LIBERTY

Without SHELTER

Life in Post-RFRA America

PAGE 6

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LIBERTY

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The Sound and the Fury

I was amazed to read in *Liberty* (March/April 1998, p. 16) that Judge Moore is "promoting religion" by permitting the display of the Ten Commandments and prayer in his courtroom. If this logic follows, then every vestige of our Christian historical nature is in violation of the First Amendment, which does not say that at all.

The Prayer Room in our nation's capitol displays a Bible and the stained-glass window of George Washington praying at Valley Forge. This is permission of religion without promotion of religion, which is what the First Amendment allows and prohibits.

Recently I was excoriated in the printed press and by a few members of the House of Delegates in the General Assembly of Maryland for my invocation before the House, which they claimed was "sectarian and political." But no one specifically told me not to pray in the name of Jesus, which is the way the majority of Christian denominations pray.

The argument that ensued in my presence in the antechamber of the House was that praying in the name of Jesus was promoting the Christian religion and was offensive to non-Christians. I tried to explain that permitting was not promoting, and that their taking offense was not religious toleration but religious bigotry.

The issue is that government cannot dictate to the religious how they must pray and what they must say, whether it is politically correct or not. Lawyers and judges looking for loopholes notwithstanding, my major is in the English language, and I read the First Amendment as not promoting, but permitting religious freedom, which restrains government, not religion. Government cannot advocate nor be adverse to religion. To deny permission is to promote adversity. In an age when we are forced to tolerate so many things offensive to Christians, what justifies religious intolerance?
ROBERT T. WOODWORTH, Pastor
Baltimore, Maryland

In respect to the Roy S. Moore case, and whether the Ten Commandments are a fit code for civil government, the question is not "Are they fit?" but "Which ones?"

Bible scholars know that the Ten Commandment law has two parts: the first four, which define the believer's duty to God; and the last six, which define moral behavior between members of society. The last six commandments are consistent with natural law; one could say they are perhaps the best summary of natural law. (I fear, however, that some have been so far influenced by postmodern thought that they "can't see how.")

So, in respect to the Moore case, if he desired to post the second table of the Decalogue in his courtroom, he would have my full support. There is nothing expressly religious about it (the mention of God in the fifth commandment is incidental to its reasonableness). But to post the first table, as a guide or inspiration in matters of law, would be quite out of order.
MICHAEL PREWITT
Rapidan, Virginia

I am alternatively outraged and inspired by the articles and ideas expressed in *Liberty*. Your Obiter column "Neutral Values," however, was excellent.

One tie-in that came to mind as I read the article is the foundational statement that lies at the heart of much postmodern philosophy: "There is no such thing as absolute truth." Much like the phrase "neutral values," this statement is also self-disproving. If the statement is true, then it refutes the substantive content of the statement. If it is false, then there must be such a thing as "absolute truth."

"Neutral Values" is simply another in a long line of clever attempts to cloak anti-religious intolerance in the sheep's clothing of benign rhetoric.

This discussion reminds me of an excellent passage from the book of Romans: "The wrath of God is being revealed from heaven against all the godlessness and wickedness of men who suppress the truth by their wickedness. . . . Although they claimed to be wise, they became fools" (Romans 1:18 and 22, NIV).
TIMOTHY M. GIBBONS
Chattanooga, Tennessee

This is to tell you how much I sincerely enjoy receiving and reading your magazine.

I wish to commend you on your excellent magazine. As was quoted recently in your magazine, it will benefit the world when, "Behold, how good and how pleasant it is for brethren to dwell together in unity!" (Psalm 133:1).
DEAN RAY
Live Oak, Florida

I have read your September/October 1998 issue. I was troubled by the stinging letter from Rev. Morgan of Blue Ridge, Georgia. Rev. Morgan ended his letter with a meanspirited

COVER ILLUSTRATION BY RALPH BUTLER

attack on the religious tradition of the Adventist Church.

I started wondering what Rev. Morgan had in mind when he mentioned "historic Christianity" in his letter. Rev. Morgan's letter simply noted he served at "St. Luke's Church, Blue Ridge, Georgia." My curiosity got the better of me, and I performed a short Internet search to learn Rev. Morgan serves in an Episcopal church. That, in turn, made me wonder if Rev. Morgan's longing for "historical Christianity" would include the desire for a return to the state persecuting Baptists and other "dissenting congregations" on behalf of an established Episcopal church, as happened in Colonial America.

While most Baptists seem to have forgotten our past, some of us have not. I take no small comfort in the belief most Episcopalians would not approve of at least the tone of Rev. Morgan's epistle. You and I do not share the same religious traditions. I do, however, very much support your mission as guard against such "historical Christianity."
F. THOMAS CURRY
Arkadelphia, Arkansas

As a longtime reader of *Liberty* who normally finds your articles and opinions both balanced and sensible, I must take exception to the comments on page 5 of the March/April issue entitled "Saved From Faith."

I cannot but wonder what your response would have been had the roles been reversed. Assume a custodial Christian mother was raising her children in her faith, while the Jewish father exposed those children to his faith, which taught them that Jesus was not the Messiah, that the Messiah had not yet come, and thus that Christianity was false. What would your reaction be? Would you have criticized a Supreme Court then?

In either case we must recognize that the custodial parent has the primary responsibility of raising the children, which includes their religious education. If the non-custodial parent interferes with that responsibility, it can only be harmful to the children. The Massachusetts Supreme Court, who ruled unanimously, was correct in their finding, and *Liberty* erred in their critical comment that "... there are some troubling implications in a decision. . . ." I find your reaction troubling, and hope you will rethink your position.
ROBERT L. DREYFUS
Greenville, South Carolina

ECT Debate

I am very surprised at the naive letter by Joseph G. Scoville ("Anti-Catholicism," July/August) who writes, "I was therefore puzzled at your *(Liberty)* strong condemnation of recent efforts by Catholic and Protestant Christians at healing centuries of division, principally the documents *Evangelicals and Catholics Together* and *The Gift of Salvation*.... As far as I can tell, neither of these is a threat to anyone's religious liberty."

Is Mr. Scoville not aware that the ECT document avoids the serious theological differences that divide Evangelicals and Catholics, particularly the issue of "justification"? The Catholic view on justification is an ongoing process of God rewarding merit through the sacramental system.

Justification is a process through infant baptism, good works, the Mass, and adhering to the Catholic Church's teachings as the way to salvation. In the Evangelical view, justification is the perfect righteousness and merit of Christ imputed to the believer. It is the inherent righteousness of Christ, not the inherent righteousness of the believer that is the foundation of the Evangelical believer's justification.

This ECT document is an affront to religious liberty in that it condemns proselytizing when it states, "... it is neither theologically legitimate nor a prudent use of resources for one Christian community to proselytize among adherents of another Christian community." These Catholics and Protestant signers of the document are dishonest in not admitting that our theological differences are very sharp. How sad that Evangelicals like Colson are "ashamed of the Gospel of Christ" (Rom 1:16) and are unwilling to acknowledge that Roman Catholicism preaches "another Gospel" (Gal. 1:6-9) which is not that of our Lord and Saviour Jesus Christ.

Jefferson wrote, "that all men shall be free to profess, and by argument to maintain their opinions in matters of religion." Mr. Scoville ought to realize that this view of Jefferson is also that of the U.S. Constitution's First Amendment whereas the ECT document condemns religious freedom. No wonder that *Liberty* is most correct in its strong condemnation of Protestants and Catholics who promote the ECT document and not the foolish accusation which myopic Mr. Scoville makes when he writes, "Your readers can only conclude that you have digressed from your core message to express a rather virulent anti-Catholicism."
JOHN CLUBINE
Toronto, Ontario

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DECLARATION OF PRINCIPLES

The God-given right of religious liberty is best exercised when church and state are separate.

Government is God's agency to protect individual rights and to conduct civil affairs; in exercising these responsibilities, officials are entitled to respect and cooperation.

Religious liberty entails freedom of conscience: to worship or not to worship; to profess, practice and promulgate religious beliefs or to change them. In exercising these rights, however, one must respect the equivalent rights of all others.

Attempts to unite church and state are opposed to the interests of each, subversive of human rights and potentially persecuting in character; to oppose union, lawfully and honorably, is not only the citizen's duty but the essence of the Golden Rule–to treat others as one wishes to be treated.

HIGH-TECH HATE: Though the Free Speech clause of the First Amendment was written to protect political discourse only, it has been expanded to cover just about everything, such as flag desecration, cybersex, and racist rhetoric (child pornography isn't protected, despite the ACLU's best efforts). However much most Americans appreciate this protection, what's troubling is the rise in electronic hate speech on the Internet. According to the Anti-Defamation League, hate websites have more than doubled from 1996 to 1997, a trend that has raised cries for censorship.

Good luck. If Bill Clinton (of all people) couldn't even get the Communications Decency Act—which would have limited the crudest pornography in cyberspace—to pass constitutional muster, fat chance of anyone pulling the plug on the Aryan Nation, the Ku Klux Klan, StormFront, and other Neanderthal ideologues who have crawled far enough out of their caves to at least be able to build a website. The other problem is, Who determines what qualifies as "hate speech"? As columnist Charles Levendosky wrote: "Often one man's hate speech is another man's political statement. And political commentary has—and should have—the highest First Amendment protection."

This question isn't just speculative rhetoric. Recently, a company that makes a software filter called Cyber Patrol decided that among the sites it would block out for hate

ILLUSTRATION BY RAY DRIVER

speech was, believe it or not, the PG-rated American Family Association website of the Reverend Don Wildmon, because of AFA's stand against "gay rights." How ironic, considering that the American Family Association, in a well-meaning crusade against pornography, has pushed parents, schools, and libraries to use Internet filters—including Cyber Patrol.

THE PIQUING OF FATHER NEUHAUS: We wondered what took so long for Richard John Neuhaus, editor of *First Things*, to respond to the shellacking he has been receiving in *Liberty*. Though nothing personal was meant, he and/or his magazine have been mentioned (excoriated?) at least a dozen times in the past few years. What piqued Father Neuhaus enough, however, to plunk out acerbic replies—twice—were the Iambs and Pentameters section of March/April 1998 and November/December 1997.

As one of the movers-and-shakers in this politics-disguised-as-piety attempt to prove that Catholics and Protestants, because of their belief in Christ, are "one in Christ" (which is like saying that Jews and Muslims, because of their belief in Moses, are "one in Moses")—Mr. Neuhaus fumed over our questioning that dubious assertion, along with the even more dubious one that Catholics and Protestants preach the same gospel. After all, despite all the gushing pronouncements in both "Evangelicals and Catholics Together," and "The Gift of Salvation" about how unified both religions are on justification by faith alone—what does one do (for instance) with the statement by John Paul II (quoted in *Christianity Today* in its more "Protestant" phase), in which the "Holy Father" says: "It would therefore be foolish, as well as presumptuous . . . to

claim forgiveness while doing without the sacrament of penance"? Of course it would be foolish . . . that is, unless you believe in salvation by grace alone, as taught in the writings of Paul—which, obviously, the pope doesn't, and thus how presumptuous of Mr. Neuhaus to imply that he (and Roman Catholics in general) do.

