

Religious Liberty for the Politically Powerful: The Changing Free Exercise Jurisprudence of the United States Supreme Court

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Abstract - This article traces the judicial interpretation of the free exercise clause of the United States Constitution. The First Amendment forbids laws “respecting an establishment of religion or prohibiting the free exercise thereof.” During different periods of the Supreme Court, the justices have promoted their vision of neutrality and charted a more liberal or conservative jurisprudence. Reflecting the Nixon, Reagan, and Bush appointments, the Court since the 1970s has accorded greater latitude to government regulation of religious activities. The right to put religious faith into practice has become rather empty for minorities who lack the political size, sophistication, and clout to influence legislative outcomes.

In principle, the constitutional commitment to religious liberty and diversity is a hallmark of American society. The First Amendment forbids laws “respecting an establishment of religion or prohibiting the free exercise thereof.” Yet historical practice teaches that humans are prone to intolerance and persecution in the name of religion. American history is replete with instances of Christian and Protestant zealotry with the fallout of government hostility towards minority practices. Not until the 1940s was the United States Supreme Court even willing to interpret the First Amendment as protecting religiously motivated conduct, rather than simply religious beliefs. Gradually the Court began to treat religious liberty as a preferred position, protecting religious choices from purposeful and incidental government interference. In *Sherbert v. Verner* (1963), the Warren Court took the courageous step of extending free exercise protection to even religious practices coming into conflict with the incidental effects of generally applicable laws. But reflecting the Nixon, Reagan and Bush appointments, the Court since the 1970s has accorded

greater latitude to government regulation of religious activities. In *Oregon v. Smith* (1990), the Rehnquist Court brushed aside precedent and held that the free exercise clause protects people from government efforts to directly target and interfere with religious practices, but not from the incidental burdens of facially neutral laws. A disappointed Congress and President Clinton responded by enacting the Religious Freedom Restoration Act (1993). It was supposed to restore the *Sherbert* standard of the free exercise clause. But the Court struck down RFRA as an invasion of the judicial prerogative to define the substance of constitutional rights. Having turned back the historical clock, the free exercise of religion is once again hollow for the politically powerless. Religious liberty is shallow unless the Court provides equal concern and respect to religiously dictated conduct posing no risk to public safety.

1. RELIGION WITHIN THE UNITED STATES:

Like most provisions within the United States Constitution, the free exercise clause contains opaque language susceptible to different interpretations. Efforts to discern just what early Americans intended by the phrase “Congress shall make no law...prohibiting the free exercise” of religion have produced more questions than answers. Neither the history nor the language of the First Amendment conclusively explains under what conditions government violates the free exercise clause. The historical record reveals that the Founders were unable to reach a consensus about the proper relationship between government and religion. At a minimum, the free exercise clause was intended to prevent federal officials from regulating religious beliefs or singling out and interfering with harmless religious conduct. Even the language of the First Amendment suggests a broader prohibition. The unqualified words “free exercise” seem to forbid more than simply interfering with beliefs and discriminating against practices. Whether the free exercise clause was adopted to protect religious conduct from the incidental burdens of generally applicable laws is unclear. Indeed, the history of early America leaves a mixed message about the original intentions of the people who drafted and ratified the free exercise clause.¹

After the American Revolution, a widespread movement to place religion on a voluntary basis emerged within the newly formed states. Between 1776 and 1791

the only state not to adopt a constitutional provision protecting freedom of religion was Connecticut. At the time of the adoption of the First Amendment, the charters of nine states extended *broad protection* to the free exercise of religion (see figure 1). Delaware, Georgia, Massachusetts, New Hampshire, and New Jersey protected the free exercise of religion unless such practices interfered with the liberty or safety of others. The constitutions of North Carolina, Pennsylvania, Vermont, and Virginia placed no restrictions on the free exercise of religion, but implicitly such practices could not interfere with private rights or public safety. Many of the states also provided exemptions from such generally applicable statutes as religious oath requirements, military conscription, and ministerial support. This classical liberal tradition treated religion as a private matter, protecting the voluntary support and exercise of religion except where there was an overriding social interest to protect the liberty and safety of others. In contrast, the constitutions of four states provided a *narrower protection* for the free exercise of religion at the time of the ratification of the First Amendment (see figure 1). Maryland, New York, South Carolina, and Rhode Island protected the free exercise of religion as long as such practices were consistent with morality and safety. Many states also had laws requiring the strict observance of the Sabbath and prohibiting activities seen as undermining Christian moral standards. The charters of six states even (Connecticut, Delaware, Georgia, Maryland, Massachusetts, and New Hampshire) permitted general assessments by taxing people for the support of the church they attended. This classical republican tradition treated religion as a public matter, allowing government regulation of the support and exercise of religion to make citizens virtuous. Rather than revealing a coherent intent, the historical record shows that early Americans viewed religious freedom very differently. Indeed the congressional debates of the First Amendment provide support for the broad and narrow traditions, suggesting that the Founders were unable to agree among themselves, even within the context their own times.

FIGURE 1: THE HISTORICAL EVOLUTION OF RELIGIOUS LIBERTY			
Broad Free	Narrow Free	General	General

Name of State	Exercise Based Protections	Exercise Based Protections	Tax Assessment Provisions	Tax Assessment Prohibitions
Delaware	1776	-----	1776	1792
Georgia	1649	-----	1777	1798
Maryland	-----	1776	1776	1810
Massachusetts	1780	-----	1692	1833
New Hampshire	1776	-----	1693	1819
New Jersey	1776	-----	-----	1776
New York	-----	1777	1664	1777
North Carolina	1776	-----	-----	1776
Pennsylvania	1776	-----	-----	1776
Rhode Island	-----	1663	-----	1776
South Carolina	-----	1790	1778	1790
Vermont	1777	-----	1777	1786
Virginia	1776	-----	1780	1785

Equally important, the generation to adopt the First Amendment was unaware of many of the constitutional issues confronting Americans today. What was once largely a Protestant culture has become a melting pot for a wide array of sectarian denominations who face a more pervasive regulatory state. Even before the arrival of the Pilgrims, Native Americans had been exercising religious beliefs to receive the favors of certain spirits. Waves of immigration from Europe, Asia, Africa, and Latin America later generated a diverse range of religious faiths: Amish, Baptists, Buddhists, Roman Catholics, Episcopalians, Hindus, Jews, Lutherans, Methodists, Muslims, Presbyterians, Quakers, Sikhs, Santeros, and so on. Large populations of Christian Scientists, Jehovah's Witnesses, Mormons, Seventh Day Adventists, and other groups have emerged indigenously. Of course, these sectarian groups share a common interest in the supernatural and a corresponding commitment to standards of right and wrong. But these religious denominations differ widely with regard to their sectarian doctrines and worship practices. Such spiritual diversity has created constant tension within the American system of democratic government. Problems arise because government must reconcile the collective needs of the majority with the individual rights of the minority. This forces the state to determine under what conditions the welfare of the community justifies the regulation of sectarian beliefs and practices. As a

