THE DEMISE OF FREE EXERCISE: AN HISTORICAL ANALYSIS OF WHERE WE ARE, AND HOW WE GOT THERE

I. INTRODUCTION

Eleven years after the signing of the Declaration of Independence, a Constitutional convention was called to amend the Articles of Confederation. Out of that convention came the United States Constitution, and "a more perfect union."[1] Some of the delegates to the Constitutional convention refused to sign the new Constitution if it did not include a Bill of Rights.[2] James Madison, who opposed a Bill of Rights at the convention, drafted the initial provision that later became the First Amendment, which included a religious liberty clause. Madison initially opposed the amendment on religious freedom because he "believed religion functioned best when it was not dependent on the state for its existence or support."[3] Thomas Jefferson agreed with Madison's position that issues of religion were outside of the sphere of civil government. He stated his views in his second inaugural address.

> In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercise suited to them, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies.[4]

It is clear from this comment that the free exercise of religion was of paramount importance to Madison. It is also demonstrable that for most of our country's first two hundred years the high accord given to freedom of religion by the Founders was held inviolable by the courts.[5] However, in the past twenty years, the actions of the Supreme Court have led some legal scholars to conclude that free exercise of religion "has become the least protected of our fundamental constitutional rights," and that

---

1 U.S. CONST. preamble.

2 The National Legal Foundation, Foundations of Freedom: The Constitution and Bill of Rights 22 (1985).

3 JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS 106.

4 *Id.* at 243.

5 In 1943, Justice Jackson, writing for the majority in *West Virginia State Board of Education v. Barnette*, stated that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

"for the majority of the Supreme Court, free exercise is a falling star."[6] If the Founding Fathers viewed the free exercise of religion as fundamental to the well-being of the newly formed nation, and the Supreme Court clung to that view until at most fifty years ago, one might ask what happened to cause the demise of the free exercise clause. This comment will review the historical basis for the free exercise clause, and examine the most significant Supreme Court decisions that have defined, expanded, and limited the free exercise of religion.

II. BLACKSTONE'S INFLUENCE ON AMERICAN POLITICAL THOUGHT

In 1984, the *American Political Science Review* published a study conducted by Professor Donald Lutz, "The Relative Influence of European Writers on Late Eighteenth Century American Political Thought." Lutz's study found that our Founding Fathers quoted the Bible more than any other source in their political writings. The Bible, which accounted for 34% of the total citations, was followed by Baron Charles Montesquieu with 8.3% of all citations and Sir William Blackstone with 7.9% of all citations. (John Locke was a distant third with 2.9%).[7] Blackstone's primary contributions were in the areas of legal and rights theories. It is the Founders' reliance on Blackstone that lays the foundation for our study of religious liberty.

In 1769, Sir William Blackstone published his *Commentaries on the Laws of England*. In the first volume of Blackstone's work, he discussed rights that are natural to man and concluded that:

> [they] need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural duties (such as, for instance, the worship of God, the maintenance of children, and the like) receive any stronger sanction from being also declared to be duties by the law of the land.[8]

Blackstone's decision to cover this material in this introduction to his first volume indicates the primary importance that he placed on man's duty to God. Blackstone pointed out that man's duty to worship God is a natural duty that precedes his participation in a civil society and cannot be dictated by civil government. Blackstone continued this thought in *Book One, Chapter One: Of the Absolute Rights of Individuals.*

---

[6] R. Collin Mangrum, *The Falling Star of Free Exercise: Free Exercise and Substantive Due Process Entitlement Claims in City of Boerne v. Flores*, 31 CREIGHTON L. REV. 693 (1998).

[7] EIDSMOE, *supra* note 3, at 51-52 (1987).

[8] 1 WILLIAM BLACKSTONE, COMMENTARIES *54.

"By the absolute rights of individuals we mean those which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy whether out of society or in it."[9] Blackstone transitioned into discussing the role of civil government by explicitly stating that "the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature."[10]

The scope of this comment does not permit a full-scale examination of the Founders' reliance on Blackstone and the English Common Law, but the language and theory used by Blackstone are nearly identical to those used by Thomas Jefferson when he penned the Declaration of Independence seven years later:[11] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men."[12] Compare Jefferson's words to those used by Blackstone when he stated that man was "endowed with both reason and free will,"[13] that among natural rights which "God and nature have established . . . are life and liberty,"[14] and that the "principal aim of society" is the protection of these rights.[15] Some may question why Jefferson did not include the terms "freedom of religion" in his list of inalienable rights, but Blackstone again supplies the answer: "[F]or he has so intimately connected, so inseparably interwoven, the laws of eternal justice with the happiness of each individual, that the latter cannot be attained, but by observing the former."[16] Blackstone believed "[h]appiness" was intricately tied to following the dictates of one's conscience in performing his duties to God; the role of government is to ensure that all men are free to perform those duties.

---

9 *Id.* at 119.

10 *Id.* at 120.

11 Interview with Gary Amos, Regent University Law Professor, in Virginia Beach, Va. (Oct. 28, 1998).

12 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

13 BLACKSTONE at *39.

14 *Id.* at *54.

15 *Id.* at *120.

16 *Id.* at *40.

III. AN HISTORICAL ANALYSIS OF THE FREE EXERCISE CLAUSE

A. The First One Hundred Years: A Period of Calm (1791-1890)

In order to determine the extent to which free exercise rights/claims have been downplayed or ignored, it is helpful to begin by examining the history of such claims. In the first one hundred years following the adoption of the Bill of Rights, only six cases that had any substantial reference to free exercise of religion made it before the Supreme Court.[17] Of those six cases, two involved church property,[18] one involved a municipal restriction on where funerals could be performed,[19] and three involved adherents to the Church of Jesus Christ of Latter Day Saints (Mormons). One Mormon case dealt with church property being confiscated because the church continued to teach the doctrine of bigamy in violation of state law and was not in compliance with state regulations regarding property holdings by religious societies.[20] The two principal cases involved Mormons violating criminal laws and excepting to the charges because their religion directed their disobedience.[21] Only these two cases were decided on grounds that addressed an individual's freedom of conscience or action.