Though in our criticism *Liberty* made only a passing reference to Luther, Brother Neuhaus penned a twenty-or-so-line polemic saying that Seventh-day Adventists—who abstain from eating pork and drinking booze (two of Luther's favorite pastimes, especially the latter)—are somehow unqualified to pass a theological judgment upon those who are bowdlerizing the gospel for political expediency. The problem with that argument is that neither Adventists (much less Lutherans) hold Luther as the final authority on theology. We reserve that for the Bible alone, and on it's this basis—that of the Scriptures—we reject the myth, so crucial for Neuhaus' political vision, that Catholics and Protestants believe, preach, and teach the same gospel. Indeed, the Protestant reformers, whom Rome burned at the stake, didn't give their lives over what Charles Colson (the Protestant Rosencrantz to Neuhaus' Guildenstern) once had the gall to trivialize as "petty quarreling."

On a more personal note, Father Neuhaus took exception to our words and cartoon in which we questioned the inconsistency of the man whose magazine, issue after issue, year after year, constantly and unabashedly and courageously affirms the right to life yet can't seem to find any words about attempts to restrict the promotion and sale of tobacco except to mock it. What would it take to get Father Neuhaus to speak out in favor of laws that might make teenage accessibility to deadly poison a little more difficult? A first-trimester fetus smoking, perhaps?

"All I meant to say," Mr. Neuhaus wrote in his retort, "is what I believe, namely, that a world without cigars and pipes may be a world with a great deal less personal happiness." For whom? Certainly not the ones who are struggling with a habit that at worst will kill them or, at best, will lower the quality of their life (emphysema—what a way to enjoy "personal happiness"!). Certainly not for those who have lost their loved ones to smoking. Certainly not for the kids who get started on a habit that they can't stop.

Obviously someone as brilliant and thoughtful as Father Neuhaus has been able, somehow, to reconcile his crusade for life with his ambivalence regarding attempts to restrict tobacco trade. But why can't he—along with so many other pro-life, pro-God-and-family-and-apple pie conservatives—at least keep quiet rather than mock earnest and sincere efforts to preserve life? His attitude is enough to make a reasonable person ask, Is *First Things* (or any of its related institutions and foundations) receiving money, directly or indirectly, from the good folks who have given us everything from Joe Camel, 400,000 smoke-infested corpses a year, and second-hand smoke?

ANOTHER BRICK IN THE WALL: For years, anti-separationists have been trying to tear down their much hated wall-of-separation metaphor, which has been maligned and attacked by those who, apparently, think that centuries of European religious history (never burdened with this troublesome wall) should be the model for America. Now, though, a recent historical discovery shows that the wall might not only be "high and impregnable" (as Justice Hugo Black in *Everson v. Board of Education*) but even "eternal."

Jefferson used the wall-of-separation metaphor in his now famous letter to the Danbury Baptist Association in 1802, in which he wrote, "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state."

The original draft is in possession of the Library of Congress, which asked the FBI to uncover the parts that Jefferson, for whatever reasons, had inked out. FBI director Louis Freeh agreed, and the FBI, using digital photography and computer analysis, recovered a few deletions, including one that deals with the wall metaphor. In the original, the phrase had been penned, . . . "thus building a wall of eternal separation between church and state."

Eternal separation? For some folks, the wall of separation itself is bad enough, but in Jefferson's mind the notion that it was a wall of "eternal separation" carried enough credence to make it into at least an early draft. Of course, the modifier was eventually excised, perhaps because Jefferson thought it was a bit hyperbolic. After all, America doesn't need a wall of eternal separation—just one that lasts as long as the Republic does.

THE TRIUMPH OF THE WEST: From a press release issued last summer by the Communist Party of the United States: "The Communist Party, USA today announced the transfer of its financial portfolio from Merrill-Lynch, effective immediately."

In 1991 the archbishop of San Antonio was denied a permit to enlarge St. Peter's Catholic Church in Boerne, Texas. The archbishop's challenge of the denial led to *City of Boerne v. Flores*,[1] in which the U.S. Supreme Court struck down as unconstitutional the Religious Freedom Restoration Act (RFRA) of 1993. As a result, many religious people are like the homeless—without shelter.

As with many church-state cases, the real issue here isn't the particular; it's the universal behind it. In *Flores* the problem wasn't the denial of the building permit per se, but the rationale the Court used in upholding the denial, which was that RFRA was unconstitutional.

RFRA arose in response to the Supreme Court's decision in *Employment Division v. Smith*,[2] which eradicated what many court observers believed to be bedrock constitutional principle first established in *Sherbert v. Verner*[3] and amplified in *Wisconsin v. Yoder*.[4] Under *Sherbert/Yoder*, when a governmental requirement conflicted with an individual's religious practices, in order for the requirement to prevail over the individual's religious practices the government had to demonstrate a compelling state interest that showed why the practice should not be allowed. Then, even if the government was able to demonstrate that interest, it had to prove further that there was no less restrictive means by which to achieve its secular purpose. In other words, the onus and burden was on the government to show that it had a very good reason to restrict a religious practice; if not, then those seeking an exemption or accommodation to a law that restricted their practice should, ideally, have gotten it.

But in a radical departure from precedent, the *Smith* Court stated that the free exercise clause of the First Amendment "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[5]

According to *Smith*, the only time the *Sherbert/Yoder* test applies is in the hybrid situation in which the free exercise claim is raised (1) "in conjunction with other constitutional protections, such as freedom of speech and of the press"[6] or (2) "where the state has in place a system of individual exemptions," such as in unemployment compensation cases. In the latter situation, the state "may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[7]

Thus *Smith* relegated the Free Exercise Clause to only an antidiscrimination provision leaving unprotected individuals whose religious beliefs may be somewhat different from society's mainstream. The *Smith* justices reduced free exercise protection while completely aware that their action might have a disparate effect on those who are members of minority religions. The Court stated:

"It may fairly be said that leaving accommodation to the political process will place at relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."[8]

This diminished understanding of free exercise protection was not shared by much of the American religious community, the Congress, or the president. The result was RFRA, which mandated that federal, state, and local government be subject to the compelling state interest/least restrictive alternative test

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Life in Post-RFRA America

when free exercise claims were raised by an individual who found his or her religious practices were in conflict with governmental law, regulation, or action.

When Congress enacted the RFRA, it relied primarily on its Fourteenth Amendment enforcement power. The Fourteenth Amendment provides in relevant part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

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The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The courts have repeatedly held that the religion clauses of the First Amendment are applicable to the states by reason of the Fourteenth Amendment to the United States Constitution. Thus those who argued that under Section 5 of the Fourteenth Amendment Congress had the right to enact RFRA contended that "Congress . . . is only protecting by legislation one of the liberties guaranteed by the Fourteenth Amendment's due process clause, the free exercise of religion, beyond what is necessary under *Smith*."[9]

However, the Court held that in adopting RFRA, Congress went beyond its Fourteenth Amendment authority. Because the *Smith* Court had decided the scope of the Establishment Clause, when Congress enacted RFRA, it went too far:

"Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[10]

Also, the Court concluded that "RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion."[11] As the Court noted, "in most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry."[12]

In summary, the Supreme Court instructed that "when the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles."[13] The Court argued that once interpretation of the Free Exercise Clause was made by the courts, "it is this Court's precedent, not RFRA, which must control."[14]

The *Flores* decision, of course, did not settle the argument or end the problem. On the contrary.

First, it was argued that although RFRA has been held unconstitutional as far as the federal legislation may be applied to state and local governments, it is not unconstitutional with reference to federal agencies. This is because the Fourteenth Amendment, the basis of the *Boerne* decision, does not apply to the federal government. In a recent case, *In re: Young Christians v. Crystal Evangelical Free Church*,[15] the Eighth Circuit Court of Appeals held that the Bankruptcy Act also violated RFRA. (In these cases, bankruptcy trustees recovered from churches the tithes paid by bankruptcy debtors.) The court concluded that RFRA was an appropriate means by which Congress could modify the United States bankruptcy laws.

Second, in *Flores* three of the justices dissenting from the majority argued *Smith* itself should be reexamined. Justice O'Connor, joined by Justice Breyer, concluded that the Court in *Flores* may well have been correct in ruling that Congress did not have the power under the Fourteenth Amendment to enact RFRA in light of the Court's earlier *Smith* deci-

sion. But she observed that the *Flores* decision "is premised on the assumption that *Smith* correctly interprets the Free Exercise Clause."[16] Justice O'Connor then stated that "this is an assumption that I do not accept."[17] She continued, explaining that the Free Exercise Clause "is best understood as an affirmative guarantee of the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law."[18]

In his *Flores* dissent, Justice Souter had "serious doubts about the precedential value of the *Smith* rule and its entitlement to adherence."[19] He stated he was "not now prepared to join Justice O'Connor in rejecting it [*Smith*] or the majority in assuming it to be correct."[20] But he called for "a full adversarial consideration" of the issue. Justice Souter stated that "this case should be set down for reargument permitting plenary examination of the issue."[21]

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f religion.

The *Flores* case continues to generate much heat. Professors Eisgruber and Sager argued that RFRA was "practically unworkable" and that in *Flores* the Court "was renouncing a congressional vision of religious liberty that was at radical odds with its own."[22] In contrast, Oliver Thomas, special counsel for religious and civil liberties of the National Council of Churches, compared *Flores* with the century-old *Dred Scott* decision, saying the "decision . . . is a blow not only to the sovereignty of the Congress but to the American people as well."[23]

In June of this year federal legislation was introduced to reinstate the compelling state interest/least restrictive alternative test as part of federal law applicable not only to the federal government but also to state and local governments. But the new legislation, called the Religious Liberty Protection Act, is limited to situations that involve or affect interstate commerce, when the burdensome state program is a recipient of federal funds, and when the accommodation is aimed at avoiding religious discrimination. Nor is it without detractors (see pp. 10-14). Besides this law, a broad-based coalition of religious organizations is currently asking state legislatures to pass legislation requiring the application of the *Sherbert/Yoder* test in each state.[24]

The bottom line in this free exercise mess is that though the *Sherbert/Yoder* test was hardly perfect, it did provide some level of judicial protection for the free exercise of religion. After *Smith* and now *Boerne*, that protection, with rare exceptions, is all but gone. Even worse, among many scholars who oppose the jurisprudence behind *Smith*, and who see a need for greater free exercise protection, much disagreement exists on the best way to reinstate these protections.

