THE CONSTITUTIONAL REQUIREMENT OF SENSITIVITY TO RELIGION

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I don't know whether the *Smith* opinion can stand much more whipping today. It's received quite a bit. Unfortunately from my point of view, it's not a dead horse. It lives, breathes, and continues to do harm. So I think it deserves more attention in a way that we haven't quite touched on today. That's going to be the direction which I hit.

I want to begin by looking back a considerable amount of time. If we don't know where we came from, we don't know who we are, and we don't know where we're going. That is not an invention of mine, but I like it. So I want to look at where we came from with free exercise. There was a time when religion and government were in fact one. That time existed in our country. So we don't need to go back beyond Jamestown. We don't need to go back into European history or history elsewhere. We can look here at our own history and find that government and religion were one. As the separation between the two grew, it became necessary to establish spheres of authority and power for each and hence a boundary line of some sort that would exist between the two. While all that was going on we had the Enlightenment and the development of individualism. Thus, we have a number of currents contributing to the, dare I say it, evolution that produced the free exercise doctrine as it exists in the Federal Constitution.

I stress that the state constitution has been mentioned here in the earlier panel and deserves mentioning yet again because the free exercise concept, or should I say concepts, existed at the state level prior to the time they existed at the national level and indeed it is fair to ask whether the Federal Constitution introduces anything new with respect to free exercise. Now we have had two hundred and sixteen years since the adoption of the Bill of Rights and in that

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time religion, however it is defined, and religious activity has expanded and in the government sphere the state has expanded its influence as well. And so while the state is more active by far than it was at the time of the framing of the Bill of Rights and religion is both more numerous and more diverse in its theocratic concepts we find both asserting themselves today in 2007 and for perhaps the last fifteen, twenty years, in fact, you can plug in any number of years there and you will see a progression in which both the state and religious activity expanded. Therefore the opportunities for conflict between the two have grown enormously. So free exercise is more important today than it was in 1791 when the Founders struggled with how they would draw the appropriate lines between government authority and the religious propositions.

Now I want to stress that from my point of view and my reading the history the Free Exercise Clause is about individuals while the Establishment Clause is about groups. The Founders had a particular view of establishment that is really quite different than the view that has grown from the Supreme Court activity. The idea of separation of the two is not something very common among the Founders. So to the extent that we get this idea of conflict between free exercise and establishment, that's a much larger problem created not by the Founders and not by the developers of the liberty concept as with free religion but rather it's something that has resulted from the efforts of our Court and our politicians to struggle with these two competing spheres of influence, the church and the state.

Whatever the original understanding of the religious clauses, and particularly free exercise, the applicability to current conditions is really quite important and worthy of examination in a way that the *Smith* Court avoided—I think deliberately avoided. We were talking before this panel convened and asked whether there are any defenders of the *Smith* opinion? And the answer to that question put that way is not many, if any. But if you ask whether there are defenders of the *Smith* theory of free exercise the answer is really quite different. There are scholars who have written on the subject and who are prepared to defend the theory of the *Smith* opinion. I am not one of them, and I am not here today to do that so I guess it falls to you, Steve, to defend the theory of the *Smith* case if any of us are going to do it.

From the Framers' point of view, the source of consideration for the religious clauses was freedom of conscience, not freedom of religion. Religion was but one expression of conscience. When the

Founders struggled with this proposition it's really quite interesting to see that speech and religion got sort of separately identified, but the core was freedom of conscience. Freedom of conscience was important to Jefferson, to Madison, to Adams, virtually to everyone who took a major role in this activity in 1791, including President Washington. They all held a view about conscience and that idea of conscience included the ability to act on your beliefs. So the artificial distinction which the first major Supreme Court opinion drew in *Reynolds v. United States*, the Mormon polygamy case, that beliefs are protected by the Free Exercise Clause, but conduct is not, was erroneously based on isolated comments, principally of Thomas Jefferson.

Nothing could be further from the general view of the Founders. Yes, Jefferson did say something to that effect but Madison and Ames and Livermore and so many more who took part in the framing of the Free Exercise Clause took an entirely different view. And that view was that those folks who feel they are commanded by God to act in a particular way are deserving of sensitivity from the government, and where possible, some accommodation to that. The language was used when state constitutions were formed, when the Bill of Rights was being discussed, and particularly when the religious clauses were being discussed. Language was put forward.

There were lots of models which would have limited the free exercise of religion. Some state models would have limited the right to act so long as you don't interfere with the opportunities for others to practice their religion, so long as you do not interfere with the peace and the order of society. Those were the limits imposed. No general limit. In fact, what theoretical sense does it make to arrive at the conclusion that general legislation can override the expression of political conscience in terms of practice and religion? If that's true, you don't need the Free Exercise Clause at all. Indeed, you don't need any of those limitations which the Framers struggled with so mightily. And note, when all is said and done, the restrictive models that were available to the Framers were rejected.Instead the Framers of the amendment adopted "nor prohibit the free exercise thereof." No limitations expressed. None.

