SYMPOSIUM: A SECOND-CLASS CONSTITUTIONAL RIGHT? FREE EXERCISE AND THE CURRENT STATE OF RELIGIOUS FREEDOM IN THE UNITED STATES

THE FALL OF FREE EXERCISE: FROM 'NO LAW' TO COMPELLING INTERESTS TO ANY LAW OTHERWISE VALID

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The First Amendment explicitly allows "no law . . . prohibiting the free exercise" of religion.[1] Currently, however, Supreme Court doctrine permits any law that operates to prohibit the free exercise of religion, unless that law happens to be invalid for some other reason.[2] This enormous gulf and resulting drastic dilution of free exercise protection under federal constitutional case law is the

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[1] U.S. CONST. amend. I. Pertinent to religious freedom, the First Amendment begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.* According to the very language of the First Amendment, its history, and early Supreme Court case law, the guarantees of religious freedom in the Bill of Rights were originally applicable only to the federal government. *See* Barron v. Mayor of Balt., 32 U.S. (1 Pet.) 243, 247 (1833). Free exercise of religion was "incorporated," "absorbed," or nationalized and, thus, made assertable against state and local governments through the Fourteenth Amendment's guarantees of "liberty" and "due process" in a series of decisions in which the Supreme Court made clear that freedom of religion is a preferred right entitled to special protection. *See, e.g.,* Palko v. Connecticut, 302 U.S. 319, 324–26 (1937) (identifying free exercise of religion as one of those rights "implicit in the concept of ordered liberty" and about which "neither liberty nor justice would exist if they were sacrificed"); Cantwell v. Connecticut, 310 U.S. 296, 310–11 (1940) (emphasizing that "[i]n the realm of religious faith, and in that of political belief . . . the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential"; and specifying that only "a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State" would be a permissible infringement on those liberties).

[2] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (holding—and insisting that the Court had not previously held to the contrary—that the First Amendment's guarantee of religious free exercise does not protect a religious objector from the dictates of "an otherwise valid law").

instigation for today's symposium.

The Albany Law Review is among the very oldest[3] and most distinguished law reviews in this country.[4] Among other things, it has a tradition of provocative, enlightening annual symposia, exploring crucial legal-societal issues affecting America and the world. In recent years we have had symposia on torture; on lesbian, gay, bisexual, and transgender families; on violence as a concept in international law; on judicial selection, campaign speech, and activism; on American court reliance on foreign law; and even on human cloning.[5] We are able to sponsor such symposia because of the distinguished participants who visit Albany Law School each year for the event, such as those who are with us today; and also because of the exceptional law review students who work to put these symposia together, such as this year's members and, particularly, our Editor-in-Chief Jerald Sharum and Symposium Editor Peter VanBortel. This year we will be focusing on the current constitutional status of free exercise of religion from a wide range of perspectives. To get things started, let me offer a few introductory remarks to help place our topic in context.

FIRST AMENDMENT FORMULATION

Again, the very language of the First Amendment free exercise protection is rather absolute. It simply and unqualifiedly permits *"no law"* that prohibits religious exercise.[6] As Hugo Black was fond

[3] Tracey E. George & Chris Guthrie, *An Empirical Evaluation of Specialized Law Reviews,* 26 FLA. ST. U. L. REV. 813, 814–15 (1999).

[4] Alfred L. Brophy, *The Relationship Between Law Review Citations and Law School Rankings,* 39 CONN. L. REV. 43, 53, 63 (2006).

[5] Symposium, *Torture: Paradigms, Practices, and Policies*, 67 ALB. L. REV. 331 (2003); Symposium, *"Family" and the Political Landscape for Lesbian, Gay, Bisexual and Transgender People (LGBT),* 64 ALB. L. REV. 885 (2001); Symposium, *Conceptualizing Violence: Present and Future Developments in International Law,* 60 ALB. L. REV. 565 (1997); Symposium, *Issues Facing the Judiciary,* 68 ALB. L. REV. 557 (2004); Symposium, *"Outsourcing Authority?" Citation to Foreign Court Precedent in Domestic Jurisprudence,* 69 ALB. L. REV. 645 (2006); Symposium, *Manufactured Humanity: The Ethics and Legality of Stem Cell Research, Bioengineering, and Human Cloning*, 65 ALB. L. REV. 587 (2002).