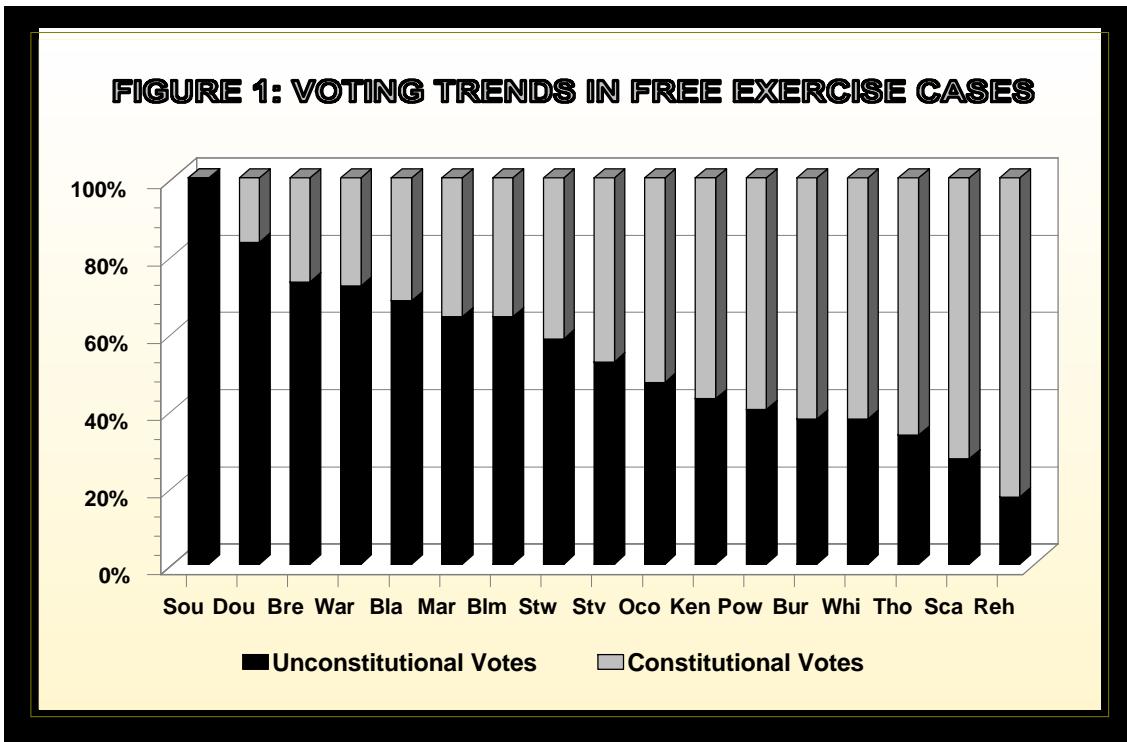
result of the spiritual pluralism in American society, coupled with the ubiquitous growth of the public sector, the danger of government hostility toward religious choices has become more intense during the twentieth century.

2. COMPETING VISIONS OF NEUTRALITY:

Given the power of judicial review, the role as arbiter of the conflicts arising between government and religion has primarily fallen to the Supreme Court. Since the adoption of the First Amendment the Court has considered the merits of about fifty free exercise cases. Throughout these cases the justices have stressed that the Constitution requires the state to maintain a position of neutrality toward sectarian interests.¹ Judicial tests have even been devised to determine when public policy offends the principle of neutrality. Justices are also constrained by legal doctrines discouraging them from ignoring the intent, text, and precedent of constitutional law. But far from neatly disposing of religion cases, these guidelines have proven to be flexible enough to enable the justices to cast their vote to achieve a particular result. No doubt the theory of legal positivism that judges have no discretion, make no law, but simply declare the law is a myth. Policy-making for justices “is not at all a science, but applied politics” because the phrases of the Constitution have an open texture with a certain incompleteness for dictating future applications. As such, the justices cannot be expected to magically set aside their political attitudes when they don the robes of justice. Indeed the general terms of the free exercise clause have remained the same. Yet the meaning attributed to them has slowly changed as the Court has adjusted to cultural forces and the ideological attitudes of new justices. According to law professor Lawrence Friedman, “only the naïve think that the Court merely interprets the Constitution’s words. In fact, the Court makes new law boldly and continually, sometimes with only a cursory nod at the text, or no nod at all.”² Not surprisingly, the justices have interpreted the opaque language of the free exercise clause to perpetuate their own attitudes about the proper role of government within a religiously diverse society.

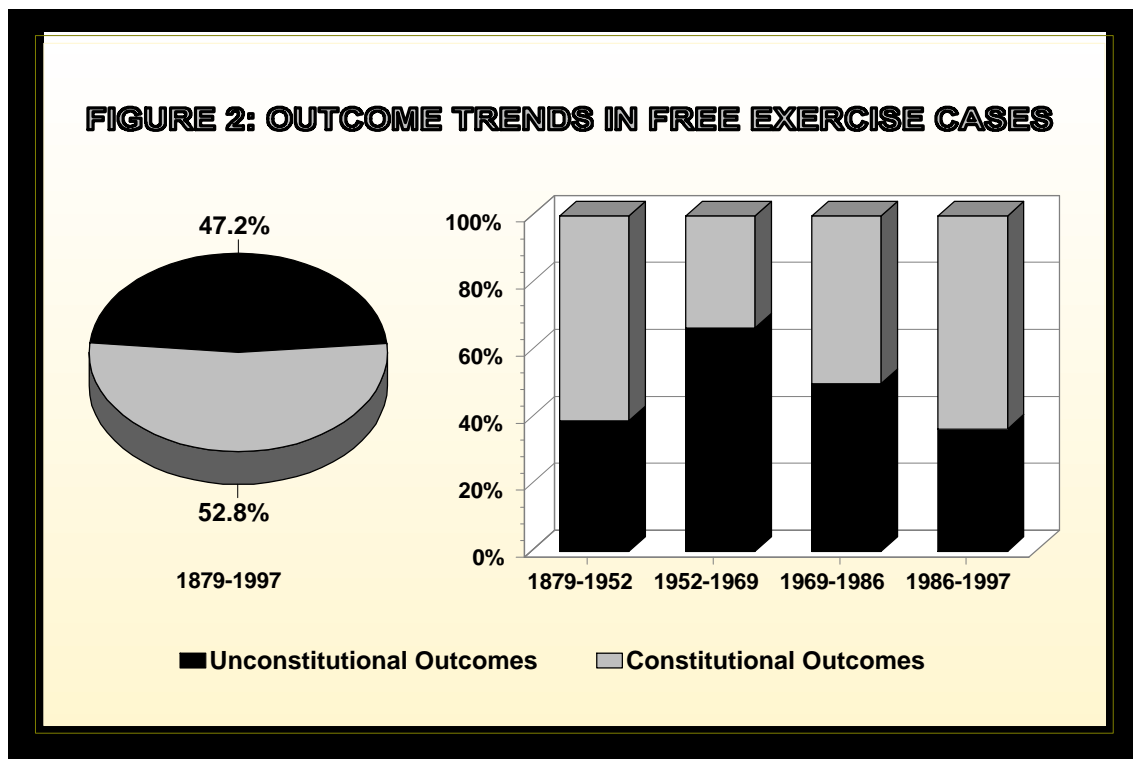
As a political institution, the Supreme Court has adopted competing theories of the free exercise clause and decided cases largely along ideological lines. Some justices have taken more of a *strict or impact neutrality position*, claiming that the

