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OUR MISSION

A student-run research publication at the University of Pennsylvania, the Penn Undergraduate Law Journal seeks to foster scholarly discourse on topical and historical issues pertaining to law or the legal system. In this spirit, the Journal's principal objective is to publish exceptional undergraduate works, drawn from an array of disciplinary perspectives, that evaluate and elucidate the intricacies, vagaries, and nuances of law as they relate to domestic and international affairs, business, academia, and society. PULJ aims to sustain and enrich a vibrant discussion about law at the undergraduate level because it recognizes that the student writers of today will be the leaders, lawyers, and scholars of tomorrow.

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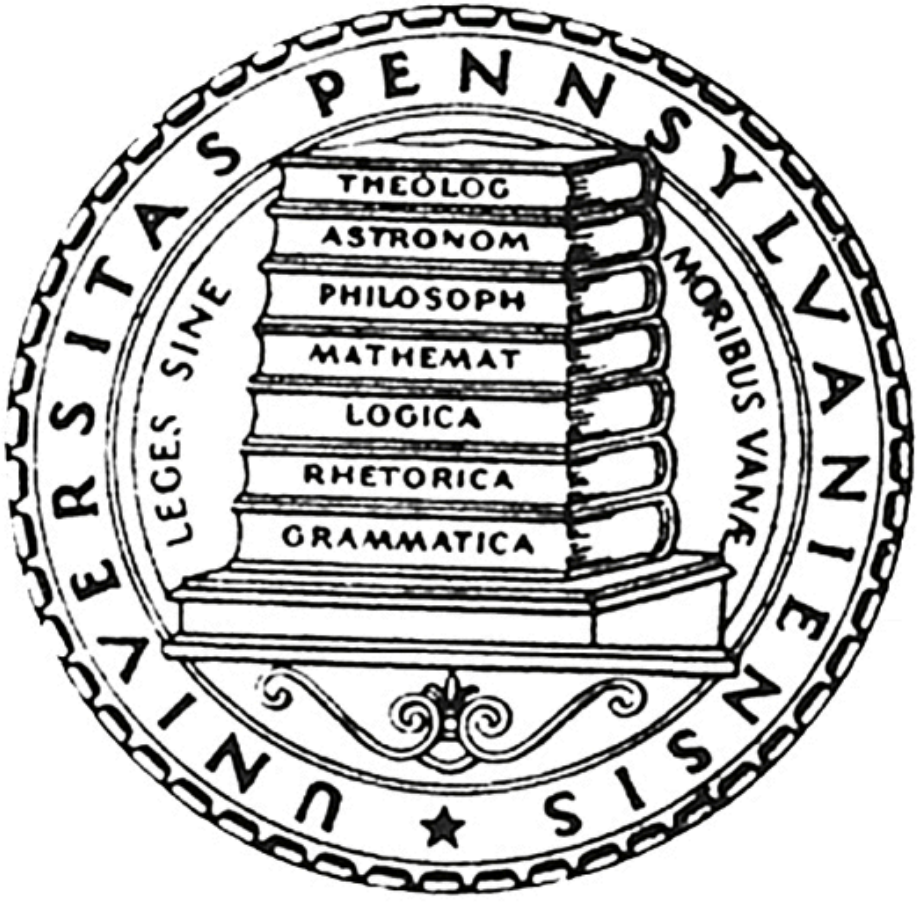
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LETTER FROM THE EDITOR-IN-CHIEF

Lorenza Colagrossi, University of Pennsylvania

Dear Reader,

On behalf of the entire Penn Undergraduate Law Journal staff, I am very pleased to present you with the twelfth installment of our publication. This edition brings together three distinguished articles that explore the dynamic legal topics of the context and legacy of *Milliken v. Bradley*, the political theory surrounding *Food and Drug Administration v. Brown & Williamson*, and the free exercise of religion. Together, these articles cover a breadth of topics which are integral to the United States legal system and we are very humbled to be able to share our authors' outstanding work with you.

The first piece, *Unpacking Milliken: An Analysis of Milliken v. Bradley and its Legacy*, is authored by Trevor Thompson of Columbia University. The author begins by providing context about the segregation of buses in Detroit public schools and outlines the case's path towards the Supreme Court. Thompson then examines the majority and dissenting opinions paying particular attention to Chief Justice Warren Burger's majority opinion and Thurgood Marshalls' principal dissent. The article argues that the case was wrongly decided by citing the legal precedent of cases such as *Reynolds v. Sims* and *Swann v. Charlotte-Mecklenburg Board of Education*. Thompson concludes by demonstrating that "the Court's holding in *Milliken*, by insulating suburban school districts from efforts to desegregate predominantly black public schools in metropolitan areas throughout the nation, has perpetuated racial segregation and widened the racial achievement gap."

Our second article comes to us from Sunwoo Lee of Stanford University who uses a spatial model to corroborate the claim that "the complex politics behind tobacco regulation reveal that the courts are better understood as an institution that not only responds to and interprets congressional intent but also plays a significant part in setting the stage for a well-formed congressional intent to emerge." Divided into three parts, the article argues this through the lens of *Food and Drug Administration v. Brown & Williamson*. Lee's analysis provides thoughtful insight into the congressional response to the push for tobacco regula-

tion by the FDA and the executive branch.

The final piece, authored by Caroline Freeman (née Snell) of Middlebury College, argues that the free exercise of religion should be viewed as a positive right. In her analysis of thought-provoking cases such as *Employment Division v. Smith*, Freeman calls for a "permissive and flexible" reading of the Establishment Clause. The author concludes that, in order to be consistent with the promise of liberty promised in the First Amendment, the free exercise of religion protects the right to act in accordance with one's morals and conscience unless state intervention is found to be absolutely necessary.

I would like to thank our authors whose phenomenal articles allow our journal to keep running and growing each year. But most of all, I would like to thank our entire PULJ team for their tireless efforts. Each and every one of you played a crucial role and helped make this edition possible. I would like to dedicate this edition to Omar Khoury, our fearless leader and editor-in-chief emeritus. Omar, your hard-work and dedication to the journal inspired us every day. We will miss you dearly and are confident you will go on to do great things and continue to change the lives of everyone you meet for the better. To me, you were a mentor and prepared me for the role of editor in chief better than anyone ever could. This one's for you.

Thank you,

Ana Lorenza R. Colagrossi

Editor in Chief

ARTICLE

UNPACKING *MILLIKEN*: AN ANALYSIS OF *MILLIKEN V. BRADLEY* AND ITS LEGACY

Trevor Thompson, Columbia University

INTRODUCTION

Justice Thurgood Marshall does not mince words when he introduces his dissenting opinion in *Milliken v. Bradley*, a 1974 case concerning the segregated state of Detroit's public schools. Lambasting the majority's holding that the district court could not forcibly compel suburban school districts to participate in a plan to desegregate Detroit's public schools, Marshall wrote that he could not "subscribe to this emasculation of our constitutional guarantee of equal protection of the laws."[1] The Court in *Milliken* did not disagree with the lower courts' finding that the record presented by plaintiffs contained evidence of unlawful actions taken by the Detroit School Board that led to the *de jure* segregated state of Detroit's public schools. Rather, the Court was divided over the appropriate course of action to remedy this finding.

To Chief Justice Warren Burger and the majority, the showing of a constitutional violation committed by the Detroit School Board was not sufficient to legally impose a metropolitan-wide remedy on fifty-three of Detroit's suburban school districts. They argued that absent evidence that the suburban districts had played a role in segregating Detroit or that the State had drawn school boundary lines with discriminatory intent, a remedy had to be limited to the city of Detroit.[12] Justice Marshall rejected this claim in the dissent, arguing that because Detroit's School Board was a local instrumentality of the State of Michigan, it was ultimately the State's duty—per precedents set by prior desegregation cases—to "eliminate all vestiges of racial discrimination and to achieve the greatest possible degree of actual desegregation."[13] As the plaintiffs sufficiently demonstrated, doing so required the participation of the predominantly white schools in Detroit's suburban school districts. Thus, the dissenters believed it was incumbent on the Court to uphold the eight remedies imposed by the district court.

In this paper, I will explore *Milliken* in all of its complexity, first by

1 *Milliken v. Bradley*, 418 U.S. 717, 782 (1974).
2 Id. at 417-418.
3 Id.

elaborating on the context in which the case occurred and its path to the Supreme Court. I will then dissect the majority and dissenting opinions of the case, paying particular attention to the reasoning underlying Chief Justice Warren Burger's majority opinion and Justice Marshall's principal dissent. I will then argue why I think *Milliken* was wrongly decided. I will ground my argument in precedents set by the Court prior to *Milliken*—namely, in *Reynolds v. Sims* and *Swann v. Charlotte-Mecklenburg Board of Education*—and the district court's finding that the State of Michigan was demonstrably complicit in creating not only the segregated state of Detroit's public schools, but of the city overall. Finally, I will examine the way in which the Court's holding in *Milliken*, by insulating suburban school districts from efforts to desegregate predominantly black public schools in metropolitan areas throughout the nation, has perpetuated racial segregation and widened the racial achievement gap. In other words, I will demonstrate that virtually all of what Justice Marshall prophesied in his prescient dissent in *Milliken* has, sadly, come to fruition.

CONTEXTUALIZING *MILLIKEN*

In 1968, roughly six years before the Supreme Court ruled on *Milliken*, the February report issued by the National Advisory Commission on Civil Disorders—also known as the Kerner Commission—declared that "Our nation is moving toward two societies, one black, one white—separate and unequal."[4] Convened just days after U.S. army paratroopers arrived in Detroit to contain a riot that by then had seen law enforcement officers shooting at looters, the Kerner Commission sought to investigate the underlying causes of the civil unrest that had erupted in Detroit and many other urban communities in the 1960s.[5] The report's findings were sobering and divisive, with one conclusion in particular capturing the attention of the media and inflaming the report's opposition: white institutions and white society were complicit in the creation and maintenance of urban ghettos populated overwhelmingly by African Americans throughout the nation.[6]

In *The Color of Law*, Richard Rothstein provides substantial support for the Kerner Commission's conclusion. Rothstein explains how racially-explicit governmental policies played a major role in confining African Americans to urban ghettos in the 1960s.[7] He demonstrates how African Americans did not initially become sequestered in ghettos due to forms of *de facto* segregation or private choice, such as white families leaving neighborhoods as they became increasingly populated by black families or real estate agents steering white families away from black neighborhoods. On the contrary, Rothstein explains that African Americans' dominant presence in ghettos throughout the nation, beginning in the first half of the twentieth century, was a product of intentional government action and racially explicit policies at the federal, state, and local level.[8] In short, *de jure* segregation—segregation by law and public policy—was largely responsible for the residential segregation that characterized the makeup of many urban communities like Detroit in 1968.[9]

Many of the policies Rothstein identifies as crucial to the creation and maintenance of *de jure* residential segregation in urban communities throughout the nation had an especially profound impact on the city of Detroit. [10] In 1933,

4 Michael W. Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s* 105 (2007).

5 . Id. at 104.

6 Id. at 97.

7 Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* VII-VIII (2017).

8 Id.

9 Id.

10 Id. at 75.

during the Great Depression, President Roosevelt's administration created the Home Owners' Loan Corporation (HOLC), a federal agency tasked with purchasing the existing mortgages of many Americans who risked defaulting on their loans due to the adverse economic effects of the depression.[11] To assess the likelihood that a property for which it was considering issuing a new mortgage would maintain or increase in value, the HOLC took into consideration the racial composition of the neighborhood in which the property was located.[12] HOLC agents relied on agency-created, color-coded maps of every metropolitan area in the nation to make this determination, with the safest neighborhoods colored green and the riskiest—and least likely to receive loans—colored red. The neighborhoods with majority black populations were invariably colored red, irrespective of their size, population, and economic status.[13]

When the Federal Housing Administration (FHA) was established in 1934 to make homeownership more accessible by insuring mortgages up to 80 percent of purchase price, the agency adopted the HOLC's color-coded rating system to make its own appraisals of properties to ensure that prospective buyers would not default on their loans.[14] The FHA favored suburban development and provided substantial loans for the construction of new homes in the suburbs, but discouraged banks from making any loans in urban neighborhoods colored red, a policy codified in the *Underwriting Manual* it provided to its loan appraisers. The *Underwriting Manual* also instructed FHA loan appraisers to give higher ratings to neighborhoods shielded from the infiltration of "inharmonious racial or nationality groups," since they were far more likely to retain stability and increase in property value.[15] The FHA even favored properties in areas where whites were physically separated from African American families through the establishment of natural or artificial barriers such as highways or boulevards.[16]

Because the FHA and the Veterans Administration programs, both of which adopted the HOLC's color rating system, encouraged white flight to the suburban neighborhoods where whites were likely to receive first-time mortgages, the cumulative effect of these agencies' policies was the nationwide sequestering of African Americans in uninsured urban ghettos in cities like Detroit and the mass suburbanization of white Americans.[17] This phenomenon was especially evident in Detroit, a city whose black population expanded considerably from

11 Id. at 63.
12 Id. at 64.
13 Id.
14 Id.
15 Id. at 65.
16 Id.
17 Id.

1910 to 1930 and again during World War II.[18] In one particularly egregious case in Detroit, the FHA required a developer to erect a physical wall separating a whites-only project from nearby black residences.[19] In 1968, metropolitan Detroit's concentration of black residents in central-city neighborhoods and white residents in its suburbs reflected the stark impact of these racially explicit policies.

18 Joyce A. Baugh, *The Detroit School Busing Case: Milliken v. Bradley and the Controversy over Desegregation* 26 (2011)..