[6] The First Amendment literally forbids only "Congress" from infringing upon free exercise. Indeed, the history of the Bill of Rights and the early case law make clear that the guarantees in the first ten amendments to the Federal Constitution were intended as protections against the federal government alone. *Barron*, 32 U.S. (1 Pet.) at 247, 250. The Supreme Court eliminated any lingering doubt about the free exercise protection several years later when it specifically held that the religious liberty guaranteed in the First Amendment—like the rest of the protections in the Bill of Rights—did not apply to state or local governments, but only to the federal. Permoli v. New Orleans, 44 U.S. (1 How.) 589, 609 (1845).

of saying, "'no law' means no law."[7] But such a strictly literalist approach to the First Amendment generally—and to free exercise specifically—such an unconditional, categorical, absolutist application is hardly realistic, probably impossible, and, indeed, would be reckless to order and civility in a free society.[8]

On the other hand, it is instructive to consider revolutionary-era documents and understandings of religious liberty. Thomas Jefferson's Bill for the Establishment of Religious Freedom in Virginia is, to be sure, among the most seminal. Drafted by Jefferson in 1777 and ultimately passed into law several years hence, owing largely to the efforts of James Madison,[9] it recognized government's justified interference with religious liberty only within the narrowest confines. In Jefferson's words, which were left unchanged in the statute enacted by the Virginia legislature, "it is time enough for the rightful purposes of civil government for its officers to interfere when [religious] principles break out into overt

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Nearly a century later, however, federal constitutional "liberty" was explicitly guaranteed against undue encroachment by the states and their local governments in the Due Process Clause of the post-Civil War, 1868-ratified Fourteenth Amendment. The Supreme Court eventually seemed to "incorporate" the free exercise of religion guarantee of the First Amendment into the Fourteenth Amendment in *Hamilton v. Regents of the University of California*. 293 U.S. 245, 262 (1934); *id.* at 265 (Cardozo, J., concurring). The Court's pronouncement was unequivocal a few years later in *Cantwell v. Connecticut*. 310 U.S. 296, 303 (1940).

[7] *See* HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 27–28 (8th ed. 2003) [hereinafter ABRAHAM, FREEDOM]. Under the very terms of the First Amendment, Justice Black's famous aphorism is no less applicable to the free exercise of religion—and to every other liberty guaranteed in that amendment—than it is to the freedom of speech to which he most typically applied it. *See, e.g.,* HUGO L. BLACK, A CONSTITUTIONAL FAITH 45 (1968); Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553–54, 563 (1962); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

[8] Regarding free speech, to which Hugo Black typically applied his literalist approach, one need only imagine "no law" prohibiting insubordinate, defiant speech in the armed forces, or "no law" prohibiting deliberately dishonest and malicious defamatory or perjurious speech. These and other readily imaginable examples, though perhaps extreme, nevertheless would seem to make clear that "no law" cannot be applied without at least some minimal flexibility and essential qualifications.

Examples of religious exercise to which "no law" cannot sensibly or responsibly be applied are even easier to imagine—e.g., human sacrifice, child labor, parental refusal to allow life-saving or disease-preventing medical treatment, female mutilation, pedophilia, etc.

[9] SAUL K. PADOVER, JEFFERSON 79–82 (1980); *see also* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 54 (2d ed. 2006) [hereinafter MCCONNELL, RELIGION].

Jefferson counted the Virginia Statute for Establishing Religious Freedom among only three accomplishments for which he wished to be remembered. In accordance with his own instructions, Jefferson's epitaph, engraved on his tombstone at Monticello, Virginia, identifies him only as the author of that statute and the Declaration of Independence, and as the Father of the University of Virginia. DUMAS MALONE, THE SAGE OF MONTICELLO 499 (1977).

acts against peace and good order."[10] Only "overt acts," and only when they disturbed the "peace and good order," would allow abridgement of the guaranteed freedom of religion.

Thomas Jefferson's formulation was early recognized by the Supreme Court as central to understanding the First Amendment's protection of religious liberty.[11] New York State's constitution, drafted by John Jay and adopted the same year Jefferson authored his religious freedom bill, similarly guaranteed free exercise with only narrow exceptions.[12] "[A]cts of licentiousness" and "practices inconsistent with the peace and safety of this State" were the sole limitations expressed.[13]

Several other state constitutions enacted at the time of the Revolution, among them those of Georgia,[14] Massachusetts,[15] and New Hampshire,[16] as well as the Northwest Ordinance,[17] likewise sharply restricted government's authority over religious exercise. Public disturbances, threats to safety, and other such conduct inconsistent with peaceful society were alone identified as limitations on the immunity of religious practices and duties from government interference.[18]

But whether free exercise of religion is construed to be absolute, as it is stated in the First Amendment, or subject to the limited restrictions identified in early state charters, there is a huge abyss between either of those and the current Supreme Court formulation that subordinates free exercise to any otherwise valid law. There is a huge abyss in terms of legal doctrine between, on the one hand, no law or no law except for state interests in peace and safety, and on the other, any law that passes a minimal legitimate-interest or rational-basis test. But that is presently the test under federal constitutional jurisprudence.

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[10] PADOVER, *supra* note 9, at 81; MCCONNELL, RELIGION, *supra* note 9, at 55.

[11] *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 162–64 (1878); *see also* Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947).

[12] BERNARD SCHWARTZ, 2 THE ROOTS OF THE BILL OF RIGHTS 301 (1980).

[13] *Id.* at 312.

[14] *Id.* at 299 ("provided it be not repugnant to the peace and safety of the State").

[15] *Id.* at 340 ("provided he doth not disturb the public peace, or obstruct others in their religious worship").