First Amendment forbids the state to place purposeful and incidental burdens on religious practices posing no threat to public safety. Interpreting the free exercise clause as a strict limitation on the regulation of spiritual matters, Justices Black, Warren, Douglas, Marshall, Brennan, Blackmun, and Souter have voted to strike down most forms of state interference with religion (see table 1). Under this view the Court has upheld a narrow range of government burdens when closely tailored to achieving a compelling public safety interest. Other justices have taken a *benign or facial neutrality position*, claiming that the First Amendment only forbids the state to place purposeful (but not incidental) burdens on religious practices posing no threat to public safety. Construing the free exercise clause as a benign limitation on the regulation of spiritual matters, Justices White, Burger, Rehnquist, Kennedy, Scalia, Powell, and Thomas have voted to uphold most forms of state interference with religion (see table 1). Under this view the Court has sustained a broad range of government burdens when remotely tailored to achieving some rational public interest. Another factor complicating case outcomes is that some justices have over time become more or less committed to their initial vision of neutrality and others have taken a more centrist position. The swing voting records of Justices O'Connor and Stevens suggest that they have been more sensitive to factual contexts and the opinions of their colleagues. As a result, the Court has often been divided into two groups with many cases being decided by narrow margins and hair-splitting logic.



Reflecting the makeup of the majority, the Supreme Court has entertained a narrow and broad vision of neutrality leaving little guidance for public policy. The underlying reason for this dichotomy is that the free exercise decisions are largely driven by the ideological attitudes of the justices within the context of the facts of cases.³ Indeed the different theories of neutrality can be placed on an ideological continuum depending upon whether they provide greater protection for individual liberty (liberal attitude) or greater latitude for governmental authority (conservative attitude). Justices embracing benign neutrality interpret the free exercise clause as providing leeway to the state to regulate religious practices under laws of general application. Governmental coercion of sectarian choices or singling out sectarian practices for regulation is required to violate the First Amendment under this more conservative position. Justices favoring strict neutrality construe the free exercise clause as prohibiting the state from interfering purposefully and incidentally with religious practices posing no real threat to public safety. Governmental coercion of sectarian choices or discrimination against sectarian practices is sufficient, but not necessary to violate the First Amendment under this more liberal position. During different periods of the Court the justices have promoted their vision of neutrality

and charted a more liberal or conservative direction (see table 2). From 1879 to 1952, the justices ruled in favor of free exercise claims only 38% of time. Not until the Warren Court period (1952-69) were free exercise claimants supported at an unprecedented rate of 67%. Gradually the preference for religious liberty declined with the Burger Court (1969-86) ruling in favor of free exercise claims 50% of the time and the Rehnquist Court (1986-97) 36% of the time. Moving from the more liberal path of the Warren Court to the more conservative course of the Burger and Rehnquist Courts makes the free exercise guarantee resemble a Rorschach blot, a splatter of constitutional ink left to the ideological eyes of the judicial beholder.



2. A BEWILDERING COURSE OF NEUTRALITY:

Prior to the 1940s, the Supreme Court decided very few cases under the free exercise clause. One reason was that the Bill of Rights was originally construed as applying solely to the national government. After all the First Amendment merely forbids Congress to pass laws “prohibiting the free exercise” of religion. Another reason for the paucity of cases was that the Court was

unwilling to take an activist role in defending religious liberty. Its early ground breaking work reflected a very narrow sense of the principle of neutrality. In *Reynolds v. United States* (1879), the Court held that religious belief but not religious conduct was protected by the free exercise clause. The case arose when George Reynolds was convicted of violating a federal law prohibiting the advocacy or practice of polygamy within the territory of Utah. It was clear from the congressional debate of the anti-polygamy issue that the legislation was aimed squarely at the Mormon faith. Speaking for a unanimous Court, Chief Justice Waite upheld the law on the basis that the free exercise clause was not intended to protect religious practices from valid secular laws. He argued that government “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.”⁴ He held that the statute was within the powers of Congress because monogamous marriage was a practice of Western moral tradition and a foundation of civilized society. The Court rejected outright any constitutional requirement to exempt such harmless religious action out of fear that people could become laws unto themselves. Under the secular regulation rule, the Waite Court sanctioned the power of federal officials to interfere with religious conduct deemed to be socially undesirable. Reynolds transformed a constitutional right to exercise religion into a political privilege, subject to the passions of the majority. Such a doctrine provided a benign right for protecting religious practices. Persons were free to believe, but whether they could put their beliefs into practice depended on the political process.

After the *Reynolds* case, the secular regulation rule became firmly implanted within the landscape of constitutional law. The distinction between protected belief and unprotected actions continued to further the crusade of the federal government to harass Mormons. In *Davis v. Beason* (1890), the Court upheld a statute denying the right to vote or run for public office to any person belonging to an organization favoring polygamy. Samuel Davis was a Mormon who had been disqualified from voting for falsifying his oath renouncing polygamy as a condition to exercising the franchise within the Idaho territory.

Speaking for a unanimous Court, Justice Field saw membership to the Church of Latter Day Saints as no different than practicing polygamy. He stated that no interference can be permitted “with man’s relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his beliefs.” But religious action, continued Justice Field, may not interfere with “the laws of society, designed to secure peace and prosperity and the morals of its people.” Crimes are no less odious because of being cloaked within religious garb. Polygamy is a crime condemned by “civilized and Christian countries” and to call it “a tenet of religion is to offend the common sense of mankind.”⁵ Again the Court refused to construe the free exercise clause as protecting religious choices from generally applicable laws, even though polygamy was integral to the Mormon faith and posed no risk to the public safety. The effect of *Davis* and *Reynolds* was to turn religious freedom into an illusion for unpopular groups, who were left to rely upon legislative grace for statutory exemptions. Such simple accommodations were shortcoming and religious minorities continued to be persecuted for their unconventional practices under the secular regulation rule.