19 Rothstein, *supra* note 7, at 65.

MILLIKEN'S ORIGINS

It was in this racially divided environment that *Milliken* first began to take form. Because of the inextricable link between housing and education, Detroit's public schools became increasingly segregated over the course of the twentieth century as the city's African American population grew and white Americans fled to the suburbs. By 1968, Detroit's public school system was comprised of 133 virtually all-black public schools and 69 virtually all-white public schools.[20] As was commonly the case with housing in black neighborhoods, many of Detroit's predominantly black public schools were in far worse condition than their white counterparts, so much so that black students at a Detroit high school even initiated a walkout in 1966 to protest the school's low quality of education in comparison to those at predominantly-white schools.[21] The walkout, among other events, led to protracted conflicts between the black community and Detroit's Board of Education, which at the time contained a liberal-labor-black coalition receptive to black parents' demands.[22] In February 1968, against an already tense racial backdrop, black community leaders organized a citywide conference to demand major reform of public school governance.[23]

The conference set in motion a series of events that eventually led the Detroit School Board to pass an integration plan in April of 1970. Known as the April 7 plan, it redrew attendance boundaries for twelve of the twenty-two high schools situated along the city's residential color line and drew new regional boundaries maximizing desegregation insofar as it was possible within city limits.[24] Though the April 7 plan would only reassign roughly 9,000 of Detroit's 290,000 pupils, it was poised to dramatically alter the racial composition of eleven of the city's twenty-two high schools.[25] Significantly, the plan would reassign a few white children from white schools to black schools for the first time in the history of the system.[26]

The April 7 plan was met with significant backlash by many white Detroit residents. Parents from four of the city's predominantly white junior high schools included in the plan organized a boycott of their children's schools. Some members of the black community who favored strong community control of their children's schools were also opposed to the plan's attempt to impose "so-called

20 Paul R. Dimond, *Beyond Busing: Reflection on Urban Segregation, the Courts, and Equal Opportunity* 26 (2005).
21 Baugh, *supra* note 18, at 68.
22 Id. at 69.
23 Id. at 73.
24 Dimond, *supra* note 20, at 27.
25 Baugh, *supra* note 18, at 78.
26 Dimond, *supra* note 20, at 27.

integration" on their children.[27] State legislators, many of whom were incensed by the board's actions, intervened to kill the April 7 plan just one day after it was passed. Members of Michigan's House of Representatives soon passed a bill that mandated attendance of neighborhood schools, a provision that undercut the April 7 plan and all but ensured the maintenance of segregated schools; none of Detroit's black House members supported the bill.[28] Similar measures were taken by the state senate, which drafted a bill in June that specifically repealed the April 7 plan and included an "open enrollment" policy enabling white students remaining in neighborhoods transitioning from white to black to transfer out of black schools.[29] After making its way through the state house and senate, the bill, known as Act 48, was signed into law by Governor William Milliken on July 7, 1970. Representative Nelis Saunders, who voted against the bill, charged his colleagues in the state house with helping to "both divide and move our society in a backward direction".[30]

In coordination with parents and Detroit school officials, the legal staff of the National Association for the Advancement of Colored Peoples (NAACP) filed a suit in the U.S. District Court for the Eastern District of Michigan challenging Act 48's repeal of the April 7 plan and its provisions explicitly mandating segregated student assignments and racially identifiable regions.[31] Because it was unlikely that a successful repeal of Act 48 would ultimately lead to meaningful integration, the NAACP's complaint charged that racially discriminatory policies and practices had led to citywide school segregation.[32] The comprehensive nature of the complaint would ensure that meaningful integration would be achieved irrespective of who sat on the Detroit School Board by the time the district court issued its ruling. In its finalized form, the complaint sought an injunction to require implementation of the April 7's integration plan, and was filed against Michigan governor William Milliken, the Michigan Board of Education, the Detroit Board of Education, and several other school and government officials on August 18, 1970.[33] As lead attorney Nate Jones saw it, the constitutionality of Northern school segregation would soon face its first major judicial test in the city of Detroit.[34]

27 Baugh, *supra* note 18, at 80.
28 Id. at 81.
29 Id. at 82.
30 Dimond, *supra* note 20, at 28.
31 Baugh, *supra* note 18, at 86.
32 Baugh, *supra* note 18.
33 Dimond, *supra* note 20, at 30-31.
34 Id. at 36.

MILLIKEN IN THE LOWER COURTS

The trial for *Milliken* began on April 6, 1971, roughly six weeks after the Sixth Circuit ordered District Judge Stephen Roth, who had already postponed the trial, to hear the case on the merits. Judge Roth had made his disdain toward the case clear in the weeks leading up to the trial, having given a news conference in his chambers in which he described the NAACP attorneys as "outsiders [who] should go away and let Detroit solve its own problems".[35] Judge Roth had also publicly expressed skepticism toward the notion that Detroit's school system was *de jure* or *de facto* segregated, revealing his predilections and adding to the burden plaintiffs already shouldered of proving their case in court.[36] The plaintiffs nevertheless remained determined—with the evidence on their side, the NAACP lawyers were convinced Judge Roth would eventually be persuaded.[37]

The plaintiffs' hard work paid off. In his account of the case, plaintiff Paul R. Dimond describes Judge Roth as a converted man by the end of the trial.[38] In fact, Dimond notes that even one of the attorneys for the defense later said that he knew of no one "who sat through the trial who was unmoved".[39] Indeed, over the forty-one days of the trial, the NAACP attorneys methodically and convincingly demonstrated to Judge Roth that Detroit's public schools were unconstitutionally segregated because of the *de jure* housing and school segregation effected and maintained by the Detroit School Board and the State of Michigan.[40] To make their case, the plaintiffs employed a number of maps and expert witnesses; the maps testified to the sheer extent of segregation in the city and the witnesses recounted the various policies implemented to effect it.[41] The plaintiffs even hung to the right of Judge Roth a ten-by-twenty-foot map that displayed in vivid color the city's high school boundaries rigidly coinciding with its underlying racial divides.[42]

Judge Roth concluded at the end of the trial that the plaintiffs had substantiated their claim that black residents of Detroit had been unconstitutionally tethered to a separate and racially identifiable set of schools and housing. Regarding the plaintiffs' housing case, Judge Roth declared that "governmental actions and inaction at all levels, federal state and local, have combined, with those of private organizations…to establish and to maintain the pattern of residential seg-

35 Id. at 32.
36 Id. at 33.
37 Id. at 41.
38 Id. at 54.
39 Id.
40 Baugh, *supra* note 18, at 114.
41 Dimond, *supra* note 20, at 41.
42 Id.

regation throughout the Detroit metropolitan area".[43] He found the Detroit School Board in violation of students' Fourteenth Amendment rights, noting that a number of the policies it had implemented in the years building up to the trial constituted unlawful and racially discriminatory "administrative devices".[44] Of equal significance was Judge Roth's finding that the State of Michigan was complicit in the establishment and maintenance of Detroit's segregation. He declared that "both the State of Michigan and the Detroit Board have committed [intentionally segregative acts] which have been causal factors in the segregated condition of the public schools of …Detroit".[45]

In the hearings on proposals to remedy *de jure* segregation in Detroit public schools, Judge Roth made clear that he rejected the defendants' argument that because the constitutional violation occurred within Detroit's city limits, a Detroit-only remedy was mandated. For Judge Roth, it was incumbent on the State to remedy *de jure* segregation of the Detroit public schools, and since the plaintiffs had demonstrated that no Detroit-only remedy would accomplish this task, a metropolitan-wide remedy could not be dismissed if found to be necessary. Judge Roth cited the precedent established in *Brown II* that in fashioning remedies, "courts may consider problems related to…revision of local laws and regulations which may be necessary in solving the foregoing problems".[46]

Deriving judicial authority from *Brown II* to impose a remedy that looked beyond the limits of Detroit's school system, Judge Roth appointed a special panel to prepare an interdistrict busing plan that would involve fifty-three suburban school districts.[47] Judge Roth then ordered the Detroit Board to acquire approximately 295 school buses to accommodate an interim plan for the 1972-1973 school year. After being affirmed in part by the Sixth Circuit, state defendants and suburban school district-defendant-intervenors filed petitions for certiorari requesting Supreme Court review of the Sixth Circuit's ruling.[48] On November 19, 1973, six justices on the Court voted to grant certiorari to the petitions.[49] Oral arguments were heard on February 27, 1974, and on July 25–roughly five months after the case was heard–the Court issued its controversial 5-4 decision rejecting the lower courts' imposition of an interdistrict remedy.[50]

43 Id. at 69.
44 Id.
45 Id. at 71.
46 Baugh, *supra* note 18, at 123.
47 Samantha Meinke, *The Northern Battle for Desegregation* 21 (2011).
48 Baugh, *supra* note 18, at 138.
49 Id.
50 Id.

MAJORITY OPINION

Writing for the majority, Chief Justice Warren Burger first identified the legal principles that would inform his reasoning. He noted that the *Brown* holding, in its recognition of separate educational facilities as inherently unequal, mandated the Court to eliminate state-mandated or deliberately maintained dual school systems for black students and white students whenever possible.[51] Citing *Brown II*, Justice Burger then noted that courts, when fashioning and implementing remedies in school desegregation cases, were guided by "equitable principles" that afforded them a practical degree of flexibility in shaping their remedies and room to account for both public and private needs.[52] Justice Burger then turned to the precedent set by *Swann v. Charlotte-Mecklenburg Board of Education*, for which he also wrote the majority opinion. Swann held that federal remedial powers employed in pursuit of rectifying school desegregation may be exercised "only on the basis of a constitutional violation" and that "the nature of the violation determines the scope of the remedy".[53] As interpreted by Justice Burger, this suggested that a remedy imposed to correct a condition that offends the Constitution must be proportional to the degree of the constitutional violation.

On the basis of the principles established in *Brown* and *Swann*, Justice Burger held that the lower courts had gone too far in calling for an interdistrict remedy. While he did not dispute the district court's finding that there was evidence of *de jure* segregated conditions in Detroit's public schools, he argued that the absence of similar findings in the fifty-three outlying school districts rendered the metropolitan area remedy "wholly impermissible".[54] For Justice Burger, the remedy involving the suburban school districts would pass constitutional muster if either of the following had occurred: the racially discriminatory acts of one or more of the suburban school districts effected racial segregation in Detroit, or the school district lines were drawn by the State with the intention of separating the races.[55] However, the plaintiffs had not shown that the State acted with discriminatory intent when drawing school boundary lines. They also did not produce evidence that the fifty-three outlying school districts were in any way implicated in the violation of black children's constitutional rights in Detroit, or that school segregation in the outlying districts effected segregation in Detroit's public schools.[56] Thus, the absence of these findings was sufficient for Justice Burger to

50 Id.
51 *Milliken v. Bradley*, 418 U.S. 717, 737 (1974).
52 Id.
53 Id. at 738.
54 Id. at 745.
55 Id.
56 Id.

declare that the interdistrict remedy would unlawfully impose on the suburban school districts and was therefore constitutionally impermissible.

Finding the interdistrict remedy invalid, Justice Burger then argued that Judge Roth and the Sixth Circuit had inappropriately shifted their focus to the suburban school districts in order to effectuate a remedy that would achieve what they believed constituted meaningful desegregation.[57] Justice Burger felt that in fashioning a remedy to correct the condition that offended the constitution, the lower courts erroneously incorporated into their reasoning a desire to achieve a certain racial balance in the Detroit schools. Key for Justice Burger was the precedent set in *Swann* that remedying school desegregation does not require an establishment of integrated schools in the school system wherein the violation occurred—merely dismantling the dual school system is sufficient to remedy the violation.[58] Thus, for Justice Burger and the majority, the Constitution did not confer to Detroit's public-school students a substantive right to attend an integrated school. Rather, students are constitutionally protected against forced attendance of a state-mandated racially separate school. Justice Burger noted that the Court's objective was to restore "victims of discriminatory conduct to the position they would have occupied in the absence of such conduct".[59] Since an interdistrict remedy would entail students in Detroit being bused to the suburbs, this remedy was incompatible with the Court's mandate.

Justice Burger also rejected the lower courts' conclusion that, because school district lines are arbitrarily drawn on a map "for political convenience," they may be ignored when fashioning a remedy.[60] Justice Burger emphasized the importance of local control of public education, describing local autonomy as "essential both to the maintenance of community concern and support for public schools".[61] He stressed the virtue of local community members exerting control over the operation of their children's schools, and thus, felt it contrary to the history of American public education to consolidate fifty-three independent school districts into one "vast new super school district".[62] Justice Burger's emphasis on local control echoed the sentiments expressed by many Detroit parents—including some black parents—in reaction to the April 7 plan. Reverend Albert Cleage, leader of an anti-integration group, represented a coalition of black parents who felt that the only way to resolve the crisis of black miseducation in Detroit was to have black schools run exclusively by black teachers and administrators.[63] Finally, Justice Burger argued that, because there existed virutally no evidence of the

57 Id.
58 *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 2, 24 (1971).
59 *Milliken v. Bradley*, 418 U.S. 717, 746 (1974).
60 Id. at 741.
61 Id.
62 Id. at 743.
63 Baugh, *supra* note 18, at 71.

State engaging in segregative actions that had a cross-district effect, the Court could not justify an interdistrict remedy.[64] Justice Burger was even willing to accept, for the sake of argument, the finding that the State was derivatively responsible for the segregated conditions of Detroit's public schools. But, for Justice Burger, this finding still did not provide the justices with sufficient justification for an interdistrict remedy, since the effects were contained within the city of Detroit. Thus, regardless of whether the State was directly or indirectly responsible for segregating Detroit, an interdistrict remedy could not be imposed on schools in the suburban districts. [65]

Justice Potter Stewart's concurrence affirmed much of what Justice Burger argued, but included an additional controversial footnote. Like Justice Burger, Justice Stewart acknowledged the lower courts' finding of the Detroit students' Equal Protection Clause violation, but believed that a remedial decree cannot extend beyond the boundaries of the district wherein the constitutional violation occurred.[66] For Stewart, the absence of a finding that the disparity in the number of white children in suburban schools and black children in Detroit's schools was imposed or fostered by the State also mandated a Detroit-only remedy. He argued that imposing a metropolitan-wide remedy would violate the equitable principles established by previous school desegregation decisions and constitute an abuse of the Court's equitable power.[67]

In the footnote, Justice Stewart then argued that the record presented by the plaintiffs failed to substantiate the claim that intentional acts of segregation carried out by the State and the Detroit School Board confined black children to a core of schools in Detroit.[68] While he acknowledged that the record did suggest that black and white students in Detroit would have attended certain schools together had they not been deliberately separated, he argued that the plaintiffs had not shown that the number of black students in the city as a whole was caused by segregative acts. In other words, Justice Stewart felt that the record did not demonstrate that the ever-expanding population of black students in Detroit was attributable to discriminatory actions taken by the State or Detroit School Board.[69] He claimed that unknowable factors such as "in-migration, birth rates, economic changes, or cumulative acts of private racial fears" may have accounted for the increase, a controversial claim that even made an appearance in the preface to Rothstein's *The Color of Law*.[70]

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64 *Milliken v. Bradley*, 418 U.S. 717, 746 (1974).
65 Id.
66 Id. at 755.
67 Id. at 756.
68 Id. at 757.
69 Id. at 757.
70 Id.

