court in *Smith* abandoned the compelling state interest test of the *Sherbert* case. The Report concluded that in order to implement its view of religious freedom, the Senate is enacting RFRA, which utilizes 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.[198] Not only does the Constitution not authorize Congress to act in this manner, it explicitly forbids it.

B. Usurpation of Judicial Power

What is most remarkable about RFRA is the naked claim that Congress has supervisory jurisdiction over the Supreme Court. Congressman 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*."[199] Senator Alan Simpson agreed: "S. 578 is intended to overturn *Employment Division, Department of Human Resources of Oregon*

196. S. Rep. No. 111, *supra* note 186, at 4-5.
197. *Id.* at 5.
198. *See* 42 U.S.C. § 2000bb-1(c) (Supp. V 1993).
199. H.R. Rep. No. 88., *supra* note 175, at 14.

v. Smith, and *O'Lone v. Estate of Shabazz*.[200] 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."[201]

The Senate Report reviewed Justice Scalia's majority opinion and Justice O'Connor's concurring opinion in *Smith*, and Justice Souter's concurring opinion on *Smith* in *Lukumi Babalu Aye*, and then concluded that *Smith* was wrongly decided. The Report maintained 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' ruling, not the Supreme Court's in *Smith*.[202] The House of Representatives behaved similarly, 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 upon the Establishment Clause.[203] 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 "province and duty of the judicial department to say what the law is."[204] 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."[205] The judiciary, not the legislature, is to interpret and apply the law.

With the passage of RFRA, Congress did not purport to have enacted a rule of law. Instead, it simply claimed that its interpretation of the Free Exercise Clause was superior to the Supreme Court's interpretation. Yet, the Senate Report conceded that Congress had no power to interpret and apply that clause: " '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.' "[206] By

200. 478 U.S. 342 (1987).

201. S. Rep. No. 111, *supra* note 184, at 19 (citations omitted).

202. H.R. Rep. No. 88, *supra* note 175, at 8.

203. *Id.*

204. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

205. THE FEDERALIST No. 78, at 528 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

206. S. Rep. No. 111. *supra* note 184, at 8 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

enacting RFRA, however, 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 niggardly way, should it be dissatisfied with the Act's results or the political climate becomes more hostile to religious dissenters. Even the Senate recognized that 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."[207]

America's founders embraced this principle when they 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."[208] 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 ....[209]

The very purpose of a written constitution, wrote Chief Justice John Marshall, was to create a "superior, paramount law, unchangeable by ordinary means."[210] If Congress has the authority to determine what that superior, paramount law means, then by defining that law it can do whatever it chooses. How can a written constitution limit the power of a legislature if that body

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207. *Id.*

208. THE FEDERALIST No. 78, 523 (Alexander Hamilton) (quoting Spirit of Laws, vol. 1, p. 181 (Publius)).

209. *Id.* at 524-25.

210. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

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.

Relying on these *Marbury* principles and upon legislative history, a federal district judge ruled that RFRA is an unconstitutional usurpation of judicial power.[211] Other district judges have disagreed.[212] Judges who have upheld the constitutionality of RFRA have assumed that it was enacted pursuant to Section 5 of the Fourteenth Amendment. By making that assumption they have found RFRA to be a prophylactic measure designed to enhance the people's right to free exercise of religion in their relationship to the states.[213] There is no doubt that the Supreme Court has approved congressional action taken pursuant to Section 5 of the Fourteenth Amendment, granting greater protection to individual rights than that provided by courts in their judicial capacity.[214] But these cases do not mean that Congress has power to redefine the substantive constitutional norm. Rather, Congress may fashion a remedial rule based upon factual findings demonstrating that the rule is an appropriate one to prevent violations of the constitutional norm set by the constitutional text.

RFRA, by its own terms, was not fashioned for such a prophylactic remedial purpose. To the contrary, it was enacted for the purpose of imposing Congress' view of free exercise upon the courts. It is arguable that this purpose is constitutional so long as the congressional rule "enhances" individual rights.[215] The House Judiciary Committee tried its best to slip RFRA into this category of cases when it stated in its report that all the Act did was to "provide statutory protection for a constitutional value when the Supreme Court has been unwilling to assert its authority."[216] 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

211. Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tx. 1995).

212. *E.g.*, Belgard v. Hawaii, 883 F. Supp. 510 (D. Haw. 1995); Sasnett v. Wisconsin Dep't of Corrections, 891 F. Supp. 1305 (W.D. Wis. 1995).

213. *Sasnett*, 891 F. Supp. at 2042.