A. The Emergence of the Preferred Position:

Not until the 1940s were the justices ready to accord a heightened degree of protection to religious choices. The dramatic turnabout was due to membership changes and a corresponding shift away from protecting property rights and toward freedom of expression. Starting with *Cantwell v. Connecticut (1940)*, the Hughes Court decided that the free exercise clause was part of the due process guarantee of the Fourteenth Amendment and applied to the states. The case involved Newton Cantwell and his teen-aged sons, who were Jehovah’s Witnesses. They approached people on the streets of a Catholic neighborhood, and after obtaining permission from them, played a record attacking the Catholic Church. They were arrested and convicted for disturbing the peace and failing to get a solicitation license. Speaking for a unanimous Court, Justice Roberts reversed their convictions and rejected the distinction between protected belief and unprotected action. He held that the First Amendment “embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the

second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act,” continued Justice Roberts, “must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.”⁶ Action was no longer wholly unprotected and valid state regulations could not unduly interfere with religious conduct. The Court agreed that Connecticut had a legitimate interest in preventing fraudulent solicitations and breaches of the peace. The first problem rested with giving public officials the discretionary means to decide what is a bona fide religious cause, a kind of state censorship of the free exercise of religion. The second problem was that the actions of the Cantwells never posed a threat to public safety. No doubt religion and politics, concluded Justice Roberts, stir up strong feelings “so that the tenets of one may seem the rankest error to his neighbor.” But the Constitution protects “the right to arouse public anger” through exaggeration and vilification, unless there is “a demonstrably clear and present danger” to public safety. What justified protecting religion for the majority was “that, in spite of the probability of excesses and abuses,” such choices “are, in the long view, essential to enlightened opinion and right conduct on the part of citizens of a democracy.”⁷

With *Cantwell*, the Hughes Court appeared to elevate religious freedom to a preferred status worthy of protection against federal and state policies. Indeed the justices during the 1940s consistently overturned generally applicable laws placing incidental burdens on the practices of religious minorities, especially the Jehovah’s Witnesses. But the same year as *Cantwell*, the Hughes Court seemed to resurrect the benign neutrality of the secular regulation rule. In *Minersville School District v. Gobittis* (1940) the justices upheld a state law requiring school children to salute and pledge allegiance to the American flag. Across the nation around two thousand pupils had been expelled for refusing to participate in such exercises. The law was challenged by Gobittis whose children objected to the practice on the basis of the biblical command against taking up “graven images” (Exodus 20:4-5). Writing for the majority, Justice Frankfurter justified the state interest in promoting a patriotic sense of national unity. “We are dealing,” explained Justice Frankfurter, “with an

interest inferior to none in the hierarchy of legal values. National unity is the basis of national security.”⁸ He invoked the theory of judicial self-restraint to argue that deference must be given to local officials about whether exemptions would create discipline problems and doubts about the significance of the flag salute. The only dissenting voice was Chief Justice Stone. He saw a “defenseless minority” being coerced by the majority. The Constitution, argued Stone, does not indicate “that compulsory expressions of loyalty play any such part in our scheme of government as to override the constitutional protection of freedom of speech and religion.” But the concerns of Justice Stone fell on deaf ears as several states passed similar flag salute and Pledge of Allegiance statutes. The nation was even swept by a wave of persecution and vigilante-style attacks on Jehovah’s Witnesses and their churches.

In time the *Gobittis* decision was viewed with great unease. Newspapers and academic journals began to criticize the decision for its dangerous endorsement of bigotry and intolerance. Some justices came to realize that they had made a terrible mistake. In *West Virginia State Board of Education v. Barnette* (1943), the Hughes Court heard an identical flag salute case and decided to overrule *Gobittis*. Justices Black, Douglas and Murphy (who had voted with the *Gobittis* majority) suddenly changed their minds. Other factors leading to the reversal was the appointment of two new members, Justices Robert Jackson and Wiley Rutledge. In one of the most dramatic turnabouts of the Court, Justice Jackson wrote a majority opinion treating religious liberty as a preferred position. He conceded that First Amendment rights cannot be absolute, but explained that freedom of speech and religion are accorded a very high preference for constitutional protection. Justice Jackson observed that:

To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind... [F]reedoms of speech and of press, of assembly, and of worship may not be infringed on...such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect... If there is any fixed star in our constitutional constellation, it is that no public 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.⁹

The majority rejected the concern with national unity as a justification for the flag salute practice. To suggest that “patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous,” wrote Justice Jackson, “is to make an unflattering estimate of the important appeal of our institutions to free minds.” He also warned that state officials “who begin coercive elimination of dissent soon find themselves exterminating dissenters.” Such “compulsory unification of ideas achieves only the unanimity of the graveyard.”¹⁰ His comments alluded to the deplorable treatment of Jehovah’s Witnesses and the execution of Jews within Nazi Germany. Unlike its predecessor, the Hughes Court interpreted the free speech and free exercise clauses as protecting persons from being forced to salute the flag or to utter a belief against their will. *Barnette and Cantwell* recognized that generally applicable regulations of religious practices simply because the state finds such expression morally right or wrong is not a compelling enough justification under the First Amendment.

B. The Warren Court Period (1952-1969):

By the 1950s, the conflicting lines of free exercise cases provided a judicial paradox for the Supreme Court. It was uncertain how the benign (*Reynolds/Davis*) and strict (*Cantwell/Barnette*) theories of neutrality would influence the outcomes of cases. With the resignation of several justices during the 1950s, the direction of free exercise jurisprudence stood at a constitutional crossroads. In 1954 the Senate confirmed President Eisenhower’s nomination of Earl Warren, a former Governor of California. John Marshall Harlan, Potter Stewart, William Brennan, and Charles Whittaker were also appointed during the Eisenhower years. The justices quickly found themselves under siege by a host of unparalleled challenges to the norms of American society. One of the first cases was *Torcaso v. Watkins* (1961). At issue was a Maryland constitutional provision requiring public officials to declare their belief in the existence of God. Roy Torcaso was appointed to the Maryland office of notary public but was denied his commission because of his refusal to profess a theistic belief. In a unanimous opinion, Justice Black struck down the test oath as an invasion of the freedom of religion protected by the Constitution. He reaffirmed that “the First Amendment embraces two concepts—the freedom to believe and

freedom to act.”¹¹ At a minimum, continued Justice Black, the free exercise clause protects people from being forced to profess a belief or disbelief in religion. It was immaterial whether *Torcaso* was compelled to hold public office. What mattered was that Maryland treated religion as the basis for a burdensome classification. In a footnote, the Court went on to define religion broadly enough to embrace theistic and non-theistic beliefs. It listed “Buddhism, Taoism, Ethical Culture, and Secular Humanism” as among the religions which “do not teach what would generally be considered a belief in the existence of God.”¹² Presumably, the free exercise clause provided the same constitutional protection to these less popular religious faiths.

