FAITH IN THE LAW:

REINTERPRETATION OF THE FREE EXERCISE CLAUSE,

1940-1993

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ABSTRACT

The U.S. Supreme Court has used three legal standards to apply the First Amendment's Free Exercise Clause. The Court created the secular regulation rule in 1879, under which there were no constitutionally mandated exemptions from general laws having a valid secular purpose with a rational basis. It held in 1940 that the Due Process Clause of the Fourteenth Amendment incorporated the protections of the Free Exercise Clause; accordingly, it applied the Clause to state cases using the secular regulation rule.

In 1963, the liberal Warren Court adopted a new and more exacting standard for free exercise cases, the *Sherbert* test. Under *Sherbert,* if a party could demonstrate that a law or regulation infringed free exercise, then the government had to demonstrate that the law was necessary to meet a compelling interest. If universal enforcement of a law meeting a compelling interest were not the least restrictive means of meeting that interest, exemption on free exercise grounds was constitutionally mandated. *Sherbert* shifted the burden of proof to the government, requiring it to justify its actions. Nevertheless, the Court found against most claimants under *Sherbert* between 1963 and 1987.

A conservative majority of the Court, dominated by Reagan appointees, abandoned *Sherbert* in 1990. In its stead the Court adopted the *Smith* test, which held that any generally applicable and otherwise valid law facially neutral toward religion need not be subject to strict scrutiny, nor was free exercise exemption constitutionally required from such a law. *Smith* essentially represented a turn from *Sherbert* (whose test was similar to that used for all other First Amendment rights cases) to the weaker, old secular regulation rule.

Many times, when the Court ruled against free exercise claimants, the legislative branch passed specific free exercise exemptions to the law in controversy. In fact, Congress passed the Religious Freedom Restoration Act of 1993 to overturn *Smith* and require all federal and state courts to use the *Sherbert* test in free exercise cases. It is unclear whether that statute will withstand judicial review. The passage of the RFRA and free exercise exemptions vindicates the conservative Court's view that it is safe to defer to the political process to determine when exemptions are suitable, rather than subject all burdensome laws to strict scrutiny under the Free Exercise Clause.

This thesis examines the theory and application of the Court's free exercise jurisprudence from the initial interpretation of the Free Exercise Clause in 1879 through its reinterpretation between 1940 and 1993. Primary sources are the Supreme Court's published opinions, the Constitution, writings of some of the Framers of the First and Fourteenth Amendments, and contemporary scholarly and popular periodicals. Secondary sources include works by noted scholars in the fields of constitutional law and history, as well as autobiographical and scholarly materials written by Supreme Court Justices involved in free exercise cases.

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Frederick W. Stricker III

Youngstown, Ohio

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TO MOM AND DAD

Introduction
Interpreting the Free Exercise Clause

> *These amendments [in the Bill of Rights] contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.*
>
> —Chief Justice John Marshall in *Barron* v. *Baltimore* (1833)

Two days after Bernard Permoli, a Roman Catholic priest in the Church of St. Augustin, had officiated at a parishioner's open-casket funeral, the city of New Orleans issued a warrant against him. He was charged with violating a public health ordinance making it "unlawful to carry to, and expose in, any of the Catholic churches of this municipality, any corpse, under the penalty of a fine . . ., and under penalty of a similar fine . . . against any priest who may celebrate any funeral at any of the aforesaid churches."[1] Permoli appealed all the way to the U.S. Supreme Court, asserting that the Constitution of the United States forbade any law prohibiting the free exercise of religion. The Court dismissed the appeal, insisting that, as a federal court, it had no jurisdiction over the case—because "the Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."[2]

This 1845 opinion, which would be shocking were it to come from the Court today, faithfully reflected the intent of the First Amendment's Framers. Permoli assumed, as many might now, that the First Amendment was enacted to preclude all laws prohibiting the free

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[1]Permoli v. First Municipality, 44 U.S. (3 How.) 589 (1845).

[2]Ibid., 609.

exercise of religion, or abridging freedom of speech, or of the press, or the right of peaceable assembly and petition.[3] It did not. Consistent with the language of the amendment and the intent of its framers, the Court ruled that the First Amendment imposed a restriction only on the federal government. It was not until 1868, when the Fourteenth Amendment was ratified, that the Constitution prevented states from infringing on the freedoms protected in the First Amendment. In fact, the Supreme Court did not regard the Free Exercise Clause as binding on the states until the mid-twentieth century.[4]

Today, the Constitution protects the fundamental right of religious liberty against infringement by all levels of government in the United States, in part because the Supreme Court, under Chief Justice John Marshall in 1803, assumed the power of judicial review—the authority to determine the constitutionality of acts of Congress.[5] Since that time, the Court

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[3]According to John W. Baker, "many knowledgeable people . . . were surprised" by the Court's holding in *Permoli*. In Robert S. Alley, ed., *James Madison on Religious Liberty* (Buffalo, N.Y.: Prometheus Books, 1985), 271.

[4]Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). The alphanumeric soup in this citation is a deceptively complicated-looking way of telling the reader in which volume of which case law book to find a given Supreme Court decision. "310 U.S. 296" means that the case *Cantwell* v. *Connecticut* is found in Volume **310** of **United States** Reports, beginning on page **296**. "60 S.Ct. 900" refers to Volume **60** of the **Supreme Court** Reporter, page **900**; "84 L.Ed. 1213" indicates that the reader will find the case in Volume **84** of U.S. Supreme Court Reports, **Lawyers' Edition** on page **1213**. All case citations include the year of the decision at the end in parentheses.

[5]Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The power of judicial review is nowhere explicitly stated in the Constitution, but may be inferred from the wording of Article III, Section 2, which authorizes the Supreme Court to try "all Cases, in Law and Equity, arising under this Constitution." Supreme Court Justice Felix Frankfurter wrote, "The ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." Graves v. New York, 306 U.S. 466, 491-492 (1939)(concurring opinion), in Sanford Levinson, *Constitutional Faith* (Princeton, N.J.: Princeton University Press, 1988), 209 n. 159. Madison anticipated judicial review in

has held a principal responsibility in our system of government for interpreting and applying the First Amendment, as well as the rest of the Bill of Rights.[6] The Court stands as foremost defender of American rights and liberties against any majoritarian bias expressed in the political process. Indeed, many civil libertarians regard the primary purpose of the U.S. Supreme Court as the protection of minority rights.

In its interpretation of the Free Exercise Clause, the Supreme Court has relied on three different legal standards over the years. The first, called the secular regulation rule, was developed in 1878 and reinterpreted to apply to appeals from state courts in 1940. The second, called the *Sherbert* test, was created in 1963. The Court developed its third standard, the *Smith* test, in 1990. In these interpretations, the Court moved from a position that did little to protect minority religions, to a more liberal stance aggressively guarding minority rights, to a new conservatism once again skeptical of religious practices out of the mainstream.

The original secular regulation rule declared that any law having a "valid secular purpose" would withstand challenges on free exercise grounds, especially if it were a generally applicable criminal statute. The rule relied on a distinction between religious belief and practice. All were free to believe whatever they wished, but the government could

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Federalist Paper No. 78. Alexander Hamilton, James Madison, John Jay, *The Federalist Papers,* introduction by Clinton Rossiter (New York: Penguin Books, 1961), 466-472.

[6]Another view of considerable merit has been expressed by Sanford Levinson: "[It] is ultimately the conscientious individual, and not the Supreme Court, who is the ultimate interpreter of the Constitution. It is the province and duty of the citizen to declare what the law is." *Constitutional Faith,* 43-44. See also Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978), 214-215, cited by Levinson in *Faith,* 43.

regulate religious practice when it violated prevailing mores or criminal law.

The Court's first reinterpretation of the Free Exercise Clause came in 1940, when it applied the Clause to the states. This reinterpretation followed in the wake of a threat to the Court's power from the executive branch in the mid-1930s. President Franklin D. Roosevelt was exasperated with the Court because it had overturned many of the economic regulations he persuaded Congress to pass. In the wake of the threat posed by Roosevelt's plan to pack the Court with his own appointees, the Court turned from its preoccupation with judicial review of economic regulations. Instead it directed itself toward "strict scrutiny" of laws infringing on civil liberties and civil rights. In its first reinterpretation of the Free Exercise Clause, the Court applied the secular regulation rule to state free exercise cases beginning in 1940. The Court held that the Fourteenth Amendment had incorporated all the liberties guaranteed by the First Amendment, restricting the states as well as the federal government.

In 1963 the Court abandoned the secular regulation rule in favor of a second standard, called the *Sherbert* test, to balance the interests of government with the rights of the religious.[7] The *Sherbert* test shifted the burden of proof in free exercise cases to the government. It required the government to demonstrate that the law under challenge met a compelling interest, and that universal enforcement of that law was the least restrictive means of meeting that interest. If a statute did not meet a compelling state interest, it was overturned. On the other hand, if the law did in fact meet a compelling interest, it was upheld. However, if universal enforcement were not the least restrictive means available to

[7]Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).

meet the compelling state interest, the Court would order exemption from the law for religious objectors.

The *Sherbert* test remained a part of settled free exercise jurisprudence until 1990, when it was replaced by the significantly weaker *Smith* test—a standard remarkably similar to the Court's earlier secular regulation rule.[8] Under *Smith,* a law is upheld if it is "facially neutral" toward religion and generally applicable.[9] The majority of Justices on the Court now sees exemptions as permissible under the Constitution, but not mandated thereby.

The changes in the Court's approach in dealing with the Free Exercise Clause reflected the changing composition of the Court and the views of its members in each era. The Court's extremely conservative view of polygamy in the nineteenth-century Mormon cases was a reflection of the hegemony of Protestant social mores. Selective incorporation of the Bill of Rights through the Fourteenth Amendment on a case-by-case basis occurred as Justices who favored expanded protection of civil liberties took their seats on the Court. The adoption of the *Sherbert* test took place during the tenure of the liberal Chief Justice Earl Warren, as the judiciary moved boldly forward as the Civil Rights Movement gained momentum. The shift away from *Sherbert* began as the composition of the Court changed again, reflecting the more conservative views of most of President Ronald Reagan's

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[8]Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). "Jurisprudence" is the legal term for "the course of court decisions." *Merriam Webster's Collegiate Dictionary,* 10th ed. (1993).

[9]The Court refined the *Smith* test in 1993 to make it clear that a law neutral on its face toward religion would still be overturned if it were enacted to suppress any religious practice or sect. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 113 S.Ct. 2217 (1993).

appointees. Under Reagan's Chief Justice, William Rehnquist, the Court abandoned *Sherbert,* adopting *Smith* as its new standard in free exercise cases. A minority on the Court, composed of moderate and liberal Justices, favors restoration of the *Sherbert* test. Meanwhile, Congress passed legislation to compel all state and federal courts to use *Sherbert* as their standard for interpreting the Free Exercise Clause. Only time will tell whether that law will be upheld as constitutional by the Supreme Court.

This work examines the theory, and application of these three tests and their places in free exercise jurisprudence. The principal primary sources are the U.S. Supreme Court's published opinions, as well as the Constitution of the United States, the writings of some of the Framers of the First and Fourteenth Amendments, and contemporary popular and scholarly periodicals. Secondary sources include works by many scholars noted in the field of constitutional law, such as Leonard W. Levy, Leo Pfeffer, Sanford Levinson, and Michael W. McConnell, as well as autobiographical and scholarly materials written by Supreme Court Justices involved in free exercise cases.

Chapter One
Free Exercise Jurisprudence before Incorporation

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
—Constitution of the United States, Amendment I

Because the First Amendment applied only to Congress, the only free exercise cases after Permoli's unsuccessful 1845 lawsuit to come before the Supreme Court in the nineteenth century dealt specifically with federal infringement of religious liberty. The Court had held that federal courts lacked jurisdiction in free exercise cases at the state level. This chapter explores evidence that the *Permoli* decision was consistent with the original intent of the First Amendment's Framers. Next, it examines the secular regulation rule, which the Court developed to interpret the Free Exercise Clause in a series of cases involving the Mormon belief and practice of polygamy.

The members of the 1787 Constitutional Convention paid little attention to religion, noted Richard E. Morgan in his book, *The Supreme Court and Religion,* because it was a state, not federal, matter.[1] While the Constitution was being debated and ratified, however, many people demanded a Bill of Rights be included to protect both individuals and the states from potential tyranny exercised by the stronger federal government under the new Constitution. In exchange for ratification, James Madison and other leaders promised to place a Bill of Rights before the First Congress. When the First Congress considered James

[1]Richard E. Morgan, *The Supreme Court and Religion* (New York: The Free Press, 1972), 20.

Madison's proposals for constitutional amendments, "one element of [his] original package," wrote Morgan, "found no favor whatever: the proposal to extend a federal guarantee of religious freedom and separation of church and state to the states."[2] Madison considered the rejected proposal "the most valuable amendment in the whole list. If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments."[3] By killing the proposal, Congress intentionally limited the Religion Clauses in the Bill of Rights to protect the people only from the federal government, and to leave the established state churches alone. Indeed, it was not until 1833 that Massachusetts disestablished the last remaining state church.[4]

In ratifying the First Amendment, the state legislators understood that they were restricting Congress from passing any law concerning any establishment of religion—whether to create a national church or to interfere with the states' relationships with their own

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[2]Morgan, 23.

[3]*Annals of Congress* 1:783 (Aug. 17, 1789), quoted in Michael W. McConnell, "Free Exercise As the Framers Understood It," in Eugene W. Hickok, Jr., ed., *The Bill of Rights: Original Meaning and Current Understanding* (Charlottesville, Va.: University of Virginia, 1991), 58. "Madison's language prohibited both states and the federal government from infringing on the rights of conscience. In contrast, the Establishment Clause was to apply only to the federal government." Michael J. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (Washington, D.C.: American Enterprise Institute for Public Policy, 1978), in Daniel Patrick Moynihan, "What Do You Do When the Supreme Court Is Wrong?" *The Public Interest* 57 (1979): 3, at 16.

[4]Leo Pfeffer, God, *Caesar, and the Constitution: The Court as Referee of Church-State Confrontation* (Boston: Beacon Press, 1975), 5, 13.

officially established churches.[5] Likewise, the Free Exercise Clause restrained the federal power from prohibiting any or all religious practices, but left the states free to decide such matters in their own legislatures. In the case of *Barron* v. *Baltimore* (1833), Chief Justice John Marshall wrote of the Bill of Rights, "These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."[6] This understanding of the First Amendment's scope was maintained by the Court in later opinions, such as the aforementioned *Permoli* v. *First Municipality* (1845). "The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties," argued Justice John Catron, "nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."[7]

The next landmark free exercise case following *Permoli* came before the Court in 1878, and concerned only Congressional action. The plaintiff in that case, George Reynolds, was a resident of the Territory of Utah, which, being not a state, fell under the exclusive jurisdiction of Congress. Reynolds, a member of the Church of Jesus Christ of Latter-Day Saints, was an admitted polygynist, believing such practice to be his religious duty, indeed,

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[5]"Congress was forbidden to legislate at all concerning church establishments —either for or against. . . . *[I]t was prevented from interfering with the established churches in the states.*" M. Stanton Evans, *The Theme Is Freedom: Religion, Politics, and the American Tradition* (Washington, D.C.: Regnery Pubs., 1994), 284, italics original.

[6]32 U.S. (7 Pet.) 247, 250 (1833).

[7]44 U.S. (3 How.) 589, 609 (1845).

the duty of every Mormon man of sufficient means.[8] Consequently, he was indicted in the District Court of the territory on the charge of bigamy. Upon conviction, he appealed to the Supreme Court.

Before the Court, Reynolds' attorneys argued that the lower court had erred by "refusing to instruct the jury that if they found that the defendant was married in pursuance of and conformity with . . . a religious duty, their verdict should be 'Not guilty.'"[9] After all, they maintained, if Reynolds violated the statute by fulfilling his religious duty, he lacked criminal intent. Criminal intent, they insisted, "is the very gist of the offense, as it is necessarily of all crimes."[10]

Chief Justice Morrison R. Waite delivered the opinion of the Court, which considered "whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land." He reflected on "the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong."[11] Waite wrote that the First Amendment explicitly forbade Congress passing any law prohibiting free exercise of religion, and analyzed whether the polygamy statute fell within that prohibition.

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[8]"The Church taught that not only was it necessary for men to be married in order to reach the highest degree of heavenly glory, but that the greater the number of wives a man had, the greater his reward would be." Orma Linford, "The Mormons and the Law: The Polygamy Cases, Part I," *Utah Law Review* 9 (1964): 310, quoted in Sanford Levinson, *Constitutional Faith* (Princeton, N.J.: Princeton University Press, 1988), 211 n. 8. Therefore it is more accurate to state that the Mormons believing in polygyny rather than polygamy.

[9]Reynolds v. United States, 25 L.Ed. 244, 245 (1879).

[10]Ibid.

[11]Ibid., 249.

To address that matter, the Court introduced the belief-action distinction, holding that Congress cannot pass a law prohibiting religious beliefs as such, but can prohibit religious practices "in violation of social duties or subversive of good order." Turning to history to support his position, Waite quoted Jefferson as preeminent authority on the Free Exercise Clause:

> At the first session of the first Congress the amendment now under consideration was proposed . . . by . . . Madison. . . . Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, . . . took occasion to say: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not opinions, I contemplate with solemn reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State. . . ." Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.[12]

The belief-action distinction came under considerable criticism from constitutional scholars later in the twentieth century. Many scholars have especially criticized Waite's use of Jefferson as an authority on the meaning of the Religion Clauses. The focus should not have been on "what . . . Jefferson may have thought" but on "what the Congress did. . . . Jefferson was not a member of the First Congress; he was Secretary of State at the time, and quite uninvolved. (He had spent most of the previous five years on diplomatic missions in

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[12]98 U.S. 145, 164.