[16] *Id.* at 375 (same as Massachusetts).

[17] *Id.* at 400 ("demeaning himself in a peaceable and orderly manner").

[18] *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1461–62 (1990).

SMITH'S PRECURSORS

Oregon v. Smith,[19] decided by the Court in 1990 by a 5–4 vote, rejected the compelling state interest test for free exercise of religion.[20] The decision engendered a great deal of surprise, criticism, and reaction at both the federal and state level.[21] It was a clear change in the Supreme Court's jurisprudence,[22] notwithstanding the insistence to the contrary of Justice Scalia, the author of the Court's opinion.[23] It was a clear change from what

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[19] 494 U.S. 872, 879 (1990).

[20] The vote was 6–3 to reject the specific free exercise claim in question, but Justice Sandra Day O'Connor, who concurred in the result, did not join Justice Antonin Scalia's opinion for the Court rejecting the compelling state interest test. Instead, she authored a separate concurring opinion, joined by the three dissenting justices, emphatically disagreeing with the majority for "dramatically depart[ing] from well-settled First Amendment jurisprudence." *Smith*, 494 U.S. at 891 (O'Connor, J., concurring).

[21] At the federal level, Congress passed the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-41, 107 Stat. 1488, to restore the pre-*Smith* compelling-interest test for free exercise claims. The Supreme Court, however, invalidated "RFRA," at least insofar as it was applicable to the states, in *City of Boerne v. Flores,* 521 U.S. 507 (1997).

At the state level, many legislatures responded to *Smith*—and then to *City of Boerne*—in much the same way as Congress had by enacting their own "state-RFRAs". *See, e.g.,* Arizona Religious Freedom Restoration Act, ARIZ. REV. STAT. ANN. § 41-1493 (1998); Connecticut Religious Freedom Restoration Act, CONN. GEN. STAT. § 52-571b (1993); Florida Religious Freedom Restoration Act, FLA. STAT. § 761.01 (1998); Illinois Religious Freedom Restoration Act, 775 ILL. COMP. STAT. 35 (1998); New Mexico Religious Freedom Restoration Act, N.M. STAT. ANN. § 28-22-1 (West 2000); Rhode Island Religious Freedom Restoration Act, R.I. GEN. LAWS 42-80 (1993); Texas Religious Freedom Restoration Act, TEX. CIV. PRAC. & REM. CODE ANN. § 110.001 (Vernon 1999).

Additionally, several state supreme courts have construed their state constitutional guarantees of religious liberty to provide greater protection than that afforded by the First Amendment as construed in *Smith*. *See, e.g.,* Humphrey v. Lane, 728 N.E.2d 1039 (Ohio 2000); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994); First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992); State v. Hershberger, 462 N.W.2d 393 (Minn. 1990). *See generally* Stanley H. Friedelbaum, *Free Exercise in the States: Belief, Conduct, and Judicial Benchmarks*, 63 ALB L. REV. 1059 (2000); So Chun, *A Decade After* Smith: *An Examination of the New York Court of Appeals' Stance on the Free Exercise of Religion in Relation to Minnesota, Washington, and California,* 63 ALB. L. REV. 1305, 1312–33 (2000); Tracy Levy, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of* Employment Division v. Smith, 67 TEMP. L. REV. 1017 (1994).

[22] *See Smith*, 494 U.S. at 893–96 (O'Connor, J., concurring). As noted by Justice O'Connor, joined by the three dissenters, the majority's holding was possible only by "disregard[ing the Court's] consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct." *Id.* at 892; *see also id.* at 907–08 (Blackmun, J., dissenting) ("Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence.").

[23] *Id.* at 878–79 ("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. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition."). *Contra* Wis. v. Yoder, 406 U.S. 205, 219–20 (1972) ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional

most scholars and Court observers believed was the settled jurisprudence of fundamental rights, the First Amendment, and religious liberty.[24]

But this is not to suggest that prior to 1990 the Supreme Court had a particularly strong or consistent track record in protecting the free exercise of religion. A very quick recollection of a few of the most notable free exercise landmarks leads to the inescapable conclusion that the Supreme Court has, at the very best, been erratic.

Among the Court's earliest forays into free exercise were the Mormon polygamy cases in the late 1800's. *Reynolds v. United States*[25] and *Davis v. Beason*[26] were each unanimous decisions rejecting free exercise challenges to laws targeting the Mormon religious practice of polygamy. In its 1878 ruling in *Reynolds,* the 9–0 Court upheld a criminal prosecution against a practicing Mormon polygamist in the Utah Territory, under a federal statute criminalizing bigamy in any United States territory.[27] Several years later, in *Davis*, the Court contemptuously declared that for Mormons to "call their advocacy [of polygamy] a tenet of religion is to offend the common sense of mankind."[28] The Court also confidently declared a distinction between a "'religion' [that] has reference to one's views of his relations to his Creator, and to the obligations they impose," and a "*cultus* or form of worship of a particular sect"—the latter, in the Justices' view, quite clearly including the Mormons.[29] The 9–0 *Davis* Court thus had little difficulty upholding a statute of the Idaho Territory which conditioned the right to vote upon an oath against practicing, advising, or encouraging polygamy.[30] Later that same year, the Court approved an act of Congress that dissolved the Mormon Church's corporate charter in Utah and confiscated most of its

requirement for government neutrality if it unduly burdens the free exercise of religion."). *See generally* ABRAHAM, FREEDOM, *supra* note 7, at 271–99 (surveying the Court's treatment of free exercise from its earliest decisions).