Perhaps the best known of these early free exercise cases to come before the Supreme Court was *Reynolds v. United States*.[22] In *Reynolds*, a member of the Church of Jesus Christ of Latter Day Saints (Mormons) was arrested and charged with polygamy, which violated the territorial law of Utah. Among Reynolds's defenses was the claim that he was acting in accordance with the dictates of his religion and the territorial law infringed upon his free exercise rights.[23] The Court performed a dual analysis in its determination of the case. First, the Court examined the development of the First Amendment and concluded by citing Thomas Jefferson's well-known letter to the Danbury Baptist Association in 1802:

---

[17] Terrett v. Taylor, 13 U.S. 43 (1815); Permoli v. Municipality No. 1 of the City of New Orleans, 44 U.S. 589 (1845); Watson v. Jones, 80 U.S. 679 (1871); Reynolds v. United States, 98 U.S. 145 (1878); Davis v. Beason, 133 U.S. 333 (1890); Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1 (1890).

[18] *Terrett*, 13 U.S. at 43, involving land held by the incorporated Episcopal church prior to and after the revolution, and *Watson*, 80 U.S. at 679, involving a dispute over which group in a church split was entitled to land.

[19] *Permoli*, 44 U.S. at 589.

[20] *Church of Jesus Christ of Latter Day Saints*, 136 U.S. at 10-11.

[21] *Reynolds*, 98 U.S. at 145; *Davis*, 133 U.S. at 333.

[22] *Reynolds*, 98 U.S. at 145.

[23] *Id.* at 161.

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, —I contemplate with 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.[24]

Since Jefferson had been instrumental in drafting the Virginia statute that became a model for the First Amendment, the Court accepted this statement "almost as an authoritative declaration of the scope and effect of the amendment."[25] This demonstrates the theoretical underpinning of the right to the free exercise of religion. Free exercise of religion in its earliest legal challenges stood for the proposition that man was free to think and believe anything, but if his actions were found to be disruptive to good order or in violation of his civic duties his free exercise rights would be subordinate to these demands. "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[26] The prevailing opinion within the legal community today is that the *Reynolds* decision stands for the proposition that only religious belief, not religious action, is free from governmental interference. While both the *Reynolds* and *Davis* cases held that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinion, they may with practice,"[27] the previously cited quotations from the *Reynolds* case indicate that the Court limited governmental interference with religious activities only when they were "in violation of social duties or subversive of good order." Both Courts performed an historical common law analysis of bigamy, concluding that among Western peoples the practice has always been viewed as "odious" and an "offense against society."[28] The *Davis* Court stated simply that "bigamy and polygamy are crimes by the laws of all civilized and Christian countries."[29] The Court went on to state its understanding of the limits of the First Amendment as follows: "It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of soci-

---

[24] *Id.* at 164. This author contends that the Court has misapplied Jefferson's "wall of separation" comment during the last half-century, but that discussion goes beyond the scope of this paper.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 166; *Davis*, 133 U.S. at 342.

[28] *Reynolds*, 98 U.S. at 164; *Davis*, 133 U.S. at 341.

[29] *Davis*, 133 U.S. at 341.

ety."[30] This introduces the only rationale for restricting actions exercised in the pursuit of one's religion: those actions that are an affront to society based on an historical understanding of Western civilization may be restricted without violating a person's right to free exercise of religion. This position is consistent with the Blackstonian approach to religious liberty.

> Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself, (as drunkenness, or the like) they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them.[31]

Although the Court uses slightly different language, it mirrors Blackstone's thought on the limits that may be placed on man's natural liberty. "For all of us have it in our choice to do every thing that a good man would desire to do; and are restrained from nothing, but what would be pernicious either to ourselves or our fellow citizens."[32]

Second, the Court asked whether an exception to a "generally applicable law"[33] against bigamy should be granted to one whose religious belief compels him to disobey that law.[34] The Court reasoned that allowing this exception would permit certain individuals to act in a way that the state had declared to be subversive to order. The logical conclusion of this reasoning was that certain individuals could practice bigamy without prosecution while others would be prosecuted for the same conduct.[35] The Court rejected this reasoning, arguing that even if one sincerely believed that human sacrifice was a necessary part of his religion, the state would still have authority to restrict murder.[36] The view of the Court in this first free exercise challenge to a state (territorial) law that conflicted with religious free exercise was that to allow the violation of a "law of the organization of society" would "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[37] The *Davis* Court explicitly

---

30 *Id.* at 342.

31 BLACKSTONE, *supra* note 8, at *120.

32 *Id.* at *140.

33 "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, . . . regarded by general consent as properly the subjects of punitive legislation." *Davis*, 133 U.S. at 342-43.

34 *Reynolds*, 98 U.S. at 166.

35 *Id.*

36 *Id.*

37 *Id.* at 166-67.

stated that even a religious sect is subject not only to the criminal law of the state, but also the moral code upon which that law is founded

> There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that as religious beliefs, their supporters could be protected in their exercise by the constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.[38]

According to these early cases, religious free exercise could be restricted by the government when the actions of an individual or sect violated the criminal law of the state, which is based on the historical moral code of the civilization. Note the Court's reliance on the "Christian" view of morality in the above quote. Although the Court did not limit the free exercise of religion to Christian beliefs and actions, the Court relied on a Christian definition of religion in limiting the actions that would constitute a legitimate exercise of one's religion. This is entirely understandable based on the overwhelming Christian influence on the formation of our country and its institutions.[39]

B. The Next Sixty Years: A Period of Certainty and Uncertainty (1891-1950)

The years immediately preceding and following the turn of the last century were relatively silent in terms of free exercise claims. The most significant case during this period, *Holy Trinity Church v. United States*,[40] is best known for Justice Brewer's comment that "this is a Christian nation."[41] However, the case also had definite implications for the free exercise of religion. At issue in *Holy Trinity* was a Congressional act that banned any action that would "in any way assist or encourage the importation or migration of any alien or aliens . . . to perform labor

---

[38] *Davis*, 133 U.S. at 343.