THE DISSENTS

In his dissenting opinion, Justice William Douglas cited the district court's findings that State action established and perpetuated residential and school segregation in the Detroit metropolitan area to defend the imposition of a metropolitan remedy.[71] He argued that previous school desegregation cases found no constitutional difference between *de facto* and *de jure* segregation, and that the State was complicit in the creation of school districts in Metropolitan Detroit that furthered segregation. He noted that every school board in Michigan operates at the behest of the State Board of Education, and is therefore subject to state supervision of school site selection, school construction, and the drawing of school district boundaries.[72] Thus, for Justice Douglas, a school board in Michigan performs State action subject to Fourteenth Amendment restrictions every time it decides where to place a school or where to draw district boundaries. Since Judge Roth and the Sixth Circuit found that the school boards had unconstitutionally taken measures to segregate Detroit's public schools, and by extension the State was implicated in violating Detroit students' Fourteenth Amendment rights under the Equal Protection Clause.[73] Therefore, because the Court possessed the equitable power to compel a State to remedy a Fourteenth Amendment violation, the fact that the suburban school districts had not effected segregation in Detroit's public schools was not sufficient to invalidate the metropolitan remedy.[74]

Justice Byron White, joined by the other three dissenters, agreed with Justice Douglas. Justice White argued that the Court had not yet established a precedent that effective enforcement of the Fourteenth Amendment was restrained by political or administrative boundary lines.[75] Moreover, Justice White, like Justice Burger, cited *Swann* to argue that the Court is bound by the precedent to eliminate from the Detroit public schools "all vestiges of state-imposed segregation".[76] In light of these two precedents, Justice White could not find justification for the majority's claim that the Court lacked the equitable power to impose an interdistrict remedy, especially given that the district court determined it was the only remedy that would accomplish the mandate explicitly stated in *Swann*. On the contrary, Justice White argued that it was well within the equity powers of a federal district court to impose an interdistrict remedy. Thus, for Justice White, the majority's ruling allowed deliberate acts of segregation and their consequences to go unaddressed. [77]

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71 Id. at 759.
72 *Milliken v. Bradley*, 418 U.S. 717, 759 (1974).
73 Id. at 761.
74 Id. at 762.
75 Id. at 776.
76 Id. at 772.
77 Id. at 763.

Justice Thurgood Marshall, penning the principal dissent, first argued that precedents set by prior school desegregation cases firmly established that, when state-imposed segregation was demonstrated, the State was obligated to eliminate "root and branch all vestiges of racial discrimination and to achieve the great possible degree of actual desegregation".[78] This precedent informed the arguments Justice Marshall made in his dissenting opinion, the first of which addressed the majority's glaring omission of the lower courts' determination that a Detroit-only decree would not eliminate segregation. Indeed, Justice Marshall noted the irony and apparent analytical oversight inherent in the majority's remand for "prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools" as it invalidated the only remedy that would actually accomplish this task.[79]

Justice Marshall then turned to the issue of the State's responsibility for contributing to the segregation of Detroit's public schools. Affirming the district court's finding that the State of Michigan directly contributed to the segregation found, Justice Marshall argued that the State itself, in addition to the Detroit Board of Education, was obliged to cure the condition that offended the Constitution.[80] Justice Marshall also agreed with Justice White and Justice Douglas that the State's intertwined relationship with the Detroit School board—a local instrumentality of the State—implicated it in additional violations of Detroit students' Fourteenth Amendment rights.[81]

Having argued that the record amply demonstrated the State's complicity in effecting segregation in Detroit, Justice Marshall defended the metropolitan remedy first imposed by the district court. Again citing imports from *Brown II* and *Swann*, Justice Marshall noted that once a segregation violation is found, responsible officials and agencies are legally compelled to take whatever actions necessary to eliminate "root and branch" any vestiges of enforced racial segregation.[82] Because the Detroit-only remedies would leave in operation a number of racially-identifiable schools—a measure the Court had previously considered in determining the effectiveness of desegregation plans—they would fail to carry out the Court's mandate to eradicate all vestiges of the *de jure* segregation of Detroit's public schools. With Detroit's schools remaining racially identifiable under a Detroit-only decree, Justice Marshall then argued that school district lines would come to be perceived as "fences" separating the races when white parents inevitably pulled their children from the newly integrated schools.[83] In other

78 Id. at 782.
79 Id. at 783.
80 Id. at 786.
81 Id.
82 Id. at 782.
83 Id. at 804.

words, under a Detroit-only decree, the racial division between white and black children would simply reemerge between the city's schools and schools in the suburbs as opposed to existing only within the city of Detroit itself. Thus, for Justice Marshall, a vestige of state-imposed school segregation would remain as a result of the majority's decision.

Justice Marshall additionally attacked the logic underlying the majority's assertion that the involvement of outlying school districts offended the principle established in *Swann* that "the nature of the violation determines the scope of the remedy." For Justice Marshall, inherent in this principle is the notion that the remedy will actually cure the violation to which it is addressed.[84] In other words, Justice Marshall argued that the principle required the Court to take into consideration efficacy, not proportionality. In considering only proportionality when overturning the remedy imposed by the district court, the majority ironically excluded from consideration the only remedy "which promise[d] to cure segregation in the Detroit public schools".[85]

Leaving no stone unturned, Justice Marshall then addressed the majority's claims that the cross-district plan was infeasible. He cited the vast power possessed by the State to consolidate school districts and devise solutions that would remedy the segregation it played a role in creating. But he also acknowledged that inconveniences and disruption were inevitable byproducts of the Court's obligation to remedy a history of systematic discrimination. Finally, Justice Marshall wrapped up his dissent on a somber and contemplative note, expressing his fear that the majority's opinion was informed more by a perception of public opposition to school desegregation than by neutral principles of the law.[86]

84 Id. at 806.
85 Id.
86 Id. at 814.

ANALYSIS

In view of the many ways in which the majority's reasoning is difficult—and in some cases impossible—to reconcile with precedent and the district court's findings, it is difficult to escape the conclusion that Justice Burger and the other justices were influenced by public opposition to school desegregation. Justice Burger argued that the district court, in fashioning a metropolitan remedy to Detroit's segregation, erroneously sought to meet a standard that Swann did not set: the achievement of racial balance in the schools proportionate to the metropolitan area as a whole.[87] But this betrays a fundamental misinterpretation of what informed Judge Roth's decision to impose a metropolitan remedy, and, as Justice Marshall wrote in his dissent, does a tremendous disservice to the district judge.

Judge Roth held hearings on proposals for Detroit-only plans between March 14th and 21st, 1972. Over the course of this week, Judge Roth heard testimony from local and state school officials, education scholars, transportation experts, the plaintiffs, and the state defendants, on the various ways in which Detroit-only plans could be carried out.[88] After the hearings, Judge Roth arrived at the conclusion that relief of segregation of Detroit's public schools could not be accomplished within the city's geographical limits. He based his conclusion on overwhelming evidence indicating that a Detroit-only plan would increase white flight from the city and "make the entire Detroit public school system racially identifiable as Black".[89] Thus, the basis for Judge Roth's conclusion was not the remedy's failure to achieve a proportional racial balance, as Justice Burger suggested, but instead the reality supported by demographic evidence that white flight from Detroit would render it impossible to eliminate all vestiges of state-imposed segregation. Given the State's influence over its local instrumentalities, Judge Roth found it incumbent upon the State of Michigan to fulfill its constitutional duty to dismantle the dual school system in operation in Detroit. It was precisely for this reason that the metropolitan remedy was considered and imposed, not because the Detroit-only remedies failed to meet the standard to which the majority accused Judge Roth of erroneously setting.

In mischaracterizing what led Judge Roth to impose a metropolitan remedy and accusing Judge Roth of trying to become a *de facto* "legislative authority," the majority also failed to address his finding that the State of Michigan engaged in or enabled a number of policies that contained African Americans within certain neighborhoods in Detroit and excluded them from its surrounding suburbs. The majority's failure to address this finding was due in part to the Sixth

87 Id. at 721-723.
88 Baugh, *supra* note 18, at 132.
89 Baugh, *supra* note 18, at 124.

Circuit's refusal to review the proof of area-wide housing segregation presented at Judge Roth's trial.[90] Indeed, Justice Burger noted that, because the Court of Appeals did not rely upon testimony pertaining to segregated housing in affirming Judge Roth's holding, the case in its present posture "[did] not present any question concerning possible state housing violations".[91] But as attorney for the plaintiffs Paul Dimond notes, refusing to review the evidence of area-wide housing and community segregation contradicted the traditional Supreme Court practice of allowing the party that prevails in the lower courts to urge consideration of any finding that supports its judgment.[92] The Court's failure to consider these critical findings is inexcusable. It is especially egregious considering the inextricable link between housing and public schooling and the fact that the Court ruled against the party that prevailed in the lower courts. Indeed, as a former law clerk to Justice Powell argued, by failing to consider housing violations, the Court "failed to address the foremost cause of metropolitan segregation".[93]

The evidence presented at Judge Roth's trial amply demonstrated the State of Michigan's complicity in containing African Americans within certain neighborhoods in the city of Detroit. In fact, the two-pronged strategy employed by plaintiffs to persuade a publicly skeptical Judge Roth of their case entailed first showing how the housing segregation, either orchestrated or enabled by the State, had an effect on Detroit's school segregation.[94] Judge Roth heard testimony from Richard Marks, research director of the Detroit Commission on Community Relations, on the development of racial segregation in Detroit. Looking at maps that revealed the concentration of black families in certain pockets of Detroit, Marks described how, from 1940 until 1970, African Americans' efforts to move from racially identifiable black neighborhoods in the city consistently failed, even in spite of the range of economic levels within the black community.[95] In other words, claiming that African Americans could not afford housing in the suburbs or in certain white neighborhoods was not sufficient to explain the containment pattern.

Rather, as Marks and others who testified at the trial made clear, containment was the result of FHA housing policies that ensured the suburbs would remain fully white, discriminatory real estate practices such as racial steering, restrictive racial covenants that appeared in deeds throughout the 1960s despite the Supreme Court's ruling in *Shelley v. Kramer*, and the location of public housing

90 Dimond, *supra* note 20, at 111.
91 *Milliken v. Bradley*, 418 U.S. 728 (1974).
92 Dimond, *supra* note 20, at 111.
93 Id. at 112.
94 Baugh, *supra* note 18, at 93.
95 Id. at 97.

and federal urban renewal projects.[96] The plaintiffs called to the stand Martin Sloane, a former staff attorney at the Department of Housing and Urban Development, to testify to the role that the FHA's discriminatory practices—codified in its *Underwriting Manual*—played in fostering racial separation in metropolitan areas like Detroit. Donald Bauder, the head of the housing section of the Michigan Civil Rights Commission, was also called as a witness. Bauder described how residential exclusion of African Americans had spread to the suburbs, citing examples of some of Detroit's suburbs where many black Detroit residents worked but did not live. This phenomenon was especially apparent in Warren, where 20,000 African Americans worked but only five to seven black families were residents.[97] Those who did try to move to Warren were confronted with incidents of vandalism, harassment, and intimidation, which largely went unprotected by police in these neighborhoods.[98]

It was in light of these compelling testimonies and the mountain of evidence presented by the plaintiffs that Judge Roth concluded that "governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations…to establish and maintain the pattern of residential segregation throughout the metropolitan area".[99] Compounding the effects of housing segregation were the various measures taken by the Detroit School Board to build upon the residential segregation already established. Housing segregation and school segregation are interdependent, and the evidentiary record presented before the Supreme Court made this readily apparent. By failing to consider the record in its entirety before invalidating the metropolitan remedy, the majority restricted the scope of the violation that had occurred and thus was inadequately informed to pass judgment on the remedy. The record did indeed indicate that the interdistrict nature of the violation necessitated a widespread, interdistrict remedy. The State's complicity in the harassment and intimidation of prospective black entrants into white suburban neighborhoods, through the inaction and tacit approval of its police forces, constituted a form of state-sanctioned violence and, by extension, *de jure* segregation.[100]

Justice Potter Stewart's concurrence reveals how refusing to review the evidentiary record presented before Judge Roth inadequately informed the majority in their reasoning. Stewart noted in his concurrence that an interdistrict remedy may be appropriate in cases where "purposeful, racially discriminatory use of state housing or zoning laws" contributed to the separation of races.[101] But,

96 Id.
97 Id. at 102.
98 Dimond, *supra* note 20, at 47.
99 Id. at 69.
100 Rothstein, *supra* note 7, at 151.
101 *Milliken v. Bradley*, 418 U.S. 717 (1974).

as was demonstrated in district court, it was by no mere accident that white families were concentrated in the suburbs and black families were concentrated in certain neighborhoods in Detroit. In a footnote to his concurrence, Justice Stewart revealed the majority's oversight even further by noting that the record as it stood did not show that the racial composition of the Detroit school population or residential patterns within Detroit and its suburbs were attributable to governmental activity at the federal, state and local level. The fact that the plaintiffs had sufficiently demonstrated the very opposite of this conclusion to the lower courts was mentioned neither by Justice Stewart nor Justice Burger in their opinions, a glaring omission that makes the most sense in consideration of Justice Marshall's claim that the majority was responding not to the plaintiffs but to public opinion.

Though it may not have revealed Michigan's complicity in the establishment of metropolitan residential segregation, the evidentiary record reviewed by the majority did indicate how the State, either directly or by extension, was responsible for many of the acts of segregation committed by the Detroit School Board. Though Justice Burger and Justice Stewart only accepted this finding *arguendo*, they nevertheless concluded that it was still not sufficient to warrant a metropolitan remedy, since the effects of the Board's actions were contained within the city of Detroit and the suburban districts could not be implicated in the constitutional violation that occurred. The reasoning invoked in this argument, however, falls flat in the face of the precedents set by the reapportionment cases, one of which both Justice White and Justice Marshall cite in their dissenting opinions.

Justice White and Justice Marshall noted that, in *Reynolds v. Sims*, which dealt with the dilution of some citizens' voting power in Alabama, the Court held that states can be compelled to redraw configurations of local governmental units if an existing configuration infringes upon the constitutional rights of its citizens.[102] In 1964, the apportionment of representatives to Alabama's State Legislature was not determined by the electoral district's population. Instead, each district elected just one senator to the State Legislature, which led to the establishment of overrepresented electoral districts and diluted the votes of those in heavily populated districts. The Court held that this apportionment scheme denied citizens in underrepresented districts equal protection of their right to vote, and thus compelled the State of Alabama to account for population in its revision of voting districts.[103] Significantly, the Court held that state-drawn boundaries, even if drawn without discriminatory intent, could not stand if they infringed upon citizens' constitutional right to vote.[104] Thus, an electoral district—an

102 *Milliken v. Bradley*, 418 U.S. 777, 807 (1974).
103 Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. Rev. 393 (2015).
104 Id. at 414.

instrumentality of the state similar in nature to a school district—was not immune to alteration or interference even if it had not played a role in the violation for which a remedy was sought.