But the *Torcaso* case was a rather simple one. After all, the state singled out and discriminated against persons because of their lack of religious faith. Plus the State of Maryland purposely burdened religious believers by compelling them to profess their own faith. Still the question remained whether the free exercise clause relieved conscientious objectors from the responsibility of complying with laws of general application. In *Gallagher v. Crown Kasher Market* and *Braunfeld v. Brown (1961)*, the Warren Court seemed to resurrect the secular regulation rule. The cases arose when Jewish merchants complained that Sunday Closing laws discriminated against proprietors, who recognize their Sabbath on another day by requiring them to close down their businesses two days each week. Writing for the majority, Chief Justice Warren ruled that “if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance secular goals,” then the challenged law “is valid despite its indirect burden upon religious observance, unless the State may accomplish its purposes by means which do not impose such a burden.”¹³ He acknowledged that the practical effects of Blue Laws were to make the exercise of religious beliefs more expensive. Brushing aside the free exercise claim, the Chief Justice described how the wording and administration of Sunday closing laws had over time taken on a secular effect of creating a “common day of rest for society.” Justices Douglas, Brennan, and Stewart dissented on the grounds that the state forced these merchants to make a cruel choice between their religious faith and economic survival. The effect of this law, wrote Justice Brennan, “is that no one at one and

the same time may be an Orthodox Jew and compete effectively with his Sunday observing tradesman. This clog upon the exercise of religion...has the same economic effect as a tax levied upon the sale of religious literature.”¹⁴ He invited the Court to adopt a broader standard which required the state to have more than simply a rational interest before regulating innocuous religious practices.

Just two years later, the Warren Court adopted a more stringent standard for reviewing free exercise challenges. In *Sherbert v. Verner* (1963) the justices struck down a South Carolina law denying unemployment benefits to people unwilling to work on their Sabbath. Adell Sherbert was a Seventh Day Adventist who was fired from her job. She was unable to find another job due to her refusal to work on her Sabbath which fell on a Saturday. Justice Brennan wrote the majority opinion. He persuaded Justices Warren, Black, and Clark to change their minds and gained the vote of Arthur Goldberg who had replaced Frankfurter. Justice Brennan reiterated the cruel choice imposed on the religious objector by generally applicable laws. He held that “any incidental burden on the free exercise of religion must be based on a compelling state interest and use the least drastic means.” Under this more rigorous test, the majority held that the denial of unemployment benefits had a significant coercive effect on religious practices without promoting a compelling government end.¹⁵ Justice White, who was joined by Justice Harlan, wrote a strong dissenting opinion questioning the disregard for the *Braunfeld* decision and the “implications for the future” of endless religious exemptions. He contended that the burdens on Sherbert were too “indirect, remote, and insubstantial” to permit an exemption for such conduct stemming from religious beliefs. But for the majority, the state policy forced Sherbert to choose between following her religion and forfeiting benefits or abandoning her faith to gain employment. The concern with fraudulent claims fell short of being an overriding interest to burden religious freedom, particularly since there were less restrictive means than outright denial of benefits. With the *Sherbert* test, the Warren Court was able to place a heavy thumb on the state to demonstrate a compelling interest of the highest order before interfering with religious choices.

C. The Burger Court Period (1969-1986):

After the 1969 retirement of Chief Justice Warren, the Nixon Administration was anxious to return the Supreme Court to a posture of showing greater deference to government authority. President Nixon had criticized several of the justices for being “judicial activists” who were too protective of individual rights. Within three years of taking office, President Nixon was able to appoint a chief justice as well as three associate justices. Warren Burger became the next chief justice and Harry Blackmun, Lewis Powell, and William Rehnquist replaced Justices Fortas, Black, and Harlan. During the 1970s the Burger Court appeared committed to a rigorous application of the compelling interest and least restrictive means test. In *Welsh v. United States* (1970), the Court took a bold step and interpreted the conscientious objector exemption of the Selective Service Act to include persons who deny that religion is connected to their opposition to military service. The dissenters (White, Burger, and Stewart) insisted that the statute should be construed to permit draft exemptions only for persons who object to war for religious reasons.¹⁶ One year later, the Burger Court qualified *Welsh* a bit by holding that the impact of the law on objectors to particular wars was justified by an overriding state interest “in maintaining a fair system and procuring the manpower necessary for military reasons.”¹⁷ The Burger Court also carved out a narrow right for the Amish to be exempted from compulsory public school attendance beyond the eighth grade. In *Wisconsin v. Yoder* (1972), the Chief Justice stressed that such an accommodation was permissible because the education of the Amish teenager continued at home with teaching practical skills and moral values.¹⁸ The Court even extended free exercise protection to Buddhist prisoners (*Cruz*) and car owners who objected to a license plate bearing the motto “Live Free or Die” (*Wooley*).¹⁹ Overall, the weight of strict neutrality precedent and the absence of a clear conservative majority kept the Burger Court from being able to deviate from the *Sherbert* line of cases.

During the 1980s, however, the Burger Court began to gradually shift away from *Sherbert* and toward the more conservative theory of benign neutrality. In *Heffron v. International Society of Krishna Consciousness* (1981), the Court upheld a state regulation requiring sects to solicit funds, distribute literature, and conduct

sales from assigned fairground booths. Writing for the majority, Justice White saw the rule as “a general and even-handed” government attempt to regulate the time, place, and manner of speech.²⁰ The dissenters (Brennan, Marshall, Stevens, and Blackmun) upheld the ban against the sales of literature and raising of funds but thought that the prohibition against pamphlet distribution was intrusive. Five years later, the Burger Court was much more complacent toward government regulation of religious practices. In *Bowen v. Roy* (1986), the justices refused to extend free exercise protection to religious objections raised against the use of social security numbers. Stephen Roy was a Native American who refused to comply with federal rules requiring the recipients of AFDC and food stamps to provide the government with the social security numbers of their children. The decision was unanimous but underlying the opinions was a percolating disagreement about the appropriate neutrality standard. In a plurality opinion joined by Justices Rehnquist and Powell, the Chief Justice argued that claims brought under laws of general application are subject to review under a rational basis test as opposed to the strict scrutiny test of *Sherbert*. “Absent proof of an intent to discriminate,” explained the plurality, “the government meets its burden when it demonstrates that a challenged requirement for government benefits, neutral and uniform within its application, is a reasonable means of promoting a legitimate end.”²¹ Applying the test to *Roy*, the Chief Justice concluded that the federal programs were facially neutral and the social security number requirement served a legitimate government purpose of preventing fraud.