[39] *See generally*, EIDSMOE, *supra* note 1; and DAVID BREWER, THE UNITED STATES: A CHRISTIAN NATION. Brewer was an Associate Justice of the United States Supreme Court between 1889-1910. He is best known for his opinion in *Holy Trinity Church v.United States*, 143 U.S. 457 (1892).

[40] *Holy Trinity*, 143 U.S.at 457.

[41] *Id.* at 471.

or service of any kind in the United States."[42] Holy Trinity Church had contracted with an English clergyman, E. Walpole Warren, to assume responsibilities as rector and pastor of the church.[43] Justice Brewer began his analysis of the case with reference to the legislative history of the act, which overwhelmingly indicated that it was intended to apply only to manual laborers.[44] His remaining remarks, however, illustrated the high place reserved for free exercise of religion. "But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people."[45] Brewer actually went far beyond what today would be considered neutrality toward religion. Citing a case from the Supreme Court of New York, Brewer stated that:

> The people of this State, in common with the people of this country, profess the general doctrines of Christianity as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order. . . . The free, equal and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and recurred; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community; is an abuse of that right.[46]

During the remainder of this period, a number of cases with some bearing on the free exercise of religion came before the Supreme Court.[47] Of these, the majority (ten) involved municipal ordinances challenged by adherents of the Jehovah's Witnesses sect.[48] Although they were decided

---

[42] *Id.* at 458.

[43] *Id.*

[44] *Id.* at 462-465.

[45] *Id.* at 465.

[46] *Id.* at 470-471.

[47] Following is list of the more significant cases of the period: Reuben Quick Bear v. Leupp, 210 U.S. 50 (1908); Hamilton v. Regents of the University of California, 293 U.S. 245 (1934); Lovell v. City of Griffin, 303 U.S. 444 (1938); Cantwell v. Connecticut, 310 U.S. 296 (1940); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940); Jones v. City of Opelika, 316 U.S. 584 (1942) (*Jones I*); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Jamison v. Texas, 318 U.S. 413 (1943); Jones v. City of Opelika, 319 U.S. 105 (1943) (*Jones II*); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Douglas v. City of Jeanette, 319 U.S. 157 (1943); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Prince v. Massachusetts, 321 U.S. 158 (1944); Follett v. Town of McCormick, 321 U.S. 573 (1944); United States v. Ballard, 322 U.S. 78 (1944); Tucker v. Texas, 326 U.S. 517 (1946); Cleveland v. United States, 329 U.S. 14 (1946).

[48] The Court appears to have dealt with only one significant Mormon case during this same period. In Cleveland v. United States, 329 U.S. 14 (1946), the Court applied a criminal statute against the interstate transportation of women for "immoral purposes" against a fundamentalist sect of Mormons to further curtail their practice of bigamy. The

on a variety of similar issues, the ten challenges to municipal ordinances can be grouped together under the heading of "license" cases. In nearly all of these cases, the individuals involved were challenging state laws or local ordinances that forbade literature distribution or sale without a license.[49] One of the best known of these cases is *Cantwell v. Connecticut.* At issue in *Cantwell* was a Connecticut law that forbade the solicitation of money for any religious or charitable purposes without the approval of the Secretary of Public Welfare.[50] The Cantwells, a father and two sons, were arrested for "soliciting" contributions through their door-to-door canvassing and display of Jehovah's Witness material. They defended their action on the grounds that the law imposed "a prior restraint on the exercise of their religion."[51] The Court agreed with the Cantwells, stating that the free exercise clause of the Constitution protected not only the freedom to believe, but also the freedom to act without the prior restraint of the government.

> The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act.[52]

Through this series of cases, the Court maintained the precedent established by *Reynolds* and *Davis* that the state can place legitimate restrictions on an individual's right to act in pursuit of his/her religious duties. "Conduct remains subject to regulation for the protection of society."[53] However, the Court began a move away from the *Reynolds* standard that the only conduct that can be regulated is that which is "odious and offensive to society" according to the historic moral code, and allowed free exercise to be limited by the "comfort of the community."[54] The Court noted that the regulation at issue in *Cantwell* could have survived constitutional muster had it not been left to the state to determine

---

Court maintained its prior precedents that "religious creed affords no defense in a prosecution of bigamy." *Cleveland*, 329 U.S. at 20.

[49] *See Lovell*,303 U.S. at 444, *Cantwell*, 310 U.S. at 296, *Murdock*, 319 U.S. at 105, *Follett*, 321 U.S. at 573, *Jones I*, 316 U.S. at 584, *Jones II*, 319 U.S. at 105, *Douglas*, 319 U.S. at 157, *Chaplinsky*, 315 U.S. at 586, *Jamison*, 318 U.S. at 413, *and Tucker*, 326 U.S. at 517.

[50] *Cantwell*, 310 U.S. at 302.

[51] *Id.* at 304.

[52] *Id.* at 303.

[53] *Id.* at 304.

[54] *Id.*

whether the individual applying for a permit to solicit was acting on a religious belief.[55] In other words, the state cannot decide if one is acting on a religious belief, but it may restrict his right to practice that belief. In addition, the Court stated that a governmental entity does have the authority to regulate the activities that take place on its streets, so long as the legislation is "general and non-discriminatory" and only regulates the "times, the places, and manners of soliciting" or otherwise "(safeguards) the peace, good order and comfort of the community" without violating First Amendment freedoms.[56] Note the Court's language now included the "comfort of the community" as a legitimate reason for the state to restrict free exercise.