It is difficult to reconcile this precedent with the majority's claims that the boundaries of the suburban school districts were immune to efforts to desegregate Detroit's schools. In both cases, the Court acknowledged the importance of local control over government and schools.[105] But in *Reynolds*, the Court held that local control of governments could not prevail over Alabama citizens' constitutional right to vote, regardless of whether the malapportioned district was at fault for the violation that occurred. If local control of government is not sacrosanct in electoral districts when a Fourteenth Amendment violation has occurred—especially in those that played no role in carrying out the violation—the majority should have provided an explanation as to why school district' lines are impermeable when remedying Fourteenth Amendment violations. *Milliken* as it stands thus suggests that remedies to Fourteenth Amendment violations are arbitrarily subject to constraints imposed by administrative boundary lines, which, as Justice White noted, are often determined by the very actor responsible for the violation.[106]

Justice Burger and Justice Stewart both cited *Swann* to invalidate the metropolitan remedy, but by disregarding *Swann's* most important imports and breaking decisively with its precedents, they misrepresented the case and exposed a major flaw in their arguments. The Court in Swann upheld busing as a suitable remedial technique to achieve desegregation in the Charlotte-Mecklenburg school system. *Swann's* principal mandate, as Justice Marshall noted in his dissent, was unequivocal: where school segregation is found to exist, every effort must be made by responsible parties to achieve the greatest possible degree of actual desegregation.[107] *Swann* also made clear that schools that can be identified by their racial composition as "white schools" or "Negro schools" constitute violations of students' constitutional rights under the Equal Protection Clause.[108] The Court in *Swann* then declared that district judges possess a broad and flexible range of equitable powers to remedy past wrongs when fashioning remedies for the existence of dual school systems or racially identifiable schools.[109]

Justice Burger and Justice Stewart omitted these important aspects of *Swann* in their reasoning, highlighting instead the decision's principle that the "nature of the violation determines the scope of the remedy" and its instruction that desegregation did not require the establishment of a particular racial balance

105 Id.
106 *Milliken v. Bradley*, 418 U.S. 772 (1974).
107 James Freeswick, *Milliken v. Bradley* Hofstra L. R. 494 (1975).
108 *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 2,18 (1971)
109 Id. at 21.

in newly desegregated schools.[110] Justice Burger certainly did not strengthen his case by invoking *Swann's* racial balance precedent; Judge Roth considered and issued a metropolitan remedy strictly because it was the only remedy that promised to achieve actual desegregation. His desire to produce some kind of favorable racial balance was an aspect of the inaccurate account of the trial court proceedings conjured up by Justice Burger himself. Justice Marshall noted, too, that the majority inappropriately applies to *Milliken* the commonsense rule that "the nature of the violation determines the scope of the remedy." For Justice Marshall, this rule instructed the justices to consider a remedy that would actually cure the violation to which it is addressed; in other words, to fulfill its function as a remedy.[111] In this sense, the rule appears to be instructional in the justices' quest to fulfill *Swann's* most clear and important mandate: the achievement of the greatest possible degree of actual desegregation.

It is thus inexcusable that the "nature of the violation" rule is cited in support of invalidating the only remedy that would actually fulfill *Swann's* unequivocal mandate. By ruling against the metropolitan remedy, the majority assured that desegregation would not be achieved to the greatest possible extent; on the contrary, they assured it would hardly be achieved at all. When ruling out Detroit-only plans to achieve desegregation in Detroit's public schools, Judge Roth noted that plans limited to Detroit would increase white flight to such an extent that Detroit's entire school district would become "virtually all-black".[112] *Swann* made clear that the continued existence of racially identifiable schools constituted a violation of students' rights under the Equal Protection Clause, and so the Detroit-only plans fell short of *Swann's* mandate to eliminate racially identifiable schools. Nevertheless, the majority omitted any mention of the fact that the Detroit-only plans failed to meet *Swann's* guidelines, instead citing the case in ways that masked and distorted its most important implications.

The majority stressed the importance of not interfering with local control of schools—a concern merited by the history of public education in the United States—but failed to acknowledge simultaneously the degree of influence the state of Michigan exerted over its school districts in 1974. As Justice Thurgood Marshall noted, Michigan at this time served as an especially prominent example of a state where the tradition of local control of schools was subject to state laws and state authority to a considerable extent. This was demonstrated ad nauseam at Judge Roth's trial and by acts taken by the Michigan State Legislature. The plaintiffs noted at the trial that education is a state function under Michigan law, and thus that the Detroit school district served merely as an agent of the state.[113]

110 Id. at 16.
111 *Milliken v. Bradley*, 418 U.S. 807 (1974).
112 Baugh, *supra* note 18, at 124.
113 Dimond, *supra* note 20, at 63.

The plaintiffs also demonstrated that the State directly financed the Detroit School Board's intentional segregation of its public schools and approved its construction of racially divided schools.[114] When the Detroit Board settled upon a desegregation plan that would have reassigned just 9,000 of its 290,000 students, the State immediately intervened and passed Act 48, Section 12 of which killed the plan. In this case, local control was clearly subject to state interference when a desegregation plan was passed, so it should have been equally subject to interference by the district court's authority.

To suggest that the State and school boards were separate and distinct bodies is contrary to acts of the State and its influence over local school districts. When the Detroit School Board drew attendance boundary lines to conform neatly with racial divides, bused African Americans away from white schools despite their closer proximity to black neighborhoods, built schools of a particular size and in a particular location in order to restrict them to serving segregated public housing projects, and allowed open enrollment policies in neighborhoods transitioning from white to black, the State was directly or by extension responsible.[115] The State thus bore ultimate responsibility for the widespread violation of black students' constitutional rights in the city of Detroit, and so, as is clear from the history of the Fourteenth Amendment, the State should have been subject to national interference to remedy the wrongs that had been perpetrated.[116] The equitable power possessed by the Court should not have been restrained by the sovereignty of a local government, which itself was merely an extension of the state. By imposing limits on the ability of the district court to remedy the violation in which the State was very clearly implicated, the majority, as Justice White noted, permitted the very party responsible for the violation to set the terms of how it would be resolved. This seems clearly out of line with precedents set by previous cases.

Myron Orfield, professor at the University of Minnesota Law School, notes in a law review article on metropolitan segregation that *Milliken* is seen today by many as a politically motivated, doctrinally indefensible case.[117] Additionally, a former law clerk for Justice Rehnquist described the Court's refusal to review the district court's housing segregation findings as an act of "willful blindness".[118] Indeed, in light of the ways in which the majority's decision retreated

114 Id.

115 Id. at 61.

116 Mark C. Rahdert, *Obstacles and Wrong Turns on the Road from Brown: Milliken v. Bradley and the Quest for Racial Diversity in Education*, 13 Temp. Pol. & Civ. Rts. L. Rev. 785, 816 (2004) at 797.

117 Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. Rev. 363, 462 (2015) at 415.

118 Id. at 413.

decisively from precedents, ignored crucial findings material to the case, mischaracterized the district court's reasoning, and irresponsibly vested in the State of Michigan the power to remedy a violation for which it was ultimately responsible, *Milliken* is a difficult case to defend. It is only in consideration of Justice Marshall's claim that the majority was responding to public opinion that the Court had gone far enough in dismantling school segregation that the decision begins to make sense. It is otherwise difficult to accept that the brilliant men who comprised the majority at the time could commit so many egregious and inexcusable oversights in their reasoning.

MILLIKEN TODAY

Justice Thurgood Marshall concluded his dissent by predicting that the majority's invalidation of the metropolitan remedy would set our nation on a course it would ultimately regret. He feared for the future of children who would continue to be denied their equal protection rights, and prophesied that, in the absence of a metropolitan remedy, "there is little hope that our people will ever learn to live together".[119] Sadly, much of what Justice Marshall feared would happen as a result of the majority's decision is evident today. Throughout the nation, large numbers of both black and white children in metropolitan areas attend racially identifiable schools where meaningful efforts to achieve racial integration are all but futile.[120]

One of *Milliken's* major impacts was to render school district boundaries virtually inviolable, thereby incentivizing white flight. *Milliken* sent a clear message to those who wished to escape desegregation: they could flee to suburban districts where local sovereignty would triumph over desegregation efforts as long as the receiving district had never engaged in *de jure* segregation.[121] In the wake of *Milliken* and its successor cases, white departure from inner city districts has occurred on a massive scale.[122] Thus, the majority's decision to immunize suburban school districts from a metropolitan remedy has made the locally sovereign district—located almost always on the outskirts of cities as a result of widespread residential segregation effected throughout much of the twentieth century—an attractive destination for white Americans seeking to escape the racial integration of urban schools.

Milliken has also played a major role in perpetuating racial segregation in America's public schools. By insulating suburban school districts not shown to have committed *de jure* segregation from desegregation efforts, *Milliken* has developed even further the urban-suburban racial dynamic of public education in metropolitan areas throughout the nation.[123] Today, many urban public schools serve predominantly black and minority families of low socioeconomic standing. On the other hand, suburban school districts situated just outside a given city's center serve large populations of white students of higher socioeconomic standing.[124] Recent research conducted by the American Sociological Association indicates that racial segregation in America's public schools today is a product of vast differences between school districts, rather than between the schools within

119 *Milliken v. Bradley*, 418 U.S. 783 (1974).
120 Robert A. Sedler, *The Profound Impact of Milliken v. Bradley*, 33 Wayne L. Rev. 1700 (1987).
121 Aaron J. Saiger, *The School District Boundary Problem*, 42 Urb. Law. 504 (2010)
122 Id.
123 Daniel Kiel, *The Enduring Power of Milliken's Fences*, 45 Urb. Law 138 (2013)
124 Id.

the districts themselves.[125] Because suburban school districts are immunized from desegregation efforts, racial integration of public schools has become extremely difficult to achieve. Thus, *Milliken* was, in many ways, the death knell of meaningful integration of America's metropolitan-area public schools.

By making it far more difficult for desegregation efforts to permeate public school districts, *Milliken* has also erected a major barrier to confronting the racial achievement gap.[126] The racial achievement gap has developed largely due to the fact that inner-city school districts, populated predominantly by black and minority low-income families, are often underfunded and understaffed, while suburban districts, where property-wealth is greater and local revenues allocated toward schools is higher, offer students greater access to important educational resources.[127] The gap is most pronounced in the disparity between standardized test scores achieved by white and black students. Since 1990, white students have outperformed black students on reading and math achievement tests by troublingly large margins.[128] A compilation of civil rights data released by the U.S. Department of Education's Office of Civil Rights also reported disturbing racial inequalities in school discipline, early education, college readiness, and teacher equity.[129] The study found that black students are expelled at three times the rate of their white counterparts, and are three times more likely to attend a school where less than 60% of the teachers are licensed or state certified.[130] Because of the "enduring power of Milliken's fences," many commentators now argue that state endorsement of district line alteration is a necessary condition for meaningful efforts to close the racial achievement gap.[131]

Milliken has had an important constitutional legacy as well. Prior to *Milliken*, the question of whether the Constitution should be interpreted to require states to operate racially integrated schools was not clear.[132] *Milliken* seems to have resolved this question. Since it was decided, the Court has adhered to the doctrine that states are not constitutionally obliged to bring about the operation of racially integrated schools within their school districts.[133] Rather, states are merely forbidden from operating dual school systems that separate the races as a matter of governmental policy. *Milliken* has also raised the standard of proof

125 Ann Owens, Sean F. Reardon, Christopher Jencks, Income Segregation Between Schools and School Districts, 53 American Educational Research Journal 1159 (2016).
126 Daniel Kiel, *The Enduring Power of Milliken's Fences*, 45 Urb. Law 138 (2013).
127 Ann Owens, Sean F. Reardon, Christopher Jencks, Income Segregation Between Schools and School Districts, 53 American Educational Research Journal, 1160 (2016).
128 Id. at 1162.
129 Sonya Douglass Horsford, *Social Justice for the Advantaged: Freedom from Racial Equality Post-Milliken* 118 Teachers College Record 4 (2016)
130 Id.
131 Daniel Kiel, *The Enduring Power of Milliken's Fences* 45 Urb. Law, 139 (2013)
132 Robert A. Sedler, *The Profound Impact of Milliken v. Bradley*, 33 Wayne L. Rev. 1700 (1987)
133 Id.

required to force states to effect public school integration. Plaintiffs must now demonstrate governmental intent in the establishment of racially identifiable schools in order to compel state-mandated desegregation. Absent a showing of governmental responsibility or discriminatory intent, states are not constitutionally compelled to racially integrate public schools.[134]

134 Id. at 1701.

CONCLUSION

In 2014, the Washington Post ran an article with an attention-grabbing headline: "You've probably never heard of one of the worst Supreme Court decisions. But we're still dealing with its awful legacy".[135] That article was, of course, about *Milliken v. Bradley*, whose flawed decision this paper has also examined and deconstructed. Relative to *Brown*, it is indeed interesting that Milliken is so often overlooked in discussions of school segregation. As Justice Thurgood Marshall observed, *Milliken* constituted a giant step backwards in our difficult journey toward nationwide school desegregation. Justice Marshall noted that desegregation was never expected to be an easy task, but sadly, the majority took the easy way out in rendering their decision against Judge Roth's metropolitan remedy.

It is certainly conceivable that even if *Milliken* had gone the other way, the problems facing metropolitan schools throughout the nation would have persisted. Metropolitan communities in the 1970s and 1980s were facing a number of fiscal, social, and political issues that may have created inequality in schooling regardless of whether widespread racial integration of public schools was achieved.[136] Moreover, as Richard Rothstein notes, bigotry often adapts to the law; white legislators could have devised a number of different strategies to enable white parents to avoid participating in desegregation efforts. But it seems safer to assume that, if the majority had not made meaningful integration of metropolitan-area public schools nearly impossible to achieve, many black students in America would have been far better off than they are today. Arthur Johnson, the first black assistant superintendent in Detroit's school system, argued that American society would never have allowed urban public schools to have deteriorated so dramatically if more white students were enrolled.[137] However, because the majority refused to take a bold step in the right direction, we will never have an answer to this question.

Milliken and its legacy pose a number of important questions to consider. For example, if racial integration of our nation's metropolitan-area public schools is nearly impossible to achieve through the courts and state legislatures, what means are available to see to this end? But this introduces an equally important question: is integration worth pursuing? Nikole Hannah-Jones, a prolific writer on the topic of contemporary school segregation, argues that it most definitely is.