Western Europe)."[13] Professor M.E. Bradford commented on how out of place Jefferson's views were in relation to the Framers of the First Amendment; of Jefferson's famous letter of 1802 to the Danbury Baptists, he noted simply that it was "a letter without legal significance."[14] Constitutional scholar Leo Pfeffer, upon examining the belief-action distinction endorsed by the Court in *Reynolds*, found it a contradiction to the express wording of the Free Exercise Clause.[15]

After discussing the belief-action distinction in *Reynolds*, the Court went on to assert that Congress had the power to pass the polygamy law, and that it was "constitutional and valid . . . for all . . . places" under federal jurisdiction.[16] Finally, the Court turned to the question of religious exemptions to generally applicable laws having valid secular purpose—specifically pondering "whether those who make polygamy a part of their religion are excepted from the operation of the statute."[17] The Court believed that granting an exemption to the law only for those religiously opposed to it would be grossly unfair, "introducing a new element into criminal law," for if they were exempted, "those who do not make polygamy a part of their religious belief may be found guilty and punished, while those

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[13]Moynihan, 17.

[14]M.E. Bradford, *Original Intentions: On the Making and Ratification of the United States Constitution* (Athens, Ga.: University of Georgia Press, 1993), 91. See also Justice Rehnquist's dissent in *Wallace* v. *Jaffree,* 105 S.Ct. 2479, 2508 (1985).

[15]Leo Pfeffer, God, *Caesar, and the Constitution: The Court as Referee of Church-State Confrontation* (Boston: Beacon Press, 1975), 31.

[16]98 U.S. 145, 166.

[17]Ibid.

who do must be acquitted and go free."[18] Based on the belief-action distinction, Waite concluded that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[19] Accordingly, the Supreme Court upheld Reynolds' conviction. The greatest significance of *Reynolds* v. *United States* was that it set a precedent for refusing to exempt religiously motivated violators of criminal laws prohibiting the free exercise of their religion, in cases where religious practices were "in violation of social duties or subversive of good order."[20]

The Supreme Court, however, was not finished with the tenaciously polygamous Mormons. Samuel P. Davis was indicted in April 1889 in Idaho "for a conspiracy to unlawfully pervert and obstruct the due administration of the laws of the Territory" by perjuring himself. [21] "The Idaho Territory . . . had disenfranchised Mormons, and Davis was a Mormon and lied about it" in order to register to vote.[22] Justice Stephen J. Field, writing for the Court, dismissed the free exercise claim Davis based on Mormon religious beliefs:

> Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. . . . Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the

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[18]Ibid.

[19]Ibid.

[20]Ibid., 164. Such laws had to be "facially neutral" toward religion, but in the Mormon cases the Court repudiated religious belief in polygamy as a sham, even as it argued the cases on the basis of the Free Exercise Clause.

[21]Davis v. Beason, 133 U.S. 333, 334 (1890).

[22]Morgan, 42.

> moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind.[23]

Reaffirming the *Reynolds* opinion, Fields wrote that

> it was never intended or supposed that the [first] amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. . . . However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.[24]

The Court took the right to vote away from "all practicing members of the Church of Jesus Christ of Latter Day Saints," whether they actually practiced polygamy or simply advocated it.[25]

In the same term, the Court reached its decision in the cases of *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints et al.* v. *United States* and *Romney* v. *United States.*[26] The cases were appeals from a decree of the Supreme Court of the Territory of Utah that dissolved the corporation of the Mormon Church, annulled its deeds to property (except such property as was used specifically for worship), determined that its personal property had reverted to the United States, and appointed a receiver to hold it. Affirming the lower court's decision, never before has the Court acted so decisively against a specific

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[23]Davis v. Beason, 341-342.

[24]Ibid., 342-343.

[25]David R. Manwaring, *Render Unto Caesar: The Flag-Salute Controversy* (Chicago: University of Chicago Press, 1962), 45.

[26]136 U.S. 478 (1890).

religious body or adherent under such apparent thrall of religious intolerance.[27]

Justice Joseph P. Bradley, wrote for the Court: "*Affirmed. But, as the decree may perhaps require modification in some matters of detail, for that purpose only the case is reserved for further consideration.*"[28] The Court considered argument against the property seizure on free exercise grounds covered by the rule that valid secular regulations overrode free exercise concerns. Once again, opposition to the Mormon religious duty of polygamy was at the heart of the Court's decision, since it was "a matter of public notoriety, that the religious and charitable uses intended to be subserved and promoted are the inculcation and

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[27]The federal government has targeted other religious groups or adherents, but the Court has not heard their cases. For instance, Sun Myung Moon, head of the Unification Church, was indicted for failure to report income. He voluntarily returned to the United States, and requested trial before a judge "on the grounds that public hostility to him and to the . . . Church . . . was so deep-seated and so pervasive that" trial by jury would be relatively unfair. The government insisted on trial by jury, and Moon relented. He was convicted, despite the evidence, which "showed indisputably that the money which the government claimed belonged to . . . Moon, so that he ought to have paid taxes on it, was all entrusted to him by members of his church for the undisputed purpose of making a charitable gift to the church itself, as the Court of Appeals conceded. . . . [E]very single thing Moon did with that property was entirely consistent with the intentions of the donors, [but] the Court of Appeals thought it was just fine for the jury to substitute its judgment for that of the church." —Address by Lawrence H. Tribe, "The Sun Myung Moon Case," the second panel in part one, "The Executive Branch and Religious Liberty: The Case Against the Internal Revenue Service," in Russell Kirk, ed., *The Assault on Religion: Commentaries on the Decline of Religious Liberty* (Lanham, Md.: University Press of America, for the Center for Judicial Studies, 1986), 23-25. See also Dean M. Kelley, "Free Enterprise in Religion, or How the Constitution Protects Religion and Religious Freedom," in Robert A. Goldwyn and Art Kaufman, eds., *How Does the Constitution Protect Religious Freedom?* (Washington, D.C., American Enterprise Institute for Public Policy Research, 1987), 122, 130-131. On appeal to the Supreme Court, Moon's conviction was allowed to stand when writ of certiorari was denied. *Moon* v. *United States,* 104 S. Ct. 2344 (1984).

[28]Late Corporation of Latter-Day Saints v. United States, 136 U.S. 1 (1890), italics original.

spread of the doctrines and usages of the Mormon Church . . ., one of the distinguishing features of which is the practice of polygamy—a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world."[29] Bradley next challenged the sincerity and veracity of the church's practice:

> Notwithstanding . . . all the efforts made to suppress this barbarous practice—the sect . . . perseveres, in defiance of law, in preaching, upholding, promoting and defending it. . . . One pretense for this obstinate course is, that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and therefore under the protection of the constitutional guaranty of religious freedom. This is [sophistry]. . . . The state has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practised.[30]

So the Government of the United States confiscated most of the Mormon Church's property on the basis of its doctrines.

Despite the total rejection of polygamy as a sincerely held religious belief in *Romney,* the decision fell in line with the Court's adoption of the belief-action distinction.[31] As Richard Morgan noted, nineteenth-century judges and politicians were "comfortable" with the belief-action distinction, "but it took the Mormons to put the question of the meaning of free-exercise squarely before the Supreme Court and to fix the secular regulation rule . . . into the

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[29]Ibid., 48.

[30]Ibid., 48-50.

[31]For though the Court rejected such belief, it argued its doctrine on a free exercise basis. Maintaining its abhorrence of polygamy, the Court declined the opportunity to reverse its polygamy decisions as recently as the 1950s: *In re Black,* 3 Utah 2d 315, 283 P. 2d 887, certiorari denied 350 U.S. 923 (1955). According to Henry J. Abraham, the Court reaffirmed the polygamy ban in 1984. "Religion, the Constitution, the Court, and Society: Some Contemporary Reflections on Mandates, Words, Human Beings, and the Art of the Possible," in Goldwyn and Kaufman, 19.

body of constitutional law."[32] Historian David R. Manwaring defined this "secular regulation rule" *so: "There is no constitutional right to exemption on religious grounds from the compulsion of a general regulation dealing with non-religious matters.* This rule applies with equal force to legal requirements and legal prohibitions . . . . The regulation, however, must be truly secular in bent."[33]

According to the secular regulation rule, any law infringing on religious liberty was constitutional if it fulfilled a "valid secular purpose" and is "facially neutral" toward religion. An essential corollary of the secular regulation rule was the distinction made by the Court (and maintained to this day) between religious belief and religiously motivated action. Belief was absolutely protected by the Free Exercise Clause, whereas action was subject to restrictions in the best interests of society. Religious liberty was effectively subordinated to criminal law and prevailing social mores.

The secular regulation rule continued as the standard of the Court until 1963. Until 1940, however, when the Court first applied it to the states, the record against free exercise using the secular regulation rule was virtually unbroken:

> In the latter years of the nineteenth and the early twentieth centuries the rule was applied by lower courts to sustain regulations which touched, among others, the Salvation Army, soliciting, palmists, and preachers who caused disturbances by shouting during services. The only instance of a religious claim being granted against a valid secular regulation occurred in California in the early 1920's when a local school board made social dancing a part of a required physical education course [and lost a challenge by the] Protestant

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[32]Morgan, 43.

[33]Manwaring, 51, italics original.

fundamentalist . . . Hardwicke family.[34]

Although the belief-action distinction promulgated first in *Reynolds* may be useful in other contexts, it is an essential corollary of the secular regulation rule. Under the rule, any law had to meet two criteria if challenged under the Free Exercise Clause. Its purpose had to be a valid exercise of government power and also had to be truly secular in nature, not passed to outlaw a particular religious doctrine or sect, which also meant that the law was neutral on its face toward religion, and applied to all without regard for their religion. The Court got around the last criterion in the Mormon cases by two means. First, by insisting that polygamy was not a sincerely held religious practice, the Court argued, the Mormons used the claim of free exercise as a pretense, an excuse for grossly immoral behavior abhorrent to every civilized society. Second, the Court declared the laws in question to be both valid and secular because monogamy was a foundation of civilization, without which society would be destroyed. A basic function of government was the preservation of social order, so the Court held that religious liberty was subordinate to generally applicable criminal laws having valid secular purposes. The Free Exercise Clause provided no protection for practices which violated commonly observed social mores. As products of their time, the Justices simply reflected the Protestant hegemony in American religious life.[35] The Court was just as horrified by the practice of polygamy as any other non-Mormon, and used legal reasoning to

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[34]Morgan, 43-44, citing Hardwicke v. Board of School Trustees, 54 Cal. App. 696 (1921).

[35]It should not be inferred from the phrase "Protestant hegemony" that Catholics approved of polygamy. Rather, backing Christian doctrines with the force of law in America is a tradition strongly based on Puritanism and Calvinism. Other examples of such laws are the Sunday "blue" laws and Prohibition.

suppress it. Victorian morality prevailed under force of law.

It can be argued that the Court's imposition of monogamy on the Mormons, clearly giving force of law to the majority's religious opposition to polygamy, simply reflected the Court's post-Civil War view of American nationhood. As someone once said, the Civil War was fought over a question of grammar: was it constitutionally accurate to say "the United States *was*" or "the United States *were*?" With the Union's victory, the idea of the United States as one, indivisible nation, and of Americans as one people, predominated.

American nationalism, as in emerging European nationalism, relied upon a common language, common system of education, and a common morality based on a common religion. The First Amendment explicitly forbade establishing any one denomination by law, but nearly all Americans, including the Justices on the Supreme Court, saw the United States as a Christian nation. The Protestant majority saw polygamy as an Oriental evil, unsuited for a civilized nation. Indeed, it viewed as uncivilized all nations which were not demonstrably Christian; the terms "Christian" and "civilized" were synonymous with "Western." As Chief Justice Waite wrote disdainfully in *Reynolds:* "Polygamy has always been odious among the Northern and Western Nations of Europe and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and African people."[36] This same attitude was expressed by Justice Bradley in *The Late Corporation of Latter-Day Saints:* "The state has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind."[37]

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[36]Reynolds, 164.

[37]Late Corporation of Latter-Day Saints, 48-50.

All of the appellants in the aforementioned Mormon cases fell afoul of federal laws allegedly having a valid secular purpose; each of the cases pertained to Congressional action or authority. By the *Permoli* precedent, the Supreme Court would not apply the Free Exercise Clause to the states. Had Idaho and Utah been states at the time of those cases, and if the Free Exercise Clause were irrelevant, there presumably would have been no federal question involved—the free exercise claims would have been examined under state law.

However, a twentieth-century debate raged as to whether the Free Exercise Clause would have been applicable to the states through the Fourteenth Amendment, ratified in 1868. Yet it was not until 1940 that the Supreme Court held that the Religion Clauses applied to the states through the Fourteenth Amendment. The next chapter will consider the intent of the Framers of the Fourteenth Amendment, and how they viewed its relationship to the Bill of Rights.

Chapter Two
Enter the Fourteenth Amendment

> *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws.*
>
> —Constitution of the United States, Amendment XIV, § 1

Despite the fact that the First Amendment was never originally intended to be applied to the states, the Supreme Court began to apply it clause by clause, case by case, beginning in 1925. That year, in *Gitlow* v. *New York*, the Court ruled that the First Amendment's guaranties of free speech and press applied to the states because the Due Process Clause of the Fourteenth Amendment had "incorporated" select protections of the Bill of Rights.[1] In 1940, the Religion Clauses were the last part of the Amendment to be applied by the Court to the states. That event marked the first reinterpretation of the Free Exercise Clause by the Court since *Reynolds*, for, although the Court continued to rely on the secular regulation rule to analyze free exercise cases, the Court could now hear cases on appeal from the state level.[2]

This chapter examines the framing of the Fourteenth Amendment and the debates over its ratification. It ascertain whether the Framers of the Fourteenth Amendment intended to incorporate the Free Exercise Clause, thus applying it to the states, and how the Supreme Court interpreted the amendment. The Court's reinterpretation of the Religion Clauses in 1940 developed from two major factors. One was the prior incorporation of the rest of the

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[1]Gitlow v. New York, 268 U.S. 652 (1925).

[2]Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

First Amendment. The other was the Court's change of direction toward strict scrutiny of laws infringing civil liberties, a change made in the wake of President Roosevelt's attempted threat to the Court's independence and power.

The Supreme Court reinterpreted the Free Exercise Clause in 1940 by applying it to the states for the first time. This application relied on the Court's doctrine of selective incorporation, which means that "the Due Process Clause of the Fourteenth Amendment absorbed the first eight amendments and made them applicable to the states."[3] This doctrine has been very difficult to defend, since the Due Process Clause in the Fourteenth Amendment expressly applied only one part of the Bill of Rights to the states—the Due Process Clause of the Fifth Amendment. The Fifth Amendment's Due Process Clause prohibited Congress from depriving any person of life, liberty, or property, without due process of law., whereas the Fourteenth Amendment's Due Process Clause prohibited states from doing the same. The question immediately coming to mind is how the Due Process Clause of the Fourteenth Amendment could encompass a Bill of Rights already containing an identical Due Process Clause in only one of its amendments.

The Supreme Court applied the protections afforded individuals against the United States in the First Amendment to the states by arguing that those rights were also protected by the Fourteenth Amendment. Many scholars have argued that it was not the intention of the Framers of the Fourteenth Amendment to incorporate the Amendments in the Bill of

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[3]*Report to the Attorney General: Religious Liberty under the Free Exercise Clause, August 13, 1986* (Washington, D.C.: U.S. Government Printing Office, 1986), 10 n. 15. Actually, the Court has never held the Second Amendment applicable to the states.

Rights.[4] Some historians have reasoned that the Religion Clauses in particular could not have been slated for incorporation in original intent. In *The Theme Is Freedom,* journalist M. Stanton Evans warned, "To enter this terrain we must grasp the Orwellian concept of 'applying' a protection of the states *as a weapon against them*—using the First Amendment to achieve the very thing it was intended to prevent."[5] Constitutional scholar Steven D. Smith agreed, arguing that "the religion clauses as originally understood were purely jurisdictional"—that is, they simply protected the states from Congressional interference—and therefore "contained no substantive right or principle of religious freedom that could have been 'incorporated' even if the enactors of the Fourteenth Amendment had wanted to" do so.[6]

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[4]Chief among them are Charles Fairman, Stanley Morrison, and Raoul Berger. See Fairman and Morrison, *The Fourteenth Amendment and the Bill of Rights: The Incorporation Theory* (2 *Stanford Law Review* 5 and 140 (1949); reprint, New York: De Capo Press, 1970); Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Mass.: Harvard University Press, 1977). Legal scholar Leonard W. Levy also believes that the framers did not intend incorporation. See his *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan, 1986), 122. Fairman wrote to counter Justice Black's view of incorporation in *Adamson* v. *California*, 332 U.S. 46 (1947) (dissenting); Black responded in *Duncan* v. *Louisiana*, 88 S. Ct. 1444, 1455 (1968) (with Douglas, concurring) that he had "read and studied this article extensively, including the historical references," and that it "failed to refute" the views in his own *Adamson* dissent. "Professor Fairman's 'history' relies very heavily on what was not said in the state legislatures . . . [rather than] by the men who actually sponsored the Amendment in Congress." *Duncan,* 1455-1456. Black relied on his extensive Senate experience in relating that members of Congress vote on a measure based on how its sponsors and opponents explain its meaning. *Duncan,* 1456. See also Michael Curtis' *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, N.C.: Duke University Press, 1986), which Henry J. Abraham and Barbara A. Perry consider to be a "learned point-by-point rebuttal of Raoul Berger's historical arguments." *Freedom and the Court: Civil Rights & Liberties in the United States,* 6th ed. (New York: Oxford University Press, 1994), 42 n. 51.