Three years following *Cantwell*, the Court handed down decisions in several cases, consolidated for argument purposes, that further addressed the restrictions that a community could impose upon the distribution of literature and door-to-door canvassing techniques used in the name of free exercise of religion.[57] In 1942, the Court had decided that the City of Opelika, Alabama (*Jones I*), could require a religious adherent to obtain a license to sell books and other literature. The city's ability to tax the "profession" was not viewed as an infringement on the individual's right to exercise his religion.[58] The following year, the Court overturned its ruling in *Jones I* and broadened the scope of activities covered by the free exercise of religion.[59] This signaled a turn back toward the *Reynolds*' standard as the Court evaluated the questioned conduct against historical Christian norms.

The Court acknowledged that hand distribution of literature was "an age-old form of missionary evangelism" and a "potent force" in various religious movements.[60] It noted that this type of evangelism was a hybrid of preaching and distribution of literature (thereby implicating free speech, free press, and free exercise of religion) and held that it should be given the same status as "worship in the churches and preaching in the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion."[61] The Court acknowledged that this type of religious free exercise could create unique police

---

[55] *Id.* at 305.

[56] *Id.* at 304.

[57] *Jones I*, 316 U.S. at 584, Jobin v. Arizona, 319 U.S. 105 (1943), Murdock v. Pennsylvania, 319 U.S. 105 (1943); Martin v. Struthers, 319 U.S. 141 (1943); Douglas v. Jeanette, 319 U.S. 157 (1943).

[58] *Jones I*, 316 U.S. at 596-98.

[59] *Jones II*, 319 U.S. at 103.

[60] *Murdock*, 319 U.S. at 108.

[61] *Id.* at 109.

power problems for the state,[62] but rejected the position that the state had a right to tax the commercial aspect of the literature sale, stating that "the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial enterprise."[63] Its finding that "[a] state may not impose a charge for an enjoyment of a right granted by the federal constitution"[64] felled the municipal license tax on religious literature distributed in an evangelistic manner.[65]

Two other significant cases, involving Jehovah's Witnesses' challenges to other governmentally imposed obligations, were also instrumental in elevating the realm of religious free expression over other societal concerns. The uncertainty of the Court's free exercise jurisprudence was once again evident in a ruling that was directly overturned just a few years later. In 1940, the Court, in *Minersville School Dist. v. Gobitis*, held that a school policy enforcing a salute to the American flag did not violate the free exercise of religion of those who objected to the salute. The Court exalted the values that the flag symbolized over the individual religious adherent's right. "The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by our flag."[66]

Based on the Court's position in *Gobitis*, the State of West Virginia enacted legislation that mandated a program in civics, including mandatory flag salutes by public school children, that would promote general good will in America.[67] Just three years later, in *West Virginia State Bd. of Educ. v. Barnette*, the Court reversed itself, stating that a compulsory flag salute violated the religious free exercise of conscientious objectors. The Court directly overturned its holding in *Gobitis* and struck down the

---

[62] *Id.* at 110. *See, e.g., Chaplinsky*, 315 U.S. at 568, where a Jehovah's Witness was convicted for using offensive language to a police officer who was removing him from the area where an unruly mob was protesting his activities.

[63] *Murdock*, 319 U.S. at 111.

[64] *Id.* at 113

[65] Justice Jackson wrote a strong dissent in these cases challenging the exaltation of "street evangelism" to the same "high estate" as church worship. He noted the "abusive" manner in which some Witnesses had aired their comments and noting the outcome of Chaplinsky asked, "how then can the court today hold it a 'high constitutional privilege' to go to homes, including those of devout Catholics on Palm Sunday morning and thrust upon them literature calling their church a 'whore' and their faith a 'racket'?" Douglas v. Jeanette, 319 U.S. 157, 180 (1943) (Jackson J., dissenting). Jackson challenged the Court's position as "adding new stories to the temples of constitutional law" that will cause the collapse of "what has before been regarded as religious liberty." Id. at 181-182.

[66] Minersville School Dist. v. Gobitis, 310 U.S. 586, 600 (1940).

[67] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 625 (1943).

West Virginia law. In his concurring opinion, Justice Murphy stated that "official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship."[68] Murphy continued, stating that freedom of conscience is a goal to be protected even at the expense of what might be called patriotic duty.

> Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.[69]

The Court in *Barnette* made one other salient point that will be discussed in a later section. "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[70]

As evidenced by its decisions and subsequent overturning of *Jones I* and *Gobitis*, it is apparent that the Court struggled with the breadth of free exercise of religion during this period. The Court infringed on the free exercise of religion by restricting certain practices in terms of time, place, and manner necessary to protect the "comfort of the community," but maintained its focus on whether the regulated conduct was an offense to traditional Christian concepts of moral order. Despite upholding individual free exercise rights in these cases, the Court's uncertainty in this area led to a moderate narrowing of those rights. However, the Court's definition of what constituted unrestrainable conduct was still firmly founded on the Blackstonian approach that the duty a man owed to God could only be limited by the state when his conduct crossed the line of historical Christian morality.

C. The Last Fifty Years: A Period of Confusion: Exaltation and Demise? Or a Return to Normal? (1951-1998)

A complete cataloging of the number of free exercise of religion cases that have come before the Supreme Court during these years is not necessary to understand the Court's trend in deciding these cases. This

---

68 *Id.* at 646 (Murphy J., concurring).

69 *Id.*

70 *Id.* at 638.

survey will examine several of the cases generally thought to be the most definitive in explaining the Court's position during a given period.[71]

One of the most frequently cited cases that was decided during the early years of this period is *Sherbert v. Verner*.[72] Adell Sherbert lost her job because she refused to work on Saturday, the Sabbath day of the Seventh Day Adventist Church to which she belonged. When Ms. Sherbert was unsuccessful in finding other employment, she filed for unemployment compensation and was denied by the State.[73] The State statute that governed unemployment compensation said that a claimant would be ineligible for benefits if "he has failed without good cause . . . to accept available suitable work when offered him by the employment office or the employer."[74] The State Supreme Court had denied Ms. Sherbert's claim to benefits, arguing that the statute "places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs."[75] The Supreme Court disagreed.