So the Framers had something in mind and at least - at the very least - it was sensitivity to religious practice, accommodation where possible. When Madison spoke to this point he spoke in terms of government refraining from interference with religious practice unless it endangers the state. If the religious practice endangers the state, then it can be overridden. Now Madison's language was

not accepted. It was not accepted in Virginia where he proposed it. Do we know why it wasn't accepted? Regrettably, we do not. The sources are not great, yet another of the many limitations. In looking to the intent of the Framers, I think we can extract at least this much. The intent was government must show sensitivity to religious practice. It is fair to conclude that the Framers reflected the nearly unanimous view expressed in the state constitutions that free exercise was both freedom of conscience and freedom of action driven by that conscience.

I submit to you that the *Smith* opinion shows zero sensitivity to religious practice. Why? As discussed previously, Justice Scalia articulated, and drew four other justices to this position, that to allow a judicially created exemption defeats the democratic processes and far preferably to putting this delicate question in the hands of the judges, we put it in the hands of the legislature. And admitting that the majoritarian position will not be sensitive to minority religions, the Court nonetheless prefers to leave the issue in the hands of the legislature. Without much explanation, but in the little explanation there is, Justice Scalia goes back to John Locke. And that is the position which Locke articulated. Well that's interesting, except for that fact that the Framers explicitly rejected that position. So if I remember correctly, if I am wrong, please correct me, Scalia is one who looks to the original intent. Well I don't know that I want to go very far in that direction because it leads to dismantling of the opinion of *Smith* which it richly deserves.

But the more important point is the theory of *Smith* because that's what we have to live with. The opinion is archived, but we have to live with the results. As you heard in many of the examples here today, *Smith* has this impact, has that impact. There are all these impacts which the theory continues to have and which we need to address.

In the remarks today Justice Jackson was quoted as having said we have courts for a reason. We put this kind of decision in the hands of the courts for a reason. Were the Framers thinking along these lines? They absolutely were. We have controversy, considerable controversy over history, but I think we can find points of agreement. Even looking at different interpretations of the history I think we can find points of agreement which articulate some principles on which our free exercise stand.

Someone expressed the view that the Free Exercise Clause has been repealed by the *Smith* opinion. Well, it wouldn't be the first

time that the Supreme Court has set aside important language in the Constitution. I think of the Privileges and Immunities Clause in the Fourteenth Amendment, which appeared to have died an early death but may still have a little bit of breath in it, I don't know. But in any event, it isn't the first time that the Court has set aside an important provision and looked elsewhere. I think the *Smith* Court, the five member majority, may have been doing the same thing and may have set aside the protection of individuals looking elsewhere for that protection. In limiting the Fourteenth Amendment Privileges and Immunities Clause, you will remember the Court gave rise to a whole cottage industry on interpreting and applying the equal protection and due process clauses. Things that might ordinarily have come up under privileges and immunities instead came up in those areas.

The *Smith* opinion is weak in another regard, theoretically. It looks to support its position primarily by looking at nuanced interpretations. That's the kindest way I can put it - nuanced interpretations of precedent finding, as Professor Meier was discussing the RLUIPA decisions and talking about Smith being based upon inquiry into decision-making that was generalized and not specific with regard to the applicant. Well that's an interesting argument except for the fact that *Smith* involves a case in which a specific process existed to determine whether or not Black and his colleague were entitled to unemployment compensation. If *Sherbert*, which involved unemployment compensation, has validity because there was some individualized decision-making involved, exactly the same individualized decision-making was involved in *Smith*. So the coherence isn't there. And that frightens me because if someone is dedicated to the *Smith* conclusion that only discrimination against religion is protected by the Free Exercise Clause, then they are going to have to sort out all the inconsistencies and exceptions which exist in the precedents. In other words, in my view if that is the position, then *Sherbert* is in danger, and for that matter so is *Yoder*. Neither case can survive scrutiny under what the *Smith* doctrine provides. They are not logical; they are not coherent in the framework. So to focus on *Smith* and just accept it takes an optimistic view that at least we have got this little bit and we have got that little bit, but we do not have much. And even those tidbits are tenuous to say the least.

There are lots of different ways to criticize the opinion in *Smith*. I commend to your attention some articles by Michael McConnell who has first opined on the origins of religious freedom in a *Harvard*

Law Review article which I cite in my materials. I want to call your attention to an additional cite to Michael McConnell who has responded to *Smith* and to some of the critics of his position as well at 57 *University of Chicago Law Review* 1109. From pages 1121 to 1129 he discusses in great detail the precedent upon which *Smith* relies. The precedents include precedents which are distinguished (you can evaluate that) and precedents upon which the Court relied. And when you look at that coverage, and I think McConnell has done an interesting job of deconstructing the *Smith* opinion. When you look at those precedents you begin to realize what is in danger beyond the limits of *Smith*. Of course, the limits of *Smith* are few and too far between.

So my point basically is this, that while there is disagreement among historians and interpreters of our history and indeed the language of the First Amendment, I think we can find some core principles. The basic objection I have to *Smith* is that it is not faithful to basic principles and it has indeed repealed the Free Exercise Clause as the Framers' intended. The Framers were not omnipotent, they did not, could not take into account contemporary circumstances. So if the Court is prepared to defend the *Smith* opinion based upon contemporary circumstances and contemporary interpretations of constitutional law, it's legitimate, then we have something to talk about. But I am afraid the Court has become advocates rather than judges. I believe that the *Smith* opinion was preordained by the members of the majority of the Court and was going to be the outcome regardless. And that's no way to run a constitutional court.