[5]M. Stanton Evans, *The Theme Is Freedom,* 284.

"Madison's language," wrote legal historian Michael J. Malbin, "prohibited both states and the federal government from infringing on the rights of conscience. In contrast, the Establishment Clause was to apply only to the federal government."[7] After the First Congress eliminated Madison's restrictions on the states, both Religion Clauses applied exclusively to Congress, as the Court recognized in *Permoli.* If the Establishment Clause were a purely federalist measure, it could not be possible to apply it to the states without the Newspeak of Orwell. Acquiescing to the view that the Establishment Clause was jurisdictional in nature, civil liberties scholar Akhil Amar found that not to be true of the Free Exercise Clause. He argued that because the Free Exercise Clause "was paradigmatically about citizen rights, not state rights . . . it thus invites incorporation."[8] The Clause concerned itself particularly "with the plight of minority religions, and thus meshes especially well with the . . . thrust of the Fourteenth Amendment."

"There are those who say," wrote Professor William Lee Miller in *The First Liberty,* "there are not really two clauses, that they should be, as the lawyers phrase it, 'read as one.'"[9]

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[6]Steven D. Smith, *Preordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (New York: Oxford University Press, 1995), 50.

[7]Michael J. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978), in Moynihan, 16.

[8]Akhil Reed Amar, "The Bill of Rights as a Constitution," 100 *Yale L. J.* 1131, 1159 (1991), in Steven D. Smith, 35.

[9]William Lee Miller, *The First Liberty: Religion and the American Republic* (New York: Paragon House, 1985), 300. Justice Sandra Day O'Connor agreed with this reading, arguing that the Free Exercise Clause and the Establishment Clause have a "common purpose," which is "to secure religious liberty." *Wallace* v. *Jaffree,* 105 S.Ct. 2479, 2496 (1985).

Of these, some, such as Leo Pfeffer, viewed "any violation of the strict separation of church and state" as "a violation of religious liberty." Others, such as "former Solicitor-General . . . (and Harvard law professor) Erwin Griswold and Professor Wilbur Katz of the University of Chicago [saw] separation [as] justifiable . . . *only insofar as it is* a servant of the fundamental . . . only and governing principle," free exercise.[10]

In the debate of Free Exercise Clause versus Establishment Clause, it is germane to consider the religious liberty implications of the Constitution *before* the Bill of Rights was adopted. Article VI, Section 3 contains the provision that "no religious Test shall ever be required as a Qualification of any Office or Public Trust under the United States." Note well the strength of the wording: "no religious Test shall ever be required," not only to hold public office, but any "Public Trust." As constitutional law expert Joseph Schuster contemplated, "The bar to religious oaths may have been employed . . . in order to prevent [states' establishments] from encroaching on the 'freedom of religion' which was to be the norm at the national level." Accordingly, it would appear that the ban on religious tests for federal officers and trustholders "lends support to the argument that for the framers religious freedom . . . was the primary concern," not whether churches remained established by state law.[11] So there is a preexisting constitutional principle of religious liberty more explicitly stated in the Free Exercise Clause, but whether the Clause applies to the states was another debate.

As social scientist Joseph B. James noted, "the framing and adoption of the Fourteenth

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[10]William Lee Miller, 300.

[11] Joseph F. Schuster, *The First Amendment in the Balance* (San Francisco: Austin & Winfield, 1993), 297.

Amendment [were] inextricably woven into the broad pattern of [R]econstruction."[12] At the end of the Civil War, the Radical Republicans in Congress believed that blacks were freemen, because slavery was unrecognized under common law, and therefore illegal. They believed that all freemen had citizenship and all the civil rights accompanying them, such as suffrage. The problem with their view, of course, was that it had been repudiated by the Supreme Court in the antebellum case of *Dred Scott* v. *Sandford.*[13] After passing the Thirteen Amendment in 1865 guaranteeing the freedom of the slaves, it remained a doctrine of case law that a freeman did not necessarily possess citizenship. The Radical Republicans sought to remedy this problem with the Fourteenth Amendment.[14]

The Radicals feared their work might be undone or at least unfinished if the Democrats regained control of Congress, a very real fear with the readmission of the Southern states to the Union. Therefore the Radicals determined that apportionment in Congress would have to depend on the extent to which black citizens were provided the opportunity to vote. The Radicals reasoned that blacks would vote for the party that had freed them, rather than the party of slaveholders. Republicans expected to retain their power

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[12]Joseph B. James, *The Framing of the Fourteenth Amendment,* Illinois Studies in the Social Sciences: Volume 37 (Urbana, Ill.: University of Illinois Press, 1956), 3.

[13]60 U.S. 393 (1857).

[14]The phrasing of the apportionment rule in the Fourteenth Amendment was taken as a loophole by which Southern states could choose to deny blacks the right to vote in exchange for less representation in Congress, a case of the tail wagging the dog. The Radical Republicans did not simply wish to hold on to the reins of power, but also genuinely wanted to secure the civil rights of the freed slaves. It also became clear that the courts would not construe citizenship as granting full civil rights. They therefore found it necessary to push through a Fifteenth Amendment specifically guaranteeing black suffrage.

through black suffrage.

Other issues faced during the framing of the Fourteenth Amendment were addressed by the amendment. The framing of the Fourteenth Amendment involved a variety of issues, many moral or philosophical, some politically expedient. Ratification of the Amendment, furthermore, was made a condition of readmission to the Union, virtually guaranteeing its enactment.

After Congress framed the Fourteenth Amendment, and the states ratified it, the Supreme Court, as always, began to construe, interpret, and apply it. In the *Slaughter-House Cases*, 16 Wall. 36 (1873), the Court narrowed the scope of the amendment to exclude incorporation of the First Amendment.[15] The Court ruled that the Privileges or Immunities Clause of the Amendment ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .") protected only the rights held by persons as citizens of the United States, not as citizens of any given state. In other words, under the Amendment's scheme of dual citizenship (national and state), national citizenship rights were protected against state action, but state-citizenship rights were not subject to federal oversight, except through the Equal Protection Clause. The Equal Protection Clause ("No State shall . . . deny to any person . . . the equal protection of the laws") was held to require states to provide sojourners from other states the same rights—whatever they might be—that they provided citizens of their own state. Under the *Slaughter-House* ruling, the

[15]Regarding the *Slaughter-House Cases,* Hugo Black maintained that the Court was not shown in those cases the convincing evidence that the Framers of the Fourteenth Amendment saw as one of its primary purposes the overturning of *Barron* v. *Baltimore. Adamson* v. *California*, 67 S. Ct. 1672, 1688 (1947) (Black, dissenting).

Privileges and Immunities Clause did not encompass the protections of the Bill of Rights, and the Equal Protection Clause only applied a state constitution's protections to out-of-state visitors.

The Court held in a series of cases, principally in the 1870s, that the Fourteenth Amendment had a much narrower scope of operation than intended by Congress. The Court justified itself by the contention that a broader scope would interfere with states' rights—which, as we can see from the Congressional debates, was precisely what Congress had in mind. As a later Supreme Court Justice concluded,

> study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as . . . opposed its submission and passage, persuades me that . . . [it] was [intended] to make the Bill of Rights, applicable to the states. With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn . . . that case.[16]

How was the Fourteenth Amendment intended to apply the Bill of Rights to the states, if indeed it was? The text suggested that it was to be through the Privileges or Immunities Clause, but what was the meaning of "privileges" and "immunities"? The answer may be found in Blackstone's *Commentaries on the Laws of England,* which was published in the Colonies shortly before the Revolution. It "divided the rights and liberties of Englishmen into those 'immunities' that were the residium of natural liberties and those 'privileges' that society had provided in lieu of natural rights."[17] The words reappeared in the Articles of Confederation: "The . . . free inhabitants of each of these states . . . shall be entitled to all

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[16]Adamson, 1686, italics added, footnote omitted.

[17]Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham, N.C.: Duke University Press, 1986), 64.

privileges and immunities of free citizens in the several states."[18] Article IV, Section 2 of the original Constitution of the United States provided, "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[19] Legal scholar Chester Antieau argued that this clause was intended "to secure basic, natural, fundamental rights of citizens. . . . to be the same throughout the nation, and the states were prohibited from violating them."[20] If Antieau was right, the express rejection by Congress of wording in the Bill of Rights to prevent the states from infringing on free exercise would seem to indicate that religious liberty was not encompassed by the Privileges and Immunities Clause. If that was the case, it would not be covered by the Privileges or Immunities Clause of the Fourteenth Amendment. However, Professor Kurt Lash "understands the free exercise clause to have had very limited substantive content [but] argues that in ensuing decades Americans came to believe . . . that those clauses had greater substantive content and scope than their framers had intended. Consequently, the enactors of the Fourteenth Amendment incorporated the religion clauses . . . as those clauses had come to be understood."[21]

This reading appears to be confirmed by the speeches and writings of the

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[18]Ibid., 65.

[19]Ibid.

[20]Ibid., citing Antieau, "Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four," 9 *Wm. & Mary L. Rev.* 1, 5 (1967). See also Curtis, 65-66, citing Michael Conant, "Antimonopoly Tradition under the Ninth and Fourteenth Amendments: Slaughter-House Cases Re-Examined," 31 *Emory L. J.* 785 (1982).

[21]Steven D. Smith, 50-51, quoting in part Kurt T. Lash, "The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment," 88 *Nw. U. L. Rev.* 1106, at 1140 n. 157 (1994). Smith's comments are based on a draft.

Congressional Republican leaders and others who framed the Amendment. They believed that "the rights in the Bill of Rights were privileges and immunities of citizens of the United States that should be shielded from hostile state action."[22] In fact, Attorney Michael Kent Curtis pointed out, "John Bingham, the author of the amendment, and Senator Howard, who managed it for the Joint Committee in the Senate, clearly said that the amendment would require the states to obey the Bill of Rights. Not a single senator or congressman contradicted them. . . . Today, the idea that states should obey the Bill of Rights is controversial. It was not . . . for Republicans in the Thirty-ninth Congress."[23]

As Curtis indicated, Senator Howard, during Senate debate, asserted that the Fourteenth Amendment would secure "the personal rights guaranteed . . . by the first eight amendments."[24] Congressman Woodbridge of Vermont considered the Fourteenth Amendment "to give to a citizen of the United States, in whatever State he may be, those privileges and immunities which are guarantied to him under the Constitution of the United States."[25] Congressman John Bingham said before the House on February 28, 1866, that the Fourteenth Amendment was "simply a proposition to arm the Congress of the United States, by the consent of the people, . . . with the power to enforce the bill of rights as it stands in the

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[22]Curtis, 91.

[23]Ibid.

[24]Richard C. Cortner, *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Nationalization of Civil Liberties* (Madison: University of Wisconsin Press, 1981), 5, quoting U.S. Congress, Senate, *Globe*, 39th Congress, 1st session (1865-66), 2765.

[25]Curtis, 69, citing *Cong. Globe*, 39th Congress, 1st session, 1088 (1866), emphasis added by Curtis.

Constitution today."[26]

After it was ratified, even a number of the Amendment's opponents accepted Bingham's argument.[27] In 1874 Congressman Roger Mills, in opposition to a proposed Civil Rights bill, spoke of what the Privileges or Immunities Clause meant, and among them he listed freedom of religion.[28] A Georgia Democrat, Thomas Norwood, "also believed that the . . . Fourteenth Amendment included all rights in the Bill of Rights."[29] Overall, noted Sanford Levinson, "There is good reason to believe that the framers of the Amendment believed that they were referring to certain notions of fundamental rights, some written as in the Bill of Rights, others unwritten, that would be enforced by the judiciary against state deprivation."[30]

Yet during debate on the Blaine Amendment in 1876, written to prohibit state financial aid to religious schools, Congress did not appear to understand the Religion Clauses as applying to the states; if they had, the Blaine Amendment would have been redundant. Why was this so? The Supreme Court had narrowed the scope of the Fourteenth Amendment to exclude the Religion Clauses from incorporation. According to Curtis, the Supreme Court issued several decisions limiting the Privileges or Immunities Clause and denying that certain rights in the Bill of Rights were included in it, and Congress simply regarded the Court's

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[26]Ibid.

[27]Ibid., 166, original in italics.

[28]Ibid., quoting 2 *Congressional Record* 384 (1874).

[29]Ibid.

[30]Levinson, 86.

decisions as the law.[31] Senator Oliver Morton spoke thus of the Blaine Amendment: "The fourteenth and fifteenth amendments . . . have, I fear, been . . . almost destroyed by construction. Therefore I would leave as little as possible to construction. I would make [the proposed . . . Blaine amendment] so specific and so strong that they cannot be construed away and destroyed by the courts."[32] The Blaine Amendment failed to pass. Therefore, as Curtis concluded, by 1876—and until 1925—the incorporation of the First Amendment by the Fourteenth was "of only academic interest."[33]

Regardless of what original intent lay behind the framing of the Fourteenth Amendment, or what the understanding of the ratifying legislators was, the Supreme Court took its own course. Adhering to the doctrine of *stare decisis*, the Court refused to overturn its precedent in the *Slaughterhouse Cases*; therefore, the Privileges or Immunities Clause remained virtually useless. The Court eventually came around to the same view as those who held that the intent of the Fourteenth Amendment was to apply the Bill of Rights to the states. The difficulty was how to rule thus without overruling the basis of all Privileges or Immunities Clause jurisprudence. The solution the Court found was to incorporate most of the rights enumerated in the Bill of Rights on a case-by-case basis, by funneling them through the Due Process Clause. The greatest problem was that the Fifth Amendment already contained a

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[31]Curtis, 170.

[32]Curtis, 170, quoting 4 *Congressional Record* 5585 (1876).

[33]Curtis, 170. In contrast, William E. Nelson contends that Congress never specified whether the Amendment was intended to protect absolute rights or simply guarantee equality under state law; he concludes that original intent is unknowable. *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, Mass.: Harvard University Press, 1988), 123.

Due Process Clause. It may have been far simpler and more sensible for the Court to conclude it had erred in the *Slaughterhouse Cases* and reverse itself—by holding that the Privileges and Immunities Clause incorporated the Bill of Rights—than to choose the route it did. According to the Court's incorporation doctrine, the protections afforded in the First Amendment were applicable to the states because they were "liberties" covered by the language in the meaning of the Fourteenth Amendment's Due Process Clause.[34] The clause forbade states from depriving any person of life, liberty, or property without due process of law. Unfortunately for the Court's argument, the Fifth Amendment's Due Process Clause, which applied to Congress, has the exact same wording. To be charitable, it is at best highly improbable that the protections of several amendments, one of which contains a Due Process Clause, could be encompassed by a nearly identical Due Process Clause. If that were true, then seven of the amendments in the Bill of Rights are redundant, and could have been replaced by the words of the Due Process Clause: "No person shall be deprived of life, liberty, or property, without due process of law."

Nevertheless, despite the logical fallacies or rational failures involved in the Court's incorporation theory, that theory was and is the real-life operating principle, the doctrine of law, because the Supreme Court is the ultimate reviewer of laws and interpreter of the Constitution in the judicial branch. The Congress may legitimately exercise its power to

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[34]"Some of the . . . rights safeguarded by the first eight Amendments against national action may also be . . . against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because [they] are enumerated in the first eight Amendments, but because . . . they are included in the conception of due process of law." *Palko* v. *Connecticut,* 58 S. Ct. 149, 152, footnote 4 (1937), citation omitted without ellipses.

interpret the Constitution as it passes laws, the President and his departments and agencies may likewise exercise their authority to interpret the Constitution when implementing and attempting to enforce those laws, but the Supreme Court holds the trump card—regardless of the merits of the Court's decisions, Congress and virtually every officer of the executive branch abide by them, perceiving the Court as the ultimate authority.[35] As psychologists are fond of saying, perception is reality.

Notwithstanding arguments over the intent of the framers and ratifiers of the Fourteenth Amendment, then, the First Amendment's protections first began to apply to the state governments beginning in 1925. By that year, three of the Justices on the Court had been appointed during the Progressive Era, one of them by President William Howard Taft. In 1925, Taft was Chief Justice when the Justices unanimously agreed to expand individual liberties, a concept in tune with the Progressive movement, in *Gitlow* v. *New York.*[36] In that case, the Court found against a party who had asserted a First Amendment interest by ruling that the state had an overriding concern. Of greatest significance to constitutional law was the Court's recognition that Gitlow had a First Amendment interest, and could have found against the State of New York had its interest not been compelling. The Court ruled that

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[35]All elected federal officials and commissioned officers take oaths to support and defend the Constitution of the United States—*not* the Supreme Court's interpretation of it, though even as admired a scholar as Leo Pfeffer has made the mistake of believing that members of Congress "take an oath to support the Constitution *as interpreted by the Supreme Court.*" Letter by Pfeffer, *The New York Times,* February 16, 1978, A22, in Levinson, 37.

[36]In *Gitlow* v. *New York,* Justices Oliver Wendell Holmes and Louis Brandeis dissented from the judgment of the Court, but agreed with the seven-member majority that the First Amendment guaranties of freedom of speech and press applied to the states through the Fourteenth Amendment.