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. . . . [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.[76]

Having determined that the statute as applied placed an undue burden on Ms. Sherbert's free exercise of religion, the Court asked whether there was a compelling state interest that "justifies the substantial infringement of Appellant's First Amendment right."[77] Citing *Thomas v. Collins*,[78] the Court stated that only the gravest abuses, endangering paramount interest, give occasion for permissible limitation."[79] While the Court's language here is reminiscent of Blackstone's

---

[71] Cases involving conscientious objectors to war/draft will not be discussed because they also encompass numerous political questions that go well beyond the scope of this work.

[72] Sherbert v. Verner, 374 U.S. 398 (1963).

[73] *Id.* at 399-400.

[74] *Id.* at 401.

[75] *Id.*

[76] *Id.* at 404, 406.

[77] *Id.* at 406.

[78] 323 U.S. 516 (1945). *Thomas* was a free speech case, and the *Sherbert* Court cited only its comment that First Amendment rights are accorded the highest deference to governmental restrictions.

[79] *Sherbert*, 374 U.S. at 406.

approach and that of the Court in *Reynolds* nearly one hundred years before *Sherbert*, it in fact represents another subtle shift away from the historical reasons for limiting religious free expression.[80] In *Reynolds*, only conduct that fell outside the bounds of traditional Christian morality was limitable by the state. In *Cantwell*, free exercise was limited for the "comfort of the community," but only within a Christian moral context. In *Sherbert*, free exercise is limited by any compelling state interest. While the Court found that South Carolina did not have a compelling state interest in refusing to recognize Saturday as a legitimate Sabbath for purposes of unemployment compensation, the Court's shift in analysis opened the door for consideration of what activities the government may regulate because of a compelling state interest.[81] As in *Cantwell*, the Court in *Sherbert* exalted the individual's free exercise rights were exalted over the demands of the state; but the Court's changing terminology and shifting analysis opened the door for further restrictions in future cases. [82]

Sherbert represents another shift in free exercise jurisprudence as well. In *Reynolds*, *Cantwell*, and their progeny, free exercise of religion was used by the defendant to claim an exemption from a criminal proceeding. The duty of the Court was to determine whether the law barred conduct offensive to peace and good order. If the conduct in question was viewed as violating traditional Western Christian morals, the state had a legitimate interest in controlling the conduct regardless of the religious nature of the conduct. In *Sherbert*, the free exercise of religion began to be used by a plaintiff to secure a governmental benefit unavailable to her because of her religious views. In this context, Justice Brennan developed a balancing test that weighed the "burden" on the adherent's religion against the state's compelling interest in its program. This shift en-

---

[80] Gary Stuart McCaleb, *A Century of Free Exercise Jurisprudence: Don't Practice What You Preach*, 9 REGENT U. L. REV. 253, 263 (1997).

[81] Two years prior to the *Sherbert* decision, the Court had upheld a Pennsylvania law that mandated Sunday closing. A Jewish merchant had objected to the statute on the grounds that his Sabbath was Saturday and the law forced him to be closed two days during the week instead of one. The court acknowledged that the statute "operates so as to make the practice of their religious beliefs more expensive," but found that the state had a compelling interest in a uniform day of rest. Braunfeld v. Brown, 366 U.S. 599, 607 (1961). The Court decided this case because the incidental burden on Braunfeld's religion does not restrict his "worship," it simply costs him money to observe both his conscience and the law. *Id.* at 605. While the decision may be valid on those grounds, the Court's willingness to find a compelling state interest in a "uniform day of rest" moves us far away from the Blackstonian approach.

[82] *See, e.g.*, Herb Titus, *The Free Exercise Clause: Past, Present, and Future*, 6 REGENT U. L. REV. 7 (1995) (arguing that *Sherbert* marked a departure for the Court from the *Reynolds* standard that religious practice should not be an excuse for violating generally applicable laws).

trenched the Court in a compelling state interest mode for the next thirty years and allowed it to "balance" free exercise of religion claims that under the *Reynolds* analysis would have been either granted or denied based on the law and the lack of jurisdiction of the Court over religious matters.[83]

Nine years after *Sherbert*, the Court decided *Yoder v. Wisconsin*,[84] believed by many to be a solid win for religious free exercise. However, the extremely narrow holding in *Yoder* actually placed even greater limitations on who could successfully advance free exercise claims. *Yoder* involved a Wisconsin compulsory education statute that required children to attend school until they were sixteen years old. Three Old Order Amish/Conservative Amish Mennonite families were fined for failure to comply with the law when they would not send their fourteen- and fifteen-year-old children to school.[85] The State of Wisconsin challenged the holding of the State Supreme Court that requiring these children to pursue formal education beyond eighth grade would be a violation of their free exercise of religion. The Court acknowledged that it is not always easy to determine what actions are religiously motivated and that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."[86] Nevertheless, the Court found the conduct of the Amish within the protective realm of free exercise of religion. The Court apparently agreed with the *Reynolds* Court in acknowledging the high accord given to free exercise of religion, but limited it to legitimate religious expression defined by a moral code that is higher than "every man [doing] that which was right in his own eyes."[87] The Court once again elevated the right of free exercise of religion beyond all but the most absolute needs of society:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.[88]

---

[83] *See generally*, Titus, *supra* note 82, at 15-17.

[84] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[85] The Amish believe that children should go to school through the eighth grade and then continue their education at home. The crux of their post-eighth grade education is learning the practical skills of life required for those of their faith. All three children had completed the eighth grade. *Id.* at 210-12.

[86] *Id.* at 215-16.

[87] *Judges* 21:25 (King James).