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135 Daniel Hertz, You've Probably Never Heard of One of the Worst Supreme Court Decisions, THE WASHINGTON POST, www.washingtonpost.com/posteverything/wp/2014/07/24/youve-probably-never-heard-of-one-of-the-worst-supreme-court-decisions/. (2014).

136 Baugh, *supra* note 18, at 207.

137 Id.

For Jones, reforms like charter schools, small schools, Race to the Top, No Child Left Behind, and standardized testing reform have not made meaningful progress in closing the racial achievement gap that perpetuates wealth inequality between white Americans and African Americans.[138] She argues that the only reform that has made any progress toward achieving this end is racial integration of public schools. But Jones recognizes what the justices on the Supreme Court recognized in 1974: achieving racial integration is no easy task. Indeed, it requires, as *Milliken* amply demonstrated, collaborative efforts between white Americans and African Americans, the wealthy and the poor, and legislators and the community. But Jones encourages her readers not to take the easy way out. For, until efforts to integrate our public schools are made, inequality in education between urban and suburban school districts will continue to persist and adversely affect the lives of thousands of students every day.

138 Dale Mezzacampa, Writer Nikole Hannah-Jones Issues a Challenge to Parents In Philadelphia and Beyond, *THE NOTEBOOK ICAL*, thenotebook.org/articles/2018/10/02/nikole-hannah-jones-issues-a-challenge-to-parents-in-philadelphia-and-beyond/. (2018).
139 Id.

Works Cited

Baugh, Joyce A., The Detroit School Busing Case: Milliken v. Bradley and the Controversy over Desegregation. University Press of Kansas, 2011.

Burger, Warren Earl, and Supreme Court Of The United States. U.S. Reports: Milliken v. Bradley, 418 U.S. 717. 1973 Periodical. Retrieved from the Library of Congress, <www.loc.gov/item/usrep418717/>.

Burger, Warren Earl, and Supreme Court Of The United States. U.S. Reports: Swann et al. v. Charlotte-Mecklenburg Board of Education et al., 402 U.S. 1. 1970. Periodical. Retrieved from the Library of Congress, <www.loc.gov/item/usrep402001/>.

Dimond, Paul R., Beyond Busing: Reflections on Urban Segregation, the Courts, and Equal Opportunity. University of Michigan Press, 2005.

Flamm, Michael W., Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s. Columbia University Press, 2007

Freeswick, James. "Milliken v. Bradley." Hofstra Law Review, vol. 3, no. 2, (1975).

Hertz, Daniel. "You've Probably Never Heard of One of the Worst Supreme Court Decisions." *The Washington Post*, WP Company, 24 July 2014, www.washingtonpost.com/posteverything/wp/2014/07/24/youve-probably-never-heard-of-one-of-the-worst-supreme-court-decisions/.

Horsford, Sonya Douglass. "Social Justice for the Advantaged: Freedom From Racial Equality Post-Milliken." *Teachers College Record*, vol. 118, no. 030306, (2016).

Kiel, Daniel. "The Enduring Power of Milliken's Fences." *The Urban Lawyer*, vol. 45, no. 1, Jan. 2013: 137–181.

Meinke, Samantha. "Northern Battle for Desegregation," The Michigan Bar J ournal, vol. 90, no. 9 (2011): p. 20-23. HeinOnline, https://heinonline.org/HOL/P?h=hein.barjournals/micbj0090&i=1374.

Mezzacampa, Dale. "Writer Nikole Hannah-Jones Issues a Challenge to Parents in Philadelphia and Beyond." *The Notebook ICal*, 3 Oct. 2018, thenotebook.org/articles/2018/10/02/nikole-hannah-jones-issues-a-challenge-to-parents-in-philadelphia-and-beyond/.

Orfield, Myron. "Milliken, Meredith, and Metropolitan Segregation," UCLA Law Review, vol. 62, no. 2 (2015): p. 363-462. HeinOnline, https://heinonline.org/HOL/P?h=hein.journals/uclalr62&i=362.

Owens, Ann, et al. "Income Segregation Between Schools and School Districts." American Educational Research Journal, vol. 53, no. 4, (2016): 1159–1197, doi:10.3102/0002831216652722.

Rahdert, Mark C. "Obstacles and Wrong Turns on the Road from Brown: Millik en v. Bradley and the Quest for Racial Diversity in Education," Temple Political & Civil Rights Law Review, vol. 13, no. 2 (2004): 785-816. HeinOnline, https://heinonline.org/HOL/P?h=hein.journals/tempcr13&i=791.

Rothstein, Richard. The Color of Law: A Forgotten History of How Our Government Segregated America. Liveright Publishing Corporation, a Division of W.W. Norton & Company, 2018.

Saiger, Aaron J. "The School District Boundary Problem." The Urban Lawyer, vol. 42, no. 3, (2010): 495–548. JSTOR, JSTOR, www.jstor.org/stable/27895808.

Sedler, Robert A. "The Profound Impact of Milliken v. Bradley." *Wayne Law Review*, vol. 33, (1987).

ARTICLE

A POSITIVE POLITICAL THEORY UNDERSTANDING OF *FOOD AND DRUG ADMINISTRATION V. BROWN & WILLIAMSON*

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INTRODUCTION

In 1964, the surgeon general released a landmark report announcing the existence of a causal connection between smoking and severe health concerns, such as certain types of cancer and bronchitis.[1] Despite the widespread publication of the report, it was only decades later, in 2009, that the Food and Drug Administration (FDA) began to regulate tobacco, after the passage of the Family Smoking Prevention and Tobacco Control Act. A significant reason for the delay was *Food and Drug Administration v. Brown & Williamson* (2000), in which the Supreme Court held that Congress did not intend for the FDA to regulate tobacco. This conclusion was based on an assessment of legislative history and consequently struck down the FDA's attempts to regulate tobacco.[2]

One way of interpreting these events is that Congress did not originally intend for the FDA to regulate tobacco but reversed this position in 2009. According to this view, the Court's job is to simply reflect congressional intent at the time of its decision. It sees the Court as being largely detached from politics—reactive judges who have a final say on administrative law.[3] This view presents a straightforward explanation for *Brown & Williamson*: the Court performed the role of assessing congressional intent and accordingly rejected the FDA's claim to tobacco regulation. To the contrary, I argue that the complex politics behind tobacco regulation reveal that the Court is better understood as an institution that not only responds to and interprets congressional intent, but also plays a significant part in setting the stage for a well-formed congressional intent to emerge. Congressional intent does not form in a sterile environment. It is not immune to exogenous influences, and the Court's ruling is certainly one of these influences. In the case of Brown & Williamson, I believe the Court (intentionally or not) assumed the role of a "whip." It compelled a divided and disconcerted Congress

1 Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service 31-2 (1964).

2 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

3 Daniel B. Rodriguez & Barry R. Weingast, *Is Administrative Law Inevitable?*, UC Berkeley Law and Economics Workshop. 3 (2009).

to decide on whether it would grant the FDA the authority to regulate tobacco, which was finally accomplished in 2009 through the passage of the Family Smoking Prevention and Tobacco Control Act. The argument that the Court exerts influence over legislative intent is consistent with claims made by positive political theorists and further strengthens the view that the dichotomy between administrative law and politics is a false one.[4]

This paper is divided into three sections. In Part I, I provide a detailed account of the congressional response to the push for tobacco regulation by the FDA and the executive branch. From this often-overlooked legislative history, I argue that, contrary to the Supreme Court's interpretation of congressional behavior in *Brown & Williamson*, Congress was neither "silent" nor expressly against the FDA's mission to regulate tobacco. In Part II, I analyze *Brown & Williamson* to illuminate a mismatch between actual congressional behavior and the Court's interpretation of that behavior. In Part III, I explore potential explanations for this puzzle. While traditional legal theory falls short of providing a satisfactory account of the discrepancy, I argue that positive political theory offers a more cogent explanation. By reading discord in Congress as a stance against deference, the Supreme Court has tabled the decision to be ultimately made by Congress. I use a spatial model to corroborate this claim.

I. Legislative Behavior Pre-*Brown & Williamson*

From 1990 to 1997, under FDA commissioner David Kessler, the administration developed a proposal to regulate tobacco.[5] The central aim of the regulation effort was to reduce the appeal of and access to tobacco for children, as well as restrict certain advertising.[6] Kessler was able to get President Bill Clinton and Vice President Al Gore on board with the proposal.[7] In February 1995, with the explicit support of the executive branch, the FDA finally released the jurisdiction document that laid out its proposed tobacco regulations.[8] The document marked the FDA's plan to depart from the 80 year old doctrine that it did not have jurisdiction over tobacco.[9] Hence, a long stream of bureaucratic work culminated in regulations to prevent child tobacco use, a position popular among the public at

4 Daniel B. Rodriguez, *Administrative Law*, The Oxford Handbook of Law and Politics 351 (2008).

5 *Developments in Policy: The FDA's Tobacco Regulations*, 15 Yale L. & Pol'y Rev. 1189-91 (1996).

6 Margaret Gilhooley, *Tobacco Unregulated: Why the FDA Failed, and What To Do Now*, 111 Yale L.J. (2002).

7 Id., 1190.

8 Kenneth Jost, *Closing In on Tobacco*, CQ Researcher 9, 977-1000 (1999).

9 Id.

the time. [10] [11]

Congressional reaction to the FDA's intention to regulate tobacco was unexpected. The 105th Congress met from 1997 to 1999, during the fifth and sixth years of the Clinton administration, when both chambers operated with a Republican majority.[12] The Republican domination in Congress, along with the *Brown & Williamson* decision, may suggest that Congress was absolutely silent on the issue or perhaps even uniformly antagonistic to the FDA's purported jurisdiction over tobacco. However, the truth is more complicated. A close look at legislative history indicates that, far from being silent, Congress was actively wrestling with the issue of tobacco regulation. The White House had already made clear that tobacco legislation was among the administration's top legislative priorities.[13] [14] The FDA's sharp change in position combined with the fact that the public was increasingly calling for more stringent tobacco regulation placed the issue at the top of the congressional agenda as well.[15] In fact, at the time, many scholars speculated that the creation of a federal tobacco policy would be one of the 105th Congress's greatest feats.[16]

In late 1997, a few years after the FDA announced its plan to regulate tobacco, John McCain (R-AZ), chairman of the Senate Commerce, Science, and Transportation Committee, led the development of a bill that would advance stricter tobacco policy.[17] The bill (S.1415) looked like it was off to a strong start when the Senate Commerce Committee approved it by a vote of 19-1 on April 1.[18] S.1415 was intended to be a game-changer that could impact public health and the tobacco industry for years to come. It would have raised the price of cigarettes by $1.10 per pack over the course of five years, restricted the advertising of tobacco products in an effort to curb the number of new teenage smokers, and imposed multibillion-dollar penalties on tobacco companies if youth smoking

10 Brian J. Fogarty & James E. Monogan III, *Patterns in the politics of drugs and tobacco: The Supreme Court and issue attention by policymakers and the press*, 38 Politics 214 (2018).

11 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).
It is noted that "a public comment period followed, during which the FDA received over 700,000 submissions, more than "at any other time in its history on any other subject," attesting to the public attention the FDA's decision to regulate tobacco attracted.

12 Mildred L. Amer, *Membership of the 105th Congress: A Profile* (1998), https://digital.library.unt.edu/ark:/67531/metadc819282/m1/1/.

13 *Fire Safe Cigarettes*, CQ Almanac (1990), http://library.cqpress.com/cqalmanac/document.php?id=cqal90-1112939.

14 *Presidential Statement: Clinton Details Five Key Elements For Teen Smoking Legislation*, CQ Almanac (1998), http://library.cqpress.com/cqalmanac/cqal97-0000181106.

15 *While Congress Debates Bill, Court Rules Against FDA's Power To Regulate Tobacco*, CQ Almanac (1998), http://library.cqpress.com/cqalmanac/cqal98-0000191081.

16 Id.

17 Id.

18 Id.

reduction targets were not met.[19] Most importantly, it would have granted broad authority to the FDA to regulate tobacco.[20] The swift committee approval of the bill was an indication that Senate Republicans were making tobacco legislation a top priority, as expected.

The biggest obstacle to the passage of S.1415 was not dissent over how much authority to hand the FDA, as senators were willing to narrow their differences on this issue in order to preserve the momentum of the bill. Archival documents indicate that "Commerce Committee member Bill Frist [R-TN] hammered out an agreement [regarding FDA authority] with fellow Labor Committee members Edward M. Kennedy [D-MA] and Vermont Republican James M. Jeffords, as well as with Judiciary Committee Chairman Orrin G. Hatch [R-UT]."[21] Officials from the FDA and the White House were also on board.[22]

Rather, what eventually killed the bill was disagreement over its economic implications.[23] While it looked like S.1415 was gaining momentum as it neared the Senate floor, it was actually putting itself at risk of becoming unpassable. The bill's success emboldened its backers to push for even more stringent regulatory measures. Democrats were determined to make the bill tougher on the tobacco industry at every turn, including multiple attempts to raise the price increase from $1.10 to $1.50 per pack.[24] [25] Meanwhile, those opposed to the bill succeeded in adding extraneous amendments offering tax breaks and increased funding for the interdiction of illegal drugs.[26] All this was unwelcome news to Senator McCain, who, striving for the political center, argued that S.1415 was a carefully crafted package that should not be picked apart by different factions.[27] The White House agreed.[28] Soon, however, the bill no longer resembled the one originally approved by the Commerce, Science, and Transportation Committee in April. It had transformed into an amalgam of ideas from the Finance Committee and the Clinton administration, as well as pickings from other senators' bills.[29] It was evident to all parties that the bill's focus on teen smoking had been blurred by immaterial issues, which included discussions over using the bill to compensate tobacco

19 National Tobacco Policy and Youth Smoking Reduction Act, S.1415, 105th Cong. (1997).
20 *While Congress Debates Bill, Court Rules Against FDA's Power To Regulate Tobacco*, CQ Almanac (1998), http://library.cqpress.com/cqalmanac/cqal98-0000191081.
21 Id.
22 Id.
23 Id.
24 *While Congress Debates Bill, Court Rules Against FDA's Power To Regulate Tobacco*, CQ Almanac (1998), http://library.cqpress.com/cqalmanac/cqal98-0000191081.
25 National Tobacco Policy and Youth Smoking Reduction Act, S.1415, 105th Cong. (1997).
26 *While Congress Debates Bill, Court Rules Against FDA's Power To Regulate Tobacco*, CQ Almanac (1998), http://library.cqpress.com/cqalmanac/cqal98-0000191081.
27 Id.
28 Id.
29 Id.

farmers and asbestos workers, as well as to eliminate the so-called marriage penalty—a tax imposed on families earning less than $50,000 a year.[30]

On June 18, 1997, S. 1415, a bill that once looked unstoppable, died after it was recommitted to the Committee on Commerce.[31] Immediately, the Democrats and President Clinton blamed the Republican majority for its demise. They did not think that the conservatives would risk the poor publicity that could result from voting against a bill with the goal of decreasing tobacco smoking by teenagers.[32] However, by pointing out the mess the bill had become after partisan conflicts, the tobacco industry and conservative opponents of the bill were able to successfully convince fence-sitting colleagues and the public that the bill had lost its focus on preventing tobacco addiction among teenagers and instead was disfigured into an opportunity to expand the reach of the government.[33]

The prospects that the House would take up the task that the Senate had failed to accomplish were slim. The House was in agreement with the Senate that prevention of teen smoking was very much needed, but appeared unwilling to enact any major legislation that would empower the FDA to address the problem.[34] Instead, Speaker of the House Newt Gingrich (R-GA) promised that the House would attempt to pass a small-scale bill that would tackle the same issues of tobacco use.[35] This was never realized due to lack of support in the House.[36]

Senator McCain had warned Congress consistently that if it failed to enact the tobacco legislation, tobacco regulation would continue only through piecemeal court decisions and that only a House-Senate conference would be able to guarantee a comprehensive shift in regulation policy through the expansion of the FDA's jurisdiction.[37] This proved true. Independently of the Senate bill, fifteen states continued their fight in court against tobacco companies, demanding the reimbursement of smoking-related Medicaid expenses.[38] Moreover, the FDA and the tobacco companies continued their appellate case to determine the agency's authority to regulate nicotine and tobacco advertising.[39]

An ambitious bill died in the Senate because members of Congress could

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30 *While Congress Debates Bill, Court Rules Against FDA's Power To Regulate Tobacco*, CQ Almanac (1998), http://library.cqpress.com/cqalmanac/cqal98-0000191081.