In another 1986 case, the Burger Court continued to pull back the reins of commitment to the *Sherbert* standard of strict neutrality. *Goldman v. Weinberger* (1986) arose because a commissioned officer of the United States Air Force was prevented from wearing his Jewish yarmulke. A bare majority (Rehnquist, White, Burger, Powell, and Stevens) elected not to apply the compelling interest test and upheld the military dress regulation. The majority opinion of Justice Rehnquist simply deferred to “the military interests of discipline served by the uniform dress code.”²² In *Goldman* and *Roy*, the dissenters (O’Connor, Brennan, Blackmun, and Marshall) were troubled by the use of the rational basis standard and the credulous deference to government which relegated a constitutional right to the barest level

of minimal scrutiny. The concerns of the dissent seemed to be justified. *Goldman*, *Heffron*, and *Roy* signaled a disturbing trend of less protection for religious choices

coming into conflict with laws of general application. Table Three presents a scale of the voting patterns for fourteen free exercise cases decided between 1969 and 1986. No doubt the Burger Court appeared to experience a high level of consensus

with only four of the sixteen issues being decided by close votes. But at a deeper level, a widening gap of jurisprudence was developing among the justices with two coalitions tending to compete for the case outcomes. The strict neutrality bloc of Justices Brennan, Marshall, and Blackmun voted together at a rate of 100% and combined to cast twenty-seven unconstitutional votes and nineteen constitutional ones. The benign neutrality bloc of Justices Rehnquist, Burger, White, and Powell was much less cohesive but combined to cast thirty-seven constitutional votes and only nineteen unconstitutional ones. Only Justices Stewart, Stevens, and O'Connor sided with the majority in nearly every case, providing the swing votes on the close issues. Overall the Burger Court supported free exercise claims 71% of the time during the 1970s, but only 33% of the time during the 1980s. Cases like *Heffron*, *Roy*, and *Goldman* signaled a judicial revolution of free exercise proportions.

<p align="center">TABLE THREE</p> <p align="center">SCALE OF FREE EXERCISE</p> <p align="center">CLAUSE CASES FROM</p> <p align="center">1969 TO 1986</p>	D	B	M	B	B	O	S	H	S	P	W	B	R	V	E
	O	R	A	L	L	C	T	A	T	O	H	U	E	O	R
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	G	N	S	C	C	N	V	L	W	E	T	G	N	E	O
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	S	N	L	U		R	S		T				I		
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													T	U/C	
McDaniel v. Patty (78)	-	U	U	*	-	-	U	-	U	U	U	U	U	U	8/0 0
Wisconsin v. Yoder (72)	U	U	U	U	-	-	-	-	U	*	U	U	*		7/0 0
Widmar v. Vincent (81)	-	U	U	U	-	U	U	-	-	U	c	U	U		8/1 1
Thomas v. Review Board (81)	-	U	U	U	-	-	U	-	U	U	U	U	C		8/1 0
Cruz v. Beto (72)	U	U	U	U	-	-	-	-	U	U	U	U	C		8/1 0
Wooley v. Maynard (77)	-	U	U	U	-	-	U	-	U	U	U	U	C		8/1 1
Bowen v. Roy A (86)	-	U	U	U	-	U	?	-	-	C	u	C	C		5/3 1

Welsh v. United States (70)	U U U * U - - U	C - C C -	5/3	0											
Heffron v. ISKCI A (81)	- U U U - - U	- C C C C C	4/5	0											
Goldman v. Weinberger (86)	- U U U - U	C - - C C C C	4/5	0											
Gillette v. United States (71)	U C C C C - - C	C - C C -	1/8	0											
Johnson v. Robinson (74)	U C C C - - - -	C C C C C	1/8	0											
Bowen v. Roy B (86)	- C C C - C C - -	C C C C	0/9	0											
B.J.U. v. United States (83)	- C C C - C C - -	C C C ?	0/8	0											
Heffron v. ISKCI B (81)	- C C C - - C -	C C C C C	0/9	0											
United States v. Lee (82)	- C C C - C C - -	C C C C	0/9	0											
Unconstitutional Votes = 49%	5	10	10	7	1	3	5	1	5	5	6	6	2	67	1
Constitutional Votes = 51%	0	6	6	7	1	3	5	1	5	8	10	10	9	70	2
U: vote for right of free exercise C: vote for governmental policy *: the nonparticipating members ?: no opinion on the case merits C or U: wrote majority decision c or u: inconsistent or error vote	REPRODUCIBILITY		SCALABILITY												
	3		3												
	CR = 1 - $\frac{3}{43}$ = .93		CS = 1 - $\frac{3}{21}$ = .86												

D. The Rehnquist Court Period (1986-1998):

After the retirement of Chief Justice Burger, the Reagan administration was eager to return the Supreme Court to a more conservative agenda. The election of Ronald Reagan to the White House had been supported by a coalition of Christian groups, who hoped to reorder the role of religion within American society. Reagan had shared the political platform with Reverend Jerry Falwell and campaigned as a born-again Christian. He supported government accommodation of fundamentalist Christian values. Reagan believed “it was an incontrovertible fact that all complex and horrendous questions confronting us at home and worldwide have their answer in that single book—the Holy Bible.”²³ He attacked the Supreme Court for creating a climate hostile to mainstream sectarian groups. Its rulings were characterized as a source of transition from an era where common religious values dominated public life to one where government was confined to a secular realm. Reagan insisted that the generation to adopt the First Amendment expected government to promote the values of the Christian majority. He pledged to pack the federal courts with judges who would interpret the Constitution according to his theory of original intent. It was no surprise when President Reagan elevated Rehnquist from

associate to chief justice. He filled the associate justice seat with Antonin Scalia, who was known for his conservatism on the Court of Appeals in the District of Columbia. Reagan also was able to appoint Anthony Kennedy to fill the vacancy left by the retirement of Justice Powell. Equally important, the Reagan and Bush administrations capitalized on the influence of the Solicitor General whose amicus briefs the justices read with extra care. In a series of cases, the United States Department of Justice filed a brief calling for the modification or elimination of the *Sherbert* standard. Eventually the changes in judicial membership and the efforts of the Solicitor General paid off.

During the first term, the Rehnquist Court showed a narrow commitment to the strict standard of neutrality. Eight justices voted to reaffirm the application of *Sherbert* to another unemployment compensation case. *Hobbie v. Unemployment Appeals Commission (1987)* arose when Florida denied unemployment benefits to Paula Hobbie. She was fired from her job because she refused to continue working on Saturday following her conversion to Seventh-Day Adventism. Speaking for the Court, Justice Brennan held that the Constitution protects the free exercise rights of employees who adopt a new or convert to another religion after being hired. He explained that “where the state conditions receipt of an important benefit upon the conduct proscribed by a religious faith or denies such a benefit because of conduct mandated by a religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden on religion exists.” Such infringements on the free exercise of religion, continued Justice Brennan, “must be subjected to strict scrutiny” and “can be justified only by proof from the state of a compelling interest.”²⁴ He scoffed at the invitation from Solicitor General Charles Fried to substitute the *Sherbert* test with a rational basis one whenever a burden on religion stems from a facially neutral law. He argued that the appropriate standard was *Sherbert* rather than *Roy* because only a plurality vote supported the use of the reasonable basis test to the social security number regulation. Justice Brennan also described *Roy* as an anomaly with little application to the free exercise clause. The lone dissenter was the Chief Justice who called for a return to *Braunfeld*: “Where

a state has enacted a general statute, the purpose and effect of which is to advance its secular goals, the Free Exercise Clause does not...require the state to conform that statute to the dictates of any religious conscience.”²⁵ His plea for adopting a more deferential standard was taken seriously. Indeed the prediction of the Chief Justice turned out to be correct—*Hobbie* was exceedingly narrow and a judicial anomaly.