[24] Friedelbaum, *supra* note 21, at 1064–66; Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence,* 1993 BYU L. REV. 275; Douglas Lycock, *The Remnants of Free Exercise,* 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision,* 57 U. CHI. L. REV. 1109 (1990).

[25] 98 U.S. 145 (1878).

[26] 133 U.S. 333 (1890).

[27] *Reynolds*, 98 U.S. at 146.

[28] *Davis,* 133 U.S. at 341–42.

[29] *Id.*

[30] *Id.* at 346–47.

property.[31]

The Quakers did not fare much better before the Court. In its 1929 decision in *United States v. Schwimmer*,[32] the Court affirmed the denial of naturalized citizenship to a fifty year old woman who, true to her pacifist convictions as a Quaker, had acknowledged on her application: "'I would not take up arms personally'" in defense of the country.[33] To the majority, this refusal offended "a fundamental principle of the Constitution," namely "the duty of citizens by force of arms to defend our government."[34] In one of the earliest glimmers of hope for free exercise, however, three of the justices took issue with the Court's decision. Oliver Wendell Holmes, joined in his dissenting opinion by Louis Brandeis, reminded the majority of another— "more imperative[]"—fundamental of the Constitution: "the principle of free thought—not free thought for those who agree with us."[35] Moreover, with direct reference to the religious pacifism in question, Holmes expressed his dismay that Quakers could be disqualified from citizenship simply "because they believed more than some of us do in the teachings of the Sermon on the Mount."[36]

Three years later, in *Hamilton v. Regents of the University of California,*[37] the Court built upon *Schwimmer* and *Macintosh.* It rejected the free exercise claims of students who were expelled from the state university for refusing to participate in required classes in military instruction. The Justices were unanimous that the students' religious convictions were "unquestionably" sincere and "[u]doubtedly" included within the 'liberty" safeguarded against state encroachment by the Fourteenth Amendment.[38] Nevertheless,

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[31] The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (upholding a federal statute dissolving the corporate charter of the Mormon church and forfeiting all its property except that used exclusively for religious worship, burial and parsonage).

[32] 279 U.S. 644 (1929).

[33] *Id.* at 647.

[34] *Id.* at 650.

[35] *Id.* at 654–55 (Holmes, J., dissenting).

[36] *Id.* at 655. Two years hence, in *United States v. Macintosh*, 283 U.S. 605 (1931), the Court again upheld the denial of naturalization on the basis of pacifist religious beliefs, in this case involving a Canadian Baptist minister who served as a chaplain at Yale. The Court's decision now garnered a bare five Justice majority. As before, Holmes and Brandeis dissented, this time joining an opinion by Charles Evans Hughes. Ultimately, the position of Holmes, Brandeis, and Hughes became the majority when the Court explicitly overruled *Schwimmer* and *Macintosh* fifteen years later in *Girouard v. United States*, 328 U.S. 61, 69 (1946).

[37] 293 U.S. 245 (1934).

[38] *Id.* at 261, 262.

according to the Court, that liberty "[p]lainly"[39] did not include "the right to be students in the State University" without satisfying "the conditions of attendance" imposed by the state—regardless of how objectionable to the avowedly safeguarded religious principles.[40] Subsequently, in its 1945 decision in *In re Summers*,[41] the Court applied parallel reasoning to uphold Illinois's denial of admission to the bar of a federally certified conscientious objector. Albeit now by a bare 5–4 vote, the Court rejected the claim of an applicant who was disqualified solely for his religious scruples against serving in the state's militia.[42]

The justices were equally unsympathetic to religious freedom challenges to the so-called Sunday "blue laws." These state provisions, prohibiting most businesses from operating on the Christian Sabbath, were variously claimed to violate equal protection, due process, non-establishment, and free exercise.[43] In *Braunfeld* and *Crown Kosher,* Orthodox Jewish retail merchants in Pennsylvania and Massachusetts attacked their states' blue laws for unfairly burdening their religious convictions. With Saturday being their own religious Sabbath, and Sunday being the legally mandated one, their work week was reduced to five days. For the Court, however, the critical point was that the state restrictions did "not make unlawful any religious practices," but "simply regulate[d] a secular activity."[44] The conceded "financial sacrifice" resulting from the legislated day of rest was dismissed as "only an indirect burden on the exercise of religion."[45] No accommodation or

[39] *Id.* at 265.

[40] *Id.* at 262.

[41] 325 U.S. 561 (1945).