> for present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.[37]

By the late 1930s the Court had applied all the First Amendment guaranties against the states except the Religion Clauses. Before the Court even began to incorporate the First Amendment, there were quiet rumblings that it regarded religious beliefs as falling under the protection of the Fourteenth Amendment, but the Court did not explicitly say that the Free Exercise Clause was incorporated. In *Meyer* v. *Nebraska*, Justice James C. McReynolds wrote, "The . . . liberty guaranteed . . . by the Fourteenth Amendment. . . . denotes . . . the right of the individual . . . to worship God according to the dictates of his own conscience. . . ."[38] However, during the 1930s, the rumblings grew louder, even as, for example, the Court reaffirmed the belief-action distinction.[39] In 1934, in a concurring opinion,[40] Justice Benjamin N. Cardozo stated, "I assume for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states."[41]

What was needed to give the Court a final push to incorporate the Religion Clauses was an appropriate case involving clear-cut, state-sanctioned persecution of a religious group

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[37]268 U.S. 652, 666 (1925).

[38]43 S. Ct. 625, 626 (1923).

[39]United States v. MacIntosh, 283 U.S. 605, 625 (1931).

[40]A concurring opinion is not an authoritative pronouncement of the Court.

[41]Hamilton v. Regents of the University of California, 293 U.S. 245, 265 (1934).

or discrimination against a person on religious grounds. While a stronger bent toward protection of aggrieved minorities, religious or otherwise, was unnecessary, since the Court had already been steadily applying pieces of the First Amendment to the states, such a change in the Court's direction was indeed coming.

Early in the first Franklin D. Roosevelt administration, the President successfully pushed through Congress his "New Deal," a series of laws intended to ameliorate the ravages of the Great Depression. Most of the New Deal legislation was economic in impact and orientation, such as setting a federal minimum wage, and establishing agencies to provide employment. In case after case, the Supreme Court found that the New Deal Congress had exceeded the powers given it by the Constitution. Fed up with what he perceived as the Court's meddling, anxious to see his reforms put into action, and apparently believing the maxim that the Constitution means whatever the Supreme Court says, Roosevelt set out to amend the Constitution by amending the Court. In 1937 FDR proposed what came to be known as "the Court-packing plan," whereby the size of the Court would have increased under the pretense of helping the lifetime-tenured justices over seventy with the Court's work load. What he actually intended, of course, was to select Supreme Court nominees who believed his program was constitutional and pack the Court with them.[42] Congress saw through his plan, and even though it was supportive of the New Deal, neither it nor the public supported tampering with the independence of the judiciary.

Notwithstanding Roosevelt's failure to get his plan implemented, the Court took

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[42]Michael E. Parrish, *Felix Frankfurter and His Times: The Reform Years* (New York: Free Press, 1982), 267-272.

notice of the threat to its independence. Later in that same year, in the case of *United States v. Carolene Products Co.*, the Court turned its attention away from economic regulations by Congress. It expressed a willingness to defer to legislators and presume the constitutionality of such statutes unless they do not "rest upon some rational basis within the knowledge and experience of the legislators."[43] Instead of scrutinizing economic regulation, the Court signaled that it would turn its attention to civil liberties and civil rights. Justice Harlan F. Stone wrote for the Court:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . [P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[44]

The Court had taken on defense of the Bill of Rights as one of its primary missions. The stage was then set for it to declare that the Fourteenth Amendment incorporated the First Amendment's Religion Clauses. All that was yet needed was an appropriate appeal.

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[43]United States v. Carolene Products Co., 82 L.Ed. 1241 (1938).

[44]United States v. Carolene Products Co., 58 S. Ct. 778, 783, footnote 4 (1938).

Chapter Three
The Secular Regulation Rule after Incorporation

> *The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.*
>
> —Justice Owen J. Roberts in *Cantwell* v. *Connecticut* (1940)

Newton Cantwell and his two sons were Jehovah's Witnesses who went house to house individually in a Catholic neighborhood in late 1930s New Haven, Connecticut. They asked each householder whether they could play a record on their portable phonographs. They also asked each householder to purchase one of their religious publications, and if refused, solicited a charitable donation to cover the costs of publishing. The phonograph record the Cantwells played included an attack on Catholicism.[1]

The Cantwells were arrested and charged with violating a state law forbidding solicitation of "money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member . . . unless such cause shall have been approved by the secretary of the public welfare council."[2] Newton Cantwell's son Jesse was also charged under common law with "breach of the peace." The State Supreme Court ruled that the Cantwells' actions fell within the terms of the state law, and upheld their convictions.[3] It also upheld Jesse Cantwell's common law conviction, but held that the charge

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[1]Cantwell v. Connecticut, 60 S.Ct. 900, 902 (1940).

[2]Ibid.

[3]Ibid., quoting 126 Conn. 1, 8 A.2d 535.

was "invoking or inciting others to breach of the peace,"[4] by so offending Catholics that they might assault him.

On May 20, 1940, the U.S. Supreme Court applied the Religion Clauses to the states, seventy-two years after ratification of the Fourteenth Amendment, stating:

> We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.[5]

After reaffirming the belief-action distinction , the Court weakened the secular regulation rule by arguing that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[6] Concluding that the Connecticut statute unduly infringed on the free exercise of religion, the Court reversed the Cantwells' convictions. The Jehovah's Witnesses had achieved their first Supreme Court victory, and the Court had completed its incorporation of the First Amendment.[7]

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[4]Ibid.

[5]Ibid., 903.

[6]Ibid.

[7]Note that not only had the Court turned to strict scrutiny of possible infringements of civil liberties following the threat posed by FDR's Court-packing plan. FDR had the opportunity to appoint at least eight Justices and the Chief Justice during his unprecedented eleven-plus years in office, securing the Court for New Deal progressivism until Earl Warren took his seat as Chief Justice in 1953. Under Warren's leadership, the Court continued its liberal tradition aggressively expanding civil rights and liberties even after his retirement in 1969.

Soon after, another case involving state persecution of Jehovah's Witnesses came before the Court: *Minersville School District* v. *Gobitis.*[8] Walter Gobitis was a lifelong resident of Minersville, a small town in Schuykill County, Pennsylvania.[9] While attending the Minersville schools he had saluted the flag without complaint.[10] In 1931 he and his wife both became Jehovah's Witnesses.[11] Four years later, two of their children were in the Minersville public school system, when the school board, backed by rulings from the Department of Public Instruction and the state attorney general, voted unanimously to make the customary salute of the American flag compulsory. Almost immediately, the Minersville school superintendent expelled the Gobitis children, who had been refusing to salute the flag for approximately a month.[12] Gobitis sought legal help from the Jehovah's Witnesses' headquarters, and after some delay, the Witnesses' national legal counsel filed a bill of complaint in the U.S. District Court in Philadelphia.[13] The school board voted to fight, though lacking wide support: two Philadelphia newspapers editorialized against the

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[8] 310 U.S. 586, 84 L.Ed. 1375, 60 S.Ct. 1010 (1940).

[9] Walter Gobitis, testimony (summary), Transcript of Record, p. 47, Minersville School District v. Gobitis, 310 U.S. 586 (1940), cited by Manwaring, 81.

[10] Walter Gobitis, personal interview with Manwaring, January 20, 1957, in Manwaring, 81.

[11] Ibid.

[12] Ibid., 82-83. Judge Rutherford, head of the Jehovah's Witnesses, gave a radio address against the flag-salute on October 6, 1935. Within days, the Gobitis children abode by it. On November 6, the school board held its vote. According to Pfeffer, Jehovah's Witnesses "were preceded by Mennonites and others[s]," but "the Witnesses . . . became the chief victims of persecution and bloodshed for their refusal" (142).

[13] Manwaring, 84-85.

compulsory flag salute; the editor of the *National Education Association Journal* agreed, as did a number of county school superintendents. The state superintendent, according to a newspaper account, "denounced the compulsory salute as 'fine for Hitler and Mussolini, but not for the American public.'"[14]

The District Court Judge, prior to the *Cantwell* decision, had rejected the secular regulation rule, assumed the incorporation of the Religion Clauses by the Fourteenth Amendment, and dismissed Minersville's motion to dismiss the complaint against them, ordering the case to trial.[15] At trial, the judge ruled in favor the Jehovah's Witnesses: "Our country's safety surely does not depend upon the totalitarian idea of forcing all citizens into one common mold of thinking and acting or requiring them to render a lip service of loyalty in a manner which conflicts with their sincere religious convictions. . . ."[16] The judge held the Minersville regulation unconstitutional under the Due Process Clause of the Fourteenth Amendment, and issued a permanent injunction against its enforcement.[17] The Minersville school board voted unanimously to appeal. The Circuit Court of Appeals unanimously affirmed the lower court's decision on November 10, 1939.[18] Everything looked favorable

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[14]Ibid., 93. Manwaring cited the Philadelphia *Inquirer*, December 4, 1937, for this quotation.

[15]Ibid., 91-93. Lower courts could clearly see the direction in which the Supreme Court was heading, and anticipate the total incorporation of the First Amendment by the Fourteenth.

[16]24 F. Supp. 271, 274 (E.D.Pa. 1938), quoted in Manwaring, 104.

[17]Manwaring, 105.

[18]Minersville School District v. Gobitis, 108 F. (2d) 683 (3d Cir. 1939), cited by Manwaring, 112.

for the Witnesses when the school board appealed to the Supreme Court.

Each side in the case filed a brief with the Court in defense of its position. The American Civil Liberties Union and the Bill of Rights Committee of the American Bar Association filed briefs *amici curiae* on behalf of the Jehovah's Witnesses.[19] The Minersville School Board's brief "reminded the Court that it had four times disposed of similar attacks on flag-salute regulations. . . ."[20] It quoted extensively from *Reynolds* v. *United States, Hamilton* v. *Regents,* and *United States* v. *Macintosh,* also citing other federal precedents, all in support of the secular regulation rule.[21] For the Witnesses, Judge Rutherford wrote what historian David Manwaring decsribed as "a discouragingly bad brief . . . [which] ignored all the most crucial constitutional issues," and relied heavily on *ad hominem* attacks.[22] The briefs *amici curiae,* well-written and argued overall, bore the burden of defending the Witnesses' position.[23]

Justice Felix Frankfurter wrote for the Court, relying on the Mormon cases and other precedents, defending the belief-action distinction once again, as well as restoring the secular

[19]An *amicus curiae* brief, or "friend of the Court" brief, is an argument filed on behalf of one side or the other in a case by an interested party, with the permission of the Court and both sides in the dispute.

[20]Manwaring, 120. The four cases were Leoles v. Landers, 302 U.S. 656 (1937); Hering v. State Board of Education, 303 U.S. 624 (1938); Johnson v. Deerfield, 306 U.S. 621 (1939); Gabrielli v. Knickerbocker, 306 U.S. 621 (1939).

[21]Ibid.

[22]Ibid., 123.

[23]Ibid., 123-131.

regulation rule to full force[24]: "In all these cases the general laws in question, upheld in their application to those who refused obedirence [*sic*] from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable."[25] He continued, "We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security,"[26] and he mused that the "wisdom of training children in patriotic impulses . . . is not for our . . . judgment."[27] Frankfurter concluded, "for us to insist that, though the ceremony may be required, exceptional immunity must be given to dissidents, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline. . . ."[28]

Justice Harlan F. Stone, author of the *Carolene Products* opinion, wrote an earnest and solo dissent which took the Court by surprise.[29] Responding to a statement in the Court's opinion that such laws as the compulsory flag salute regulation were constitutional "as long as the remedial channels of the democratic process remain

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[24]According to Manwaring (133), the dictum in *Cantwell* stating that regulation must not "unduly infringe the protected freedom" did not present a direct challenge to the secular regulation rule because the Connecticut statute explicitly dealt with religion.

[25]60 S.Ct. 1010, 1013.

[26]Ibid.

[27]Ibid., 1014.

[28]Ibid., 1015.

[29]Manwaring, 135.

open. . . .," Stone wrote:

> This seems to me no more than the surrender of the constitutional protection of the liberty of small minorities to the popular will. We have previously pointed to the importance of a searching judicial inquiry into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied upon to protect minorities. See *United States* v. *Carolene Products Co.*[30]

The professional response to *Gobitis* was swift and overwhelmingly hostile. Among law journals and scholarly articles surveyed by one historian, thirty-one of thirty-nine comments on the case were critical.[31] Popular magazines took little notice of the case, and newspapers that did were divided in their assessment.[32] Interestingly, the magazine Frankfurter had helped found, the *New Republic*, "dealt with the *Gobitis* decision at length, repeatedly, and unfavorably."[33] Catholic law journals, no lovers of Jehovah's Witnesses, unanimously condemned the decision.[34] *The Christian Century* commented, "Their refusal to . . . salute is not half so dangerous to this country as the . . . zeal of patriots who . . . are more anxious to have a symbol of liberty saluted than to have liberty maintained."[35] It judged

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[30]Gobitis, 1018, italics added, citation omitted without ellipses.

[31]Manwaring, 149.

[32]Ibid., 153.

[33]Ibid.

[34]Ibid., 155. These journals were *Fordham Law Review, Georgetown Law Journal, Jurist, Notre Dame Lawyer, St. Johns Law Review* and *University of Detroit Law Journal.*

[35]"The Flag Salute Case," in *The Christian Century*, June 19, 1940, quoted in Terry Eastland, ed., *Religious Liberty in the Supreme Court: The Cases That Define the Debate Over Church and State* (Grand Rapids: Eerdmans, 1993), 38.

the *Gobitis* decision "not a wise one."[36]

The result of the *Gobitis* decision was three years of taunting, kidnapping, castration, and other abuse of Jehovah's Witnesses, stigmatization of their children, and vandalization of their Kingdom Halls.[37] Hundreds of Witnesses' children expelled for refusing to salute the flag in thirty-one states—and eventually thousands among all forty-eight. Days after the ruling, adult Witnesses were beaten for refusing to salute. Mobs as large as 2,500 people destroyed Kingdom Halls, and the entire adult population of one town attacked sixty Witnesses. Just between June 12 and 20, the Justice Department received hundreds of reports of attacks against Jehovah's Witnesses—it was like sharks in a feeding frenzy.[38] A tarring and feathering incident, more beatings and torture followed over the next few months, often with the participation of the police or sheriff's deputies.[39] As Manwaring noted, "It became fashionable in many places to jail Witnesses on sight, 'just in case.'"[40] No other free exercise decision of the Supreme Court in the twentieth century led to such terrible consequences. Horrified at these consequences of their ruling, and responding to the public reaction, the Court welcomed the opportunity to hear a similar case three years later, in order to reconsider

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[36]Ibid., 37.

[37]Leo Pfeffer, *God, Caesar, and the Constitution: The Court as Referee of Church-State Confrontation* (Boston: Beacon Press, 1975), 143-44. According to Pfeffer, the "record of violence and persecution" was "uninterrupted" for two years, and the causes "almost without exception" were "the flag and the flag salute."

[38]Ibid., 143.

[39]Manwaring, 164-166.

[40]Ibid., 166.

the compulsory flag salute.[41] In the meantime, "the clearest evidence of the turn of the tide" was Congressional legislation passed in 1942 and supported by the American Legion, which advised civilians to simply stand at attention during the pledge, with men removing their hats, neither action affecting the conscience of the Witnesses.[42]

In 1942 the Court heard several cases together under the name *Jones* v. *Opelika* which involved Jehovah's Witnesses' refusal to apply for licenses or pay license taxes in order to distribute their literature door-to-door. Harlan F. Stone, by then Chief Justice, wrote,

> The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position. . . . The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws.[43]

Despite this pronouncement, the Court decided to uphold the license tax laws as valid secular regulations.

Justices Black, Douglas, and Murphy took a rare opportunity to indicate that they had changed their minds about their own previous decision in *Gobitis:*

> The opinion of the Court sanctions a device which in our opinion suppresses or tends to suppress the free exercise of a religion practiced by a minority group. This is but another step in the direction which *Minersville School Dist.* v. *Gobitis*, . . . took against the same religious minority and is a logical extension of the principles upon which that decision rested. Since we joined in the opinion in the *Gobitis* Case, we think this is an appropriate occasion to

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[41]West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

[42]Pfeffer, 144.

[43]Jones v. Opelika, 316 U.S. 584, 608, 609 (1942).

> state that we now believe that it was also wrongly decided. Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be. The First Amendment does not put the right freely to exercise religion in a subordinate position. We fear, however, that the opinions in these and in the *Gobitis* Case do exactly that.[44]

Justice Frank Murphy wrote a separate opinion dissenting against the Court's judgment in *Opelika,* arguing:

> Whatever the amount, the taxes are in reality taxes upon the dissemination of religious ideas, a dissemination carried on by the distribution of religious literature for religious reasons alone and not for personal profit. . . . Freedom of speech, freedom of the press, and freedom of religion all have a double aspect—freedom of thought and freedom of action. Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind.[45]

"But," Murphy recognized, "even an aggressive mind is of no missionary value unless there is freedom of action, freedom to communicate its message to others by speech and writing."[46] Justices do not write dissenting opinions merely to express their opposition to a decision, but to provide useful arguments they hope will be cited later to overturn that decision. Dissenters on the Supreme Court frequently look forward to vindication.

A few months after *Jones* v. *Opelika*, the Court had the opportunity to reverse itself and vindicate Murphy's dissent. On March 11, 1943, the Court heard arguments for several, separate Jehovah's Witnesses' cases. The first to be decided were *Douglas* v. *Jeannette* and *Martin* v. *Struthers.* Thelma Martin had been convicted of violating a Struthers, Ohio, city

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[44]Ibid., 623-624, italics added.

[45]Ibid., 616, 618.