214. *E.g.*, City of Rome v. United States, 446 U.S. 156 (1979).

215. *E.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966).

216. H.R. Rep. No. 88, *supra* note 175, at 9.

to repudiate the constitutional norm in *Smith*. As noted previously, RFRA cannot be justified as an exercise of remedial power under Section 5 of the Fourteenth Amendment 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. RFRA, however, subordinates the free exercise of religion to any law that 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."[217]

C. *RFRA Guarantees Toleration Not Free Exercise*

In Section 2(a) of RFRA, Congress first 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."[218] By definition, an unalienable right is one that cannot be given or taken away.[219] If the free exercise of religion is an unalienable right, then it cannot be prohibited no matter how strong 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*."[220] Accordingly, the First Amendment reads simply that "Congress shall make no law ... prohibiting the free exercise [of religion]."[221]

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 substantially 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*

217. 42 U.S.C. § 2000bb-1(b) (Supp. V 1993).

218. *Id.* § 2000bb(a)(1) (emphasis added).

219. BLACK'S LAW DICTIONARY 1523 (6th ed. 1990).

220. James Madison, *Memorial and Remonstrance Against Religious Assessments* (circa June 20, 1785), *in* JAMES MADISON ON RELIGIOUS LIBERTY, at 56 (Robert S. Alley ed. 1985) (emphasis added).

221. U.S. CONST. amend. I.

governmental interests."[222] 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. It was James Madison's view of the relation between God and man, and man and civil society that informed the First Amendment.

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 upon the Virginia legacy of both Madison and Jefferson, members of the subcommittee received both written and oral testimony on the inalienability 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.[223]

This testimony, however, was hotly contested. Nadine Strossen, President of the National Board of Directors of the American Civil Liberties Union, and others like her, prevailed with their view that religion was a subjective term defined by each individual. [224] Strossen claimed that such a definition was necessary to

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222. 42 U.S.C. § 2000bb(a)(5) (Supp. V 1993) (emphasis added).

223. *Hearings on H.R. 2797, supra* note 171, at 89 (testimony of Dean Herbert W. Titus).

224. *Id.* at 96. Congressman Craig Washington 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. *Id.* He asked this author 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 1 minute. Who defines the American tradition then, sir? You?

give everyone's religion the same protection under the First Amendment.[225] 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."[226] Hence, she opted for the compelling

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Mr. TITUS. No. I quoted to you from the Constitution of Virginia and I think that every legal scholar will indicate to you. . .[t]hat the first amendment rests upon the Virginia legacy.

Id. at 97.

Congressman Hyde later gave this author an opportunity to explain the constitutional significance and difference between a First Amendment based upon the Creator's definition of religion, not man's definition:

Mr. HYDE. Dean Titus, what about LSD - the League for Spiritual Development? Timothy Leary ... Didn'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 again, 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 of 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 that are owed to the Creator by reason and conviction.

Id. at 101-02.

225. *Id.* at 104-05 (testimony of Nadine Strossen, President of the National Board of Directors of the ACLU).

226. *Id.* at 105.

state interest test as a necessary compromise for the good of an "orderly society."[227] 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 it "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."[228]

V. FREE EXERCISE: THE RELIGIOUS PLURALISM THESIS

A. 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.[229] To qualify, an individual must demonstrate that their beliefs and practices are based upon some holy book or holy tradition that has remained constant over a considerable period of time.[230] In the alternative, one must demonstrate that one's convictions are comparable to such religious faiths.[231]

Over the years, the Supreme Court has proffered a modern 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.' "[232] 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

227. *Id.* at 103.
228. 42 U.S.C. § 2000bb-1(b) (Supp. V 1993).
229. Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).
230. *Id.* at 215-16.
231. *Cf.* United States v. Seeger, 380 U.S. 163, 176 (1965).
232. *Id.* at 180 (quoting PAUL TILLICH, II SYSTEMATIC THEOLOGY 12 (1957)).

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."[233]

Such religious egalitarianism dispenses with the judicial duty to define religion with any specificity. 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. Professor Laurence Tribe of Harvard University 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 defined 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 ...."[234]

The Court and Professor Tribe simply ignore the constitutional 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 or ethicist's views should determine the meaning of an eighteenth century text. Nor have they explored the historical conflict leading to the adoption of that text.

Recently, Justice Souter has called this failure to the Court's attention. Faulting *Smith* for failing "to consider the original meaning of the Free Exercise Clause," 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.[235]

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233. *Id.* at 183 (quoting DAVID S. MUZZEY, ETHICS AS A RELIGION 98 (1951)).

234. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 1181 (2d ed. 1988).

235. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2248-49 (1993) (Souter, J., concurring).

Souter urged the Court, in an appropriate case, to "explore the history that a century of free-exercise opinions have overlooked."[236] He called 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."[237] Among the scholarly articles cited by 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 Professor Michael McConnell.[238]

B. Pluralism: An Historical View

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 with the Free Exercise Clause. McConnell's article is a free-wheeling 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. In essence, McConnell argues that the Free Exercise Clause was designed to "exempt" individuals from certain civic duties on the grounds of religious conscience for the purpose of encouraging a variety of expressions of religious faith with the proviso that civil society could step in when it demonstrates a strong enough interest in the health and safety of the whole community.[239]

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 that document. Instead, an analysis begins with the language of the document, turning to

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236. *Id.* at 2249.

237. *Id.*

238. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*," 103 HARV. L. REV. 1409 (1990) [hereinafter McConnell, *Origins*].

239. *Id.* at 1473-1517.

history only for the purpose of giving meaning to the text or resolving an ambiguity. In this way, 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. In the first example, he devotes considerable space to a chronicle of legislative actions exempting religious conscientious objectors from certain civil duties.[240] But of what relevance are legislatively granted exemptions? Do they not smack of legislative discretion, rather than of 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.[241] 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."[242] 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 the strongest evidence of the meaning of "free exercise of religion" in the First Amendment.[243] In his review of these texts, however, McConnell gives equal weight to state constitutional provisions that do not contain the phrase "free exercise" as to those that do.[244] As for the state constitutions that do refer to "free exercise," he pays little attention to the fact that all but one denies "free exercise" to activities that threaten the peace

240. *Id.* at 1466-73.

241. Phillip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 929-30 (1992) [hereinafter Hamburger, *Religious Exemption*].

242. McConnell, *Origins*, *supra* note 238, at 1473.

243. *Id.* at 1456.

244. *Id.* at 1456-58.

and safety of the community.[245] When considering the Virginia Constitution, the one state constitution 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 constitutions that expressly include an exception.[246] 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 that adopted constitutions before 1787. 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.[247] Three others extended absolute protection to certain specified acts of religious worship, but no protection to any other religious acts.[248] Only two states, Georgia and Virginia, extended constitutional protection to "religion" generally.[249] 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."[250] An earlier draft of the Virginia free exercise clause contained a similar qualification, but that was eliminated at the behest of James Madison.[251]

These textual differences and similarities were of little, if any, concern to McConnell. 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.

C. Religion: A Textual Perspective

By the time McConnell considers the text of the First Amendment, he has laid the groundwork for construing "free

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245. *Id.* at 1455-58; *See* Hamburger, *Religious Exemption*, *supra* note 241, at 921.

246. McConnell, *Origins*, *supra* note 238, at 1462-63.

247. E.g., N.Y. CONST. of 1777, art. XXXVIII; N.H. CONST. of 1784, pt. I, art. V; DEL. DECL. OF RIGHTS OF 1776, §§ 2, 3; MD. DECL. OF RIGHTS of 1776, art. XXXIII; MASS. CONST. of 1780, art. II; S.C. CONST. of 1790, art. VIII, § 1.

248. N.J. CONST. of 1776, art. XVIII; PA. CONST. of 1776, art. II; VT. CONST. of 1777, Ch. I, art. III.

249. GA. CONST. of 1776, art. LVI; VA. CONST. of 1776, art. XVI.

250. GA. CONST. of 1777, art. LVI.

251. VA. CONST. of 1776, art. XVI.

exercise of religion" to mean "rights of conscience."[252] Having previously used the phrases 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. As McConnell himself acknowledges, the House Select Committee modified Madison's initial proposal protecting religious freedom to read as follows: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."[253] 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."[254] 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 a limited prohibition against the establishment of certain religious acts.[255] McConnell laments that there is no record extant to explain the Senate's action. Because of this, he spends a good deal of space examining the various dictionary definitions of "religion" and "conscience," noting their respective differences.[256] 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."[257]

As for the possibility of redundancy, McConnell previously acknowledged that the version containing both "religion" and "conscience" had been drafted by Fisher Ames, a "notoriously careful draftsman and meticulous lawyer."[258] 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 the term "conscience" was too broad and that "religion" was necessary to confine the Free Exercise Clause's protections to "religious claims" as contrasted to nonreligious ones.[259] If that is what the drafters meant to say,

252. McConnell, *Origins*, *supra* note 238, at 1488-1500.
253. *Id.* at 1482 (quoting 1 Annals of Cong. 757 (Joseph Gales ed., 1789).
254. *Id.* (quoting 1 Annals of Cong. 796 (Joseph. Gales ed., 1789).
255. *Id.* at 1483-84.
256. *Id.* at 1488-94.
257. *Id.* at 1495.
258. *Id.* at 1483.
259. *Id.* at 1495-96.