In *O’Lone v. Shabazz* (1987), the Rehnquist Court began the gradual process of dismantling the compelling interest and least restrictive means test. The incident involved two Islamic inmates who asked to be exempted from a New Jersey prison regulation which prevented them from attending Jumu’ah, a weekly congregational Muslim service. The prison refused to grant them any dispensation even though the policy allowed inmates who were classified as greater security risks to attend. In a five-to-four opinion, the Chief Justice simply concluded that the prison regulations

served an important penological end of controlling inmate movement. The Court wrote that “[w]e take this opportunity to reaffirm our refusal,” even where claims are made under the Constitution, “to substitute our judgment on difficult matters of administration, for the determinations of officials charged with the formidable task of running a prison.”²⁶ The dissenters (Brennan, Marshall, Stevens, and Blackmun) insisted that prison policies burdening the religious practices of inmates must still be subject to meaningful judicial review. Justice Brennan argued that the reliance of the rational basis standard is an inadequate test to evaluate alleged violations of even the rights of inmates. The dissent concluded that “to deny the opportunity to affirm membership in a spiritual community, however, may extinguish an inmate’s last source of hope for dignity and redemption. Such a denial requires much more justification than mere assertion that any other course of action is infeasible.”²⁷

The next year the Rehnquist Court figured out another way to get around the compelling interest and least restrictive means standards. *Lyng v. Indian Cemetery Protective Association* (1988) involved the efforts of Native Americans to stop the construction of a forest service road and the cutting of timber within a government

owned wilderness area. The land had historically been used by Yurok, Karok, and Tolowa tribes to perform rituals that depend on privacy and an undisturbed natural setting. Five justices (O'Connor, Rehnquist, White, Scalia, and Stevens) held that strict scrutiny no longer applied to situations where the state frustrates rather than coerces religious choices. Justice O'Connor explained that the free exercise clause condemns only the government actions that would "coerce individuals into acting contrary to their religious beliefs" but does not disallow actions which merely have an "incidental effect on certain religious practices."²⁸ She accepted the devastating effect that the logging and road construction would have on traditional religious rituals of Native Americans. For the majority, the free exercise clause simply did not require government to "satisfy every citizen's religious needs and desires." The dissent of Justice Brennan, joined by Justices Blackmun and Marshall, was critical of the majority for substituting the *Sherbert* test with a noncoercion one. He argued that "Native Americans will not derive solace from the knowledge that although the practice of their religion will become 'more difficult' as a result of the Forest Service, they remain free to maintain their religious beliefs."²⁹ The effect of *Lyng* and *Shabazz* was to set the judicial stage for the fall of religious liberty as a preferred position and the eventual resurrection of the secular regulation rule.

In *Oregon Employment Division v. Smith* (1990), the Supreme Court simply interpreted the free exercise clause as no longer protecting religious practices from generally applicable laws. By a six-to-three vote the justices upheld a criminal law prohibiting the use of peyote and a state policy denying unemployment benefits to members of the Native American Church. They had been dismissed from their jobs for ingesting this mild hallucinogen during a religious ceremony. Once again, the Solicitor General asked the justices to jettison the *Sherbert* test and focus instead on government coercion. Writing for the majority, Justice Scalia held that the state may regulate religious practices as long as the burdens are the secondary effect of a facially neutral law. He argued that the unemployment compensation cases were distinguishable since the Sabbatarian practices of the employees were not against a

criminal statute: “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.”³⁰ He also contended that to “make an individual’s obligation to obey a statute contingent on the law’s coincidence with his religious belief, except where the government’s interest is compelling, contradicts tradition and common sense.” The legislature, continued Justice Scalia, is free to make accommodations for religiously motivated conduct, “but the unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or where judges weigh the social importance of all laws against the centrality of all religious beliefs.”³¹ The dissenting opinion of Justice Blackmun, who was joined by Justices Brennan and Marshall, lamented about the abandonment of a settled and inviolate principle which was designed to protect the exercise of all religions. *Smith* represented the death of a strict principle of neutrality providing protection to religious choices coming into conflict with generally applicable laws.

Three years later, the Rehnquist Court reaffirmed the benign neutrality logic of the *Smith* decision. *Church of Lukumi v. Hialeah* (1993) involved the practice of animal sacrifice associated with the Santeria faith, a fusion of traditional African religion with Roman Catholicism. When a Santerian group announced the building of a church and school, the city of Hialeah held an emergency public meeting and passed ordinances regulating animal sacrifice. Unanimously the justices voted to strike down the law as a purposeful attempt to single out and prohibit a particular religious practice. But the unanimity of the decision was deceptive. The majority opinion was written by Justice Kennedy who was joined by the Chief Justice and Justices White, Scalia, Stevens, and newcomer Clarence Thomas. He reaffirmed the theory of *Smith*: “The free exercise cases establish the general proposition that a law that is neutral, of general applicability need not be justified by a compelling state interest even when the law has an incidental effect of burdening a particular religious practice.”³² The reasoning of the majority was vigorously challenged by Justices O’Connor, Blackmun, and newly appointed

David Souter. They advocated a return to the strict scrutiny standard of *Sherbert* and the principle that religious practices posing no clear harm to public safety deserve to be exempted from laws of general application. The dissenters recognized that few laws even discriminate against religious practices; rather they impose severe kinds of incidental burdens on religious choices. Plus the freedom to believe without the corollary freedom to act out beliefs is like one hand clapping—belief without practice is a hollow right.

In a recent case, the Rehnquist Court even placed some qualifications on the judicial invitation for legislatures to provide exemptions to generally applicable statutes. The case arose when Congress and President Clinton passed the Religious Freedom Restoration Act of 1993. It was supposed to restore the strict scrutiny test of *Sherbert* where federal or state laws regulate religiously inspired conduct, even under so-called laws of general application. Section 3 of the RFRA provided “that government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person is: (1) in the furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering such an interest.” The Act was justified by Congress as a remedial measure to enforce the free exercise clause of the First Amendment. But the Rehnquist right would have none of this. In *City of Borne v. Flores* (1997), the Court struck down RFRA as an invasion of the judicial prerogative to interpret the substance of the provisions of the Constitution. Speaking for the majority, Justice Kennedy held that RFRA was an attempt to scale up and kick back the power of judicial review by “altering the meaning of the free exercise clause.”³³ He reasoned that Congress had no authority to define the substantive meaning of the First Amendment. The *Smith* decision, not RFRA, was the controlling standard of review for free exercise claims. In a stroke of judicial activism, the majority seemed quite willing to interfere with the political process to prevent sweeping legislative accommodations of religious practices.