[88] *Yoder*, 406 U.S. at 215.

The Court further summarized its current position, stating that there are religious acts protected by the Constitution that are "beyond the power of the State to control, even under regulations of general applicability."[89] The Court correctly held to a Blackstonian model in this case; unfortunately, the Court did not define what religious acts are beyond the power of the State to control, or what constitutes a compelling state interest. Even more unfortunate was the Court's reliance on the compelling state interest test. Under the *Reynolds* analysis, there is no doubt that the Court would have reached the same conclusion; however, the *Yoder* Court's reliance on the compelling state interest test continued to degrade the *Reynolds' view* that the free exercise of religion had absolute primacy over all but the most fundamental laws necessary to preserve peace and good order.

Significantly, the Court's analysis indicates that the exemption granted to the Amish would likely have been denied to more "mainstream" individuals. The Court relied heavily on social science data in determining that the Amish possessed a distinctive culture and that the education of Amish children was not harmed by their separatist religious views.[90]

> [T]he record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, 'be not conformed to this world. . . .'This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.[91]

The Court further emphasized the nearly "300 years of consistent practice"[92] by the Amish and noted that exposing Amish children to worldly influences associated with public education would substantially interfere with "his integration into the way of life of the Amish faith community at the crucial adolescent stage of development."[93] Everyone within the religious free exercise community should herald this victory for the Amish. However, the Court's reliance on the social environment

---

89 *Id.* at 220.

90 *Id.* at 215-29.

91 *Id.* at 216.

92 *Id.* at 219.

93 *Id.* at 218.

of the Amish and their complete separation from "mainstream" America makes this holding of limited value to religious free exercise cases in general. The logical conclusion is that under *Yoder* free exercise rights are protected for religious adherents that have a lifestyle that is completely distinct from anyone else, and that can prove the integral connection between their faith and their civic actions by resorting to practices that have remained unchanged for centuries.

One of the most controversial free exercise decisions of the Supreme Court is the 1990 decision in *Employment Division v. Smith*[94] (hereinafter *Smith II*).[95] In *Smith II*, the Court was called upon to decide whether a state law that forbade the use of peyote violated the free exercise of religion of two Native Americans who used peyote as a sacrament in religious ceremonies. Justice Scalia, writing for the majority, hearkened back nearly one hundred years to the Court's decision in *Reynolds*, stating that if laws are violated in the name of religion, an individual's religious belief would become "superior to the law" making every person "a law unto himself."[96] Scalia upheld the ban on peyote use because it was "a valid and neutral law of general applicability"[97] that was not simply "an attempt to regulate religious beliefs."[98] Although Scalia reached the correct conclusion, he missed one key point of the *Reynolds* analysis. It is true that any law directly aimed at religious practice should be held violative of free exercise.[99] However, it was not the general applicability of the ban on bigamy that kept it from being a violation of free exercise, but that bigamy was viewed as "odious" and an "offense against society" based on fundamental Christian doctrine.[100] The use of peyote should have been examined against the same standard. Peyote is a hallucinatory drug,[101] classified by the State of Oregon as a Schedule I controlled substance.[102] There is little doubt that the Christian traditions embodied in the common law would find that even the ceremonial use of a drug that caused hallucinations in its user would be offensive to society.

---

[94] For an early example of the diametrically opposed viewpoints on *Smith II* from within the Christian community see Herbert W. Titus, *The Free Exercise Clause: Past, Present, and Future*, 6 REGENT U. L. REV. 7 (1995), and Michael P. Farris and Jordan Lorence, *Employment Division v. Smith and the Need for the Religious Freedom Restoration Act*, 6 REGENT U. L. REV. 65 (1995).

[95] Employment Division v. Smith, 494 U.S. 872 (1990).

[96] *Id.* at 879.

[97] *Id.*

[98] *Id.* at 882.

[99] *Id.* at 877-78.

[100] *See supra* text accompanying note 28.

[101] BLACK'S LAW DICTIONARY 1146 (6th ed. 1990).

[102] *Smith II*, 494 U.S. at 874.

Justice Scalia did not apply the compelling interest test to this case, instead resting his decision on the general applicability of a criminal statute that only incidentally burdens religion. Scalia applied a Reynold's type analysis to the facts in *Smith II* and correctly concluded that granting a religious exemption to a criminal law would create an unworkable standard where a single act could be both legal and illegal at the same time. Had Scalia also rested his opinion on the historical view of the act in question, the Court would have made a complete return to the Reynold's standard. Scalia, however, did not reject the "compelling state interest" test as a general rule, and Justice O'Connor relied heavily on the test in her concurring opinion.[103] Citing *Yoder*, O'Connor stated that

> The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests "of the highest order."[104]

The Court's continued reliance on the compelling state interest test and Scalia's reliance on the neutrality and general applicability of laws, regardless of the nature of the conduct, both spelled doom for any elevation of free exercise rights. Some commentators have argued that *Smith II* effectively kills free exercise claims and that if a state passed a prohibition law that even the sacramental use of wine would be outlawed.[105] This argument fails to account for Scalia's specific provision for such activities under the free exercise of religion.

> But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods of modes of transportation. It would be true, we think (though no case of ours have involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.[106]

Scalia's opinion in *Smith II* did not eviscerate the free exercise clause, but restored it to a pre-*Sherbert* posture where the conduct is measured not against a compelling state interest but against generally applicable neutral laws that regulate only that conduct that is an offense

---

[103] *Id.* at 891-907 (O'Connor, J., concurring).

[104] *Id.* at 895.

[105] Richard F. Duncan, *Religious Freedom in a Post-RFRA World*, RELIGIOUS LIBERTIES NEWS (E.L. Weigand Practice Groups of the Federalist Society, Washington, D.C.), Summer 1998, 1, 2.