[46]Ibid.

ordinance prohibiting ringing doorbells or otherwise summoning householders in order to distribute literature.[47] The Court concluded, wrote Justice Hugo L. Black, "that the ordinance is invalid because [it is] in conflict with the freedom of speech and press," and reversed Martin's conviction.[48] Justice Murphy wrote a concurring opinion, joined by Justices William O. Douglas and Wiley B. Rutledge, arguing that the ordinance should have been overturned on free exercise grounds.[49] Three justices dissented, finding the ordinance to violate no provision of the First Amendment.[50]

Two more Jehovah's Witnesses' cases came before the Court in 1943, both of which concerned the constitutionality of laws licensing and taxing religious solicitation. In *Douglas* v. *Jeannette*, the Court dismissed a lawsuit filed against the city of Jeannette, Pennsylvania, because it had enacted an ordinance requiring a license and tax for all solicitation, including that which was religious[51]; on the same day ruled that such an ordinance was unconstitutional in *Murdock* v. *Pennsylvania.*[52] In *Murdock,* where the Court combined eight separate but similar cases, Justice Douglas wrote that the ordinance

> sets aside the residential areas as a prohibited zone, entry of which is denied petitioners unless the tax is paid. That restraint and one which is city wide in scope (*Jones* v. *Opelika*) are different only in degree. Each is an abridgment

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[47]63 S.Ct. 862, 863 (1943).

[48]Ibid., 866.

[49]Ibid., 866-867.

[50]Ibid., 869-870.

[51]63 S.Ct. 877 (1943).

[52]63 S.Ct. 870 (1943).

> of freedom of press and a restraint on the free exercise of religion. They stand or fall together. The judgment in *Jones* v. *Opelika* has this day been vacated. Freed from that controlling precedent, we can restore to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs . . . through distribution of literature.[53]

The last of this series of cases to be decided was *West Virginia State Board of Education* v. *Barnette.*[54] The facts of the case were these: after the *Gobitis* ruling, West Virginia passed a law requiring all public and private schools to inculcate patriotism. Under authority of that act, the State Board of Education made the flag salute and simultaneous pledge of allegiance compulsory on pain of expulsion.[55] Expellees were regarded as "unlawfully absent," subject to delinquency proceedings, and their parents were held liable for criminal prosecution.[56] Walter Barnette and other appellees sued for an injunction against enforcement of the West Virginia Americanism statute in U.S. District Court. The court issued the injunction, and the state appealed directly to the Supreme Court.[57]

Justice Robert H. Jackson, who had been appointed to the Court after *Gobitis*, was assigned to write the opinion by Chief Justice Stone, who had been the lone dissenter in that case. Jackson wrote that the flag salute, in conjunction with the pledge of allegiance, was a form of speech which, when compelled, was familiar to the Bill of Rights' framers when they

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[53]Ibid., 877, italics added.

[54]West Virginia State Board of Education v. Barnette, 63 S.Ct. 1178 (1943).

[55]Ibid., 1179-1181.

[56]Ibid., 1181.

[57]Ibid.

created the free speech protection.[58] "Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held," he continued. Rather, those who fail to share such views are equally denied their constitutional liberty by coerced speech.[59] In *Gobitis*, "the Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule."[60]

Turning to the powers of the officials involved, Jackson noted that the Fourteenth Amendment reaches all levels of government, including Boards of Education. As to the coercive nature of the West Virginia Board's regulation, he remarked ascerbically, "The action of Congress in making flag observance voluntary and respecting the conscience of the objector in a matter so vital as raising the Army contrasts sharply with these local regulations in matters relatively trivial to the welfare of the nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution."[61]

Commenting on a statement in the *Gobitis* opinion that such laws as the compulsory flag salute regulation are constitutional "as long as the remedial channels of the democratic process remain open. . . .," the Court rejected the dictatorship of the majority to the precise extent that it would infringe on protected liberties[62]:

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[58]Ibid., 1183.

[59]Ibid., 1183-1184.

[60]Ibid., 1184.

[61]Ibid., 1185.

[62]Minersville v. Gobitis, 60 S.Ct. 1010, at 1015 (1940).

> 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. 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. [63]

Addressing "the very heart of the *Gobitis* opinion, . . . that 'National unity is the basis of national security,' . . . and . . . such compulsory measures toward 'national unity' are constitutional," the Court noted the history of such measures, from Roman persecution of Christians to the Inquisition, from the Siberian gulags to the nation's current World War II enemies, realizing that "those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."[64]

Jackson saw it necessary to reiterate that the First Amendment "was designed" to prevent "those ends by avoiding these beginnings."[65] He indicated that believing patriotism would flourish only if patriotic ceremonies were compelled was underestimating American institutions "and their appeal to free minds."[66] He praised, in effect, America's diversity and individualism, arguing that the "price is not too great" for such freedom when it occasionally breeds eccentricity and abnormality.[67]

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[63]Barnette, 1185-1186.

[64]Ibid., 1186, italics added.

[65]Ibid., 1187.

[66]Ibid.

[67]Ibid.

In an oft-quoted and eloquent conclusion, the Court concluded that

> if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. . . . We think that the action of the local authorities . . . transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control. The decision of this Court in *Minersville School District* v. *Gobitis* and the holdings of those few . . . decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is affirmed.[68]

Justices Roberts and Stanley F. Reed dissented, adhering to the opinion of the Court in *Gobitis.* Justices Black and Douglas issued a concurring opinion, in which they explained their reasons for changing their minds about *Gobitis,* among them, that the ceremony, "when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for religious persecution. As such, it is inconsistent with our Constitution's plan and purpose."[69] Justice Murphy also issued a concurring opinion, asserting that America's unity lay in "freedom and . . . persuasion," rather than in "force and compulsion."[70]

Justice Frankfurter penned a lengthy dissenting opinion which opened with the disclaimer, "One who belongs to the most vilified and persecuted minority in history is not

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[68]Ibid. The preceding cases were Leoles v. Landers, 302 U.S. 656 (1937); Hering v. State Board of Education, 303 U.S. 624 (1938); Johnson v. Deerfield, 306 U.S. 621 (1939); Gabrielli v. Knickerbocker, 306 U.S. 621 (1939).

[69]Barnette, 1188.

[70]Ibid.

likely to be insensitive to the freedoms guaranteed by the Constitution."[71] He argued, however, that his personal views were irrelevant, that the Court's decision was "libertarian," and admonished his brethren for abandoning "judicial self-restraint."[72] He appealed to history, claiming that "one can say with assurance . . . that . . . the writings of the great exponents of religious freedom—Jefferson, Madison, John Adams, Benjamin Franklin—are totally wanting in justification for a claim by dissidents of exceptional immunity from civic measures of general applicability. . ."[73] Frankfurter also was "fortified in [his] view of [*Barnette*] by the history of the flag salute controversy in [the] Court." He noted that the same decision had been unanimously reached in four of the previous five cases dealing with the salute, and the fifth reached with only a single dissenter. His defense of the secular regulation rule, which he saw as ignored in this case, was vehement.[74] Perhaps Frankfurter failed to recall that the Court had modified the secular regulation rule in *Cantwell,* when it had argued that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[75] Thus, in *Barnette,* the Court had balanced the permissible

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[71]Ibid.

[72]Ibid.

[73]Ibid., 1192, double hyphens replaced with dashes.

[74]For a lengthy discussion of Frankfurter's career on the Court—and why, as a founder of the American Civil Liberties Union, he nevertheless served frequently as an obstacle to the expansion of civil liberties, while former Ku Klux Klan member Hugo Black took the lead as their defender—see James F. Simon, *The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America* (New York: Simon and Schuster, 1989).

[75]Barnette, 1192.

end of inculcating patriotism with the protected freedom and found the secular regulation had unduly infringed that freedom. The secular regulation rule, as modified in *Cantwell,* remained the Court's standard for interpreting the Free Exercise Clause.

To many, *Barnette* signaled a clear turn by the Court toward guarding minority religious rights when dealing with the Free Exercise Clause.[76] However, Terry Eastland, a fellow at the Ethics and Public Policy Center in Washington, D.C. later disagreed with that assessment, arguing that *Barnette* did not overrule *Gobitis*, just because the Court had changed its mind about the compulsory flag salute. "The . . . Court . . . did not embrace the argument . . . that those with religious objections should be exempted from otherwise valid law." Rather, the Court considered "the constitutional liberty of the individual" to be on the line. "*Barnette* is, strictly speaking, not a free-exercise case," but a broad First Amendment case. "Yet the case came to the Court as such, . . . and was argued in those terms." All of the justices who wrote opinions "saw the case at least in part as about a claim of religious liberty."[77] Contrary to Eastland's view, the Court explicitly stated that it was reconsidering a precedent, which means that its rebuff should be seen as invalidating the *Gobitis* decision, but he was right about the Court continuing to use the secular regulation rule instead of

[76]For example, see "Court Upholds Freedom of Conscience," in *The Christian Century*, June 23, 1943; "Religious Freedom," in the Washington *Post*, June 16, 1943. The popular press reaction was generally, but not unanimously, favorable. For example, in "The Flag Salute Decision," in the (Washington) *Evening Star*, June 16, 1943, the paper agreed with the logic of *Gobitis*; three days later, in "The Court on the Flag Salute," the *New York Times* lauded the *Barnette* ruling.

[77]Terry Eastland, ed., *Religious Liberty in the Supreme Court: The Cases That Define the Debate over Church and State* (Grand Rapids: Eerdmans, 1993), 39.

adopting the reasoning of the *Gobitis* dissent.[78]

The Court clearly took its role as protector of free exercise seriously in these 1943 cases, since it ruled in favor of the aggrieved or persecuted religious minorities, even while upholding the old secular regulation rule. The rule was considerably weakened, nevertheless, in its application: prior to 1940's *Cantwell* decision, no claim of religious liberty had been sustained at the federal level. However, among the Court's significant free exercise cases between 1940 and 1943, *Gobitis* was the only one to uphold governmental infringement.

Beginning in 1945, however, the Court wavered in its commitment to religious liberty, issuing a series of free exercise decisions which strongly upheld secular regulations that infringed religious liberty.[79] Over the next eighteen years, claims based on the Free Exercise Clause were rarely won against the government. In fact, the Court occasionally hindered free exercise even when deciding cases on the basis of the Establishment Clause, as in *Braunfeld* v. *Brown* (1960)[80].

In *Braunfeld*, a Jewish storekeeper was required by the Law of Moses to do no work from sunset Friday to sunset Saturday. The law of the state required him to close his store

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[78]Barnette, 63 S.Ct. 1178, 1181.

[79]In the case of *In re Summers*, 325 U.S. 561 (1945), the Court ruled against a conscientious objector who had been denied admission to the Illinois bar. The appeal *Kut* v. *Board of Unemployment Compensation*, 329 U.S. 669 (1946) was "dismissed for the reason that the decision of the state court . . . was based upon a nonfederal ground [in]adequate to support it." The *per curiam* cases *Corporation of Presiding Bishop* v. *Porterville*, 338 U.S. 805 (1949), *Gara* v. *United States*, 340 U.S. 857 (1950), and *Donner* v. *New York*, 342 U.S. 884 (1951), were all "dismissed for want of a substantial federal question." The Court denied certiorari in the cases of *Warren* v. *United States*, 338 U.S. 947 (1950) and *Richter* v. *United States*, 340 U.S. 892 (1950).

[80]Braunfeld v. Brown, 366 U.S. 606 (1960).

on Sunday. As a result, his Gentile competitors had an unfair advantage over him, since he could only stay open five days a week. Fearing the loss of his business against criminal sanctions for opening on Sunday, the storekeeper insisted that the Sunday closing law was a violation of the Establishment Clause because the law favored the Christian day of rest. The Court decided in favor of the government, claiming that the State's interest in regulating a uniform day of rest outweighed the burden placed on the Jewish storekeeper's business. Justice William Brennan was unsatisfied with the majority opinion:

> The Court . . . is not confined to the narrow inquiry whether the challenged law is rationally related to some legitimate legislative end. . . . Religious freedom . . . has . . . been one of the highest values of our society. . . . The honored place of religious freedom in our constitutional hierarchy . . . must now be taken to be settled. Or at least so it appeared until today. For in this case the Courts seem to say, without so much as a deferential nod toward that high place which we have accorded religious freedom in the past, that any substantial state interest will justify encroachments on religious practice, at least if those encroachments are cloaked in the guise of some non-religious public purpose.[81]

Three years after *Braunfeld*, the Court decided the landmark 1963 case *Sherbert* v. *Verner* on the basis of the Free Exercise Clause.[82] In adopting the *Sherbert* test, even while reaffirming the belief-action distinction, the liberal Warren Court abandoned the secular regulation rule in favor of the standard it had long used for deciding cases involving other First Amendment freedoms, thus no longer treating free exercise as less important than free

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[81]A simultaneously concurring and dissenting opinion in *Braunfeld*, 610, quoted in Elwyn A. Smith, *Religious Liberty in the United States: The Development of Church-State Thought Since the Revolutionary Era* (Philadelphia: Fortress Press, 1972), 324-25.

[82]Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).

speech or press. Over many decades, the Court had developed its role of protecting minority religious rights from majoritarian bias in the political process. With the creation of the *Sherbert* test, the Court presented minority religions with what appeared to be their greatest defensive weapon.

Chapter Four
Strict Scrutiny: The Compelling Interest Test

To agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause . . . and thus beyond the power of the State to control, even under regulations of general applicability.
—Chief Justice Warren Burger in *Wisconsin* v. *Yoder* (1972)

A Seventh-Day Adventist, Mrs. Adell Sherbert, was fired from her job of two years when her employer demanded that she work on Saturday, the Sabbath. The State of South Carolina denied her unemployment benefits, arguing that "her refusal to work Saturdays, causing other employers to refuse to hire her, disqualified her for failure to accept suitable work."[1] Finding in Mrs. Sherbert's favor in 1963, the Supreme Court, held that "if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[2] In analyzing and deciding the case, Justice William J. Brennan, Jr. wrote that South Carolina needed to demonstrate a "compelling . . . interest" to justify "infringement . . . of [Mrs. Sherbert's] constitutional rights of free exercise,"[3] and determine whether "no alternative forms of regulation" would meet

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[1]Sherbert v. Verner, 10 L.Ed.2d 965 (1963).

[2]Ibid., 970.

[3]Ibid.

that interest without infringement of her religious rights.[4] The Court ruled that Mrs. Sherbert's free exercise claim outweighed "the state's interest in preserving the unemployment compensation fund from dilution from false claims, and in not hindering employers from scheduling necessary Saturday work."[5]

In a concurring opinion, Justice Douglas noted that the *Sherbert* case was "profoundly important."[6] He cited the religious scruples of several groups: Moslems are required to pray five times daily and attend mosque Fridays; Quakers do not swear, but will affirm; Sikhs must wear swords; Jehovah's Witnesses must proselytize door-to-door with literature; Buddhists may be vegetarians; and Seventh-Day Adventists observe the Sabbath.[7] These citations he used "to show that many people hold beliefs alien to the majority . . . which could easily be trod upon under the guise of 'police' or 'health' regulations. . . ." He took notice "that a majority . . . can, through state action, compel a minority to observe their particular religious scruples so long as . . . [it] can be said to perform some valid secular function."[8] That was what the Court had, in effect, ruled in the *Sunday Blue Law Cases*[9] wherein Douglas dissented. He argued that this case and other Free Exercise Clause cases

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[4]Ibid., 972.

[5]Ibid., 965.

[6]83 S.Ct. 1790, 1797.

[7]Ibid., 1797-1798.

[8]Ibid., 1798.

[9]Gallagher v. Crown Kosher Market, 366 U.S. 617, 81 S.Ct. 1122, 6 L.Ed.2d 536; Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1960); McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

were on a collision course with Establishment Clause jurisprudence. Agreeing with the result of the *Sherbert* decision, Douglas closed his remarks, "In order to reach this conclusion the court must explicitly reject the reasoning of *Braunfeld* v. *Brown.* I think [that] case was wrongly decided and should be overruled, and accordingly I concur . . . in the case before us."[10]

The *Sherbert* test was introduced during the tenure of liberal Chief Justice Earl Warren (1953-1969). Under Warren, the Supreme Court embarked on a crusade to reinterpret the Constitution, especially the Fourteenth Amendment, in order to protect and expand civil liberties and civil rights. In particular, the Court focused its activism on the protection of minority rights. The majoritarian bias of the political process had kept many Southern blacks from exercising their right to vote, made racial segregation the law of the South, and permitted or encouraged various forms of discrimination in a broad range of public activities and services. To redress this situation, the Warren Court systematically recognized nearly every clause of the Bill of Rights as incorporated by the Due Process Clause of the Fourteenth Amendment, and thus applicable to the states. As a result, the right to privacy and a plethora of rights of criminal defendants were protected from infringement by state authorities.

Most of the Supreme Court Justices who sat on the Court from the mid-'50s into the '70s were liberals who used their powerful positions to further the cause of minority rights, and to protect individual rights in general from government interference. Several of these Justices, among them Byron White and Thurgood Marshall, were appointed by Presidents

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[10] 83 S.Ct. 1801, italics added.

Kennedy and Johnson, who shared their agenda. Others, such as Chief Justice Warren, and Justices William J. Brennan, Jr. and Harry Blackmun, were disappointments to Presidents Eisenhower and Nixon, who had hoped to turn the Court in a more conservative direction.[11] These latter Justices had relatively conservative records on the bench prior to their elevation to the Supreme Court. After taking their seats on the high Court, however, they were influenced by their liberal colleagues and by the new power in their hands. On the lower courts they had been bound by Supreme Court decisions, but once on the Supreme Court, they could make those decisions, bound only by their own interpretations of the Constitution, and to some extent, by precedent.