So far the Rehnquist Court of the 1990s has become increasingly permissive about government interference with religious choices. Table Four presents a scale of the voting patterns for the eleven free exercise cases decided between 1986 and 1997. A majority of the justices have followed the conservative initiatives of the Burger Court and accorded legitimacy to efforts to regulate religion under laws of general application. *Shabazz, Lyng, Smith, and Hialeah* underscore a judicial battle over the appropriate standard to evaluate free exercise claims. The strict neutrality bloc of Justices Brennan, Marshall, Blackmun, and now Souter have defended the continued use of the *Sherbert* test to protect religious activities from incidental and purposeful regulation. They have voted together at a rate of 100% and combined to cast twenty-one unconstitutional votes and eight constitutional ones. In contrast the benign neutrality bloc of Justices Rehnquist, Scalia, White, Thomas, and Kennedy has called for exceptions to and the elimination of *Sherbert* to allow government more discretion to enforce secular laws. They have voted together 83% of the time and combined to cast thirty-one constitutional votes and twelve unconstitutional ones. Justices Stevens and O'Connor stood between the two coalitions, but joined the conservative bloc at a rate of about 73%. Overall the conservative thirsts of the Rehnquist right have been quenched by the abandonment of the *Sherbert* standards and the corresponding diminished support for free exercise claims (36%). Under a benign theory of neutrality, the Supreme Court has turned back the constitutional clock and resurrected the secular regulation logic of *Reynolds, Davis, and Gobittis*.

<p>TABLE FOUR</p> <p>SCALE OF FREE EXERCISE</p> <p>CLAUSE CASES FROM</p> <p>1986 TO 1997</p>	<p>S B M B S P O K T W S R V E</p> <p>O R A L T O C E H H C E O R</p> <p>U E R A E W O N O I A H T R</p> <p>T N S C V E N N M T L N E O</p> <p>E N H K E L N E A E I Q S R</p> <p>R A A M N L O D S A U S</p> <p>N L U S R Y I</p> <p>L N S</p> <p>T U/C</p>
<p>CLBA v. City of Hialeah (93)</p>	<p>U - U - U - U U U U U U 9/0 0</p>

Frazee v. Illinois DES (89)	- U U U U - U U - U U U 9/0 0				
Hobbie v. Florida UACC (87)	- U U U U U U - - U U C 8/1 0				
Lee v. Krishna Society (93)	U - - U U - U U C C C C 5/4 0				
Krishna Society v. Lee (93)	U - - U U - U C C C C C 4/5 0				
O’Lone v. Shabazz Estate (87)	- U U U U C C - - C C C 4/5 0				
Lyng v. NW Indian CPA (88)	- U U U C - C * - C C C 3/5 0				
Oregon ED-DHR v. Smith (90)	- U U U C - C C - C C C 3/6 0				
Hernandez v. IR Comm. (89)	- * C C C - C * - C C C 0/7 0				
Swaggart v. Cal. Tax Bd. (90)	- C C C C - C C - C C C 0/9 0				
Davis v. United States (90)	- C C C C - C C - C C C 0/9 0				
Unconstitutional Votes = 47%	$\frac{3}{0}$ $\frac{5}{2}$ $\frac{6}{3}$ $\frac{7}{3}$ $\frac{6}{5}$ $\frac{1}{1}$ $\frac{5}{6}$ $\frac{3}{4}$ $\frac{1}{2}$ $\frac{3}{8}$ $\frac{3}{8}$ $\frac{2}{9}$ $\frac{45}{51}$ $\frac{0}{0}$				
Constitutional Votes = 53%					
U: vote for right of free exercise C: vote for governmental policy *: the nonparticipating members ?: no opinion on the case merits C or U: wrote majority decision c or u: inconsistent or error vote	<table border="1"> <thead> <tr> <th>REPRODUCIBILITY</th> <th>SCALABILITY</th> </tr> </thead> <tbody> <tr> <td> $CR = 1 - \frac{0}{44} = 1.00$ </td> <td> $CS = 1 - \frac{0}{19} = 1.00$ </td> </tr> </tbody> </table>	REPRODUCIBILITY	SCALABILITY	$CR = 1 - \frac{0}{44} = 1.00$	$CS = 1 - \frac{0}{19} = 1.00$
REPRODUCIBILITY	SCALABILITY				
$CR = 1 - \frac{0}{44} = 1.00$	$CS = 1 - \frac{0}{19} = 1.00$				

During the past two decades, the Supreme Court has become complacent toward government efforts to accommodate the religious needs of the majority and regulate the religious choices of the minority. In the 1980s, a conservative group of justices began to chip away at the strict neutrality line of cases. They either refused to find a significant burden on the exercise of religion (*Lyng/Bowen*) or carved out exceptions to the compelling interest test (*O’Lone/Goldman*). In *Smith (1990)*, the Rehnquist Court turned the preferred position for religious freedom into a political privilege subject to the passions of the majority. Religion cannot be singled out for discriminatory treatment, but religious obligations are subject to the full panoply of facially neutral regulations. The effect of *Smith* was to resurrect *Reynolds*. People are free to believe but not free to practice their sectarian beliefs whenever there is a conflicting law of general application. The right to put religious faith into practice is rather empty for minorities who lack the political size, sophistication, and clout to influence legislative outcomes. Such a blind judicial fidelity to the paradigm of majority rule ignores how Mormons, Jehovah’s Witnesses, Native

Americans, and others have been treated for their religious faith. On its face the secular regulation rule is neutral; but its adverse impact on minorities threatens their opportunity to practice their religion. More than ever before, the Christian majority is positioned to lobby the legislative and executive branches to maintain their status, even at the expense of robbing unpopular groups of their diversity, autonomy, and dignity.

In the final analysis, the Supreme Court is the institution best suited to serve as the guardian of constitutional freedoms. It provides a more neutral forum to take religious liberty seriously since the justices are relatively insulated from the temper of political majorities. Of course, the Court is not the Constitution. As Louis Fisher explains, the Court is merely an equal voice in the constitutional dialogue between the three branches of government and the citizens.³⁴ The Charter expressly grants Congress and the President the power to enact and enforce laws for the well-being of society. The majority is expected to rule on most matters. But the power to rule must show equal concern and respect to individual choices about the good life. The Constitution requires a heavy weight to be assigned to a person's right to do what the majority perceives to be a harmless wrong. The hydraulic pressure to skew the scales of democracy towards paternalism can only be guarded against by justices who are willing to rigorously protect religious freedom. To allow otherwise would permit political majorities to be the judge of their own cause. Decisions about how constitutional rights serve to restrict majority rule are not issues which in fairness can be left to the political branches. It is the duty of the Court to scrutinize whether government burdens on the exercise of sincerely-held religious tenets are based on furthering a demonstrable compelling interest which cannot be achieved by a less restrictive means. Under such a strict mode of analysis, the state may only interfere with religious practices that present an actual risk of harm to an overriding interest of the highest order, such as public safety or the rights of others. Strict scrutiny is necessary to fulfill the constitutional promise to treat the exercise of religion as a fundamental right. It accords the politically powerless the same opportunity to put their faith into practice as enjoyed by the politically powerful. The time has come for the

Supreme Court to return religious liberty to its rightful place—a cherished and fixed star within the majestic constellation of American constitutional values.

3. ENDNOTE BIBLIOGRAPHY

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