[106] *Smith II*, 494 U.S. at 877.

against society and disruptive to peace and good order. Those who would argue that *Smith II* excised the free exercise clause from the Constitution[107] are relying on a *Sherbert* and *Yoder* definition of free exercise, not a *Reynolds* and *Davis* definition. Scalia deviated from the Reynolds standard only in allowing religious free exercise to be limited by a different standard. In *Reynolds*, the Court denied free exercise rights only when the activity was a violation of traditional western morality. In *Smith II*, Scalia adopts "socially harmful conduct" as the standard.[108] Justice O'Connor also relied on a socially harmful conduct standard but insisted that it be weighed against a compelling state interest.[109] Scalia argued that many laws that support the orderly functioning of society must be struck down if evaluated in a compelling state interest framework. He stated that "any society adopting such a system would be courting anarchy."[110] Unfortunately, the lack of consensus on the Court regarding what principle should limit the outer boundary of religious free exercise led to the worst free exercise decision in the history of the Court in 1997.

The Court had a rare opportunity in 1992 to examine the validity of a regulation that was directly targeted at the religious exercise of a particular group. Following the announcement that members of the Santeria religion intended to open a place of worship in Hialeah, the city council held an emergency meeting and passed several ordinances banning "ritual" animal sacrifice. Local members of the sect, a Cuban religion that sacrificed animals during its religious worship, challenged the law as violative of their free exercise of religion.[111] This case (hereinafter referred to as *Hialeah*) is distinguishable from *Smith II*, *Sherbert*, *Cantwell*, and *Reynolds* because these ordinances directly targeted a particular religious group.[112]

> The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. . . . Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated

---

[107] Symposium, *Law, Religion and the Secular State, Proceedings of the Second Annual Symposium of the Constitutional Law Resource Center*, Drake University Law School 11,15 (1991).

[108] *Smith II*, 494 U.S. at 885 (citing Lyng v. Northwest Indian Protective Assn. , 485 U.S. 439 (1988)).

[109] *Id.* at 905 (O'Connor J., concurring).

[110] *Id.* at 888.

[111] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[112] *Id.* at 526-28.

> the Nation's essential commitment to religious freedom. The challenged law had an impermissible object.[113]

By contrast, the laws at issue in *Reynolds*, *Cantwell*, *Sherbert*, and *Smith II*, were generally applicable to the entire population and neutral toward religion. The laws applied to the individual regardless of his/her religion or lack thereof. In *Hialeah*, the city adopted its ordinances for the specific purpose of denying the adherents this portion of their worship.[114] In this case, the Court relied on the compelling state interest test to determine whether the ordinances were valid despite the obvious intent to apply them in a religious context.[115] Had the Court utilized the *Reynolds* approach, it would not have asked if the government had a compelling state interest to limit the ritual sacrifice of animals; it would have asked whether the ritual sacrifice of animals conflicted with the traditional norms of Christian morality upon which our laws are founded. The Court found that there was no legitimate reason to interfere with the religious worship of the sect, but once again perpetuated the slide away from the "Christian moral tradition" test to the compelling state interest test.[116] In its most extreme position yet, the Court considered whether laws that constituted a direct attack on religious worship were still justified if they served a compelling state interest.[117] Once again, the right result was clouded by faulty reasoning that continued to weaken the foundation supporting the right of free exercise.

The foundation was completely destroyed when the Court decided *City of Boerne v. Flores*.[118] The compelling state interest test, and viewing generally applicable neutral laws without reference to whether the conduct is morally offensive, led to what may be the worst free exercise decision ever. This case involved efforts by a local congregation to expand the facilities of St. Peter Catholic Church in Boerne, Texas.[119] The city refused to grant a building permit because the church was located in a historic district and subject to a historic landmark ordinance.[120] The church challenged the ordinance under the Religious Freedom Restoration Act (RFRA), which Congress had passed in response to *Smith II*. RFRA sought to return the Court to the compelling state interest test enunciated in *Sherbert*, which Congress believed had been abandoned in

---

[113] *Id.* at 523-24.
[114] *Id.* at 534-35.
[115] *Id.* at 542.
[116] *Id.* at 547.
[117] *Id.* at 533.
[118] City of Boerne v. Flores, 117 S. Ct. 2157 (1997).
[119] *Id.* at 2160.
[120] *Id.*

Smith II.[121] In deciding this case, the Court struck down RFRA on Constitutional grounds unrelated to religious free exercise. This did not eliminate the compelling state interest test, but simply stated that Congress did not have the authority to enact substantive legislation under the Fourteenth Amendment.[122] This left the Court free to invalidate or enforce the law on its own terms. Had RFRA been declared constitutional, the state would have had to prove that it had a compelling interest in preserving its historical district. Because the Court declared RFRA unconstitutional, the Court did not address these arguments. However, it does not take much imagination to envision a state making an argument that it has a compelling interest in preserving its history through its landmark protections. Justice Kennedy's majority opinion, however, made it even easier for a state to limit free exercise rights. The Court accepted the neutral laws of general applicability test adhered to in *Smith II*. However, where Justice's Scalia and O'Connor required "socially harmful conduct" to defeat a free exercise claim, Justice Kennedy limited government action only to the needs of a "modern regulatory state."[123] Justice Scalia followed the same logic while analyzing historical data relied upon by the dissent when he concluded that colonial religious freedom laws were always enacted with the proviso that "peace and order" be maintained. "Peace and order" seems to have meant, precisely, obeying the laws."[124] Of course, this provides no limiting feature whatsoever. This principle would allow the government to limit free exercise of religion simply by enacting legislation.