31 National Tobacco Policy and Youth Smoking Reduction Act, S.1415, 105th Cong. (1997).

32 Kenneth Jost, *Closing In on Tobacco*, CQ Researcher 9, 977 (1999).

33 *While Congress Debates Bill, Court Rules Against FDA's Power To Regulate Tobacco*, CQ Almanac (1998), http://library.cqpress.com/cqalmanac/cqal98-0000191081.

34 Id.

35 Id.

36 Id.

37 *While Congress Debates Bill, Court Rules Against FDA's Power To Regulate Tobacco*, CQ Almanac (1998), http://library.cqpress.com/cqalmanac/cqal98-0000191081.

38 Todd Gaziano, *Federal Litigation Against the Tobacco Industry: Elevating Politics Over Law*, Heritage Foundation (Jul. 30, 1999),

39 Id.

not agree on the details and tangential issues surrounding the legislation. But the buzz over the bill suggests that far from the conventional tale, the 105th Congress was not silent on the issue of tobacco regulation. Particularly, if we see the attempt at legislating S. 1415 as a response to the FDA's bold declaration a few years earlier, it is more likely that Congress did not deliberately keep authority over tobacco from the FDA but simply lacked the political unity and will to decisively grant the FDA jurisdiction.

II. *Brown & Williamson*: A Legal Puzzle

From the early 1970s, FDA officials contended that the Food, Drug, and Cosmetic Act (FDCA) gave the FDA wide latitude to interpret its own statute to protect public health by any means it deemed necessary and proper.[40] Ever since, Congress had largely deferred to the FDA's purported statutory authority, leaving the FDA's interpretation of regulation unchallenged.[41] This changed with *Brown & Williamson.*

On the issue of tobacco regulation, the FDA contended that while Congress never provided an explicit mandate, it was authorized to regulate tobacco and other drugs on the grounds of the FDCA.[42] This claim was challenged by the Fourth Circuit Court, based in Richmond, Virginia, which ruled that tobacco products did not fit within the FDCA's regulatory scheme. The Court claimed that the FDCA did not permit a drug or device that cannot be used safely to remain on the market.[43] Yet, the FDA had internally categorized tobacco products as being unsafe, making it inevitable that they be banned if under the FDA's jurisdiction. The Court determined that Congress never intended the FDA to ban tobacco under the FDCA.[44] In its ruling, the Court cited the 1984 Supreme Court decision in *Chevron v. Natural Resources Defense Council*, which laid out a two-step test that can be used to determine the extent to which a court reviewing an agency action should give deference to the agency's construction of a statute that it has been delegated to administer.[45] [46] The test first directs courts to assess whether Congress "has directly spoken to the precise question at issue." If "the intent of Congress is clear," the court "must give effect to the unambiguously expressed intent of Congress."[47] However, if the court determines that this is not the case and that Congress's intent is not clear, the court is then directed to give the

40 *FDA v. Brown & Williamson Tobacco Corp.*, 153 F.3d 155 (4th Cir. 1998).
41 Id.
42 Id.
43 Id.
44 *FDA v. Brown & Williamson Tobacco Corp.*, 153 F.3d 155 (4th Cir. 1998).
45 Id.
46 *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984).
47 Id.

agencies more leeway in interpreting their own statutes.[48] The question then becomes "whether the agency's answer is based on a permissible construction of the statute."[49] As long as the agency's interpretation of the statute is deemed reasonable, the court may not substitute it with its own construction of the statute.[50]

The Fourth Circuit Court was of the opinion that this case be settled by the first portion of the test. It claimed that even though Congress never explicitly prohibited the agency from regulating tobacco products, the agency attempted to "stretch the act beyond the scope intended by Congress," therefore violating Congress's expressed intent.[51] But, if the case, as the Court admits, lacks unambiguous expression of congressional intent, it is puzzling how the Court could base its ruling on the first step of the *Chevron* test, which requires express congressional intent. FDA officials were quick to point out that the Court probably decided the case on the first test because otherwise, they would have had to pay much greater deference to the agency and uphold the FDA's regulation attempts.[52] In other words, they accused the Court of making a decision and then devising a post-hoc justification through the *Chevron* test.

The Supreme Court later reaffirmed the 4th Circuit Court's ruling and reasoning. In its majority opinion, it attempted to justify the way in which the ruling can be grounded on the first step of the *Chevron* test.[53] On one hand, it admitted that deference under *Chevron* to an agency's construction of a statute is generally "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps," while also arguing that this was an "extraordinary case" and that "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[54] There are two main reasons for which the Supreme Court contended that the FDA's claim for jurisdiction over tobacco products can be rejected despite the absence of explicit congressional intent. First, it claimed that Congress was entirely aware of the hazards of teen smoking and, in response, created a distinct regulatory scheme for tobacco products that, according to the Court, was "incompatible with FDA jurisdiction."[55] Second, it cited instances in which Congress refused to pass bills that granted the FDA (or any agency, for that matter) authority over tobacco.[56] It specifically referenced three bills from 1963 (H.R.5973,

48 Id.
49 Id.
50 *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984).
51 *FDA v. Brown & Williamson Tobacco Corp.*, 153 F.3d 155 (4th Cir. 1998).
52 *While Congress Debates Bill, Court Rules Against FDA's Power To Regulate Tobacco*, CQ Almanac (1998), http://library.cqpress.com/cqalmanac/cqal98-0000191081.
53 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).
54 Id.
55 Id.
56 Id.

S.1682, and H.R.9512) and one from 1965 (H.R.2248) that were introduced in Congress but failed to become law.[57] The Supreme Court made the argument that, altogether, it cannot be said that Congress was either silent or left congressional intent ambiguous: "Indeed, this is not a case of simple inaction by Congress that purportedly represents its acquiescence in an agency's position."[58] Instead, according to the Court, the careful consideration and subsequent rejection of FDA-favorable bills and regulatory schemes indicates that congressional intent that is not explicit but significant and clear may be sufficient to deny regulatory authority to those agencies operating as if congressional intent is not evident.

Despite the justification offered in the majority opinion, there are some questions about the ruling that remain unanswered. For one, the long history of failed bills and the FDA's past reluctance to claim regulatory authority over tobacco are not truly indicative of contemporary congressional intent.[59] If anything, the most relevant considerations for determining congressional intent would be the recent legislative efforts towards tobacco regulation detailed in the previous section, namely, the attempted passage of S.1415. It is odd that the majority opinion refers to unsuccessful bills from the 1960s but makes no mention of S.1415. One explanation for this omission is that the discussion over S.1415 by members of Congress challenged the conclusion the Court wanted to reach about congressional intent. As opposed to the other bills, there is greater difficulty in reading S.1415 as plain refusal to grant the FDA authority.[60] Admittedly, the legislative discourse around S.1415 supports the Court's claim that Congress was concerned about teen smoking and that it wasn't completely silent on the matter. However, it also shows that a relatively stable, bipartisan agreement was reached on the matter of how much jurisdiction to give the FDA. Therefore, the collapse of the bill cannot be attributed solely to the reluctance of Congress to extend the FDA's authority to cover tobacco products but primarily to disagreements over the bill's economic effects. Against Senator McCain's wishes, S.1415 was picked apart and too many amendments were proposed.[61] The biggest disputes had to do with financial concerns: what should be the specific increment in cigarette price increases, how much financial burden should be imposed on the industry, and how much should the tobacco farmers be compensated?[62] Exactly how much authority should be given to the FDA was not highly-contested, indicating relative agreement on this issue.

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57 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

58 Id.

59 *Developments in Policy: The FDA's Tobacco Regulations*, 15 Yale L. & Pol'y Rev. 1189-91 (1996).

60 Id., 410.

61 *While Congress Debates Bill, Court Rules Against FDA's Power To Regulate Tobacco*, CQ Almanac (1998), http://library.cqpress.com/cqalmanac/cqal98-0000191081.

62 Id.

These facts about S.1415 undercut the first part of the Court's justification as well. If, as the Court claims, separate regulatory schemes enacted by Congress were definitively meant to preclude the FDA's authority over tobacco products, why would Congress seriously consider expanding the FDA's authority under S.1415? A reasonable answer to this question is that Congress had reservations about the effectiveness and/or comprehensiveness of those measures that did not involve the FDA. It recognized that teen smoking was not sufficiently alleviated by them and that only delegation to agencies would achieve satisfactory results. It is true that the House was more hesitant to give the FDA jurisdiction over tobacco products, but it was also acutely aware of the need for new solutions to teen smoking.[63] The smaller-scale regulatory scheme that Speaker Gingrich sought to propose (one which did not require FDA involvement) never came to fruition because the House was not convinced of its efficacy, not because the House was wholly opposed to granting the FDA the authority to regulate tobacco.[64] In sum, Congress was not only unhappy about the status quo of widespread teen smoking, but it was also dissatisfied with the existing regulatory schemes (which lacked FDA participation) and was considering novel solutions.

III. *Brown & Williamson* Explained through Positive Political Theory

The analysis of *Brown & Williamson* from Part II evinces that the Court's justification for its ruling appears to be forced and unreflective of legislative behavior at the time. One way to explain *Brown & Williamson* is through traditional legal theory. Traditional legal theorists contend that, "in making administrative law," the courts "sit outside the political process."[65] They view courts as enforcers that, motivated by public interest, force agencies to adhere to constraints. On this account, courts face little political pressure and get the final say.[66] The role of overseeing regulatory administration is mainly that of courts, not of Congress.[67] Legal theorists would claim that in deciding *Brown & Williamson*, the Court was plainly influenced by their interpretation of precedent and/or their ideological views. (FDA Commissioner Kessler himself believed that the majority's ideology was largely responsible for the decision.)[68] However, it is possible to disprove both claims. First, it is difficult to conclude that the justices mainly interpreted the law based on precedent. In the majority opinion, the justices applied the two-

63 Id.
64 Id.
65 Daniel B. Rodriguez & Barry R. Weingast, *Is Administrative Law Inevitable?*, UC Berkeley Law and Economics Workshop. 3 (2009).
66 Id.
67 Id.
68 Margaret Gilhooley, *Tobacco Unregulated: Why the FDA Failed, and What To Do Now*, 111 Yale L.J. 1191 (2002).

step approach from *Chevron* but did not conform to the guidelines of the test as laid out in *Chevron*.[69] Rather than recognizing the ambiguity of the statute and moving on to step two, the majority incorporated the interpretative tools of step two into step one, justifying this shift on the grounds that legislative context presented an "extraordinary case."[70] Students of the decision note that this subtle modification of the *Chevron* doctrine "result[ed] in a form of "anti-deference" that could dramatically alter agencies' ability to regulate outside their traditional areas of influence."[71] In short, the Court actively modified the *Chevron* test to justify their favored ruling. The view that judges interpret the law from a fixed data set cannot account for this strategic move.

It is also unlikely that the justices' rulings were based entirely on their ideological preferences. In the end, the ruling came down to the question of congressional intent as opposed to manufacturers' intent: "was the FDA's rule consistent with congressional intent as manifested in the Agency's jurisdictional statute?"[72] Justice O'Connor, writing for the majority, did not rely on the tobacco industry's argument that "no matter how foreseeable a product's effects, and no matter how strong the circumstantial evidence of intent, the product could not fall under the statutory definition of a drug absent express claims of drug-like function by the manufacturer."[73] The Court did not address this claim, instead citing the inconsistency with congressional intent to justify the ruling.[74] [75] Thus, the FDA's "broad approach toward manufacturers' intent, integrating foreseeable consumer use with evidence of manufacturer knowledge, was not invalidated."[76] The Court left open the possibility that the FDA's theory of intent be applied in contexts other than tobacco or be used to reassert its jurisdiction over tobacco in the future.[77] What this means is that, despite having lost this seminal case, all that the FDA needed to regulate tobacco was express congressional intent. The Court did not erect any additional barriers to the FDA's claim of authority over tobacco when it easily could have. Had the majority ruled purely based on an ideological stance against the FDA's regulation of tobacco, they would have narrowed the

69 Marguerite M. Sullivan, *Brown & (and) Williamson v. FDA: Finding Congressional Intent through Creative Statutory Interpretation--A Departure from Chevron*, 94 Northwestern U. L. Rev. 273 (1999).

70 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

71 Heather Steiner, *Food & (and) Drug Administration v. Brown & Williamson Tobacco Corp*, Ecology L. Rev. 367 (2001).

72 Margaret Gilhooley, *Tobacco Unregulated: Why the FDA Failed, and What To Do Now*, 111 Yale L.J. 1192 (2002).

73 Id.

74 Id.

75 *Developments in Policy: The FDA's Tobacco Regulations*, 15 Yale L. & Pol'y Rev. 410 (1996).