So for now, Americans are without shelter when it comes to free exercise of religion. A sad state of affairs, especially for a nation that views the free exercise of religion as one of the most basic of all human rights, to be protected.

FOOTNOTES

[1] 117 S. Ct. 2157 (1997).

[2] 494 U.S. 872 (1990).

[3] 374 U.S. 398 (1963).

[4] 406 U.S. 205 (1972).

[5] *Smith*, 494 U.S. 879.

[6] *Ibid.*, p. 881.

[7] *Ibid.*, p. 884.

[8] *Ibid.*, p. 890.

[9] *Flores*, 117 S. Ct. 2163.

[10] *Ibid.*, p. 2164.

[11] *Ibid.*, p. 2171.

[12] *Ibid.*

[13] *Ibid.*, p. 2172.

[14] *Ibid.*

[15] __ F.3d __, No. 93-2267 (8th Cir. 1998).

[16] *Flores*, 117 S. Ct. 2176 (O'Connor, J., dissenting).

[17] *Ibid.*

[18] *Ibid.*, p. 2177.

[19] *Ibid.*, 2186 (Souter, J., dissenting).

[20] *Ibid.*

[21] *Ibid.*

[22] Eisgruber and Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 Sup. Ct. Rev. 79, 83.

[23] Clarence Page, "Keeping the Faith: Religious Freedom Act Could Turn Into Worthy Amendment Scheme," Chicago *Tribune*, July 2, 1997, p 19.

[24] See *Liberty*, July/August 1998, p. 8.

Special EXE

A Compelling Case Agains

MPTIONS?

'Compelling State Interest"?

By
CHRISTOPHER L. EISGRUBER
and
LAWRENCE G. SAGER

Imagine living in a quiet residential neighborhood when a nearby homeowner (call her Mrs. Campbell) starts running a soup kitchen from her garage. Some neighbors object, fearful that the soup kitchen will increase traffic and attract "undesirables" to the area. They persuade town officials to enforce their zoning ordinance and stop Mrs. Campbell.

Mrs. Campbell sues, seeking to exempt her charitable project from the zoning ordinance. At the hearing the judge says, "Now, Mrs. Campbell, I need to know whether you are running this soup kitchen because of your religious beliefs. If you are, then I'll permit you to go ahead. If you're not, I won't."

Surely the judge's question is an affront to religious liberty. Perhaps one can sympathize with Mrs. Campbell, and believe that charitable endeavors ought to enjoy special exemptions from zoning laws. Or perhaps one sympathizes with the unhappy neighbors, and believes that Mrs. Campbell ought to move her otherwise laudable project to a more suitable location. But either way her right to do good works and her right to use her property as she wishes ought not to depend upon her religious beliefs.

Consider the bizarre and uncomfortable questions that would arise in the colloquy between the judge and Mrs. Campbell. Suppose Mrs. Campbell has long felt it intolerable for people to go hungry as a matter of simple justice, but also felt that her religion counsels that people should aid the needy. Does it matter whether she has more than one reason for doing good works? Or suppose, while Mrs. Campbell's faith requires her to care for the needy, it recognizes that there are many forms such care can take. Or suppose that within her faith charitable acts are regarded as good but not requisite for leading a religious life. Does it matter just how specific and how demanding Mrs. Campbell's religion is? Does it matter whether Mrs. Campbell attends regular church services? Would she be religious in the right way if she were moved to a life of good works by what she called "Christian ethics," even if she had little or no interest in Christian theology? And suppose Mrs. Campbell shared responsibility for the soup kitchen with her husband, an avowed secular humanist. Would the kitchen be legally permissible on days that she ran it, but not on days when he alone was present?

Is it preposterous to imagine—in a nation that loves liberty and especially prizes freedom of belief—that Mrs. Campbell could be called to account for her beliefs and commitments in this way? No. In fact, it has become fashionable for the government to make rights contingent on religious belief in just this manner, and thus to require judges to act like the judge in Mrs. Campbell's case. The paradigmatic example of this is the Religious Freedom Restoration Act (RFRA).[1] As its name indicates, RFRA was enacted in the service of religious liberty. Yet it was a misguided attempt to achieve a laudable purpose.

Under RFRA some churches were able to duck zoning laws and operate soup kitchens in residential neighborhoods when everyone else was prohibited from the same.[2] Some bankrupt religious debtors were able to circumvent bankruptcy laws and make charitable contributions when all other debtors were prevented from doing so.[3] Some religious landlords claimed that they should be able to defy civil rights laws that prohibited everyone else from discriminating against unwed couples.[4] It was even the case that some religious men who flouted child-support obligations were excused from contempt sanctions imposed upon other "deadbeat dads."[5]

In *City of Boerne v. Flores*,[6] the Supreme Court held that RFRA was unconstitutional, at least insofar as it purported to constrain state and local governments. But the era of RFRA has not

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ILLUSTRATION BY RALPH BUTLER

necessarily passed. RFRA itself may continue to apply to federal legislation like the bankruptcy laws, since *Flores* focused on Congress's power to apply the act to state and local laws. Meanwhile, many states are considering statutes patterned upon RFRA, and some members of Congress are considering legislation that would reproduce the effects of RFRA but would try to circumvent *Flores*.

What explains RFRA's popularity? Its defenders point out that laws that are neutral on their face can nevertheless impair the ability of religious believers to practice their faith. That is true, and it's a problem of great concern. RFRA's supporters accordingly believe that this leaves Americans in a kind of Free Exercise dilemma. Special privileges to disobey otherwise valid and reasonable laws, reserved for the truly religious alone, may be awkward—but such privileges are the only way to accommodate the needs of religious believers.

There is, however, a better way to promote a strong version of free exercise. First, judges and legislators should take a generous view of personal liberty, not just for religious believers, but for all people. Second, when the government carves out special exceptions for the benefit of secular interests, it should be required to do the same for comparable religious interests. And finally, when the government imposes broad, generally applicable restrictions on conduct, it should show the same sensitivity to minority religious interests that it shows to mainstream religious and secular interests.

Start with the idea that the Constitution should be understood to guarantee a generous share of liberty for all people. It's easy to see how that liberty will benefit religious believers. For example, in the famous case of *West Virginia v. Barnette*,[7] some schoolchildren refused to comply with a state law requiring them to salute the flag. They had religious grounds for their choice: they were Jehovah's Witnesses, and their faith forbade them from honoring any graven image. The Supreme Court upheld the children's right to opt out of the flag salute ceremony, but it did so without creating any special privilege for religious believers. The Court declared that the state simply had no power to compel anybody to salute the flag.

As a second example, consider one of the more appealing claims that arose under RFRA. Orthodox Jews have sought relief from zoning decisions that prohibited them from using their homes as *shteebles*—that is, from using them for small regular worship services. Orthodox Jews should have the right to conduct such services. They should have it, though, not as the result of any special privilege unique to religious believers, but because the Constitution protects the right of all people to invite friends, acquaintances, and neighbors to gather with them in their homes for peaceful purposes. One might even construe this right broadly enough to encompass Mrs. Campbell and her soup kitchen (and, of course, if Mrs. Campbell enjoys such a right, so too should any church operating in a residential neighborhood).

Home schooling provides a third illustration. Religious parents may have special reasons for wishing to educate their children at home. They may, for example, want to protect their children from influences that might damage their faith. Or they may think it desirable to provide a pervasively religious learning experience of a kind that is, in their judgment, not available from any school in their area. Such parents should have the right to school their children at home. But it should be recognized that their religious interests are a specific version of a more widely shared interest—the interest that all parents have in providing the best possible education and upbringing for their children. And the constitutional right protecting them should be equally broad: it should respect the autonomy of all parents, not merely those who have religious motives for their decision.

Consider now the second prong of this approach to religious liberty, which demands that government not turn a blind eye to religious interests when it crafts exemptions for secular ones. A recent First Amendment case from Newark, New Jersey, nicely illustrates the point. Newark's police department requires that its officers be clean-shaven. Two Islamic policemen sought an exemption on religious grounds; their faith required that they wear beards. The police department refused to relax its rule, but a federal district court granted relief. The court pointed out the police department made an exception for police officers with sensitive skin, who would suffer a rash if forced to shave. Since the department was willing to accommodate the special interests of officers susceptible to skin rashes, it was obliged to be equally receptive to the religious interests of the Islamic officers.[8]

So far these recommendations have been quite consistent with the Supreme Court's cur-

rent reading of the Free Exercise Clause. The third suggestion makes a departure from the Court's free exercise doctrine. In *Department of Employment Services v. Smith*,[9] the Court addressed a claim from practitioners of a Native American religion who sought exemption from an Oregon law. The Native American faith involved the ritual consumption of peyote. Oregon law prohibited the possession or use of peyote.

In *Smith* the Supreme Court distinguished sharply between laws such as Newark's police department regulation, which included exceptions, and laws such as the Oregon peyote regulation, which did not. The Court announced a broad per se rule to deal with any exemption claim directed at laws such as Oregon's: "The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[10]

The justices did not want the impossible task of deciding which religious people deserved what privileges in cases about zoning, bankruptcy, education, and virtually every other imaginable topic of legal regulation. The Court's unease is understandable. But it does not justify a stark distinction between laws that include exceptions and laws that do not.

For example, the Oregon law against peyote consumption may have looked like a clean, bright-line rule with no exceptions. Suppose, though, one steps back and looks at the law in its larger context. Oregon had a host of laws dealing with drug abuse. Among these was a law permitting counties to prohibit alcohol consumption. That law, however, contained an interesting provision: it required dry counties to make exceptions for the benefit of religious faiths (notably, Christian faiths) that use alcohol in religious rituals. Thus Oregon's laws may have reflected a failure to show equal regard for the practices of minority religious believers. Just as Newark made special exceptions to benefit those with special health problems but not those with special religious needs, Oregon's controlled substance laws included exceptions for the benefit of mainstream faiths but not minority ones.

Though it's possible to offer good reasons that peyote and alcohol should be treated differently, the basic point is clear: neutral and generally applicable laws may reflect a failure by the government to show equal regard for minority religious interests. Insofar as the Court in *Smith* was insensitive to the problem, its free exercise doctrine is unsatisfactory.

RFRA was passed in reaction to *Smith*, and the most generous way to view the statute is as an effort to cure the insensitivity of the *Smith* decision toward the requirement of equal regard for the needs of all citizens, including members of minority religious faiths. So understood, the goal of RFRA was impartiality, not special privilege. But so understood, RFRA was doomed from the outset. It incorporated the toughest test known to constitutional law, "the compelling state interest test." To defeat an exemption claim, the government had to show either that its law imposed no "substantial burden" on religious practices, or that it had a "compelling interest" to justify the burden. In the law's eyes, few interests count as "compelling." As a result, whatever RFRA was aiming at, it produced a stark, inequitable privilege available only to those who were religious, and religious in the right way.