In her dissent, Justice O'Connor reemphasized her reliance on the compelling state interest test, but also recognized that the majority in *Boerne*, having given up the only limiting principle required in *Smith II*, had cut free exercise adrift and left it no Constitutional protection at all. O'Connor notes the number of cases since *Smith II* in which lower courts had abridged free exercise of religion relying on their own misinterpretation of *Smith II*.[125] O'Connor, though never abandoning her reliance on the compelling state interest test, actually comes very close to a *Reynolds* analysis by reviewing the historical documents rejected by Scalia. O'Connor's lengthy analysis of many documents from the founding era is amply summarized by the following excerpts: "liberty of conscience shall

---

[121] *Id.* at 2161-62. Paragraph 5 of RFRA, 42 U.S.C. § 2000bb (a) stated that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.*

[122] *Id.* at 2162-72

[123] *Id.* at 2171.

[124] *Id.* at 2173 (Scalia, J., concurring).

[125] *Id.* at 2177 (O'Connor, J., dissenting).

not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of this State;" "every individual has a natural and inalienable right to worship God according to the dictates of his own conscience . . . provided he doth not disturb the public peace, or disturb others, in their religious worship;" "no person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments;" "no person ought by any law to be molested . . . on account of his religious persuasion . . . or practice; unless under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality."[126] Applying any of these documents against the backdrop of *Boerne* there should be no question that the case would have been decided differently had the high regard granted to free exercise of religion prevailed in the modern Court.

Compare the result in *Boerne*, where a church was not allowed to expand its facilities to accommodate more parishioners, with the result in *Holy Trinity*.[127] Holy Trinity Church was also subject to neutral, generally applicable laws, but because religion and religious conduct was ascribed a high place of honor at that time, the generally applicable law was held invalid to forbid religious conduct that was in no way offensive to society. The concern that many had with RFRA, and continue to have with a compelling state interest test, is that the Court gets to decide what a compelling state interest is. The fluctuation that has been demonstrated in the above cases indicates how difficult that proposition is. The state has a compelling interest in guaranteeing a single day of rest,[128] but does not have a compelling interest in restricting unemployment benefits to those who are able to work but choose not to for religious reasons.[129] The state has a compelling interest to prevent bigamy,[130] but does not have a compelling interest in prohibiting animal sacrifice.[131] The Court itself is split on whether the state has a compelling interest in prohibiting the use of peyote as a sacramental element.[132] The *Reynolds* Court did not struggle with evaluating what constituted a compelling state interest, because the Justices' only concern was whether the questioned conduct violated the traditional norms of Christian morality.

---

[126] *Id.* at 2180-81 (O'Connor J., dissenting) (citing the N.Y. CONST. art. 38; N.H. CONST. art. 1, § 5; NW. TERRITORY ORDINANCE OF 1787, art. 1; and MD. CONST. art. 33.).

[127] *See supra* text accompanying note 44.

[128] Braunfeld v. Brown, 366 U.S. 599 (1961).

[129] Sherbert v. Verner, 374 U.S. 398 (1963).

[130] Reynolds v. United States, 98 U.S. 145 (1878).

[131] Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993).

[132] *Smith II*, 494 U.S. at 905-06 (O'Connor, J., concurring), *Smith II*, 494 U.S. at 921 (Blackmun, J., dissenting).

While a compelling state interest is limited solely by the state's subjective will, which is free to fluctuate and reflect the morality of the times, the Christian morality test can be objectively discovered by recourse to one thousand years of Western history. In an age where rights have been discovered in "penumbras" of other rights, the Christian morality test may be the brightest line available.

IV. CONCLUSION

Although highly exalted until the last half of this century, the free exercise clause does indeed appear to be a "falling star."[133] Part of the demise is due to the Supreme Court straying from the historical basis for limiting free exercise. Since the Court decided *Reynolds* in 1878, there has been an almost constant whittling away at the breadth of the free exercise clause. By the mid-1990s, Congress had accepted the position that the compelling state interest test was "a workable test for striking sensible balances between religious liberty and competing governmental interests."[134] If religious liberty is the most fundamental right secured by the founders in the Bill of Rights, and their intent is explicitly stated with the words that "Congress shall make *no* law respecting an establishment of religion, or prohibiting the free exercise thereof",[135] then the only laws that should infringe on "free exercise" are those that affect activities outside the traditional Christian definition of religion. Recall Justice Jackson's comment in *Barnette* that the free exercise of religion "may not be submitted to vote; [it] depend[s] on the outcome of no elections."[136] To allow the state or the Court to determine that there is a compelling reason to limit religion is to exalt the state over religion, the duty an individual owes to God. History is full of such accounts. In ancient Persia, a handful of government leaders convinced the King to issue a decree that no one pray to any god other than the King for thirty days. When the Prime Minister refused to allow his free exercise of religion to be limited, he spent a night in the lions' den.[137] A Babylonian king tried to enforce idol worship and when three young rulers refused to give up their rights, they were thrown into a fiery furnace.[138]

Perhaps the best example of a compelling interest gone awry is found in the Gospel of John. Following the resurrection of Lazarus, the Jewish chief priests and Pharisees convened a council to determine what should be done to keep Jesus from turning people to Him. The council

---

[133] *See generally* Mangrum, *supra* note 6.

[134] *See generally* Duncan, *supra* note 105.

[135] U.S. CONST. amend I. (emphasis added).

[136] *See supra* text accompanying FN 64.

[137] *Daniel* 6: 1-28

[138] *Daniel* 3: 1-30.

feared that if He continued to draw men after Him, "the Romans [would] come and take away both [their] place and [their] nation."[139] Certainly nothing could be more compelling than saving the nation! In response, Caiaphas, the high priest, announces that "it is expedient for you that one man should die for the people, and that the whole nation should not perish."[140] In the eyes of certain ancient Jewish leaders, one man should die for his religious belief if it conflicted with a compelling state interest.

One thing is certain: the duty that a man owes to God places an infinitely higher calling on his life than any social duty owed to society. When these two spheres come into conflict, Blackstone, like Peter, would say, "We must obey God rather than men."[141]

Scott E. Thompson

[139] *John* 11:48 (New American Standard).

[140] *John* 11:50 (New American Standard).

[141] *Acts* 5:29 (New American Standard).