76 Margaret Gilhooley, *Tobacco Unregulated: Why the FDA Failed, and What To Do Now*, 111 Yale L.J. 1192 (2002).

77 Id.

window of opportunity for the FDA by striking down its theory of intent against tobacco manufacturers.

Positive Political Theory (PPT), on the other hand, does not see the courts as enforcers isolated from politics that get the final say on administrative law.[78] Rather, courts strategically tailor their decisions in order to respond to the constraints placed by the legislative and executive branches.[79] It does not deny that judges have a good deal of discretion over forming the doctrines that we call administrative law, but it recognizes that this discretion is bound by the influence Congress and the president exert over administrative law, something that often goes understated in traditional legal theory.[80] In short, it sees administrative law as a product of a strategic game between agencies, elected officials, and the courts, all of whom are thought to be pushing their own agenda.

PPT offers an alternative account of *Brown & Williamson* that is more attractive than those of traditional legal theory. Figure 1 below is a spatial model developed by Eskridge, Jr. and Ferejohn and further explained by McCubbins and Lax.[81] [82] Assuming that the players of the game are not only rational but also perfectly aware of other players' preferences and their future moves, this model maps the policy preferences of the Senate, the House, the president, the FDA, and the various court actors regarding the amount of tobacco regulation.[83] The status quo (SQ) in 1994 was close to the preferences of the Senate and the House, but when the FDA issued its plan to regulate tobacco and advertising in 1995, the status quo shifted to SQ 1995. With this shift in policy, "Congress could not, by itself, move policy back to SQ 1994 because the President would veto such a move."[84] However, in 1997, belying all expectations, Judge Osteen of the U.S. District Court for the Middle District of North Carolina, who was once a paid lobbyist for a group of tobacco farmers, ruled that the FDA can partially regulate tobacco.[85] Judge Osteen's ruling effectively moved the status quo to SQ 1997.[86] The status quo created by Judge Osteen was closer to the ideal points of the

78 Daniel B. Rodriguez, *Administrative Law*, The Oxford Handbook of Law and Politics (2008).
79 Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. of Pa. L. Rev. 1417–1542 (2003).
80 Id.
81 William N. Eskridge & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J. of Law, Economics, & Organization 165–189 (1992).
82 Jeffrey R. Lax & Mathew D. McCubbins, *Courts, Congress, and Public Policy, Part I: The FDA, the Courts, and the Regulation of Tobacco*, 15 J. of Contemporary Legal Issues 163-198 (2006).
83 Id.
84 Id., 172-173.
85 Marlene Cimons, *Don't be Too Quick in Judging the Judge*, L.A. Times (1997), https://www.latimes.com/archives/la-xpm-1997-04-26-fi-52777-story.html.
86 Id.

House and Senate than the previous status quo (SQ 1995), but the executive branch still preferred SQ 1997 to SQ 1994.[87] Hence, without further court action, the status quo would have remained at this point.[88] However, when the Appeals Court and, subsequently, the Supreme Court, held that the FDA lacked the authority to regulate tobacco, the status quo essentially returned to SQ 1994, a shift preferred by Congress.[89] The return to SQ 1994 made it impossible for the executive branch to move the status quo towards its point of preference. Any attempt to do so would have been met by a veto from Congress.

From this spatial model, we can see that the courts have created a stalemate (Figure 1).

Figure 1

87 Jeffrey R. Lax & Mathew D. McCubbins, *Courts, Congress, and Public Policy, Part I: The FDA, the Courts, and the Regulation of Tobacco*, 15 J. of Contemporary Legal Issues 172-3 (2006).
88 Id.
89 Id.

This is not to say that the Supreme Court had the last say.. By shifting the burden of decision-making back to Congress, the Court gave Congress another chance to decide whether it wanted the FDA to exercise authority over tobacco. This point is best illustrated through the following counterfactual.

Figure 2: Counterfactual 1

Figure 2 depicts what would have happened had the Supreme Court ruled in favor of the FDA, overturning the Fourth Circuit ruling. Following this hypothetical ruling, the status quo would have shifted to where it was in 1995, to the delight of the executive branch. Another theoretical possibility is that the Court concurs with Judge Osteen's 1997 ruling, granting the FDA partial regulatory authority over tobacco. Figure 3 depicts this scenario. In both counterfactual conditional cases, we see that the Court would not have created a stalemate but would have put a rather definitive end to the game. It would have settled the dispute by determining congressional intent on behalf of Congress.

However, far from issuing the last words in administrative law, by ruling against the FDA in Brown & Williamson, the Court highlighted the need to fill in a missing piece of information before finalizing the game—express congressional intent. It did not hand the executive branch a clear loss. Rather, it forced the president and the FDA to go through a longer but more democratic process and wait for Congress to address the matter.

Figure 3: Counterfactual 2

CONCLUSION

In 2009, President Obama signed the Family Smoking Prevention and Tobacco Control Act, finally giving the FDA the authority to regulate tobacco.[90] Scholars have noted that two aspects of this new bill speak directly to the Court's ruling in *Brown & Williamson*.[91] First, Congress directs the FDA to reissue the same regulations that the Supreme Court struck down in *Brown & Williamson*.[92] Second, Congress expressly forbids the FDA from banning tobacco products, thereby precluding concerns of internal inconsistency within the FDCA raised by the 4th Circuit Court (which were later echoed by the Supreme Court).[93]

Contrary to the conventional tale, the Supreme Court did not issue the final judgement in administrative law through *Brown & Williamson*. A PPT approach to understanding the ruling shows that the Court actively set up an opportunity for Congress to speak on the issue directly. However, it is worth ending on the note that this case study does not render useless the insights bestowed by traditional legal scholarship.[94] Serving as mediators between the legislative and executive branches, the justices of *Brown & Williamson* pushed Congress to clarify its intent on the issue and forced the executive branch to be held accountable under a more democratically legitimate statute. It appears evident that the justices' ruling was not solely motivated by their personal political agendas, but also represents their attempt to protect democratic ideals.[95]

90 Family Smoking Prevention and Tobacco Control and Federal Retirement Reform, Pub. L. No. 111-31 (2009).

91 Theodore W. Ruger, *The Story of FDA v. Brown & Williamson: The Norm of Agency Continuity*, in William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett (eds.), Statutory Interpretation Stories, 334–365.

92 Id.

93 Id.

94 Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 Columbia L. Rev. 1749-821 (2007).

95 Id.

Works Cited

Brian J. Fogarty & James E. Monogan III, *Patterns in the politics of drugs and tobacco: The Supreme Court and issue attention by policymakers and the press*, 38 Politics (2018).

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 468 U.S. 837 (1984).

Daniel B. Rodriguez, *Administrative Law*, The Oxford Handbook of Law and Politics (2008).

Daniel B. Rodriguez & Barry R. Weingast, *Is Administrative Law Inevitable?*, UC Berkeley Law and Economics Workshop. 3 (2009).

Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. of Pa. L. Rev. (2003).

Developments in Policy: The FDA's Tobacco Regulations, 15 Yale L. & Pol'y Rev. (1996).

Family Smoking Prevention and Tobacco Control and Federal Retirement Reform, Pub. L. No. 111-31 (2009).

FDA v. Brown & Williamson Tobacco Corp., 153 F.3d 155 (4th Cir. 1998).

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

Fire Safe Cigarettes, CQ Almanac (1990), http://library.cqpress.com/cqalmanac/document.php?id=cqal90-1112939.

Heather Steiner, *Food & (and) Drug Administration v. Brown & Williamson Tobacco Corp*, Ecology L. Rev. (2001).

Jeffrey R. Lax & Mathew D. McCubbins, *Courts, Congress, and Public Policy, Part I: The FDA, the Courts, and the Regulation of Tobacco*, 15 J. of Contemporary Legal Issues (2006).

Kenneth Jost, *Closing In on Tobacco*, CQ Researcher 9 (1999).

Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 Columbia L. Rev. (2007).

Margaret Gilhooley, *Tobacco Unregulated: Why the FDA Failed, and What To Do Now*, 111 Yale L.J. (2002).

Marguerite M. Sullivan, *Brown & (and) Williamson v. FDA: Finding Congressional Intent through Creative Statutory Interpretation--A Departure from Chevron*, 94 Northwestern U. L. Rev. (1999).

Marlene Cimons, *Don't be Too Quick in Judging the Judge*, L.A. Times (1997), https://www.latimes.com/archives/la-xpm-1997-04-26-fi-52777-story.html.

Mildred L. Amer, *Membership of the 105th Congress: A Profile* (1998), https://digital.library.unt.edu/ark:/67531/metadc819282/m1/1/.

National Tobacco Policy and Youth Smoking Reduction Act, S.1415, 105th Cong. (1997).

Presidential Statement: Clinton Details Five Key Elements For Teen Smoking Legislation, CQ Almanac (1998), http://library.cqpress.com/cqalmanac/cqal97-0000181106.

Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service (1964).

Theodore W. Ruger, *The Story of FDA v. Brown & Williamson: The Norm of Agency Continuity*, in William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett (eds.), Statutory Interpretation Stories, 334–365.

Todd Gaziano, *Federal Litigation Against the Tobacco Industry: Elevating Politics Over Law*, Heritage Foundation (Jul. 30, 1999), https://www.heritage.org/report/federal-litigation-against-the-tobacco-industry-elevating-politics-over-law.

While Congress Debates Bill, Court Rules Against FDA's Power To Regulate Tobacco, CQ Almanac (1998), http://library.cqpress.com/cqalmanac/cqal98-0000191081.

William N. Eskridge & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J. of Law, Economics, & Organization (1992).

ARTICLE

THE FREE EXERCISE OF RELIGION AS A POSITIVE RIGHT: AMERICAN CASE LAW AND PRINCIPLES

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INTRODUCTION

The First Amendment to the United States' Constitution provides, *inter alia*, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Born of liberal political philosophy, with its emphasis on unalienable individual rights and limited government, and of a colonial history of fleeing and engaging in religious persecution, the Religion Clauses are both a promise of religious liberty and a shield for that liberty. The Bill of Rights was created to ensure that the new government would not, in exercising its legitimate, delegated powers, trample the individual for the sake of a majority.

But what, precisely, do the Religion Clauses mean, both singly and jointly? Throughout the history of the United States, interpretations of the Establishment Clause have ranged from a strict no-aid neutrality approach to permitting active encouragement of religion so long as one denomination is not placed above others, or "nonpreferentialism". Interpretations of the Free Exercise Clause have at their narrowest required only that the government not deliberately target a religious belief, and at their most expansive required religious objectors to be granted exemptions from neutral, generally applicable laws. Each of these possibilities is further complicated by the need to satisfy both clauses. The plain text of each clause can be read in many ways, and only limited guidance is found in studying the views of the men who wrote the clauses, for their opinions varied wildly.

Over time, the Supreme Court developed an expansive view of the Religion Clauses, embracing the view that religious liberty was a positive right for the courts to defend, and that the Free Exercise Clause meant that religious practices were to be accommodated whenever possible. The Establishment Clause, rather than barring the state from acknowledging religion, was flexible enough to permit accommodation of religious views while still ensuring that no one religion was given legal advantages, nor was religion in general given an advantage over irreligion.

However, in the 1990 case *Employment Division v. Smith*, the Supreme Court abandoned its precedents and these principles. It held, in essence, that the Free Exercise Clause merely reiterated the Equal Protection Clause's protections against discriminatory classifications. Religion could be freely exercised only if a legislative majority did not find it inconvenient to some secular purpose, and courts had no role in weighing the competing interests involved.

With focus on the question of religious exemptions from neutral, generally applicable laws—the epitome of religious liberty as a positive right—the narrow reading of the Free Exercise Clause in *Smith* will be proven inconsistent with both case law and the principles of American religious liberty. Included first is a brief history of the Religion Clauses' framing and of the rejection of other proposed amendments relating to religious freedom. Then, the Supreme Court's landmark free exercise decisions prior to *Smith* will be analyzed. These decisions defined the term "exercise," interpreted the term "prohibit" and classified burdens on religious exercise, as well as ruling on the institutional roles of the courts and of legislatures in securing religious liberty.

This discussion will provide the foundation for a critique of the decision in *Smith*, both on the grounds of its divergence from precedent and from the basic principles of the Religion Clauses. Examples of John Locke's work will supplement this critique of the neutrality standard, demonstrating the extent to which the neutrality test leaves the most fundamental aspects of individual religious exercise vulnerable to unchecked majority tyranny.

After analysis of *Smith*'s reversal of the Supreme Court's expansive interpretation of the Free Exercise Clause will follow analysis of the decision's aftermath: the Religious Freedom Restoration Act (RFRA), by which Congress attempted to restore religious freedom as a positive right; the invalidation by the Supreme Court of the RFRA as applied to the states; and the resulting patchwork of varying levels of legal protection for the same natural right.

CHAPTER ONE: FRAMING THE RELIGION CLAUSES

At ratifying conventions following the Constitutional Convention, Antifederalists called for amendments ranging from major alterations to the structure of the federal government to the addition of a bill of rights.[1] Three conventions called for amendments explicitly securing religious freedom. New Hampshire proposed "Congress shall make no Laws touching Religion, or to infringe the rights of Conscience."[2] New York proposed "that the People have an equal, natural and unalienable right, freely and peaceably to Exercise their Religion according to the dictates of Conscience, and that no Religious Sect or Society ought to be favoured or established by Law in preference of others."[3] Virginia was first to call for a complete bill of rights, which it modeled on George Mason's 1776 Virginia Declaration of Rights.[4] The state also proposed an exemption from military service for religious objectors who paid to secure their replacements, as echoed by North Carolina, and extensive language regarding the nature of religious freedom:

> That religion or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by Law in preference to others.[5]

After the Constitution was ratified despite these concerns, James Madison proposed a list of amendments for the First Congress to consider, incorporating most states' recommended amendments on personal rights.[6] On June 8th, 1789, he presented nine amendments, suggesting that they be inserted directly into the text of the Constitution. Below are the portions relevant to free religious exercise and to religious exemptions:

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1 Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds., *Creating the Bill of Rights: The Documentary Record from the First Federal Congress*, Johns Hopkins University Press, 1991, ix-xi.
2 Id., 17.
3 Id., 22.
4 Id., x.
5 Id., 19.
6 Id., xiv.

> That in article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit: The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext abridged…
> The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person.[7]

Insertion into Article I, Section 9 would have added these clauses to the existing restrictions on the powers of Congress.