This claim is not mere conjecture or academic argument. In one area after another courts found that RFRA demanded that some religious persons be excused from obeying reasonable and evenhanded laws, while secular persons who were otherwise in exactly the same position and religious persons who were acting on the basis of secular motives—however lofty and altruistic their motives might be—were required to obey those laws.

The justices did not want the impossible task of deciding which religious people deserved what privileges....

RFRA's defects were not merely the product of clumsy legislative drafting. They emanated from a profoundly mistaken view of what it means to be "strong on free exercise." That view supposes that religious exercise is free only if religious conduct is presumptively and uniquely immune from any form of government regulation—and hence only if religious believers are presumptively entitled to special exemptions not available to others.

Professor Michael McConnell, an exponent of this idea, says that constitutional law should aspire to match a "hypothetical world in which individuals make decisions on the basis of their own religious conscience, without the influence of government."[11] Government should, of course, stay out of church affairs, and it should not manipulate people's religious beliefs. But government cannot help having an enormous influence on the activities of churches and religious individuals, just as it has an enormous impact on all groups and individuals within any modern society. Government provides the security, resources, and stability without which religious faith and activity would be resoundingly difficult, if not impossible, to pursue. It inculcates and enforces principles of morality—such as, for example, the principle that persons enjoy equal status regardless of their race, faith, or sex, or the principle that speech should be free—which are more congenial to some religions than others. And it doles out ownership rights without which it would be impossible even to conceptualize questions about whether Mrs. Campbell can use her house to run a soup kitchen, whether for religious reasons or any other reason.

Churches and religious individuals live within a society permeated by law. They cannot help benefiting from the existence of the legal regime that surrounds them; indeed, it would be deeply unjust to deny them any of the benefits that are available to everyone else. So too, churches and religious individuals must respect the boundaries set by reasonable, evenhanded rules that everyone else is required to obey. That is the inevitable price that accompanies the benefits of the rule of law. Any law drafted in service of a conception of free exercise that fails to accept this simple proposition is likely to do far more harm than good to religious believers and to religious liberty itself.

RFRA is a case in point. Far from reducing the impact of government upon religion, RFRA overtly manipulated religious belief. Imagine Mrs. Campbell's reaction when she learned, from the judge or her lawyer, that the fate of her soup kitchen depended upon whether her motives were religious and religious in just the right sort of way. She would have an obvious incentive not just to characterize her motives in the most favorable way but to reconceive them in order to justify her characterization of them. There is something deeply insidious about a law that puts well-motivated persons in the position of giving skewed witness to their own beliefs, under penalty of denying them the license to pursue those beliefs.

RFRA's demise has sparked a new round of legislative activity, including the so-called Religious Liberty Protection Act. Unfortunately, this bill, like nearly all the statutes now percolating in Congress and in the legislatures of many states, repeats RFRA's central error: they invoke the "compelling state interest" test. That is a great misfortune. Religious liberty is a laudable legislative concern, but it can be furthered only by legislation that expands the liberties available to everybody, or legislation that seeks to ensure that all interests (religious and secular, mainstream and minority) are treated impartially. Until legislators are ready to leave the mistakes of RFRA behind them, the legislation they produce will be ill conceived, counterproductive, and unconstitutional.

FOOTNOTES

[1]42 U.S.C. §§ 2000bb (1994).

[2]*Western Presbyterian Church v. Board of Zoning Adjustment of D.C.*, 862 F. Supp. 538 (D.D.C. 1994); *Stuart Circle Parish v. Board of Zoning Appeals of Richmond*, 946 F. Supp. 538 (E.D. Va. 1996).

[3]See, eg., *In re Young*, 82 F. 3d 1047 (8th Cir. 1996), vacated and remanded, 117 S. Ct. 2502 (1997), reinstated, 1998 U.S. App. LEXIS 7348 (8th Cir. 1998).

[4]In *Smith v. Fair Employment and Housing Commission*, 12 Cal. 4th 1143, 913 P. 2d 909 (Cal. 1996), the California Supreme Court rejected this claim by a 4-3 vote; an intermediate appellate court had granted the claim.

[5]*Hunt v. Hunt*, 162 Vt. 423, 648 A. 2d 843 (1994).

[6]117 S. Ct. 2157 (1997).

[7]319 U.S. 624 (1943).

[8]*Fraternal Order of Police v. City of Newark*, No. 97-2672 (D.N.J., July 29, 1997) (unpublished decision). The *Newark* case is remarkably similar to a hypothetical discussed in Christopher L. Eisgruber and Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 *U. Chi. L. Rev.* 1245, 1264-65 (1994).

[9]494 U.S. 872 (1990).

[10]494 U.S. 879 (internal quotation marks omitted).

[11]Michael W. McConnell, "Religious Freedom at a Crossroads," *University of Chicago Law Review* 59 (1992): 115, 169.

PROTECTING *Free* EXERCISE

A Compelling Case FOR *"Compelling State Interest"*

By MICHAEL W. MCCONNELL

In the wake of the U.S. Supreme Court's invalidation of RFRA, Congress is considering legislation (The Religious Liberty Protection Act) that would once again enable religious believers and institutions to challenge, in court, government interference with religious practice. Under this bill, believers could obtain exemptions, or accommodations, if the government lacks a sufficiently strong justification (a "compelling state interest") for hindering religious practices that conflict with the law. This has been the principal free exercise jurisprudence for the latter half of the twentieth century.

Some people, however, oppose the principle behind the bill, which they believe is unconstitutional. What are their arguments—and why are they wrong?

To begin, until 1990 the Supreme Court had interpreted the Free Exercise Clause of the First Amendment of the United States Constitution as protecting the free exercise of religion from governmental burden, subject to the "compelling state interest" test. A new conservative majority on the Court, however, overruled prior decisions and held that the Free Exercise Clause provides no shield against "neutral laws of general applicability," no matter how severely they may trench upon religious freedom. Additional

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protection for religious freedom, the Court held, is left to the political process.

By overwhelming bipartisan majorities, Congress responded in 1993 with legislation under its power to "enforce" the provisions of the Fourteenth Amendment (including the Bill of Rights). But the Supreme Court held last year that Congress's Fourteenth Amendment enforcement power does not go so far. In response, Congress is considering more modest legislation that would accomplish much the same objective.

The problem arises from the fact that few infringements on religious freedom in this country result from deliberate bigotry or persecution, but occur rather when thoughtless legislators and zealous bureaucrats insist on applying restrictions across the board, without regard to their special consequences for religious practice.

If Eisgruber and Sager are correct, then
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without also recognizing privileges for new

For instance, almost all citizens can be required to give evidence in court if they have information relating to a criminal act. But if applied without exception, this requirement means that information a Roman Catholic priest obtains in the confessional must be divulged in a court, a move that would destroy the confidentiality of a sacrament considered holy by the church. Since the first cases began, in the early 1800s, courts have uniformly recognized that the free exercise of religion requires an exception—the "priest-penitent" privilege—from the otherwise generally applicable requirement to testify.

Another example involved a Seventh-day Adventist denied unemployment compensation benefits because she refused to work on Saturday. Without an exception, based on religious belief, for refusing otherwise suitable work, citizens who observe the Sabbath would be forced to choose between forfeiting benefits or violating their faith.

Absent exceptions, churches that limit some or all clergy positions to men could be forced to hire female priests or ministers. In a case in San Francisco, which prohibits discrimination on the basis of sexual orientation, a church would have been forced to hire an openly gay organist, contrary to its moral teaching. In Maryland officials tried to force a Catholic hospital to provide training in abortions. A Presbyterian church in Washington, D.C., had to go to court when zoning administrators ruled that churches cannot perform their age-old function of feeding the poor if located in residential neighborhoods. Because of religious dietary restrictions, Muslim and Jewish prisoners require special food; Hindu girls sometimes need special gym uniforms in school; and churches of every denomination need exceptions from employment discrimination laws to be able to hire clergy of their own religious faith.

In many cases religious freedom claims can be protected by appealing to legislatures or other political bodies. But as the Supreme Court candidly admitted, small and unpopular churches will be at a "relative disadvantage" if their rights are dependent on the political process. For this reason Congress is attempting to establish a procedure wherein every person or institution whose religious freedom is threatened by "neutral and generally applicable" laws can go to court, and the government will bear the burden of showing that the imposition on religious exercise is necessary to a "compelling" (meaning genuinely important) governmental interest.

Of course, the "compelling state interest" standard doesn't guarantee victory. Because the exercise of religion involves conduct, and conduct often affects other people, the government will frequently have a legitimate right to interfere. Religious motivation doesn't justify child sacrifice, stealing, or refusal to pay taxes. But persons of all religions—small as well as large, unfamiliar as well as mainstream—will have an

equal chance to protect their rights before an impartial tribunal. This process, in turn, will make it far more likely that government officials will be willing to work out reasonable accommodations without the need to go to court.

This protection is what the proposed Religious Liberty Protection Act is supposed to reinstate. The bill enjoys widespread support—from the ACLU to the Southern Baptist Convention.

In testimony before the House and Senate Judiciary Committees, however, several constitutional law professors have asserted that under Establishment Clause jurisprudence it is unconstitutional for Congress to protect the rights of religious conviction unless Congress extends similar protections to nonreligious conviction. Professors Chris Eisgruber and Larry Sager, for example, testified that it violates the Establishment Clause for the government to favor religious commitments over "other deep concerns and interests of members of our society," such as "political," "professional," "artistic or creative," and "family" commitments.

would be unconsti-
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aper reporters.

If Eisgruber and Sager are correct, then it would be unconstitutional to recognize a priest-penitent privilege in the law of evidence without also recognizing privileges for newspaper reporters. It would mean that it is unconstitutional to excuse Sabbatarians from unemployment compensation requirements (such as willingness to work on Saturday) unless we also excuse workers who wish to spend time with their families. It would mean that prisons cannot provide kosher or hallel meals unless they supply special diets to those who wish to engage in political boycotts of certain foods. Dry counties could not permit the serving of sacramental wine without also allowing alcoholic beverages for "artistic" purposes. If the Equal Employment Opportunity Commission allows churches free rein to choose their priests and ministers on religious grounds, without governmental interference under the discrimination laws, then it must similarly exempt labor unions and secular charities from the discrimination laws.

If these results sound outlandish, it is because the constitutional argument is outlandish. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Whatever protection the Free Exercise Clause provides, that protection is applicable only to "religion," and not to moral, political, professional, artistic or creative, or family commitments. "Religion" is singled out for special treatment. If professors Eisgruber and Sager were correct that the First Amendment forbids "singling out" the exercise of religion for special protections that are not given to "the other deep concerns and interests of members of our society," then the First Amendment violates itself.