It was this liberal, pro-minority Supreme Court that dropped the secular regulation rule as its standard in interpreting the Free Exercise Clause. The secular regulation rule had long been used to support government infringement of free exercise. Victories against the government in free exercise cases had been rare, except during the brief period during World War II when the Jehovah's Witnesses prevailed in several cases examined previously. The principal reason why most such cases had been won by the government was that the secular regulation rule placed the burden of proof on the religious objector. The Court presumed the validity of a law unless it was blatantly biased in its language or obviously intended to suppress a specific sect or religious practice.

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[11]In fact, in free exercise cases, Brennan served as leader of the liberal faction on the Court until 1990. His primary opponent on the Court from 1972 was William H. Rehnquist. Brennan's views on free exercise prevailed until Rehnquist, as Chief Justice, mustered a conservative majority in *Employment Div.* v. *Smith* (1990). In that case, four of the five conservatives overturned the *Sherbert* test with the surprise swing vote of moderate John Paul Stevens. Conservative Sandra Day O'Connor voted in favor of the *Sherbert* test with liberals Brennan, Thurgood Marshall, and Harry A. Blackmun.

In 1963 the Court adopted a new standard involving "strict scrutiny," called "the compelling interest test," hereafter usually referred to as the *Sherbert* test.[12] By adopting this standard, the Warren Court signaled that it regarded the free exercise of religion on a par with freedom of speech and press, that it was a "preferred freedom, " or a "fundamental right."

The *Sherbert* test was a new and more exacting standard in church-state confrontations involving the Free Exercise Clause. Under the *Sherbert* test, if a party could demonstrate that a law or regulation interfered with the free exercise of religion, the primary burden of proof shifted to the government, which had to prove the law or regulation met a compelling interest, and that universal enforcement was the least restrictive means of meeting that interest. As constitutional scholar Leo Pfeffer noted, the case of "*Sherbert* v. *Verner* manifests a greater degree of concern for Free Exercise claims than any previous decision of the Supreme Court."[13]

The *Sherbert* test used seven criteria to decide Free Exercise Clause cases: (1) There had to be state action. If there was not, there was no violation of the Free Exercise Clause. (2) If there was state action, there had also to be the exercise of a sincerely held religious belief. (3) If the state had prohibited the free exercise of that belief, (4) the prohibition had to regulate action rather than belief. If it regulated action, (5) the prohibition had to be not on its face or in its intent aimed at religion. If it was not, (6) the prohibition had to be necessary to advance a compelling state interest, and (7) the prohibition as it stood had to

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[12] "Strict scrutiny" is the expression used in constitutional law whenever a court must examine a law in possible conflict with a fundamental right.

[13] Pfeffer, 332.

be the least restrictive means of meeting that interest.[14]

The *Sherbert* test was greatly strengthened as a standard for free exercise cases when the Court used it decide the landmark case of *Wisconsin* v. *Yoder* (1972).[15] Jonas Yoder and Wallace Miller, Old Order Amishmen, and Adin Yutzy, a Conservative Amish Mennonite, were convicted by their county court of violating Wisconsin's compulsory attendance law for withholding their children from school after completing eighth grade. They were each sentenced to pay a fine of five dollars. Attorney William B. Ball agreed to manage their appeal after being solicited by the National Committee for Amish Religious Freedom.[16] The Wisconsin Supreme Court, relying on *Sherbert,* ruled that the Free Exercise Clause of the First Amendment, applied to the states by the Fourteenth Amendment, required the State of Wisconsin to grant the Amish exemption from school attendance past age fourteen or the eighth grade. The state appealed to the U.S. Supreme Court.

All seven participating members of the Court agreed on the outcome of the case. Chief Justice Burger's *Yoder* opinion is exceedingly rare for its analysis of the history of the Amish, the sincerity of their beliefs, and the background of their specific objections in the case. As Professor Joseph F. Schuster reflected in the law school textbook, *The First Amendment in the Balance*:

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[14]*Report to the Attorney General*, vii-viii.

[15]That is, excluding draft law challenges of various kinds on religious grounds.

[16]For more details about the Committee, led and composed of non-Amish sympathetic to Amish free exercise, see William C. Lindholm, "The National Committee for Amish Religious Freedom," in Donald B. Kraybill, ed., *The Amish and the State* (Baltimore: Johns Hopkins University Press, 1993).

> *Yoder* is an extraordinarily interesting opinion . . . and would seem to be pregnant with possibilities for the development of this area of constitutional law. Its emphasis on Amish sincerity and on the laudable results of an Amish upbringing seems to recognize the necessity, even in the face of obvious danger, of the Court's making judgments about such matters as religious sincerity, and even about the end product of particular religious experience. . . . The interests of the state were real and considerable in the abstract, and would have become compelling given the proper factual situation. Thus, while it is understandable and salutary to avoid passing judment on religious actions and their consequences, *Yoder* demonstrates the necessity of such judgments in the more difficult free exercise cases.[17]

Among the Amish characteristics discussed by Burger, he drew attention to their "fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept . . . is central to their faith."[18] "A related feature of Old Order communities," he wrote, "is their devotion to a life in harmony with nature and the soil."[19] The Old Order live their faith twenty-four hours a day, within the *Ordnung*, or rules, of their community. Burger compared the baptism of Amish in late adolescence with the Jewish Bar Mitzvah, since both were voluntary acts to take on heavy responsibilities in their faith. The Amish objected "to formal education beyond the eighth grade" because of these central tenets of their religion. They could not permit their children to be exposed to the alien values of the public high school, and any formal schooling past age fourteen would interfere with their education in Amish ways at a critical point, when they began to assume adult responsibilities as farmers or prepare to be wives and mothers, and also at a time when they had to begin socialization in Amish courtship rituals leading eventually

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[17]Schuster, 320.

[18]Wisconsin v. Yoder, 92 S.Ct. 1526, at 1530 (1972).

[19]Ibid.

to marriage and the perpetuation of their people. Burger continued:

> The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than integration with, contemporary worldly society. . . . John Hostetler, one of the experts on Amish society, testified that the modern high school is not equipped, in curriculum or social environment, to impart the values promoted by Amish society. . . . [He] testified that compulsory high school attendance could . . . ultimately result in the destruction of the Old Order Amish.[20]

In order for Wisconsin to enforce its law on the Amish, the Court held, it had to demonstrate, in the face of uncontested testimony regarding the sincerity of Amish religious beliefs and potential psychological harm to their children, that the state had a compelling interest in compulsory education to age sixteen, which it did. However, it failed to prove that the least restrictive means of meeting that need required that the Amish not be exempted from its application. The success of the Amish in raising their progeny in the faith, becoming productive farmers and other socially desirable workers, and the lack of significant vagrancy, criminality, or destitution among them, convinced the Court exempting them would not create a burden for the welfare state. "Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[21]

Burger next considered the impact of compulsory attendance laws on Amish religious practice, recognizing that "the . . . law . . . compels them, under threat of criminal sanction," to violate their beliefs. This danger was not limited to the Amish point of view, but the law

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[20]Ibid., 1531.

[21]Ibid., 1533.

"carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent."[22] In other words, the Free Exercise Clause was created for the purpose of preventing unequal impact of equal laws—mandating exemption from generally applicable, facially neutral laws which incidentally burdened free exercise. "There are areas of conduct protected by the Free Exercise Clause . . . [that are] thus beyond the power of the State to control, even under regulations of general applicability," wrote Burger, citing *Sherbert, Murdock,* and *Cantwell* as examples.[23] The Court concluded that Wisconsin had failed to prove its interest in forcing Amish children into its schools for an additional two years was sufficient to override Amish free exercise rights, so affirming the decision of the Wisconsin Supreme Court in favor of the Plain People.

The Court again used the *Sherbert* test to mandate free exercise exemptions in its next landmark case, *Thomas* v. *Review Board,* ten years after *Yoder*. Eddie Thomas was a foundry worker employed by Blaw-Knox Foundry & Machinery Co., who was transferred to a department that manufactured military tank parts. A Jehovah's Witness, he requested layoff after learning every other department was involved in arms manufacture as well. Refused, he quit his job and applied for unemployment benefits. The Review Board of the Indiana Employment Security Division denied him benefits, arguing that he had quit his job for personal reasons. The Indiana Court of Appeals ordered the Board to grant Thomas benefits, and it appealed. The Indiana Supreme Court overturned the lower court's decision. It also ruled that Thomas had quit for "philosophical," not religious reasons, although even religious

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[22]Ibid., 1534.

[23]Ibid., 1535.

reasons were not acceptable cause under law.

The U.S. Supreme Court disagreed, holding that Thomas indeed terminated his employment for religious reasons, and therefore required his exemption from the Indiana statute. Chief Justice Burger, writing for the Court, quoted from *Everson* v. *Board of Education*, "A state may not 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.'"[24] Burger then countered the argument that *Sherbert* did not apply in this case, because Mrs. Sherbert was fired from her job, but Thomas quit on his own. He indicated that, had Thomas reported to the tank turret division as ordered, and then refused to work because of his convictions, he would have been fired, just as Mrs. Sherbert had been. "In both cases," he asserted, "the termination flowed from the fact that the employment, once acceptable, became religiously objectionable because of changed conditions."[25] He concluded the Court's opinion by stating, "Unless we are prepared to overrule *Sherbert, supra,* Thomas cannot be denied the benefits due him on the basis of the findings of the referee, the Review Board, and the Indiana Court of Appeals that he terminated his employment because of his religious convictions. Reversed."[26]

Perhaps the greatest significance of *Thomas* is found in the sole dissenting opinion, filed by Justice William H. Rehnquist, whom President Reagan would elevate to the post of

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[24]101 S.Ct. 1425, 1431 (1981), quoting 330 U.S. 1, 16 (1947).

[25]Ibid., 1432.

[26]Ibid., 1433, italics added.

Chief Justice five years later:

> Just as it did in *Sherbert* v. *Verner*, . . . the Court today reads the Free Exercise Clause more broadly than is warranted. . . . I would accept the decision of *Braunfeld* v. *Brown*, . . . and the dissent in *Sherbert*. . . . Where, as here, a State has enacted a general statute, the purpose and effect of which is to advance . . . secular goals, the Free Exercise Clause does not in my view require the State to conform that statute to the dictates of religious conscience of any group. As Justice Harlan recognized in his dissent in *Sherbert* v. *Verner, supra*: "Those situations in which the Constitution may require special treatment on account of religion are . . . few and far between. . . ." Like him I believe that although a State could choose to grant exemptions to religious persons from state unemployment regulations, a State is not constitutionally compelled to do so.[27]

So, Rehnquist wrote, he would affirm the decision of the Indiana Supreme Court, and simultaneously, he announced that he would overturn *Sherbert* and its compelling interest test, returning to the secular regulation rule he believed to be the correct test under the First Amendment—as incorporated by the Fourteenth.[28] As previously noted, dissenting Justices hope their opinions will serve as a basis for reversing the decisions they oppose. After his elevation to Chief Justice, Rehnquist would see his view become Court doctrine.

Over the next few years, as the Court used the compelling interest test from *Sherbert* in several free exercise cases, it accepted the asserted governmental interests in each case as compelling, or concluded that the burden on free exercise was insufficient to require exemption. [29] In *United States* v. *Lee,* a lower federal court held that requiring self-

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[27]Ibid., 1434, italics added, citations omitted.

[28]Rehnquist evidenced much dissatisfaction with the selective incorporation theory, although he now appears to have acquiesced, perhaps because of *stare decisis*. Imagine the number of precedents overthrown were the theory renounced!

[29]United States v. Lee, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982); Bob Jones University v. United States and Goldsboro Christian Schools v. United States,

employment taxes from the Amish, who conscientiously object to Social Security, was unconstitutional. On direct appeal to the Supreme Court, Chief Justice Burger noted that sincerely held Amish beliefs were violated by the compulsory social security taxation, but the Government's compelling interest necessitated uniform application of the tax laws, except as provided otherwise by Congress.[30] The Court next heard the cases of Bob Jones University, which believed that interracial dating and marriage were sinful, and Goldsboro Christian Schools, which admitted only white children.[31] The Internal Revenue Service had revoked their tax-exempt charitable status due to the practice of racial discrimination, which was "contrary to public policy."[32] Both institutions sued on free exercise grounds. Chief Justice Burger delivered the opinion of the Court covering both cases together, which held "that racial discrimination in education violates a most fundamental national public policy . . ."[33] He maintained that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . . The interests asserted by petitioners cannot be accommodated with that compelling governmental interest, . . . and no 'less

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103 S.Ct. 2017, 2022 (1983); Goldman v. Weinberger, 106 S.Ct. 1310 (1986).

[30]Congress passed an exemption extended to Amish employers. Where the employer was exempt as self-employed from his own social security taxes, his Amish employees would also be exempt from FICA taxes, and he would be exempted from paying the employer's share.

[31]Golsboro occasionally admitted mixed-race children where one parent was white. Bob Jones University v. United States, 103 S.Ct. 2017, 2024 (1983).

[32]Ibid., 2022.

[33]Ibid., 2029.

restrictive means' . . . are available to achieve the governmental interest."[34]

In 1986, the Court affirmed that its "review of military regulations challenged on First Amendment . . . grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."[35] Accordingly, it voted five to four to uphold the discharge of an Air Force psychologist and Orthodox rabbi for wearing his yarmulke while on duty.[36] Justice Brennan lectured the Court in his dissent, "Through our Bill of Rights, we pledged ourselves to attain a level of human freedom and dignity that had no parallel in history. Our constitutional commitment to religious freedom and to acceptance of religious pluralism is one of our greatest achievements in that noble endeavor. . . . Guardianship of this precious liberty is not the exclusive domain of federal courts. . . . Our Nation has preserved freedom of religion, not through trusting to the good faith of individual agencies of government alone, but through the constitutionally mandated vigilant oversight and checking authority of the judiciary."[37] Responding to his loss to the majority in this case, he pleaded, "The Court and the military have refused these servicemen their constitutional rights; we must hope that Congress will correct this wrong."[38] In 1986 Congress responded by passing an

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[34]Ibid., 2035.

[35]Goldman v. Weinberger, 106 S.Ct. 1310 (1986).

[36]According to Professor Peter Irons, "during the years they served together, Justices Brennan and Rehnquist differed in almost every Free Exercise case. Brennan set the judicial standard in 1963, . . . in *Sherbert v. Verner*. . . . [He] did not prevail in all the Free Exercise cases. He lost to Rehnquist in" *Goldman* v. *Weinberger*. *Brennan vs. Rehnquist: The Battle for the Constitution* (New York: Alfred A. Knopf, 1994), 139-140.

[37]Goldman, 1321.

[38]Ibid., 1322.

exemption requiring the military to allow Orthodox Jews to wear yarmulkes while in uniform.

All three of these preceding cases used the *Sherbert* test to balance the interests of government with those of religious individuals, but found in favor of the government in each case. After World War II, the tendency of the Court had been to defer to legislatures, usually accepting the asserted governmental interests as compelling, or the government's argument that free exercise had not been unduly burdened. Following *Sherbert,* the Court "ruled in favor of the free exercise claimant in only four of the seventeen such cases" it decided using the compelling interest test. This deferential attitude of the Court became far more pronounced as newer, more conservative appointees joined Justice Rehnquist on the bench. At the same time, responding sympathetically to minority outcries, Congress overruled several Supreme Court decisions by passing free exercise exemptions to the laws upheld.

Chapter Five
The Leap Backward

We cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation . . . that does not protect an interest of the highest order. . . . Leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that [is an] unavoidable consequence of democratic government. . . .

—Justice Antonin Scalia in *Employment Div.* v. *Smith* (1990)

The first serious challenge to *Sherbert* came in *Bowen* v. *Roy* (1986), just before Chief Justice Burger stepped down from the Court. Two American Indians, Stephen J. Roy and Karen Miller, had been denied Aid to Families with Dependent Children and food stamps because they refused to obtain a Social Security number for their 2-year-old daughter. They claimed doing so "would violate their Native American religious beliefs" and bring spiritual harm to Little Bird of the Snow by "rob[bing] the spirit," and "prevent her from attaining greater spiritual power".[1] At trial, a lower court had nearly determined the case to be moot after learning that the girl had already been assigned a number. Roy testified, however, that it was only the actual "use" of the number, not its mere existence, which would bring spiritual detriment.[2] The District Court had found in favor of Roy citing the Supreme Court's *Lee* v. *United States* decision, but the Supreme Court found that "the Federal Government's use of a Social Security number for Little Bird of the Snow does not itself in any degree impair Roy's 'freedom to believe, express, and exercise' his religion." Burger concluded that the

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[1]Bowen v. Roy, 106 S.Ct. 2147, 2150 (1986).

[2]Ibid.

free exercise claim in this case was "without merit."[3]

> This is far removed from the historical instances of religious persecution . . . that gave concern to those who drafted the Free Exercise Clause. . . . See generally M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978). . . . We conclude . . . governmental regulation that indirectly and incidentally calls for a choice between securing a . . . benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons. [4]

Burger then argued that the *Sherbert* test was inappropriate for use in this case, because "neutral and uniform" application of government benefit laws "is a reasonable means of promoting a legitimate public interest."[5] Obviously, the *Sherbert* test had begun to lose vitality in the eyes of the majority.

Justice Sandra Day O'Connor filed a dissenting opinion, joined by Justices Brennan and Thurgood Marshall, in which she strongly defended the use of *Sherbert's* compelling interest test in this case and all other free exercise cases:

> Once it has been shown that a governmental regulation burdens the free exercise of religion, "only those interests of the highest order . . . can over-balance legitimate claims to the free exercise of religion."[6] This Court has consistently asked the Government to demonstrate that the unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest,"[7] or represents "the least

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[3]Ibid., 2152-2153.