[42] *Id.* at 571–72.

[43] Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); McGowan v. Maryland, 366 U.S. 420 (1961). *See generally* ABRAHAM, FREEDOM, *supra* note 7, at 282–96.

[44] *Braunfeld*, 366 U.S. at 605.

[45] *Id.* at 606. To Justice Potter Stewart, who was among three dissenters in both *Braunfeld* and *Crown Kosher,* what mattered was the actual "impact" of the blue laws, rather than a distinction between direct and indirect burdens. As he put it, these laws "compel[ed] an Orthodox Jew to choose between his religious faith and his economic survival." *Id.* at 616 (Stewart, J., dissenting). This "cruel choice," he argued, was not one that a "State can constitutionally demand [and] not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness." *Id.*

Indeed, the majority itself recognized limitations on "indirect" burdens on free exercise. Even these were constitutionally impermissible if "the State may accomplish its purpose by means which do not impose such a burden." *Id.* at 607 (majority opinion). According to the Court, however, there simply were no alternatives that would adequately accomplish the legitimate state purposes served by the blue laws. *Id.* at 608–09.

exemption need be granted.

Immediately prior to the 1990 *Smith* decision, another pair of cases similarly evinced a rather dismissive attitude toward religious liberty by respective majorities of the Court. In *Goldman v. Weinberger,* [46] the Justices rejected the appeal of an Orthodox Jewish rabbi in the Air Force who was threatened with a court martial for wearing his yarmulke indoors in violation of the military dress code. By a 5–4 vote, the Court refused even to consider the feasibility or desirability of accommodating the undisputed religious requirement. Instead, it deferred without scrutiny or balancing to the generalized, "perceived need for uniformity" in the military.[47]

Similarly, the same year in *Bowen v. Roy*,[48] the Court refused to accommodate religious objections to a social security number. The sincere belief that such a numerical identification would cause grave spiritual harm was equated with an "objection to the size or color of the Government's filing cabinets," and the free exercise request for some alternative identification was disdained as a claimed "right to dictate the conduct of the Government's internal procedures."[49]

ONLY COMPELLING INTERESTS

On the other hand, there certainly have been some landmark victories for religious liberty in Supreme Court history. Beginning no later than the 1937 decision in *Palko v. Connecticut*,[50] free exercise of religion was recognized as "implicit in the concept of ordered liberty" that the Constitution safeguards against both federal and state transgression.[51] Delineating a jurisprudence of fundamental rights that has ever-since governed the Court's recognition of the most closely guarded liberties, Benjamin Cardozo's majority opinion specifically identified free exercise among those truly essential rights about which it could be said that "neither liberty nor justice would exist if they were sacrificed."[52]

Shortly after *Palko*, the Court sided with free exercise in the

[46] 475 U.S. 503 (1986).
[47] *Id.* at 509–10.
[48] 476 U.S. 693 (1986).
[49] *Id.* at 699–700.
[50] 302 U.S. 319 (1937).
[51] *Id.* at 324–25.
[52] *Id.* at 326.

several Jehovah's Witness proselytizing cases.[53] In *Cantwell*, for example, a unanimous Court invalidated convictions for engaging in religious solicitation without a license, and for allegedly inciting a breach of the peace.[54] The Witnesses involved, who did not obtain the statutorily required license, had stopped pedestrians in a predominantly Roman Catholic area, asking them to listen to a phonograph recording which, among other things, was condemned by the Church as an instrument of Satan.[55] As for the licensing requirement, the Court ruled that it was invalid as applied to the religious conduct in question.[56] The prevention of fraudulent and dangerous activity was surely permissible. But, in the Court's view, the law imposed an impermissible prior restraint on religious proselytizing and it had an unacceptable potential for religious censorship.[57] As for the religious conduct itself, it was constitutionally protected unless it constituted a "narrowly drawn . . . clear and present danger to a substantial interest of the State"—which the Court found it did not.[58]

During the same period as the proselytizing cases, the Court rendered what is perhaps *the* seminal decision for free exercise of religion—certainly the most seminal up to that time. In its 1943 ruling in *West Virginia State Board of Education v. Barnette,*[59] the Court invalidated the state's mandatory flag salute in public schools as applied to religious objectors. Speaking through Robert Jackson,[60] whose words both eloquent and moving are among the

[53] Douglas v. City of Jeanette, 319 U.S. 157 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. City of Opelika, 319 U.S. 103 (1943); Cantwell v. Conn., 310 U.S. 296 (1940).

[54] *Cantwell*, 310 U.S. at 300–01.

[55] *Id.* at 301.

[56] *Id.* at 306–07.

[57] *Id.* at 305–07.

[58] *Id.* at 311. The Court explained that a state's interest in preserving the peace had to be weighed against the "overriding interest" of the United States reflected in the Constitution that "the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged." *Id.* at 307.