The decision to single out religion—to treat religion differently from "other deep concerns and interests"—was deliberate. The framers considered a number of different formulations of what is now the First Amendment, some of which protected the "free exercise of religion," and some of which protected the "rights of conscience." Indeed, at one point the House of Representatives adopted a version that would have protected both: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

In dictionaries of the day the word "conscience" applied to secular as well as religious moral judgments. Samuel Johnson's great dictionary defined "conscience" as "[the] knowledge or faculty by which we judge of the goodness or wickedness of ourselves." Noah Webster's first dictionary defined it as "the faculty that decides on the right or wrong of actions in regard to one's self." Had the framers adopted the "liberty of conscience" formula, the First Amendment would have come closer to resembling the Eisgruber-Sager First Amendment. (It would still have been narrower. "Conscience" does not apply to all "deep concerns and interests," but only those rooted in the distinction between right and wrong.)

But the First Congress rejected the "conscience" language in favor of the free exercise of "religion," making clear that the protections of the amendment were applicable to religious commitments only. That did not prevent

Congress or the state legislatures from protecting other forms of conscience as appropriate, but the Constitution itself gives "religion" special protection. James Madison explained the reason:

"The religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. The right is in its nature an unalienable right. . . . It is unalienable also because what is here a right towards men is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of civil society."

This did not—and could not—mean that religious believers are exempt from law. But it did mean, in Madison's words, that a liberal state should make generous provision for the freedom of religion "in every case where it does not trespass on private rights or the public peace."

It was common for the 13 original states, even before passage of the First Amendment, to exempt believers from obligations known to be inconsistent with their religious convictions. The most common forms of accommodation had to do with military service, oath taking, and mandatory tithing. Even in the most desperate hours of the American Revolution, when the fate of the nation depended on its supply of young soldiers, the Continental Congress exempted religious pacifists (such as Quakers and Anabaptists) from military service, while calling upon them to serve the nation in ways "consistent with their religious principles." As George Washington wrote to the Quakers, "in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit."

The modern Supreme Court has continued this tradition of religious accommodation. Although in recent years the Court has held that the First Amendment does not create a *legal right* to religious accommodation, it has consistently encouraged legislatures to do so—whether or not other nonreligious concerns and interests are similarly protected. In an important decision called *Corporation of Presiding Bishop v. Amos*, the Court unanimously upheld a federal statute exempting religious organizations from the religious nondiscrimination requirements of the Civil Rights Act. According to the Court, "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious

missions." Specifically rejecting the constitutional argument now made against the Religious Liberty Protection Act, the Court stated that "where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities."

In the face of this clear evidence from constitutional text, history, and precedent, opponents of the Religious Liberty Protection Act nonetheless claim that it is "unfair" to protect religious liberty without protecting other concerns. And of course, there are some specific cases where it *would* seem unfair—usually because there is a strong constitutional tradition for protection independent of religious motivation. Most would agree, for example, that parents should have a right to home-school their children, whether for religious reasons or not. That is because most of us believe in a right of parental control over education. Even most supporters of abortion rights would agree that doctors should not be forced to perform abortions, whether their objection is religious or secular. This is because they believe that the status of the fetus is a matter for individual judgment. But these examples should not be generalized into a rule requiring religious accommodations of all sorts to be extended to secular concerns. The state should be able to protect the confidentiality of communications made to a priest or minister without having to extend the privilege to your next-door neighbor.

In its broad form, the claim that religious commitments may not be given special protection overlooks the deep logic of the First Amendment. The religion clause of the First Amendment has two parts: the Free Exercise Clause, which protects religious freedom, and the Establishment Clause, which prevents government support for religion. Those who complain that the Free Exercise Clause singles out religion for special protection rarely note that the Establishment Clause also singles out religion—this time, preventing religious institutions and commitments from receiving governmental advocacy and support. The two halves of the religion clause create a balance.

By the same token, religious concerns would be protected by the Religious Liberty Protection Act while artistic and creative concerns would not. But art can be subsidized through the National Endowment for the Arts. A National Endowment for Religion would—and should—be unconstitutional. Religion is "singled out" in two ways—with respect to burdens *and* with respect to benefits.

That is the logic of the First Amendment. This logic could not be extended to all "other deep concerns and interests of members of our society." Churches would be protected by the Religious Liberty Protection Act and environmentalist groups (for example) would not. But environmentalist groups can go to Congress and obtain passage of environmental legislation. Comparable laws promoting religion would be flatly unconstitutional. Similarly, public schools can—and do—inculcate environmental beliefs and values in schoolchildren, in ways that would be unthinkable for religious beliefs and values.

Government is free to pass legislation promoting or disadvantaging most political, professional, or other interests in our society. That's politics. But government is not free to pass legislation promoting or disadvantaging religion. As nearly as is possible, consistent with its neutral and secular objectives, government should leave decisions about whether and how to practice religion to individuals and groups. The government should neither induce nor penalize the practice of religion.

Critics of the Religious Liberty Protection Act would preserve the Establishment Clause limits on the power of government to promote religion, while rejecting the Free Exercise Clause limits on the power of government to burden religion. This would produce a lopsided, antireligious constitutional regime wholly unlike the benevolent neutrality toward religion envisioned by the framers. From the beginning this nation has recognized that each person's duty to God is a matter committed to his or her own conscience. Religion is exempt from the power of civil society except when interference is necessary to protect "private rights or the public peace." From the beginning, therefore, the states and the federal government have found ways to accommodate the free exercise of religion, insofar as "the protection and essential interests of the nation may justify and permit." The Religious Liberty Protection Act stands in this great tradition, protecting religious freedom from government imposed burdens unless the government can show those burdens serve a compelling interest. The suggestion that protections for religious conscience can go no further than protections for political or professional concerns is contrary to a constitutional understanding as old as the nation itself.

Hands Off THE Offering P

By
OLIVER S
THOMAS

Creditors Have a Right to Regain Assets Owed Them. But How Far Does That Right Extend? Congress Has Finally Answered: Not as Far as Some Creditors—and Lower Courts—Would Like to Allow.

Reverend Richard Steele is not a troublemaker. As the pastor of a church with more than 1,000 members and a budget of $650,000, he hardly has time for controversy. His days are spent comforting troubled souls and preparing next Sunday's sermon.

But he's no pushover, either. When, in an effort to recoup its losses, the creditor of a bankrupt parishioner went after the man's past tithes and offerings, Reverend Steele lived up to his name.

"Tithe and offerings are sacred," he said. "Creditors don't have a right to them."

The reverend and his Cedar Bayou Baptist Church were at the center of a national controversy over just how far creditors and trustees in bankruptcy should be allowed to go. Should they be permitted to order churches to pay back past tithes and offerings given and received in good faith? Reverend Steele says "Absolutely not."

The reverend chafes at the notion that secular businesses are entitled to more protection under bankruptcy laws than a church. A liquor store, for example, cannot be held liable by the creditors of a regular customer who goes bankrupt though he may have squandered thousands on overpriced booze. If the store sells its product and receives its money in good faith, it is a valid exchange. Yet churches are told that their members receive nothing of value in exchange for their contributions—contributions that would constitute "consideration" under bankruptcy laws. Thus the contributions are considered "fraudulent" and subject to being set aside.

"The rewards for giving to the church are both temporal and eternal," says Reverend Steele. "How could anyone consider that *fraudulent*?"

The reverend's questions notwithstanding, Cedar Bayou church was ordered by a Texas court to pay back

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The Reverend Oliver S. Thomas serves as special counsel to the National Council of Churches. He is a member of his local board of education and is the father of two daughters—both of whom attended public schools.

ILLUSTRATION BY NICK GALIFIANAKIS


A T E !
N.G.

Whether it be the widow's mite or the corporate executive's millions, churches should not be forced to refund past tithes and offerings.

more than $40,000 including interest and penalties. Some of these funds represented contributions made to the church a decade ago!

The church was not without recourse, however. Texas courts, like others of the United States, have long recognized religion as an inalienable, fundamental right. Indeed, the Texas Constitution states: "No human authority ought *in any case whatever*, to control or interfere with the rights of conscience in matters of religion." Yet the Cedar Bayou case infringed on this right to a degree few court decisions can match. Conceivably, every religious organization in Texas could have been affected.

Whether they be large or small, liberal or conservative, churches must have the assurance that funds given and received in good faith can be spent in furtherance of the church's mission. And it's not only churches that are affected. The same is true for the thousands of nonreligious charitable organizations that rely on donations for their financial support.

Because the Constitution forbids any law prohibiting the free exercise of religion, the Cedar Bayou decision was particularly noxious to churches. Fundamental to the free exercise of religion is the right of churches to carry out their mission and ministry without undue interference from the government. Nothing could be more essential to the exercise of this right than the churches' need to spend their resources secure in the knowledge that gifts given and received in good faith can be shared with others. Salaries must be paid, Sunday school literature bought, day-care centers staffed and operated, food pantries stocked. Without the knowledge that these transactions will be respected, churches are paralyzed.

The decision of the trial court did cast a pall over the legitimacy of every contribution made to a church. Whether it be the widow's mite or the corporate executive's millions, churches should not be forced to refund past tithes and offerings. If the Texas decision stood, a chill was likely to descend upon this most fundamental exercise of faith as churches began to hoard funds in order to protect themselves against the likelihood that past creditors of one of their members might sue. After all, many churches have had members who have filed for bankruptcy, and most, if not all, of these members will have contributed to the church. The court decision could have taken what would have been inconceivable to churches just a few years ago to its most misbegotten extreme by allowing virtually any creditor to bypass the trustee in bankruptcy and go directly into state court in order to retrieve funds long since spent in the exercise of Christian ministry.

Fortunately, Cedar Bayou Baptist Church had the resources to fight this battle. Most churches do not. The average Texas congregation has a budget of less than $100,000 and a single staff person—the pastor. For many churches, such as the Baptists, each of these congregations is on its own and is unable to draw on a central fund to satisfy its financial obligations. A judgment of the size rendered against Cedar Bayou could easily bankrupt such a congregation, thereby infringing upon the rights of an entire community. At best, Texas churches would be forced to set aside substantial sums of money in direct conflict with their Biblical mandate to expend their resources in ministry and service to the community. Ultimately, of course, it is the larger community that will suffer. There will be less child care, less marriage counseling, fewer soup kitchens and shelters, fewer youth programs, and ultimately, less religion in the state of Texas.

The trial court's decision appeared to violate federal as well as state law. Even the U.S. Supreme Court's pinched interpretation of the free exercise clause set forth in the draconian *Employment Division v. Smith* appeared violated. Although *Smith* did curtail the application of the traditional "compelling interest test" (which requires the government to demonstrate a compelling interest, such as public health or safety, before interfering with religious exercise), the Court retained the test in which (1) religion is intentionally burdened, (2) another constitutional right, such as freedom of speech or of the press, is implicated (i.e., a hybrid claim), or (3) the government has established a system of exemptions for nonreligious claims or activities.