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.

The textual difficulty for the McConnell thesis, however, 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 final text reads: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[260] As Justice Wiley Rutledge pointed out in *Everson v. Board of Education*,[261] 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 . . . ."[262] 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."[263] If taken literally, the Establishment Clause would prohibit any law the purpose of which is to provide a religious exemption from it. For what is such an exemption but one respecting the establishment of "individual judgment" as the rule of law in such cases. Yet, according to McConnell, the Free Exercise Clause demands such religious conscientious objections. In effect, McConnell's Establishment Clause would cannibalize his Free Exercise Clause, unless, of course, "religion" means something different for Establishment Clause purposes. That is textually impossible.

If McConnell had performed 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.[264] Like the Virginia Constitution, the First Amendment used the phrase "free exercise," and like that same provision, the First Amendment allowed for no exceptions in the interest of the peace and safety of the community. Similarly, the First Amendment used the word "religion" to define the scope of both the no

260. U.S. CONST. amend. I.
261. 330 U.S. 1 (1947).
262. *Id.* at 32 (Rutledge, J., dissenting).
263. McConnell, *Origins*, *supra* note 238, at 1490.
264. *Everson*, 330 U.S. at 11-18.

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 polygamy cases.[265] That is why the Court in those cases adopted the Virginia definition of "religion," namely, the "duty which we owe to our Creator" and which "can be directed only by reason and conviction, not by force or violence."[266] 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.[267] This principle held true even if the state could show that it had a compelling 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. The only appeal was to legislative grace.

The Virginia formula was not designed, as Professor McConnell has argued, to further a society of religious pluralism. Rather, it was designed to secure those duties that all men owe exclusively to the "Great Governor" of the universe according to the law of the Creator. In the words of James Madison:

> The Religion ... of every man must be left to the conviction and conscience of every man .... This right is in its nature an unalienable right.... It is unalienable ... because what is here a right towards men, is a duty towards the Creator.... This duty is precedent both in order of time and in 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

265. Reynolds v. United States, 98 U.S. 145, 162-63 (1879); Davis v. Beason, 133 U.S. 333, 342 (1890).

266. *Everson*, 330 U.S. at 535.

267. *Id.* at 536.

> becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.[268]

The Virginia legacy of free exercise of religion was not based on individual conscience, but on the objective laws of Almighty God. Professor McConnell, like most modernists today, would reduce this great legacy to a matter of subjective opinion, calling for puny exemptions from a state that has total jurisdiction.[269] But America's founders envisioned a Free Exercise Clause more robust than that; it was a Clause designed to keep the state out of those affairs that God had reserved by His law to be enforced by His Spirit and not by the sword of Caesar. To paraphrase Jesus Christ, the Free Exercise Clause was designed to secure by constitutional law those things that belonged to God, not to Caesar.[270]

VI. FREE EXERCISE: 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[271] according to rules established by the church, not by the state.[272] 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,[273] aided and guided by the church, not by the state.[274] 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."[275]

In *Bob Jones University*, the Supreme Court affirmed that the IRS was authorized to deny tax-exempt status to Bob Jones

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268. Madison, *supra* note 220, at 56.

269. McConnell, *Origins*, *supra* note 238, at 1516.

270. *Luke* 20:25.

271. *James* 1:27.

272. 2 *Thessalonians* 3:10; 1 *Timothy* 5:8-16; Herbert W. Titus, *The Establishment Clause: Welfare*, THE FORECAST, Sept. 1, 1994, at 5.

273. *Ephesians* 6:4.

274. *Matthew* 28:18-20; Herbert W. Titus, *The Establishment Clause: Education*, THE FORECAST, July 1, 1994.

275. I.R.C. section 501(c)(3) (West Supp. 1990).

University because the school'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 that, 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."[276] While attorneys for Bob Jones University 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.[277] The Court rejected this claim with a single paragraph: "The governmental interest at stake here 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."[278] By yielding the jurisdictional point, the attorneys for Bob Jones University made a strategic mistake, one that has led to the near demise of the Free Exercise Clause.