In other Jehovah Witness proselytizing cases decided in the early 1940s, the Court similarly invalidated the licensing, taxing, and outright prohibition of bookselling, soliciting, door to door distribution of literature, and public evangelism—as applied to religious activity. *See Douglas*, 319 U.S. at 157 (police stopping public evangelism on Sundays in response to citizen complaints); *Martin*, 319 U.S. at 141 (ordinance prohibiting door to door distribution of literature); *Murdoc*k, 319 U.S. at 105 (tax for soliciting orders for articles); *Jones*, 319 U.S. at 103 (license tax on bookselling).

[59] 319 U.S. 624 (1943).

[60] Justice Robert H. Jackson, a favorite son of Albany Law School owing to his only formal legal education being at the law school for the 1911–12 academic year, was celebrated in recent symposia sponsored by the law school and this law review and published in its pages.

most oft-quoted of any lines in any Supreme Court opinion then and now, the justices not only overruled a merely three year old precedent, but replaced it with one whose sentiments are at the core of the nation's constitutional dedication to freedom of conscience. In a passage—with respect to which the opportunity to quote should rarely be passed—Jackson wrote:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[61]

The controversy in *Barnette* arose when Jehovah's Witness children were expelled from school for refusing, on religious grounds, to participate in the compulsory salute.[62] While acknowledging the legitimate interest in fostering national unity and patriotism in the schools,[63] the Court held that those goals could not be accomplished, consistent with the Constitution, by coercion. Though a state was typically free to regulate with little more than a "rational basis" for doing so, the Court explained that fundamental liberties such as speech and worship could "not be infringed on such slender grounds."[64] As Jackson put it, those "freedoms . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."[65]

That formulation, if not as absolute as a literal reading of the First Amendment, is at least as strong as that of the revolutionary-era documents that immunized religious exercise from all government interference except when necessary to secure peace, safety, and the equal rights of others.[66] Jackson's opinion in *Barnette* thus laid the groundwork for the Court's explicit adoption of the compelling state interest test for religious liberty twenty

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See Symposium, *A Tribute to Justice Robert H. Jackson,* 68 ALB. L. REV. 509–56 (2005); Tribute, *Robert H. Jackson: Public Servant,* 68 ALB. L. REV. 777–813 (2005); Tribtue, *Wartime Security and Constitutional Liberty*, 68 ALB. L. REV. 1113–52 (2005); *see also Commencement Address of United States Attorney-General Jackson,* N.Y.L.J., June 10, 1941, at 1.

[61] *Barnette,* 319 U.S. at 642.

[62] *Id.* at 625–30.

[63] *Id.* at 640–41.

[64] *Id.* at 639.

[65] *Id.*

[66] *See supra* notes 9–18 and accompanying text.

years later in *Sherbert v. Verner*.[67]

In *Sherbert,* the Court overruled the denial of unemployment compensation benefits to a Seventh Day Adventist whose refusal to work on Saturday, her religion's Sabbath, had been deemed "without good cause" and, thus, disqualifying under the state's compensation law.[68] As viewed by the six Justice majority, the state's position forced a cruel and impermissible choice between obeying religious precepts and receiving benefits which would otherwise be granted. It was tantamount to a fine imposed for religious worship.[69] Drawing upon the Court's precedents that had underscored the especially rigorous protection to be afforded those "indispensable democratic freedoms secured by the First Amendment,"[70] the Justices made clear that only a "compelling state interest," that is, "only the gravest abuses, endangering paramount interest[s]"[71] could justify even an incidental infringement on free exercise. According to the Court, the state's posited interest of avoiding the possibility of spurious religious claims simply did not meet the test.

Thereafter, beyond the several cases in which it applied the same analysis to similar denials of unemployment benefits,[72] the Court arguably reached the high-water mark in its protection of free exercise nine years after *Sherbert*, in *Wisconsin v. Yoder*.[73] At issue was the state's compulsory education law as applied to the Amish.[74] They objected, on religious grounds, to subjecting their children to any worldly influence beyond the basic reading, writing, and arithmetic skills taught in the elementary grades.[75] Speaking through Chief Justice Warren Burger, the Court recognized the state's strong interest in education,[76] but it refused to consider that interest "absolute to the exclusion or subordination of other interests,"[77] such as those "claiming protection under the Free

[67] 374 U.S. 398 (1963).

[68] *Id.* at 399–402.

[69] *Id.* at 404.

[70] Thomas v. Collins, 323 U.S. 516, 530 (1945); *see also* NAACP v. Button, 371 U.S. 415, 438 (1963).

[71] *Sherbert,* 374 U.S. at 406 (inner quotation marks and citation omitted).

[72] *See, e.g.,* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981).

[73] 406 U.S. 205 (1972).

[74] *Id.* at 207.

[75] *Id.* at 208–11.

[76] *Id.* at 214, 221.