Here at least two of the criteria have been met. First, other constitutional rights such as the rights of speech and association are clearly implicated. And second, the bankruptcy code is replete with individualized exemptions for such things as food, clothing, and even entertainment, which are placed beyond the reach of creditors. Having satisfied the *Smith* threshold, it seems unlikely that the government could demonstrate a "compelling" reason for treating churches less favorably than secular businesses.

This is not the first time a church has been ordered to refund past tithes and offerings in

order to satisfy a member's debts. Numerous bankruptcy trustees have gone after the assets of a church, sometimes successfully. Professor Douglas Laycock of the University of Texas College of Law estimates that hundreds of these cases are pending nationwide. In short, even if Cedar Bayou Baptist Church were to win its case, the problem will persist. And what of the cost? No congregation wants to expend the tens, perhaps hundreds, of thousands of dollars that may be necessary to litigate one of these cases. A far better solution is to amend the bankruptcy code so that good-faith contributions made to a church are not considered fraudulent conveyances in the first place.

Fortunately, all these concerns have finally been addressed. In response to situations such as Cedar Bayou, Congress has passed the Religious Liberty and Charitable Donation Protection Act of 1998 sponsored by Senator Charles Grassley (R-Iowa) and Representative Ron Packard (R-Calif.). President Clinton signed it into law in June of this year. The act shields up to 15 percent of a person's gross income given to a church in good faith. The act does not protect gifts intended to place assets beyond the reach of creditors. Fraud in the name of religion is still fraud. The act, however, honors gifts made at a time when no one knew the parishioner was going bankrupt.

The Grassley/Packard bill is complicated by the fact that it will also protect church contributions made *after* bankruptcy occurs, thereby raising other constitutional concerns. Forcing creditors to subsidize a debtor's future religious obligations by having their payments reduced by the amount they give to their church may run afoul of the Establishment Clause, which forbids government promotion of religion. The problem may be alleviated by the fact that the proposed law—like the tax code—has been broadened to protect gifts made to nonreligious charitable organizations. Thus religion will not be the only beneficiary of the new law. Future gifts to the Girl Scouts, the YMCA, or other charities will also be permitted.

Perhaps a more equitable solution might have been to allow bankrupt parishioners to continue tithing, but only if they are willing to extend their payments so that creditors are not penalized. This seems to be the only way of assuring that the debtor alone shoulders the responsibility for their future tithes and offerings. The government should not force one person to assume the religious obligations that another person voluntarily chooses.

To his credit, President Clinton has also pushed the Justice Department to take up the cause of the churches in the courts. U.S. attorneys have filed numerous friend-of the-court briefs urging courts to protect religious organizations from these intrusive efforts to set aside the legitimate contributions of their members. Attorneys for a church were successful in a recent case from Minnesota, but until Congress acted, more cases were being filed each week.

Meanwhile in Bayshore, Texas, a celebration is under way. Reverend Steele and his congregation did not have to wait until the state appeals court heard its plea and determined its fate. The plea has been heard and its fate determined by a higher "court," the court of public opinion—expressed in this nation's republican form of government.

THE FREEDOM TO GIVE

President Clinton, on June 19, 1998, signed into law the Religious Liberty and Charitable Giving Protection Act of 1998. Here is his statement: "I was very pleased to sign today S. 1244, the Religious Liberty and Charitable Donation Protection Act. This bill protects the religious and charitable contributions made by people who later declare bankruptcy.

"As Americans, we value the important role religious and charitable institutions play in the daily life of this nation. Indeed, we know that fiscal responsibility for these institutions is fundamental to their efforts to meet the spiritual, social, and other concerns of our nation. It is a great loss to all of our citizens for creditors to recoup their losses in bankruptcy cases from donations made in good faith by our citizens to their churches and charitable institutions.

"As Americans, we also know that giving, whether to one's church, temple, mosque or other house of worship, or to any charitable organization, fosters and enriches our sense of community. We need to encourage, not discourage, that sense of community. The Religious Liberty and Charitable Donation Protection Act does just that."

"Rules to Live By"

By Deborah Baxtrom

The Bible Says That the Ten Commandments Should Be Written in Our Hearts. Poor Ed Di Loreto Can't Even Get Them Posted on a Fence.

Baseball and advertising are two of America's most popular activities, so when California businessman Edward Di Loreto—a strong financial supporter of local schools and colleges for decades—was solicited to buy advertising space along the outfield fence of the Downey High School baseball field, he didn't hesitate to write a check. But when the 83-year-old philanthropist wanted to use his billboard space to post the Ten Commandments on public school property, he found himself ejected from the game.

"Nothing was ever mentioned about content restrictions," said Di Loreto, seated under an American flag in his office at Yale Engineering, his machine products company. "Whenever I'm asked to advertise, I always use the Ten Commandments as ad copy. I've run the exact same ad in the yearbook of the same high school more than once. There were billboards in the outfield advertising psychics and the Masons. I just wanted to give the kids rules to live by."

Di Loreto's modest attempt to post "rules to live by" for the benefit of Downey High School's 2,800 students, grades 9 through 12, has resulted in a controversial lawsuit filed in a quiet town of 97,000, two miles southeast of Los

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Deborah Baxtrom is a freelance writer living in Los Angeles.

Angeles. Di Loreto is suing the school district for violation of his right to free speech and free exercise of religion.

"They violated my civil rights, my freedom of speech, all those bad things," he said. "They messed with the wrong person. They thought I would just go away. I won't. This is important."

The problem began when Downey Unified School District accepted Di Loreto's $400 check for billboard ad space—solicited by an athletics coach from the Downey High School Baseball Booster Club—to help the team buy new uniforms and gear. But when the sign was ready to be placed in the outfield, the district refused to post it, fearing that the sign could violate the separation of church and state, and the board didn't want a lawsuit. When Di Loreto objected, the school refunded him $300. Then, in an attempt to make the issue moot, all advertising billboards were removed from every public school in the Downey school district.

"All the signs came down because they were an eyesore and were becoming a nuisance," said school board member Margo Hoffer. Di Loreto believes the billboards were removed in order to avoid posting his sign. It was then that he filed suit.

"I hated to sue the school district," Di Loreto said, "but I had done everything they asked me to do. I said I would hire attorneys to represent the school if it was sued. I even got a letter, at the school board's request, from the state attorney general, Daniel Lungren, saying it was all right to put up my ad."

An official opinion from Lungren stated that "if a school district sells commercial advertising space on a fence surrounding its high school baseball field, it may not refuse to accept an otherwise appropriate advertisement which contains the Ten Commandments and clearly identifies the advertising party."

The school district wasn't convinced.

"We could be sued by the Anti-Defamation League if we put his sign up," said Helen Malan-Lamb, an attorney representing the school district. "If we put his sign up, then we would have to put others up also." Opponents of Di Loreto's ad believe that while a sign featuring the Ten Commandments may appear innocuous, it could open the door for more controversial religious messages to be posted on the grounds of public schools.

According to Patrick Manshardt, Di Loreto's attorney and general counsel for the Individual Rights Foundation (which is representing Di Loreto), the school district's argument violates his client's right to free speech. "In our form of government, it is not in the power of the Downey School District to tell Mr. Di Loreto what to put on his sign," Manshardt stated. "The school district gave little or no credence to the opinion of the state attorney general. Such disregard is appalling."

When Di Loreto refused to withdraw his lawsuit, attorneys for the school district had the case moved from state to federal court. A federal court judge ruled in July that the Downey school district had violated

Edward Di Loreto: "They messed with the wrong person."

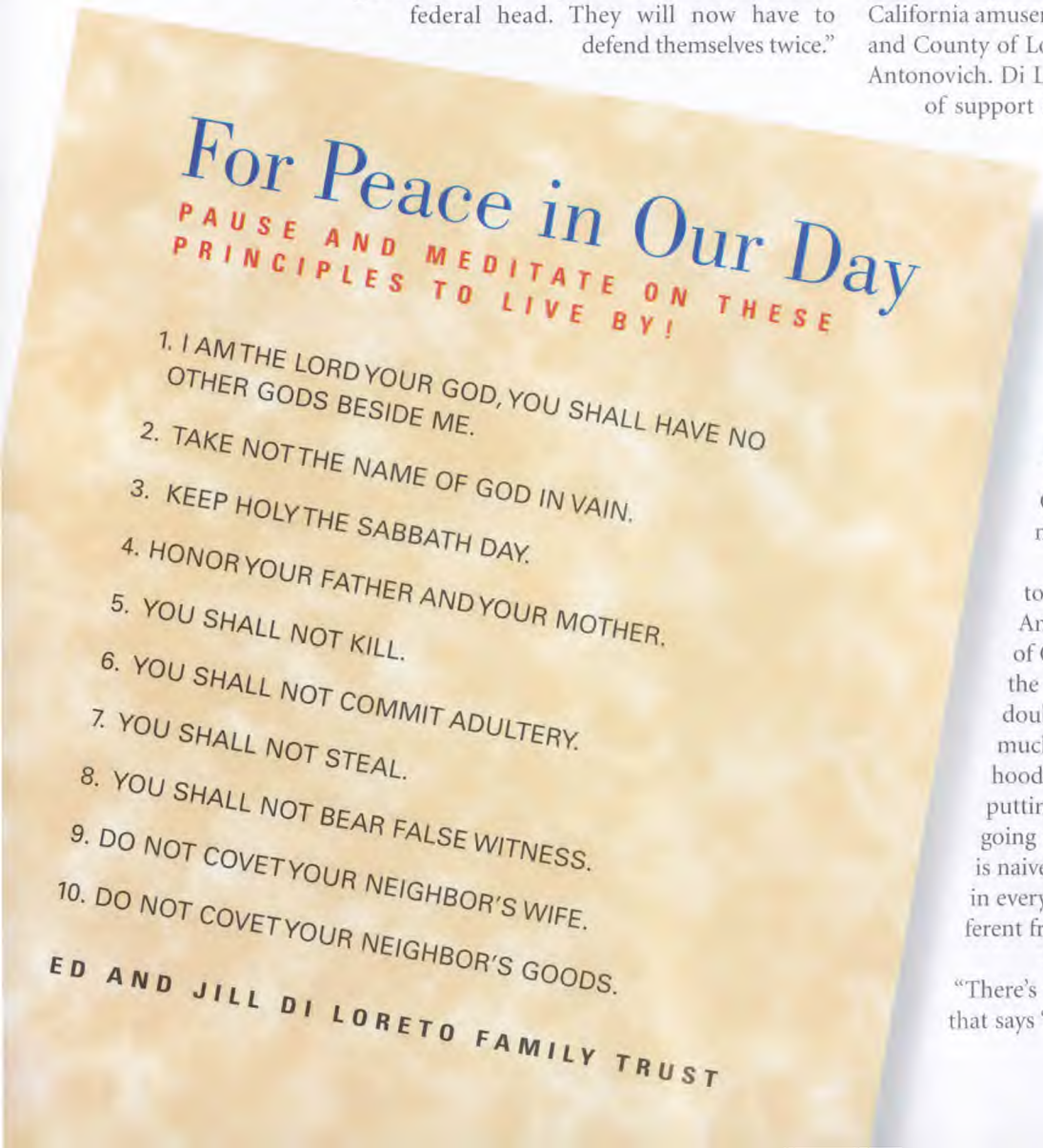
PHOTOGRAPH BY DEBORAH BAXTROM

Di Loreto's right to free speech and freedom of religion under the U.S. and California constitutions.