[4]Ibid., 2154, 2155-2156, italics added.

[5]Ibid., 2156.

[6]Wisconsin v. Yoder, 92 S.Ct. 1526, 1533 (1972).

[7]United States v. Lee, 102 S.Ct. 1051, 1055 (1982).

> restrictive means of achieving some compelling state interest,"[8] . . . . There is . . . no reason to believe our previous standard for determining whether the Government must accommodate a free exercise claim does not apply.[9]

She noted that exemptions to the welfare regulations in such cases were so few as to create no crisis—only four cases were on record at the time. Justice White also issued a dissenting opinion, which simply said, "Being of the view that *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, . . . and *Sherbert* v. *Verner* . . . control this case, I cannot join in the Court's opinion and judgment."[10]

The last gasps of the compelling interest test came in two 1987 cases. In the first case, the Rehnquist Court reversed a lower court's decision regarding unemployment benefits. It held that the lower court had misread details in the *Sherbert* opinion and more recent decisions such as *Bowen* v. *Roy*, thus affirming the Unemployment Appeals Commission of Florida's denial of benefits to a Seventh-Day Adventist who had been fired for her refusal to work Friday nights and Saturdays. Chief Justice Rehnquist filed a lone dissent, tersely worded, that he would overrule *Sherbert* v. *Verner*, and scrap the compelling interest test in free exercise cases.[11]

Several months later, the Court upheld prison regulations preventing adherents of Islam from attending Jumu'ah, a Friday afternoon service required by the Koran. The Court

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[8]Thomas v. Review Board, supra, 101 S.Ct., 1432.

[9]Bowen v. Roy, 2167, citations omitted without ellipses.

[10]Ibid., 2168, italics added, citations omitted.

[11]Hobbie v. Unemployment Appeals Commission of Florida, 107 S.Ct. 1046, 1052 (1987), italics added, citation omitted.

accepted the view that prison administrators need great leeway in deciding how best to accommodate free exercise concerns balanced against security and penal interests. Chief Justice Rehnquist delivered the opinion of the Court, which reversed a lower court's ruling upholding the free exercise claims as overriding the Government's compelling interest.

Justice Brennan filed a dissent, which was joined by Justices Marshall, Blackmun and John Paul Stevens. Brennan noted that the prison officials arranged its work schedules to allow Jews to attend Sabbath services, Christians to attend Sunday services, and concluded that they had an obligation to give Muslims "reasonable opportunity of pursuing [their] faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts"[12] This was the last case in which the compelling interest test from *Sherbert* was used to apply the Free Exercise Clause.

The Supreme Court did not formally abandon *Sherbert* at that point, however; rather, in its next free exercise case, *Lyng* v. *Northwest Indian Cemetery Protective Association* (1988), it stated that the *Sherbert* test was inappropriate in that case. By this time, support for the *Sherbert* test had fallen to such an extent that the opinion rejecting its use was written by one of the test's advocates, Justice O'Connor. To define the scope of the Free Exercise Clause, she quoted from *Roy* that it "affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."[13] The Court saw no free exercise grounds to prevent

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[12]O'Lone v. Estate of Ahmad Uthman Shabazz and Sadr-Ud-Din Nafis Mateen, 107 S.Ct. 2400, 2413 (1987), quoting Cruz v. Beto, 92 S.Ct. 1079, 1081 (1972).

[13]Lyng v. Northwest Indian Cemetery Protective Association, 108 S.Ct. 1319, 1325 (1988), quoting Bowen v. Roy, 476 U.S. 693, 699-700 (1986).

federal authorities from building a road on government land, even though that land was sacred to American Indians. She wrote that "incidental effects of governmental 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, [cannot] require government to bring forward a compelling justification for its otherwise lawful actions," because "'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'"[14]

The '80s Court had thus issued two opinions in free exercise cases that dispensed with the *Sherbert* test. By 1990, with the appointment of Anthony M. Kennedy to the Court, Chief Justice Rehnquist had the conservative majority he needed to abandon *Sherbert* altogether. Yet when the Court did abandon *Sherbert,* Court-watchers were taken by complete surprise.[15] There was no "full dress argument," that is, the change was unannounced, leaving both parties unprepared either to defend the *Sherbert* test as the basis for their arguments, or to argue using a new standard.

The Supreme Court used the compelling interest test for nearly every case argued on the basis of the Free Exercise Clause from 1963 to 1987, with the exception of *Roy* and *Lyng.*[16] The *Sherbert* test had been strengthened when it was used by Chief Justice Warren Burger in *Wisconsin* v. *Yoder* (1972), and remained in force through most of the 1980s.

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[14]Lyng, 108 S.Ct. 1319, 1326 (1988). Internal quotation is from Justice Douglas' concurring opinion in Sherbert, 1798.

[15]*Employment Div.* V. *Smith,* 494 U.S. 872.

[16]Bowen v. Roy, 106 S.Ct. 2147 (1986) and Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

However, most of the Justices appointed by conservative President Ronald Reagan looked askance at the liberal activism of the liberal Warren and Burger Courts.[17] As soon as the Rehnquist Court was able to muster a majority to abandon the *Sherbert* test, it did so.[18] The heart—or teeth—if you will, of the *Sherbert* test consisted of the criteria that the state had to prove it has a compelling interest and that the state action was the least restrictive means of meeting that interest. If the Court were to remove those criteria from its consideration in cases arising under the Free Exercise Clause, the practical result would be the return of the secular regulation rule, which historian David Manwaring defined as follows: "*There is no constitutional right to exemption on religious grounds from the compulsion of a general regulation dealing with non-religious matters.* This rule applies . . . equal[ly] . . . to legal requirements and . . . prohibitions . . . [which] must be truly secular in bent."[19]

In 1990, without giving any notice to either petitioners or respondents, nor to those filing briefs *amici curiae* in support of either side, the Court abandoned the *Sherbert* test by a five-to-four vote.[20] Alfred Smith and Galen Black were drug rehabilitation counselors in Oregon who were fired for using the sacrament of their Native American Church, peyote, in religious ritual. Peyote was on the controlled substance list in that state, and possession or

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[17]Those Justices are Antonin Scalia, Anthony M. Kennedy, and William H. Rehnquist (who had been appointed to the Court by Nixon, but was elevated to Chief Justice by Reagan).

[18]Employment Div. v. Smith, 494 U. S. 872 (1990).

[19]Manwaring, 51, italics original.

[20]Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

use was punishable by criminal sanctions, although the state had never enforced the law against the church. Oregon cited the criminal statute in agreeing with the men's employer—that they had been fired for misconduct—and refused to grant them unemployment compensation.

The Oregon Supreme Court ruled in favor of Smith and Black. Using the *Sherbert* test, the court found that the state had a compelling interest in preventing drug abuse that was overridden by Smith's and Black's free exercise rights. The state appealed to the U.S. Supreme Court.

Writing for the majority, Justice Antonin Scalia wrote that the Court had "consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[21] He also asserted that "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."[22] He immediately thereafter quoted favorably from the majority opinion written by Justice Felix Frankfurter in *Gobitis*—a case considered bad law because it had been overturned. Justice Scalia reached all the way back to 1879, quoting *Reynolds* v. *United States* to cite the distinction between

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[21]Ibid., 879, quoting United States v. Lee, 455 U.S. 252, 263, n. 3 (1982) (STEVENS, J., concurring in judgment). N.B.: a Justice who concurs in judgment while issuing a separate opinion does *not* concur with the Court's opinion. At 893, Justice O'Connor argued that "the First Amendment does not distinguish between religious belief and religious conduct, [thus] conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause."

[22]Smith, 878-879.

religious belief and practice.[23]

Scalia insisted that

> the only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but . . . in conjunction with other constitutional protections, such as freedom of speech and of the press, . . . or the right of parents . . . to direct the education of their children. . . . The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.[24]

Next, Scalia claimed that the Court had never overturned any act of government using the *Sherbert* test except unemployment compensation regulations. On the contrary, the Court had used *Sherbert* in *Yoder* to overrule the application of Wisconsin's compulsory attendance statute to the Amish, violation of which was punishable by criminal sanctions. In words reminiscent of Frankfurter's dissent in *Barnette,* Scalia called for greater judicial self-restraint, leaving permissible exemptions from laws burdening free exercise up to the democratic process:

> Because we value and protect . . . religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation . . . that does not protect an interest of the highest order. . . .[25] It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that [is an] unavoidable consequence of democratic

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[23]Such a distinction contradicts the plain wording of the text. Communicative expression of belief would be covered under the free speech and press guaranties, but practice is clearly protected by the word "exercise." See *Smith,* 879.

[24]110 S.Ct. 1595, at 1601-1602 (1990). Steven Smith suggested that Rehnquist or Scalia might agree with him that the First Amendment contains no constitutional principle of religious freedom. Steven D. Smith, 9.

[25]Smith, 888.

government. . . .[26]

The associate justice concluded: "Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug. The decision of the Oregon Supreme Court is accordingly reversed."[27]

Although he assigned rather than himself wrote the opinion, the view expressed in *Smith* was perfectly consonant with Chief Justice Rehnquist's "philosophy of judicial deference."[28] His accommodationist views in free exercise jurisprudence had finally become that of the majority.[29] In fact, Rehnquist had used the word "deference" in about forty opinions, demonstrating his willingness for the Court to defer in favor of the executive and legislative branches. In contrast, Rehnquist's principal adversary on the Court, Justice Brennan used the word "dignity" in more than thirty opinions. Professor Peter Irons believed those two words define the two men's judicial philosophies.[30] Those philosophies werepotently reflected in their landmark free exercise cases. In *Sherbert,* the issue was human dignity and the need to protect minority rights. In *Smith,* the primary issue was one of judicial

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[26]Ibid., 890.

[27]Ibid. .

[28]See Irons, 123 & ff.

[29]To read Rehnquist explain for himself his view of the Court's role, see William H. Rehnquist, *The Supreme Court: How It Was, How It Is,* 1st ed. (New York: Morrow, 1987).

[30]Irons, xi-xii.

deference to legislators as representatives of the majority of the people.

Responding to public sympathy following *Smith,* the State of Oregon wrote a religious exemption for peyote use into its controlled substance law in 1991. Prior to *Smith*, the federal government and twenty-three states provided exemption. These exemptions perhaps vindicated Rehnquist's and Scalia's faith in the political process.

The *Sherbert* test was not abandoned without dissent. Justice Sandra Day O'Connor concurred in the judgment of the Court, but refused to join its opinion, instead finding against the respondents Smith and Black using *Sherbert.* She wrote:

> The Court today extracts from our long history of free exercise precedents the single categorical rule that "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. . . ." Indeed, the Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply.[31]

She attacked the belief-action distinction, arguing, "Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause."[32] She argued that "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such.[33] Our free exercise cases have *all*

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[31]110 S.Ct. 1595, 1607-1608.

[32]Employment Div., Dept. of Human Resources of Oregon v. Smith, 110 S.Ct. 1595, 1608 (1990).

[33]Yet such a case actually came before the Court: Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S.Ct. 2217, 124 L.Ed.2d 472, 61 USLW 4587 (1993). See below for a discussion of the case.

concerned generally applicable laws that had the effect of significantly burdening a religious practice."[34] Furthermore, she wrote, "In *Yoder* we expressly rejected the interpretation the Court now adopts: 'There are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability . . . . if it unduly burdens the free exercise of religion.'"[35]

Justice O'Connor countered the Court's claim that *Cantwell* and *Yoder* were "hybrid" decisions, pointing out that "there is no denying that both cases expressly relied on the Free Exercise Clause . . . and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence."[36] She finished her scathing defense of the *Sherbert* test by quoting from *West Virginia State Board of Education* v. *Barnette* (1943), the decision overruling *Gobitis* (1940):

> 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 to the courts. 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.[37]

Justices William Brennan, Thurgood Marshall, and Harry Blackmun joined O'Connor's defense of the *Sherbert* test. They disagreed with her conclusion, however, that Smith and Black should be denied benefits. In support of the compelling interest test,

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[34]Smith, 894.

[35]Ibid., at 895-986; quoted Wisconsin v. Yoder, 406 U.S. 205, 219-220 (1972), (emphasis O'Connor 's) citations ommitted.

[36]110 S.Ct. 1595, 1609.

[37]West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

Blackmun wrote, "Until today, I thought [the *Sherbert* test] was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a 'constitutional anomaly.'"[38] Directly addressing the final point of Justice Scalia's analysis,[39] which he found incredible, Justice Blackmun wrote that he did not believe the Founders thought their dearly bought freedom from religious persecution a "luxury,' but an essential element of liberty—and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance."[40]

Smith shocked both liberals and conservatives, and few voices indicated pleasure with the decision. Derek Davis, associate director of the J. M. Dawson Institute of Church-State Studies at Baylor, in his examination of Chief Justice Rehnquist's effect on the Court, believed that "it can be argued that the *Smith* decision sidesteps what was surely one of the main purposes of the Bill of Rights: to protect minorities from the political process. . . . For the Court to simply relegate matters of religious liberty to the legislatures is an abdication of judicial responsibility of the worst kind."[41] Davis quoted Representative Stephen Solarz as saying, "With a stroke of a pen, the Supreme Court virtually removed religious freedom—our

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[38]Smith, 908, quoting from 886. Blackmun's dissenting opinion is reminiscent of Brennan's dissent in *Braunfeld*.

[39]Ibid., 888.

[40]Smith, 909.

[41]Derek Davis, *Original Intent: Chief Justice Rehnquist and the Course of American Church/State Relations* (Buffalo, N.Y.: Prometheus Books, 1991), 126-27.

first freedom—from the Bill of Rights."[42] "The right to free exercise of religion is a basic constitutional principle guaranteed in our Bill of Rights," said Robert L. Maddox, of Americans United for Separation of Church and State. "The Supreme Court's recent *Smith* decision demoted that essential right to the status of a constitutional afterthought."[43] Opposing reliance on the belief-action distinction, Lutheran pastor William C. Lindholm wrote, "The exercise of religious freedom means more than merely the right to certain beliefs in the privacy of one's own mind or to worship inside a certain church building. 'Exercise' is a verb that means to act or practice. It is possible to believe anything in a totalitarian system, but impossible to act on it. Religion is more than worship, it is a way of life."[44] Terry Eastland, director of the Law and Society Project at the Ethics and Public Policy Center in Washington, D.C., catalogued some responses to *Smith*:

> Both religious liberals (the National Council of Churches) and religious conservatives (including Richard Neuhaus, editor of *First Things*) faulted Scalia's opinion, as did both the American Jewish Committee, sponsor of *Commentary*, and the liberal American Jewish Congress. The American Civil Liberties Union, People for the American Way, and the American Humanist Association denounced the decision. Joining them were constitutional lawyers normally not aligned with their positions, such as Michael McConnell of the University of Chicago Law School.[45]

Mary Ann Glendon, a Harvard law professor, observed simply that *Smith* appeared "much

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[42]Ibid., 155. Davis cited *Church and State* 48 (September 1990): 13 for the quotation.

[43]Ibid., 155-156. Davis cited *Church and State* 48 (September 1990): 13.

[44]Lindholm, 120.

[45]Eastland, 396-397.

like a decisive step by a Court majority toward an excessively rigid posture of deference in free-exercise cases."[46]

The City of Hialeah, Florida, presented the Court with the opportunity to repudiate *Smith* in 1993. Instead, it merely fine-tuned the *Smith* test in application. Adherents of Santeria had begun moving to the city in increasing numbers. Shortly after a Santeria cleric had announced the traditionally clandestine sect was going to build a church there and practice its beliefs openly, the city passed several laws regulating slaughter under its authority to prevent cruelty to animals. After the city banned animal sacrifice, the church sued. Hialeah claimed that, because the laws were facially neutral and generally applicable, under the *Smith* test, they were perfectly valid and enforceable, although they forbade the animal sacrifices central to the Santeria religion.

The Supreme Court ruled unanimously against the city, but issued a series of separately written opinions justifying the ruling. Justice Anthony M. Kennedy wrote for the Court,

> The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs. . . . Although a law targeting religious beliefs as such is never permissible, . . . if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . ; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.[47]

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[46]"Religion and the Court: A New Beginning?" in Eastland, 480.

[47]Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S.Ct. 2217, 2222, 2227 (1993).

He concluded, "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void."[48]

Justice David Souter wrote to explain why he thought the *Smith* rule should be abandoned, but concurred in the judgment of the Court.[49] Among his criticisms was the lack of historical analysis of the meaning of the Free Exercise Clause in *Smith*.[50] Law professor Michael W. McConnell, author of an essay in the *First Amendment Handbook*, agreed: "The Court made no effort in *Sherbert* or subsequent cases to support its holdings through evidence of the historical understanding of 'free exercise of religion' at the time of the framing and ratification of the first amendment. This evident lack of support has made the decisions vulnerable to attack."[51] Souter remarked that the Court had, prior to *Smith*, applied the same scrutiny "to burdens on religious exercise resulting from enforcement of formally neutral, generally applicable laws as [it] . . . applied to burdens caused by laws that single out free

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[48]*Hialeah,* 2234. The Territories of Utah and Idaho, as well as Congress, did precisely that in the nineteenth century when they singled out the Mormons because of their polygamy. For an examination of why the laws involved in those cases would likely fail to withstand the Supreme Court's scrutiny today even under *Smith*, just as happened with the ordinance prohibiting animal sacrifice in *Hialeah*, see Joseph F. Schuster, *The First Amendment in the Balance* (San Francisco: Austin & Winfield, 1993), 316.

[49]Ibid., 2240.

[50]Ibid., 2248.