[77] *Id.* at 215. There is no question as to the meaning of the Court's reference to "other interests." Not only had the Court been discussing free exercise by name, but the reference

Exercise Clause."[78] With a citation to its decision in *Sherbert*, the Court balanced the competing interests in favor of free exercise because the state had failed to demonstrate, with particularity, why it should not grant the exemption sought by the Amish.[79]

Finally, it bears recalling how the Court in *Yoder* summarized the state of free exercise jurisprudence. It left little doubt that the compelling-interest test, however variously stated, was the appropriate standard for adjudging free exercise claims against government interference. As Burger wrote for the Court: "The essence of all that has been said and written on the subject is that only those *interests of the highest order* and those *not otherwise served* can overbalance legitimate claims to the free exercise of religion."[80]

SMITH'S RECASTING OF FREE EXERCISE

In light of such landmarks as *Palko*, *Barnette*, *Sherbert*, *and Yoder,* it was no wonder that the belief was widespread that free exercise of religion was safeguarded by the Court's compelling-interest, strict-scrutiny test. That was deemed to be well-settled doctrine.[81] Indeed, this was especially so because of the countless precedents in which the Court had repeated that infringements on *any* fundamental right were subject to the closest judicial scrutiny and were justifiable only by paramount governmental interests.[82]

But in *Oregon v. Smith*,[83] speaking through Justice Antonin Scalia, a five Justice majority assured everyone who thought that the compelling-interest test applied to free exercise that, in fact, it had never really applied, except for a few aberrational unemployment compensation cases.[84] Upholding a state drug

was immediately followed by a citation to *Sherbert*, as well as to other decisions discussing the overriding nature of state interests necessary to intrude upon religious liberty.

[78] *Id.* at 214.

[79] *Id.* at 236.

[80] *Id.* at 215 (emphasis added).

[81] *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 891, 894–95 (1990) (O'Connor, J., concurring); *id.* at 907–08 (Blackmun, J., dissenting); *see also* Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act,* 62 FORDHAM L. REV. 883, 885–86 (1994); McConnell, *supra* note 24, at 1113, 1120.

[82] Santosky v. Kramer, 455 U.S. 745 (1982) (parental rights); Dunn v. Blumstein, 405 U.S. 330 (1972) (voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); U.S. v. O'Brien, 391 U.S. 367 (1968) (expression); NAACP v. Button, 371 U.S. 415 (1963) (association); Thomas v. Collins, 323 U.S. 516 (1945) (assembly).

[83] *Smith*, 494 U.S. at 872.

[84] *Id.* at 883 (insisting that "[w]e have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation").

prohibition against members of a Native American church which used peyote in its sacramental ritual, the Court denied an exemption sought on free exercise grounds. The Scalia-penned opinion declared that the Court had "never held," and it would not now hold, that "an individual's religious beliefs excuse him from compliance with *an otherwise valid law* prohibiting conduct that the State is free to regulate."[85]

Confronted with a considerable body of precedents which certainly seemed to suggest the opposite,[86] Scalia attempted to recast the prior case law into two categories that would not contradict his pronouncement. The first category comprised those cases involving "hybrid" rights.[87] These included, for example, the proselytizing cases and *Yoder*. According to Scalia's majority opinion, free exercise had succeeded in these cases only "in conjunction with other constitutional protections"—e.g., free speech in *Cantwell* and parental rights in *Yoder*.[88] But, of course, such a characterization of those precedents renders free exercise of religion entirely superfluous. A violation of free speech, parental rights, or some other constitutionally protected liberty is prohibited by itself. In the world of the "hybrid" theory, the free exercise guarantee adds nothing.

The second category consisted of those cases in which religion or a particular religion's belief or practice was singled out for disparate treatment. According to this *re*characterization, the compelling-interest test was applied in *Sherbert* and the other compensation decisions only because "'religious hardship[s]'" were being treated less favorably than other "personal reasons" for refusing employment.[89] But again, free exercise as a substantive right with its own guarantee and protection is rendered superfluous. Any law or other government action discriminating on the basis of religion would run afoul of equal protection. Indeed, the Court's equal protection jurisprudence has long applied strict scrutiny whenever governments' disparate treatment burdens a fundamental right.[90]

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[85] *Id.* at 878–79 (emphasis added).

[86] *Id.* at 895–97, 903 (O'Connor, J., concurring) (showing how the majority "misreads settled First Amendment precedent"); *id.* at 908 (Blackmun, J. dissenting) (accusing the majority of "mischaracterizing this Court's precedents"); *see also* McConnell, *supra* note 24, at 1120 (finding that the majority's "purported . . . use of precedent is troubling, bordering on the shocking").

[87] *Smith,* 494 U.S. at 882.

[88] *Id.* at 881.

[89] *Id.* at 884.

[90] *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Harper v. Va. State Bd. of

Free exercise itself, under *Smith*, thus has no independent significance. There is no freedom to practice—i.e., to *exercise*—one's religion, only a freedom from invidious discrimination.