Nevertheless, in August the school district asked a federal judge to dismiss *Di Loreto v. Downey Unified School District Board of Education.* They also requested that sanctions be paid, claiming that Di Loreto and his attorneys had filed a frivolous lawsuit, but federal judge George H. King sided with Di Loreto. The judge refused to dismiss the case or to order the payment of sanctions, then he went a step further. He split the case between state and federal courts, forcing the school district to defend itself on two fronts.

"This case has become the legal equivalent of a Hydra for the school district," said Manshardt. "They thought they would be able to kill this case by trying to chop off its head at the federal level. Instead, two heads have grown back in its place—a state head and a federal head. They will now have to defend themselves twice."

Di Loreto's message: Is it constitutional?



That an entire school district should be running from Edward Di Loreto seems incongruous when in the company of the mild mannered, soft-spoken octogenarian. He still wears a suit and tie to work every day when he reports to his modest office in a Downey industrial park. A sign in the lobby of Yale Engineering reads, "America: Appreciate, Don't Desecrate." It hangs next to warnings about the dangers of cigarette smoking.

Offices in the same building house the Congress for American Principles (CAP), an organization started, following the suit, by Di Loreto and Evelyn Bradley, a former educator. "Mr. Di Loreto is a Catholic and I'm a Protestant," said Bradley, "but we're working together for the same goals."

CAP has attracted some of those who sympathize with Di Loreto and his lawsuit, including Carl's Jr. restaurant chain owner Carl Karcher; Stephen Knott, owner of the Southern California amusement park Knott's Berry Farm; and County of Los Angeles supervisor Michael Antonovich. Di Loreto has also received letters of support from other powerful political and religious leaders, such as Cardinal Roger Mahony, archbishop of Los Angeles.

Many of Di Loreto's supporters have joined CAP because they feel his case may help further conservative Christian goals.

"We're losing Christ in the schools," Knott said. "Enough is enough. We want Christ back into the government and the schools."

Steven Green, legal director of the Washington-based Americans United for Separation of Church and State, as quoted in the Los Angeles *Times*, says he doubts that a billboard would have much of an impact on neighborhood youth. "The thought that just putting up some kind of sign is going to have some beneficial effect is naive," Green said. "It becomes lost in everything else. It becomes no different from general advertising."

Patrick Manshardt agrees. "There's no difference between a sign that says 'Drink Coca-Cola' and Mr. Di

Loreto's sign," Manshardt said. "The price of the First Amendment is having to support the rights of people saying what you disagree with most. Ultimately, we're certain Mr. Di Loreto's right to free speech will be vindicated."

Since the school district solicited ads without restricting content, Green believes the courts will ultimately have to side with Di Loreto. "Ten to one they can't keep the church, or whoever, from posting this," Green said, but he does think the precedent could "raise some real problems." What if someone wanted to post an ad saying something disparaging about a mainstream religious organization? Or what if the Church of Satan wanted to put up a sign in a high school outfield? Green asked, "Where do you draw the line?"

Di Loreto has little patience for such speculation, insisting the line can be drawn through plain common sense. For him the issue is a simple one. "The bottom line is, they came here and sold me something, then they violated the deal," said Di Loreto, who has six children and 15 grandchildren. "This is more important than me, and we're not talking about money. We're talking about our youth. I'm not trying to sell religion, but if young people would obey those rules, we wouldn't need any laws."

In April of this year, at the state level, Superior Court judge Thomas L. McKnew laid down the law, at least his understanding of it, and ruled against Di Loreto. Saying the sign would have violated the Establishment Clause (his ruling doesn't impact the suit that is being heard in federal court), he cited *Stone V. Graham*, a 1980 U.S. Supreme Court case that struck down the posting of the Ten Commandments in a Kentucky classroom.

"I clearly believe," McKnew stated, "that to advertise on public property with the Ten Commandments that have their origins in Judeo-Christian religion would be against the establishment clause of the federal and state constitutions."

That ruling, though, is somewhat problematic, especially using *Stone v. Graham* as a precedent, in which there was clear-cut government endorsement, as opposed to Di Loreto's situation, in which he was seeking merely to advertise where others were as well.

According to Manshardt, the issue here is free speech, not government endorsement. "In this case," he said, "the ballfield fence has a secular purpose. The purpose was to raise money for the school. There's no difference between whether it's the Ten Commandments, a Coca-Cola sign, or a sign for an Italian restaurant."

The judge's ruling isn't the end of the matter, not by a long shot, not with someone of Edward Di Loreto's character (he's appealing the decision), especially when he sees the issue in such stark moral terms.

"If the kids see those words every day," he says about the Ten Commandments, "maybe they'll sink in."

WHOSE VERSION?

However questionable Judge McKnew's decision, which is likely (and ought) to be overturned, Edward Di Loreto's sign does in and of itself raise an interesting question regarding the issue of religion in the public square, and why, in the end, the further government stays away from religion, in principle, the better. And that's because there is such little agreement on the issue of religion itself.

Take Di Loreto's sign. The Ten Commandments. What can get more basic than that? There's just one problem. He's giving only one version of the Ten Commandments, the one that appears in Catholic catechisms. Mostly in response to the challenge of the Reformation, the catechized version of God's law removed the commandment against idolatry from the list, and in order to keep the Ten Commandments at ten, divided the tenth into two. In short, the version of the Ten Commandments he wants posted is not the original, as appears in the Bible.

Of course, because it was just an advertisement, and basically private speech, Di Loreto had the right to use whichever version he wanted. And though this case isn't purely an Establishment Clause issue, it just goes to show the genius of keeping church and state as separate as possible. Who wants the government in the business of enforcing religion, when Christians can't even agree on something as basic as the Ten Commandments themselves?

When Jesus said that He would draw all men unto Himself, did He mean to use a few drill sergeants to get the job done?

INDUC

By JUDGE DAVID J. HEDSPETH

One afternoon in the late 1950s, while helping my mother tidy up our rural Baptist church in the Missouri Ozarks, I came across a packet of tracts on separation of church and state published by an organization called Americans United for Separation of Church and State. I was very young, and I asked my mother what separation of church and state meant. Though I don't recall everything she said, the one thing that sticks out in my mind is her words, "Remember, the government cannot tell you how to worship."

Our community was almost religiously homogeneous at that time. Most of the active churchgoers were some variety of Baptist. At the one-room school I attended, there was only one family of Catholic kids. Very little formal religious instruction took place there. On a couple occasions over the years a man from the American Bible Society made presentations. When he left, the Catholic children would comment at recess that he did not recite the Lord's Prayer correctly and that his Bible read wrong. Even as a child I could sense the conflict in using the public school for evangelistic purposes.

A decade later I was a draftee in the Army stationed in the eastern United States. I was a "holdover" in a training company for several months because my personnel records had been lost and I could not be shipped overseas until all documents were in order. Chapel attendance was a must for me, and each Sunday morning I arose, put on my dress green uniform, and headed for the small chapel that served our company area. Sunday afternoons were spent with my law books at the Fort Dix library (I had enrolled to read law from Blackstone School of Law by correspondence while serving in the Army).

One day I received a message that the chaplain wanted me to be an usher at the main chapel. There was to be a special service, and personnel who attended the various small chapels were needed to assist. I volunteered and made sure that I was properly dressed. I arrived early, and the chapel was nearly empty. The only people there were three or four soldiers of specialist E-5 or above. As a private first class I was to follow their directives. One of the specialists was at the telephone in the vestibule coordinating the service.

Soon busloads of soldiers began arriving. I immediately concluded that these were basic training troops. They had "bone head" haircuts, and their fatigues were so new that the creases in the pants where they had been folded and packaged were still evident. The young soldiers appeared disoriented and tired, as raw trainees generally are the first days of basic training. Drill sergeants instructed the men to line up and file into the chapel in single file.

I concluded that some of the men were Catholic, because they genuflected before being seated in the pews. An occasional trainee would hurry by, holding a small black skullcap to the top of his head, there being insufficient hair to keep the cap in place. These were Jewish trainees. The chapel filled rapidly, and the specialist on the telephone canceled some buses. "We don't need any more," he said. "The chapel is full." True to military form the pews were exactly filled; I had difficulty finding a place to sit because I had been standing while the buses unloaded.

The speaker was from Bob Jones University, an independent Baptist school. There was an excellent pianist, also from the university. The sermon was Baptist, and an invitation was given afterward to those who desired to go forward and make spiritual decisions.

During the service I helped with the offering collection, and afterward we counted the money. I suppose that the offering went into the chapel fund. Actually the plates yielded very little, because basic trainees are not encouraged

to carry money. The specialists cursed and used God's name in vain as the money was counted. Being inexperienced with this task, they were frustrated. They were upset also because they had to be there that night and do extra duty. I showed them how my father, who was church treasurer back home, would stack the coins in one-dollar columns before making the final count.

After the service concluded, the soldiers vacated the building in single file. Drill sergeants barked orders to "double-time" to the buses. In just a few minutes the bus doors closed, the air brakes hissed to off position, and they were gone. Only the stench of the smoke from the diesel engines lingered in the night air.

In a back room a reception had been set up for the speaker and his team. All attendees were invited. Had the basic trainees been expected to have attended, it would have required a New Testament miracle: the cake might have possibly served two

dozen people, despite the fact that hundreds of soldiers had been seated in the sanctuary just moments earlier. I visited briefly with the guests and left.

On my way back to the barracks I concluded that the soldiers had been rounded up and bused to the chapel in order to create a full house. No consideration was made of their religious preferences. Jews and Catholics were forced to attend a Protestant service. Orders came down to make a good showing by filling the house—and, true to orders, it was filled.

My guess is that the guests from Bob Jones University did not know what had happened. I believe that they thought that the attendees came of their own free volition. I have often wondered what the non-Protestants thought. The non-Baptists? Did they think this was just another part of basic training harassment? Did they think that this was an attempt to show who was in control? What would I have thought had I been ordered to attend a Jewish service?