[51]Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," in *First Amendment Law Handbook*, James L. Swanson, ed. (New York: Clark Boardman Callaghan, 1991), 345. Reprinted from 103 *Harvard Law Review* 1409 (1990).

exercise."[52] Souter argued that the *Smith* rule could "be reexamined consistently with principles of *stare decisis.* To begin with, the Smith rule was not subject to 'full-dress argument' prior to its announcement. . . . [Its] vitality as precedent is limited further by the seeming want of any need of it in resolving the question presented in that case."[53] Justice Blackmun also wrote to defend the *Sherbert* test, believing "that Smith was wrongly decided, because it ignored the value of religious freedom as an affirmative religious liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle."[54]

Congress responded to the Court's *Smith* rule by passing the Religious Freedom Restoration Act late in 1993 (after *Hialeah*), mandating the use of the *Sherbert* test by all state and federal courts in free exercise cases. President Clinton signed the measure into law at a ceremony lauding the American tradition of religious liberty. Only time will tell whether the statute will be deemed constitutional by the Court.

Time and again, Congress or state legislatures have responded sympathetically to pleas from religious minorities that they overturn burdensome Supreme Court decisions. In *Smith,* the Court appeared to abdicate its role in protecting minority religions from majoritarian bias in the political process; however, that political process has generally worked in minorities' favor. The concern of civil libertarians is that the Court's deference to legislatures will leave minorities with no effective means of appeal in situations where they are insensitive to minority needs.

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[52]Hialeah, 2243.

[53]Ibid., 2247, italics added.

[54]Hialeah, 2250. See Pfeffer, 31-32, 33-36.

Chapter Six
The Debate over the Purpose of the Free Exercise Clause

Since the Court issued its opinion in *Smith,* legal scholars have been debating whether the *Sherbert* or the *Smith* doctrine (*Smith* being essentially the old secular regulation rule from *Reynolds*) is more consistent with the purpose of the Free Exercise Clause. In framing the debate, they find it necessary to consider whether original intent of the Clause's authors is the fundamental principle for its interpretation. Constitutional scholar Raoul Berger, for example, is a strict constructionist, who argues that the precise wording of the constitutional text, guided by original intent, is the only valid model of interpretation. Many scholars, of course, argue that Berger's view of history, and thus original intent, is wrong; for example, the intent of the framers to incorporate the Bill of Rights using the Fourteenth Amendment is controversial yet.

Author David A. Richards insists that there is a valid alternative to strict construction, which "focuses on the more abstract intentions expressed by the clauses. . . . [since] the language of the clauses . . . is itself abstract."[1] He also argues that it is unreasonable to limit the meaning of a text to its framers' intent in such a way as to ignore changes in "the political and moral culture" which applies them.[2] Considering the abstract nature of the language used, he thus considers it bad form to forever limit the meaning of those terms to their

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[1]Richards, 36.

[2]Ibid., 37.

definitions at the time of ratification.[3] Berger makes the mistake, according to Richards, of possibly "constitutionaliz[ing] what is really only one among several historically competing views of application, whereas the abstract language was chosen precisely to enable" the courts to make application of them.[4]

In comparing the *Sherbert* and *Smith* tests, it should be noted that they both place state actions under strict scrutiny. "Strict scrutiny" is the expression used in constitutional law whenever a court examines a law in possible conflict with a fundamental right. Strict scrutiny requires the government to demonstrate "a compelling state interest" behind the law in question, and to prove that the law is "the least restrictive means" of meeting that interest. Where *Sherbert* and *Smith* differ is under which circumstances state action is subject to strict scrutiny.

The Supreme Court holds under *Smith* that any law which is both neutral toward religion and generally applicable is not subject to strict scrutiny.[5] A law is considered in violation of the Establishment Clause if it intentionally favors all religions or any religions over others.[6] If a law infringing on religious conduct is neutral on its face—that is, it does not single out any religions by name, or religious conduct as such—it is presumed neutral.[7]

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[3]Ibid., 36.

[4]Ibid., 42.

[5]Hialeah, 2221.

[6]Everson v. Board of Education, 330 U.S. 1, 11, 15; 91 L.Ed. 711, 721 (1947).

[7]According to the refinement of the *Smith* test made in *Hialeah,* a facially neutral law may be challenged if its disguised purpose was to suppress religion.

If a law applies across the board to all, has a legitimate secular purpose, and only incidentally burdens the free exercise of religion, it is presumed generally applicable.

An example of a neutral, generally applicable law would be the absolute prohibition of the possession, sale, or manufacture of alcoholic beverages. The law would be presumed neutral if nothing about religion were named in it, and generally applicable if it made no exemptions, and served the state's purpose in curbing drunk driving, public drunkenness, and alcoholism. Of course, it would incidentally burden all who believe in using wine as part of a church sacrament or ordinance, but according to Justice Scalia's opinion in *Smith*, such church members could petition the legislature for a religious exemption. *Smith* permits the government to accommodate people of faith by exemption, but does not require it. However, if it were clear that the prohibition law had been passed intentionally and specifically to ban the use of wine in religious rites under the cloak of general applicability and facial neutrality (as in *Hialeah*), or if it were written so as to burden only religious use of alcoholic beverages but not secular uses, the law would *not* be considered neutral under *Smith*; it would come under strict scrutiny.

Other examples of neutral, generally applicable laws would be conscription statutes. If the laws were facially neutral and generally applicable, they would be presumed valid and enforceable under *Smith*. They would incidentally burden the Amish, Mennonites, Hutterites, Quakers, et al., as well as conscientious objectors individually opposed for religious reasons, but whose churches did not oppose all war, or only certain wars. The Free Exercise Clause would not require any accommodation for conscientious objectors, according to *Smith*, but

Congress could (as indeed it has since 1917) exempt them if it saw fit.[8]

University of Chicago law professor Michael McConnell makes a cogent argument that the Framers of the First Amendment intended by their choice of language (in historical context) to exempt religious objectors to neutral, generally applicable laws—including criminal laws—from application in violation of their freedom of conscience.[9] McConnell points out that the Framers chose not to use the wording of the British model, "tolerance," advocated by John Locke, but that of the colonial American constitutions, "free exercise," advocated by James Madison.[10] The "free exercise" provisions "expressly overrode any 'Law, Statute or clause, usage or custom of this realm . . . to the contrary'. . . . [and] limited the free exercise of religion only as necessary for the prevention of 'Lycentiousnesse' or the injury or 'outward disturbance of others,' rather than by reference to all generally applicable laws."[11] McConnell presents evidence from the writings of Madison, principal Framer of the First Amendment, that he understood free exercise "to include exemption from generally applicable

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[8]The First Congress considered a conscientious objection amendment as part of the Bill of Rights proposals, eventually rejecting it because the United States Government was unauthorized by Article I, Section 8 of the Constitution to draft anyone (and perhaps because the amendment was seen as redundant, given the existence of the Free Exercise Clause). A good argument has been made that both the Free Exercise Clause and the Thirteenth Amendment forbid conscription, an argument the Court has repeatedly rejected.

[9]McConnell in Swanson, 343-447, reprinted from 103 *Harvard L. Rev.* 1409 (1990).

[10]Ibid., 357-360.

[11]Ibid., 355.

laws in some circumstances."[12] As additional evidence, he marshals examples of colonial exemptions to generally applicable laws in the matter of swearing oaths, military conscription, and state support of clergy. He believes that Jefferson, by advocating "a belief-action distinction placed him[self] at least a century behind the argument for full freedom of religious exercise" accepted in America at the time the Bill of Rights was adopted.[13] "In summary," writes McConnell,

> it is not sufficient under the free exercise clause that a law be neutral and generally applicable. The free exercise provisions at the time of the founding were predicated on the understanding that the obligations of religion are entrusted to the individual conscience of the believer, just as the obligations of the state are entrusted to the government. Where the two come into conflict—that is, where generally applicable laws would inhibit the discharge of religious duties—the solution was to allow the believer to exercise his religion, unless the religious exercise is so injurious to others that it would injure the public peace and safety.[14]

Of course, every debate has two sides, and many scholars disagree with McConnell's conclusions. One of the most convincing of these is Gerard V. Bradley, who agrees with Justice Scalia that exemptions to generally applicable, religiously neutral laws are constitutionally permissible, but not mandated.[15] Bradley believes that judge-made free exercise exemptions have been "siren song of liberalism," and were not originally intended

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[12]Ibid., 373.

[13]Ibid., 372.

[14]Michael W. McConnell, "Free Exercise As the Framers Understood It," in Eugene W. Hickok, Jr., ed., *The Bill of Rights: Original Meaning and Current Understanding* (Charlottesville, Va.: University Press of Virginia, 1991), 62.

[15]Gerard V. Bradley, "Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism," *Hofstra Law Review* 20 (Winter 1991): 245-319.

when the First Amendment was adopted.

Most free exercise cases appearing on the docket of the Supreme Court have been requests for exemption from otherwise valid, neutral, and generally applicable laws. These were the situations addressed favorably by the *Sherbert* test. *Sherbert* required any law burdening the free exercise of religion to fall under strict scrutiny, placing the primary burden of proof on the government to show a compelling state interest was involved, and that the law was the least restrictive means to meet that interest. *Sherbert* specifically allowed for incidental burdens on free exercise, rather than only those that were intentionally discriminatory.

However, as Vaughn Murphy illustrates in his thesis, *Religion Undefined*, the Court "ruled in favor of the free exercise claimant in only four of the seventeen such cases it heard" between *Sherbert* and *Smith.*[16] Usually, the Court found the government's interest to be compelling, or free exercise insufficiently burdened.[17] "Religious rights claimants fared even poorer at the federal court of appeals level, losing eighty-five out of ninety-seven cases brought in the ten years preceding *Smith.*"[18] Courts acted quite deferentially toward the legislatures, even under *Sherbert*: "When faced with a meritorious claim in which the government's interest was not very compelling, courts often found that no burden existed. And when the burden was obvious, as when the practice was criminally prohibited, courts

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[16]Reuben Vaughn Murphy, *Religion Undefined: Rehabilitating Free Exercise Clause Jurisprudence* (Virginia Beach, Va.: Regents University through Masters Abstracts International, 1993), 7.

[17]Ibid.

[18]Ibid., 9.

often relied on the cause of the burden itself to demonstrate the state's compelling interest."[19] The problem appeared to be the judiciary's fear of being inundated by exemption requests, as legal scholar Ira C. Lupu notes: "Behind every . . . claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe."[20] In fact, Professor Douglas Laycock believed that "some judges think that the difficulty of drawing lines between true and false claims of religious belief justified a refusal to grant any exemptions."[21]

James Ryan indicated of *Smith*, that "perhaps the most lasting and helpful legacy of the case will be that it finally dispelled the mistaken notion that courts were the leading institutional protectors of religious liberty."[22] According to Ryan, there are over two thousand federal and state statutory exemptions for religious objectors.[23] (Regardless, Ryan insists, most free exercise claims also involve free speech, press, or association concerns, and could therefore invoke strict scrutiny under *Smith*'s "hybrid" standard.[24]) Although the

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[19]James Ryan, "*Smith* and the Religious Freedom Restoration Act: An Iconoclastic Assessment," 78 *Va. L. Rev.* 1407, 1422 (1992), quoted in Murphy, 10.

[20]Ira C. Lupu, "Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion," 102 *Harvard Law Review* 933, 947 (1989), quoted in Murphy, 10.

[21]Douglas Laycock, "Peyote, Wine and the First Amendment," *The Christian Century,* October 4, 1989, 879, quoted in Murphy, 11.

[22]Ryan, 1413, quoted in Murphy, 21.

[23]Vaughn, 21, citing Ryan, 1445.

[24]Scalia insisted that *Sherbert* had never been used to decide a case outside of the unemployment compensation field, unless a "hybrid" claim involving not just free exercise, but another First Amendment right were involved, as the right to control the education of one's children in *Yoder.* See *Employment Div.* v. *Smith,* 110 S.Ct. 1595, 1601-1602

Supreme Court is the ultimate defender of minority rights against majoritarian bias in the political process, it appears that Justice Scalia's faith in that process is not misplaced; rather, the fear that the majority will be unresponsive to minority claims has little evidence to justify it. For example, Congress reversed the effects of *Lee* v. *United States* by granting statutory exemption from social security taxes to Amish employees working for self-employed Amishmen, reversed *Goldman* v. *Weinberger* by requiring the military to allow Orthodox Jews to wear yarmulkes while in uniform, and passed the Religious Freedom Restoration Act to overturn *Employment Div.* v. *Smith.*

(1990).

Conclusion
The History of Free Exercise Jurisprudence

The history of free exercise jurisprudence was extremely limited prior to the twentieth century. The first free exercise case to come before the Supreme Court was *Permoli* v. *First Municipality* in 1845. The Court dismissed the appeal in that case because, it ruled, it had no jurisdiction since the First Amendment applied only to Congress, not the states.

The next case the Court heard was *Reynolds* v. *United States.* In its 1879 decision, the Court made a distinction between belief and action. Religious belief was absolutely protected by the First Amendment from Congressional interference, said the Court, but religiously motivated actions had to be subordinated to criminal law and prevailing mores. The Court instituted the secular regulation rule, which held that any valid law having a secular purpose would withstand challenge on free exercise grounds if the law had a rational basis. Under that rule, the Court decided against the Mormons in a series of cases running from 1879 to 1890.

The Court was influenced by the prevailing mores of its day, and a view of American nationalism that required a common morality—that of the majority. Thus the Court upheld all laws or regulations that discriminated against the Mormons on the basis of their belief in, and practice of, polygamy. The Court noted with disdain that polygamy was confined largely to Asiatic and African nations, while "civilized," "Christian," "Western" nations found the practice "odious."

In the early twentieth century, Progressive Justices began to push for an expansion of federal protection of civil liberties and minority rights. In 1925, the Court began selective

incorporation of the First Amendment by the Fourteenth Amendment's Due Process Clause. After FDR attempted to pack the Court with his own nominees to further his New Deal agenda, the Court turned sharply away from strict scrutiny of economic regulations toward protection of minority rights. By 1940, all of the First Amendment had been incorporated, and the Court could enforce all of its restrictions on the states, including the Free Exercise Clause.

In a series of 1940s cases involving mostly Jehovah's Witnesses, the Court applied the secular regulation rule to the states, usually finding in favor of the religious claimants. In one noteworthy case, however, *Minersville School District* v. *Gobitis* (1940), the Witnesses lost. The Court ruled that public schools could force conscientious objectors to salute or pledge allegiance to the flag. As a result, hundreds of Witnesses' children were expelled from school, and many adult Witnesses were tortured or subjected to mob action. Horrified, in *West Virginia State Board of Education* v. *Barnette* (1943) the Court reversed itself and held that the First Amendment forbade compulsory patriotic observances.

In 1963, the liberal Warren Court abandoned the secular regulation rule in *Sherbert* v. *Verner*. Writing for the Court, the leader of the liberal faction, Justice William Brennan, wrote that any government action infringing on religious liberty must be justified by a compelling interest. Furthermore, if the least restrictive means of meeting that interest allowed for religious exemptions, the Free Exercise Clause required such exemption, even if the law were otherwise valid, generally applicable, and neutral toward religion.

Justice William H. Rehnquist, who took his seat on the Court in 1972, favored an accommodationist view of the Religion Clauses, in which the Court would defer to the other

branches of government. In *Thomas* v. *Review Board* (1979), he expressed his desire to reverse *Sherbert* and scrap the compelling interest test in free exercise cases. As Ronald Reagan's more conservative appointees joined him on the bench during the 1980s, his view became more and more important. By 1990, as Chief Justice, he found a majority willing to agree with him.

In *Employment Div.* v. *Smith* (1990), the Court scrapped the *Sherbert* test, in effect returning to the old secular regulation rule. Under *Smith,* if a law were facially neutral toward religion, otherwise valid and generally applicable—especially if it were a criminal statute—it would withstand challenge on free exercise grounds. Such a law would be subject to strict scrutiny only if it failed to meet one of those criteria. The Court modified the *Smith* rule in 1993, insisting that a law burdening free exercise, even if it were facially neutral, would come under strict scrutiny if its intent or purpose was to single out religious action for suppression.

Congress reacted to *Smith* by passing legislation requiring all federal and state courts to use the *Sherbert* test in all free exercise cases. It is not yet clear whether the statute will survive judicial review. In the meantime, constitutional scholars debate whether the *Sherbert* or *Smith* rule is more consistent with the purpose of the Free Exercise Clause. They also argue over the extent to which the Supreme Court is the protector of minority rights against majoritarian bias in the political process, and even whether the majority is usually indeed deaf to the pleas of religious minorities for deferential treatment.

The Supreme Court reinterpreted the Free Exercise Clause three times between 1940 and 1993. First, by applying the secular regulation rule to the states in 1940. Second, by abandoning the secular regulation rule in favor of the compelling interest test in 1963. Finally,

by effectively returning to its 1940 position in 1990-1993.

It is too early to determine whether the Court will use the *Smith* rule to curb minority religions, as it did in the Mormon cases, or protect them, as it did the Jehovah's Witnesses in the 1940s. Although a conservative majority now dominates the Court's free exercise jurisprudence, that balance of power may shift with any future Presidential elections, and the opportunity to appoint Justices that falls to future Presidents. Only one thing is certain: the Court has changed its doctrine before, and it will change again.

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As a graduate student, Frederick was inducted into Phi Alpha Theta, the history honorary, and Alpha Epsilon Lambda, the national honorary for all disciplines at the graduate and professional level. He presented a paper at the 1995 Ohio Association of Economists and Political Scientists conference which served as the foundation for this thesis. He also presented a paper at the QUEST '96 conference at YSU, for which he received the Dean's

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