A. The Secular-Religious Dichotomy

The First Amendment, according to the arguments of Bob Jones University attorneys, did not protect "nonreligious private schools" but only "schools that engage in racial discrimination on the basis of sincerely held religious beliefs."[279] By making this distinction, the 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

276. Bob Jones University v. United States, 461 U.S. 574, 586 (1983).
277. *Id.* at 608.
278. *Id.* at 604.
279. *Id.* at 602.

"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."

The Bob Jones University attorneys also 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 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.[280] 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 Court has found few state interests insufficiently compelling to override such claims of conscience.[281]

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. Acts like these, exempting people from civic duties for "religious conscience" sake, reinforce claims 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, prompting many in the Christian community to call for a constitutional amendment to

280. *See, e.g.*, Bowen v. Roy, 476 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.).

281. McConnell, *Free Exercise, supra* note 74, at 1120 n.45, 1122 n.56.

restore "equality" for religious speech in the marketplace of ideas.[282] What is needed, however, is not a constitutional amendment but a return to the original jurisdictional principle of the Free Exercise Clause.

B. The Jurisdictional Principle

In *Bob Jones University*, 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 the benefits resulting from the promotion of the general welfare.[283]

The Court, then, augmented Congress' position 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.[284]

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

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282. Jeff Hooten, *Religious equality: Putting it in Writing*, FOCUS ON THE FAMILY CITIZEN, June 19, 1995, at 1-3.

283. Bob Jones University v. United States, 461 U.S. 574, 590 (1983) (quoting H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938)).

284. *Id.* at 591-92.

> 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.[285]

By relying upon English common law, that is, 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.[286]

A careful look at the writings of Jefferson and Madison 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 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."[287] In the 1785 Memorial and Remonstrance Against Religious Assessments, Madison wrote: "The opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men."[288] Jefferson, wrote in his statute that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical [and 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."[289]

The very nature of tax-supported public education violates these principles of the Free Exercise Clause, for as Madison put

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285. *Id.* at 597-98.

286. *See, e.g.*, Everson v. Board of Education, 330 U.S. 1 (1947).

287. Thomas Jefferson, *An Act for Establishing Religious Freedom, in* 12 Hening 12 (1786).

288. Madison *supra* note 220, at 56.

289. Jefferson *supra* note 287, at 12.

it, the formation of opinions is "Religion" and therefore "is wholly exempt from ... [the] cognizance" of Civil Society.[290] Likewise, so is welfare. As Article I, Section 16 of the Virginia Constitution of 1776 stated it, charity is a "mutual" not a "civil" duty.[291] 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: "[T]he power to tax involves the power to destroy."[292]

C. Tax Immunity

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, in *Walz v. Tax Commissioner*,[293] ruled by a vote of eight-to-one that such tax immunities do not violate that provision. In that case, Chief Justice 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."[294]

In a dissenting opinion Justice William Douglas disagreed. He found no constitutionally significant difference between a tax subsidy and a tax exemption.[295] On the other hand, he found a constitutional difference between tax immunity and tax exemption. As to the former, Douglas acknowledged that the Free Exercise Clause prohibits a tax levied on the "privilege of delivering a sermon."[296] Concerning such a privilege, Douglas assumed

290. Madison *supra* note 220, at 56.
291. VA. CONST. OF 1776, BILL OF RIGHTS, § 16.
292. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).
293. 397 U.S. 664 (1970).
294. *Id.* at 675.
295. *Id.* at 704.
296. *Id.* at 707 (quoting Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943)).

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.[297]

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. Refraining from exercising a power that it does not have could not, by definition, 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.[298] 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.[299] 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.[300] 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.[301]

CONCLUSION

The Free Exercise Clause was designed to work a dramatic change in the relationship between the church and the state. By it, 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.

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297. Herbert W. Titus, *No Taxation or Subsidization: Two Indispensable Principles of Freedom of Religion*, 22 CUMB. L. REV. 505, 518 (1992).

298. *See supra* text at 50.

299. Titus, *supra* note 274, at 516-17.

300. *Genesis* 14:20.

301. Herbert W. Titus, *The Social Security Amendments of 1983: A Tax on Religion*, 1 BENCHMARK, Jan.-Feb. 1984, at 10.

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 salvation 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 duties enforceable only by reason and conviction, from any and all encroachments by the civil authorities. A return to this general jurisdictional foundation will not only benefit the church, it will benefit all people equally. No longer will the Free Exercise Clause be available as a special privilege to be invoked by dissenters with "religious convictions." Instead, it will be employed to prohibit the state from usurping those duties, like education and welfare, that the Creator never authorized the state to enforce.