I have shared this account with a number of people over the years, many of whom didn't seem to share the sense of regret that I have about the episode. Maybe it is because they have not endured basic training and do not know what it means to be subjected to drill sergeants' commands. Maybe they do not know what persecution is. Many Southern Baptists with whom I associate do not realize that Baptists themselves were persecuted during the formative years of our country. Yet many want to go back to "what our founding fathers believed in." They fail to understand the difference between voluntary religious practice and state-mandated religious practice (which is what happens, for instance, when religious indoctrination takes place during public school classtime). They rely on the statements of popular political and religious leaders rather than on a sound personal understanding of the New Testament and a sound understanding of American history.

When Jesus said that He would draw all men unto Himself, did He mean to use a few drill sergeants to get the job done? I must admit that my meager witness in the barracks was much less dramatic than what I had observed that memorable night at the chapel. But which method would Jesus honor?

I remember a story I was told about my family. During the Civil War, with all the skirmishes between Confederate and Union forces in our community, our church closed its doors for several months. I have often felt that it is ironic what my grandfather experienced the day when he was kept from church because of fear of the military, and what I witnessed the day when individuals were forced to go to church by the military.

There are many uncertain areas in the church-state debate. Many issues that aren't crystal clear. But all things considered, I believe that my mother understood it well when on that afternoon, many decades ago in rural Missouri, she said, "Remember, the government cannot tell you how to worship."

David J. Hedspeth is a judge in the Carter Country Circuit Court in Van Buren, Missouri.

POMO BROMO

Madonna and Material Discourse

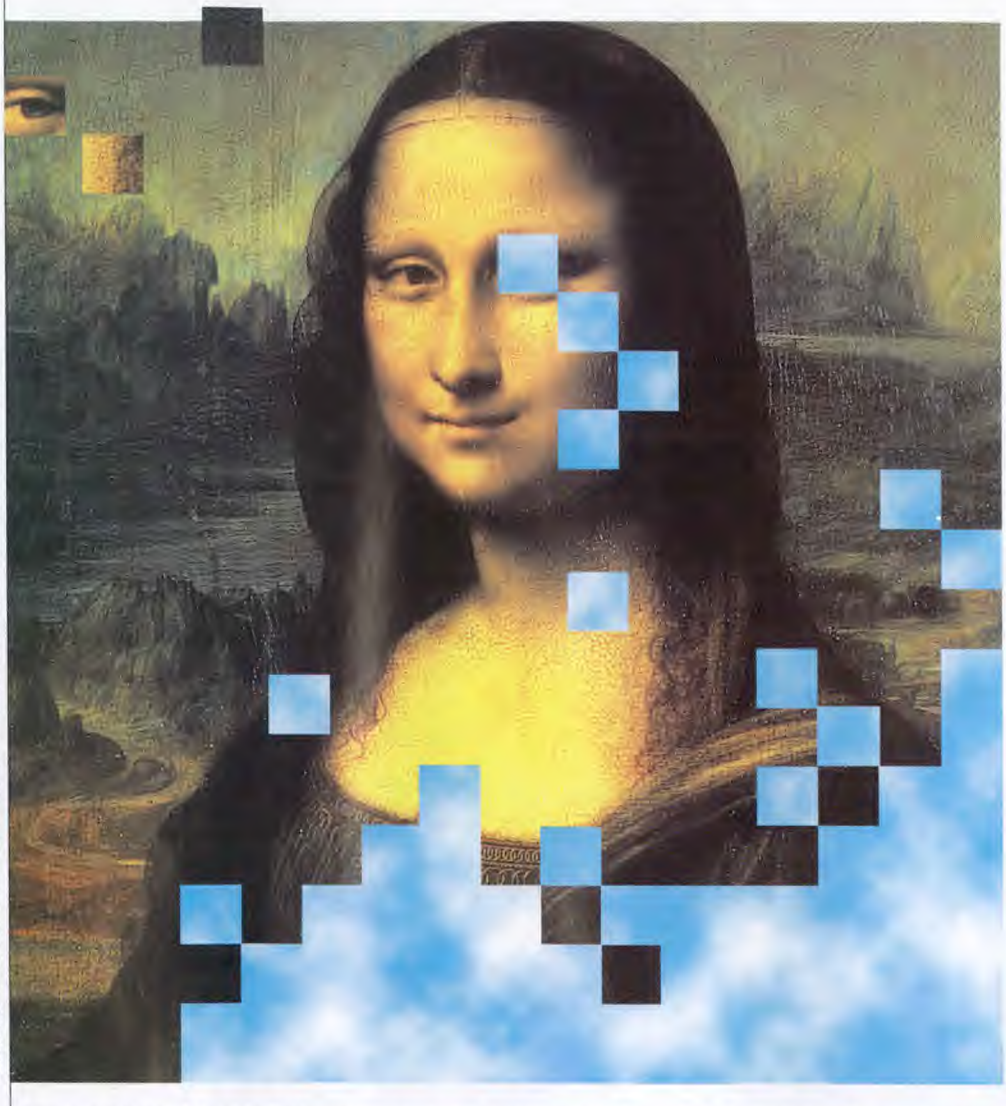
"If one examines structuralist discourse, one is faced with a choice: either accept expressionism or conclude that expression is a product of communication. Derrida's analysis of expressionism states that consensus is a product of the masses, but only if consciousness is distinct from narrativity; otherwise, we can assume that government is fundamentally impossible."
—*From* Expression and Structuralist Discourse

Whatever its faults (the unreasonable trust in reason, the tendency toward hypernaturalism, the unwarranted optimism in human progress, the "demythologization" of religion), the Enlightenment worldview at least included the possibility of knowledge and of truth. The real was deemed rational and, hence, knowable by rational minds. Not only does reality exist, but we can—through a diligent application of reason, scientific method, common sense, and mathematics—understand and exploit it for our maximum good.

However extreme the Enlightenment thesis (that *all* knowledge is rational), and however painfully parochial (to limit reality to reason and science alone is like looking at Mount Everest through a pinhole)—its antithesis, post-modernism (pomo), denies the possibility of knowledge at all. Reality is nothing but a subjective construction of the mind, which itself is structured only by transient, localized, and fluctuating cultures, traditions, and predilections. For pomos there is no overarching absolute, no grand metanarrative in which humanity can establish common roots, no natural laws in which we all operate. Truth is as multifaceted and multivalent as individuals and societies themselves. Ethics, morality, justice, righteousness, even knowledge, are at best collages of local prejudice, at worst coldhearted attempts to legitimatize social structures in order to control and terrorize the masses. If Yeats could warn that "the center cannot hold," postmodernism asserts that "the center" was always an artificial construct to begin with. Though pomos appear, provisionally at least, to accept certain stanchions of the external world (gravity, the periodic table of elements, astrophysics), even science is viewed as a particular mental posture contrived in a mostly European and American White male milieu (the worst of all) and, hence, exceedingly suspect.

Postmodernism—playful, faddish, erudite, strewing its discourse with chic vocabulary and phraseology ("language games," metalinguistics, heterotopia, deconstructionism, the "differend" "play of signifiers," "regimes of truth")—is just a late-twentieth-century rehash of ancient Greek skepticism, perhaps best expressed by Arcesilaus, of member of the Platonic academy, when he said, "Nothing is certain, not even that." What's more, postmodernism is typical of the nonsense that permeates the extremes. It's the *Posse Comtitatus* of the intellectual elite.

Of course, there's a certain amount of contingency in our knowledge, and whatever we know we know provisionally, and language referents are mere subjective and ephemeral tools—this is all given. But these limitations don't mean that humans still can't know truth. Since when is knowledge "knowledge" only when it's apodictic? That I don't know how gravity works, that great blocks of ignorance surround my grasp of planetary motion, that why we're moving in ellipses and not circles is beyond my ken, still doesn't mean I can't "know" that the sun will rise tomorrow and plan my life accordingly. That we can't know everything "for sure" doesn't mean we can't know something "for sure," a basic truth that postmodernism misses. That's why it's so silly, a truth recently brought home when, as a joke, physicist Alan Sokal submitted to the scholarly journal *Social Texts* a ridiculously titled article, "Transgressing the Boundaries: Toward a Transformative Hermeneutics of Quantum Gravity" (come on, a *hermeneutics* of quan-



SCALA/ART RESOURCE, NY. LEONARDO DA VINCI (1452-1519). MONA LISA. LOUVRE, PARIS, FRANCE.

tum gravity!). Amazingly enough, the article—filled with arcane and abstract silliness, including phrases such as "emancipatory mathematics" and "liberatory science"—was published as a serious piece.

The quotation at the beginning of this editorial ("Madonna and Material Discourse"), no matter how erudite it sounds, is in fact nonsense, taken from a website (http://www.cs.monash.edu.au/cgi-bin/) that uses a computer to create grammatically correct but meaningless postmodern texts. "The essay you have probably just seen," the site says at the bottom of the text, "is completely meaningless and was randomly generated by this Post-modernism Generator."

Nevertheless, tempted we might be to dump postmodernism into history's curiosity closet (along with theosophy, alchemy, and phrenology), we can't. Postmodernism, to one degree or another, has invaded the mainstream of Western thought, including the church-state debate, where separationism is becoming a conduit for one of the most serious consequences of the postmodernist ideal: amoralism. After all, if all truth is subjective, localized, and fluctuating, morality must be as well, and thus any attempt to enforce moral strictures through law is nothing but power grabs by an elite bent on dominion and terrorism. When any civil attempt to structure a moral base for society is deemed violative of church-state separation, the pyrrhic victory of postmodernism is apparent.

Few concepts, though, are more antithetical to postmodernism than separation of church and state, which was extricated from the Enlightenment ideal that truth not only exists but can be known and lived. Church-state separation arose out of a belief that God created natural laws, and that humankind could find freedom, fulfillment, and happiness by obeying those laws. Far from reflecting the axiological nihilism of the postmoderns, church-state separationism is premised upon an overarching, enduring, and universal *moral* metaconcept, which is that God wants humankind to be free and happy, that He has placed the desire for these ideals in the heart of the rational and moral beings He has created, and that one of the best ways to ensure that happiness and freedom was to allow humanity to (or not to) worship and serve God as each individual deemed fit. Keeping government as far out of religious issues as possible was an attempt to protect moral integrity, not denude it of meaning by making it helplessly subjective, contingent, and locally determined.

Separation of church and state is an edifice, however limited, built upon the concept that God in heaven has established eternal norms of right and wrong, good and evil, justice and injustice—and that one fundamental expression of this right, good, and justice is freedom to worship God according to the dictates of one's own conscience, and not the conscience of others. What it wasn't built on, nor should it espouse, is the postmodernist chimera that places ethics on the same plane as aesthetics, and that declares moral preferences no qualitatively different than gastronomical ones, a notion as nonsensical as "Madonna and Materialist Discourse."

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