The reasons motivating the *Smith* majority's rather tortured reading of the free exercise guarantee and the Court's precedents can be distilled to two. There is the specter of free exercise run wild, permitting each individual to choose which laws to obey and, thus, "'to become a law unto himself.'"[91] The majority warned that applying the compelling-interest test, in its undiluted form, "would be courting anarchy."[92] Under such a scenario, religious exemptions would be required for "military service," "taxes," "health and safety regulation[s]," "manslaughter," "child neglect," "compulsory vaccination," "child labor laws," racial anti-discrimination laws, and, in fact, "civic obligations of almost every conceivable kind."[93]

Of course, this parade of horribles is preposterous. Judges are in the business of judging, of balancing, of making distinctions.[94] No judge worthy of judicial office, indeed no sensible human being, is incapable of distinguishing between religious conduct involving human sacrifice, child abuse, endangering the public health and safety, racial discrimination, and other grave concerns on the one hand, as opposed to religious conduct which involves nothing of that sort but nevertheless conflicts with some general law or regulation dealing with some non-compelling or non-essential government interest. And Justice Scalia and the four justices who joined him were surely more than able to make those distinctions.

A second reason motivating the rejection of the compelling-interest test might well have been judicial restraint, a preference for leaving any possible accommodation of free exercise to the political process.[95] To be sure, there have been legislative efforts by Congress and some states to restore the pre-*Smith* level of protection to free exercise, and some state supreme courts have declined to follow *Smith* and, instead, have adhered to the standards of *Sherbert* and *Yoder* as a matter of state constitutional law.[96]

Elections, 383 U.S. 663, 667 (1966); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[91] *Smith,* 494 U.S. at 882, 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

[92] *Id.* at 888.

[93] *Id.* at 888–89.

[94] *See generally* Vincent Martin Bonventre, *Judicial Activism, Judges' Speech, and Merit Selection: Conventional Wisdom and Nonsense,* 68 ALB. L. REV. 557, 574–76 (2005).

[95] *Smith,* 494 U.S. at 890.

[96] *See supra* note 21 and accompanying text.

But the critical point is that the nation's constitutional promise of religious free exercise is no longer guaranteed special protection. No longer is free exercise safeguarded under the Constitution against routine government interests. No longer must state courts subject infringements upon free exercise to the compelling-interest test; in fact, no longer *may* federal courts do so to infringements by state governments.[97] No longer is that the law of the land.

Hence, for example, in a recent decision of the New York State Court of Appeals—a state tribunal with a somewhat strong tradition of independent state constitutional adjudication[98]—the compelling-interest test was rejected.[99] Though the court also rejected the "otherwise valid law" standard of *Smith*, the test it adopted under the state constitution required "substantial deference" to the legislature[100] and provided little additional protection for free exercise. Genuine burdens on free exercise are perfectly permissible under the New York rule, unless it can be demonstrated that the "interference with religious practice is unreasonable.[101] Free exercise under state constitutional standards such as New York's, as under the Supreme Court's ruling in *Smith*, is effectively reduced to a mere privilege, protected only against burdens that are proven to fail the test of reasonableness, or are otherwise invalid.

CONCLUSION

The Supreme Court majority in *Smith* acknowledged the inevitable burden on free exercise resulting from its judicial passivity in protecting religious liberty. "[L]eaving accommodation to the political process," Scalia conceded, "will place at a relative disadvantage those religious practices that are not widely engaged in."[102] But he justified this as a "consequence of democratic

[97] The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-41, 107 Stat. 1488, intended to restore the compelling-interest test, but was invalidated by the Court insofar as it applied to the states. City of Boerne v. Flores, 521 U.S. 507 (1997).

[98] *See generally* Vincent Martin Bonventre, *State Constitutionalism in New York: A Non-Reactive Tradition,* 2 EMERGING ISSUES ST. CONST. L. 31 (1989); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle,* 61 ST. JOHN'S L. REV. 399 (1987).

[99] Catholic Charities of Diocese of Albany v. Serio, 859 N.E.2d 459 (N.Y. 2006).

[100] *Id.* at 466.

[101] *Id.* at 467. The California Supreme Court, another one of the nation's influential state tribunals, has thus far simply declined to choose between the compelling-interest test and the *Smith* standard. *See* Catholic Charities of Sacramento, Inc. v. Superior Court**,** 85 P.3d 67, 91 (Cal. 2004).

[102] *Smith,* 494 U.S. at 890.

government [that] must be preferred"—preferred, apparently, to taking free exercise more seriously by insuring more rigorous safeguards.[103]

In response, it would again be difficult to improve upon lines written by Justice Jackson in *Barnette:*

> 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.[104]

[103] *Id.*

[104] *W. Va. State Bd. Of Educ. v. Barnette,* 319 U.S. 624, 638 (1938). Justice O'Connor likewise quoted this passage of Jackson in her concurring opinion. *Smith,* 494 U.S. at 903 (O'Connor, J. concurring). Thomas Jefferson's argument urging the addition of a bill of rights to the Constitution underscores Jackson's words and the proper role of the judiciary. In his letter to James Madison, dated March 15, 1789, Jefferson wrote: "In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary." *See* BERNARD SCHWARTZ, 3 THE ROOTS OF THE BILL OF RIGHTS 620 (1980).