Madison also sought to apply these restrictions to the states, recommending "that in article 1st, section 10, between clauses 1 and 2, be inserted this clause, to wit: No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[8] As with his proposals regarding Congress, Madison would have inserted this limitation on the states alongside existing restrictions on their powers.

A brief overview of the three free exercise issues Madison raised will follow, with analysis of their consideration in the First Congress. These are the issues of religious exercise and the federal government, religious exercise and the states, and exemptions from military service for conscientious objectors, respectively.

The Federal Government and Religious Freedom

On July 28th, 1789, a committee formed to consider amendments that would insert the following clause into Article I, Section 9: "no religion shall be established by law, nor shall the equal rights of conscience be infringed."[9] The House of Representatives began debate on this language on August 15th. Echoing Federalist concerns that a bill of rights was either unnecessary or harmful, given that Congress had only the authority that was expressly delegated to it, Roger Sherman motioned that the amendment be stricken entirely.[10] James Madison replied that Antifederalists were concerned that the "necessary and proper" clause of the Constitution expanded Congressional authority far beyond express delegations; it was important to respect the concerns of the state conventions on

7 Id., 12.
8 Id., 13.
9 Id., 30.
10 Id., 157.

this issue.[11] Daniel Carroll urged retaining the clause, arguing that "the rights of conscience are in their nature of peculiar delicacy, and will little bear the gentlest touch of the governmental hand"; the states' proposed amendments, he stressed, reflected the deep concerns of many religious sects.[12]

It was in the course of this debate that Madison supplied the most explicit interpretation of the meaning of the guarantee of religious freedom, that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[13] Though agreeing with Madison's interpretation of what the protection for religious freedom ought to be, some members voiced their concern that the current language could be misconstrued "to abolish religion altogether." Accordingly, the House agreed to a motion to substitute "The Congress shall make no laws touching religion or the rights of conscience."[14]

On August 24th, the House passed the following language for consideration by the Senate: "Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed."[15] The Senate considered and rejected each of the following:

1. "Congress shall make no law establishing any particular denomination of religion in preference to another";
2. "Congress shall make no law establishing One religious Sect or Society in preference to others"; and
3. "Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect".

The Senate also declined to either pass the House's language or strike out the clause entirely.[16]

The Senate finally did pass the following, striking out the House's phrase about rights of conscience: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." [17]

The final clause, passed by both chambers of Congress and ratified by the states, became the Religion Clauses of our First Amendment, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

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11 Id., 157-8.
12 Id., 157.
13 Ibid.
14 Id., 153.
15 Id., 38.
16 Ibid.
17 Ibid.

In total, Congress considered twenty separate drafts of the religion clauses: four suggested by the states, ten debated in the House, five debated in the Senate, and the final version, written by a joint committee.[18] Records of the House debates, as outlined above, are sparse; records of the Senate debates are nonexistent. Regarding the Free Exercise Clause, and, to a lesser degree, the Establishment Clause, "the congressional record raises as many questions as it answers."[19] The record reveals that Congress rejected the extensive language offered by Virginia and by Madison, and that it first passed, then removed, provisions on freedom of conscience. It is not clear, however, *why* Congress did these things or made the other, smaller alterations; were they substantive, clarifying, or merely aesthetic? In the absence of detailed records of the debates themselves, very little insight can be made into why Congress settled on the language of the Religion Clauses—and, consequently, little insight into original meaning. One can examine contemporary understandings of individual words and concepts—concluding, for example, that "prohibit" was effectively a synonym for "infringe" and "abridge"—but cannot understand the Religion Clauses in context without knowing why that language was rejected.[20]

The record is more detailed, however, regarding Madison's two other proposals regarding religion. These were that religious objectors be exempted from military service and that the states be placed under limitations similar to the federal government.

The Right Not to Bear Arms?: Conscientious Objectors

Madison had proposed that "no person religiously scrupulous of bearing arms, shall be compelled to render military service in person," echoing the Virginia Convention's proposal that religious objectors be exempted upon payment to employ a substitute.[21] This was included in the House Committee's Report, and debate began on August 17th. Three distinct objections were raised. First, Elbridge Gerry feared that ambiguity in the clause would defeat the very purpose of the militia—to defend against the government—by giving the government discretion to declare who was religiously scrupulous and to exclude them from bearing arms.[22] Gerry proposed altering the clause to limit its coverage to members of pacifist sects. Roger Sherman criticized the proposed alteration,

18 John Witte, Jr., *Religion and the American Constitutional Experiment*, 2nd ed., Westview Press, 2005, 89.
19 Id., 96.
20 Id., 98.
21 Veit, Bowling, and Bangs Bickford, *Creating the Bill of Rights*, 12, 19.
22 Id., 182-3.

arguing that some individual members of pacifist sects might be willing to serve, and that they should not be barred from doing so.[23]

James Jackson then raised an objection on the grounds of fairness and equality: if religious objectors were to be exempted, then only one portion of the country would contribute to its defense. He argued that religious objectors should be exempted only upon providing for a substitute, as the Virginia Convention had recommended. No motion was made regarding this suggestion.

Finally, Egbert Benson motioned to strike out the clause entirely. The records paraphrase his argument:

> Modify it…as you please, it will be impossible to express it in such a manner as to clear it from ambiguity. No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the government. If this stands part of the constitution, it will be a question before the judiciary, on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not[.] It is extremely injudicious to intermix matters of doubt with fundamentals. I have no reason to believe but the legislature will always possess humanity enough to indulge this class of citizens in a manner they are so desirous of, but they ought to be left to their discretion.[24]

Benson's speech included several different grounds for objection. First, he was concerned about whether the exemption could be phrased in such a way as to leave no ambiguity. Second, he argued that exemption from military service due to conscientious objections was not a natural right, but an indulgence that a government could justly decline to offer. This distinction between different types of religious freedoms—those natural and those granted—led into a criticism on institutional grounds; because it was a discretionary indulgence, it was best left to legislatures, and not to courts, which should only have regard to "fundamental," or natural rights. Twenty-two voted in favor of Benson's motion to strike out the clause, but twenty-four voted against.[25]

The House resumed debate on August 20th. Thomas Scott reiterated Gerry's criticism that an imprecise exemption might harm the militia, which was essential to avoiding a dangerous standing army.[26] Elias Boudinot argued for the exemption on three grounds.[27] The first was pragmatic: conscientious objectors forced to bear arms would make poor soldiers, and the militia ought to be

23 Id., 183.
24 Id., 184.
25 Ibid.
26 Id., 198.
27 Id., 198-9.

designed for maximum effectiveness. Second, it would be unjust to compel honest men to violate their consciences in a matter of such gravity. In support of this, he cited what the record refers to as "several instances of oppression in the case which occurred during the [Revolutionary] War," presumably, impressment of Americans into the British Navy. Finally, the issue reflected the broader need, in establishing a new government, "to let every person know that we will not interfere with any person's particular religious profession."[28]

The House concluded its consideration of conscientious objectors by retaining the clause and adding "in person" to the end, presumably in keeping with concerns, discussed above, that conscientious objectors should be required to contribute indirectly to the national defense. This would leave the House's final proposal as "no one religiously scrupulous of bearing arms, shall be compelled to render military service in person."

The Senate eliminated the exemption for conscientious objectors, and it is not present in the final amendment, this being the Second. Without records of the debates, however, conclusions cannot be made about why the exemption was eliminated.

The House debates provide insight into contemporary thinking regarding religious exemptions. First, it is notable that a clause explicitly exempting conscientious objectors from service in the militia was included in addition to what became the Free Exercise Clause. This indicates several possibilities: the Free Exercise Clause was not understood to require any religious exemptions from general laws, necessitating separate provisions for any exemptions to be made; the Free Exercise Clause might have provided for some exemptions, but not from military service, requiring a separate provision; or the Free Exercise Clause may have provided for exemptions from military service, but the issue was so politically important as to require explicit language. Unfortunately, none of the debates address the interaction or relationship between the two clauses, making it difficult to determine which is the proper interpretation.

Second, the criticisms of and the arguments for the proposed clauses foreshadow later issues for the Supreme Court, regarding both exemptions from military service and the status of exemptions in general. Gerry and Scott feared the effects of an exemption on the general interest, and Jackson criticized the potential for unfairness. On the other hand, Boudinot argued that the exemption would not significantly harm the militia, as the individuals to be exempted would not contribute even if legally compelled to do so. Moreover, the exemption was not only in the particular case of military service, but also as part of a broad commitment to non-interference with religion. Benson's criticisms, finally, addressed both the workability of exemptions and the fundamental nature of

28 Id., 199.
29 Id., 38.

the issue, leading to institutional questions: was it a fundamental right to be addressed by the courts, or a matter of legislative discretion? While the records of these debates do not yield decisive answers to any of these questions, they do demonstrate that the questions considered by the Supreme Court are the same questions posed while framing the Religion Clauses.

Finally, it is of course significant that the exemption from military service for conscientious objectors was considered, and even passed by the House, but not included in the amendments to the Constitution. As is later discussed, Congress did eventually grant religious objectors statutory exemption from military service. The boundaries it drew for qualification for the exemption were expansively interpreted by the Supreme Court, resulting in a definition of religious beliefs that included beliefs founded on purely moral or ethical grounds with no concept of a supreme being. This broad understanding of what constituted religion corresponded with an expansive understanding of free exercise rights. The conscientious objector cases show the difficulty in defining what is religious, and the even greater difficulty of stating what is *not* religious, while preserving neutrality.

The States and Religious Freedom

Madison's last proposal relating to religious freedom, which was echoed by the first House committee, was "no state shall violate the equal rights of conscience."[30] This was one of only two of Madison's proposals that were not suggested by any state.[31] Thomas Tucker objected in the House's debate, arguing that it would amend the constitutions of the individual states, not the federal Constitution; since many felt that the new government interfered too much with the states already, the clause should be stricken.[32] Madison contended that this was "the most valuable amendment on [his] whole list; if there was any reason to restrain the government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the state governments."[33] Tucker's motion was rejected. Samuel Livermore, while not objecting to the sentiment, preferred affirmative phrasing: "the equal rights of conscience…shall not be infringed by any state."[34] This modification was adopted by the House. This change in phrasing from a limitation on the power of the states to a positive guarantee was consistent with the House's decision not to

30 Id., 12, 31.
31 Id., xiv.
32 Id., 188.
33 Id., 188-9.
34 Id., 189.

insert the amendments into the Constitution—Madison, recall, had proposed inserting this clause into the list of powers forbidden to the states—but rather to list the amendments together at the end.[35]

Despite the House's initial adoption of Livermore's positive phrasing, the final House Resolution read "no state shall infringe…the rights of conscience."[36] The reason for this reversal is unclear. The Senate struck out this clause. While, again, the Senate's debates are not recorded, it is reasonable to assume that Senators elected by state legislatures tended to agree with Tucker's complaint of interference with the sovereignty of the states, especially given that the proposed amendment originated not with any state ratifying convention, but with Madison. It was not until the Supreme Court incorporated the Religion Clauses through the Fourteenth Amendment that its protections were applicable against interference by the states.

Conclusions from the Framing Debates?

Understanding the origins and the history of the Religion Clauses is important; however, sparse records of the debates in the House and a lack of records of the Senate's debates prevent conclusive insight into what the men who wrote the Religion Clauses meant by them. While more detailed originalist analysis would yield information that might illuminate the Religion Clauses, their legislative history alone yields little. Studying the framing of the Religion Clauses does not settle questions about interpretation, but it does confirm that those questions have been contentious from the start.

35 See, especially, Roger Sherman's arguments for a separate listing of amendments, ibid., 109-111.

36 Id., 41.

CHAPTER 2: WHAT IS AN EXERCISE OF RELIGION?

The Religion Clauses provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." To understand what it is that the Free Exercise Clause protects, one must examine its key terms: "free exercise" and "prohibit." This section will review and analyze the Supreme Court's interpretations of the term "free exercise," focusing on two questions: what religious practices constitute the exercise of religion in the meaning of the Free Exercise Clause? Do all exercises of religion receive the same protection? The following section will analyze the Court's treatment of the term "prohibit."

The Supreme Court has been fairly consistent in distinguishing between religious beliefs and religious conduct, and in holding that religious beliefs are absolutely protected from government interference. The level of protection afforded to religious conduct has nonetheless varied, as has the range of conduct held to be covered by the Free Exercise Clause. In general, the Court has embraced a broad understanding of both "religion" and "exercise," hesitant to disagree with religious objectors' characterizations of their claims.

The Supreme Court's first Free Exercise Clause case was *Reynolds v. U.S.*, 98 U.S. 145, in 1878.[37] George Reynolds, a Mormon, then argued that because he believed it to be his religious duty to marry a second time, he should not have been convicted under a law criminalizing polygamy. The Supreme Court upheld his conviction.

To reach this conclusion, the *Reynolds* Court first sought to define the "exercise" of religion. Noting that this term is not elaborated upon in the Constitution itself, it turned to Thomas Jefferson, particularly to his Virginia Bill for Establishing Religious Freedom, which was drafted in 1777 and adopted in 1786.[38] The Court quoted,

> To suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous falacy [*sic*], which at once destroys all religious liberty…it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.[39]

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37 Murray Dry, *Civil Peace and the Quest for Truth: The First Amendment Freedoms in Political Philosophy and American Constitutionalism*, Lexington Books, 2004, p. 221.

38 For a history of the bill and its full text, see John Ragosta, "Virginia Statute for Establishing Religious Freedom (1786)," in *Encyclopedia Virginia*, Virginia Humanities, accessed online Dec. 5, 2018, https://www.encyclopediavirginia.org/Virginia_Statute_for_Establishing_Religious_Freedom_1786#start_entry.

39 *Reynolds v. U.S.*, 98 U.S. 145 (1878), 163.

The Court found that because Jefferson was an "acknowledged leader" of the First Amendment's advocates, the Virginia statute could be considered an authoritative expression of the meaning of the Free Exercise Clause.[40]

Drawing on Jefferson, the Court limited the meaning of "exercise" by distinguishing between belief and conduct, ruling, "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."[41] In other words, the *Reynolds* Court held that holding and professing one's beliefs constituted the "free exercise" of religion, but that the Free Exercise Clause did not protect religiously required conduct.

In 1940, when the Court next had occasion to consider the Free Exercise Clause, it adopted a far more expansive interpretation of the Clause's protections. In *Cantwell v. Connecticut*, 310 U.S. 296, the Court considered two issues involving Jehovah's Witnesses. As a part of their religious worship, the Witnesses engaged in solicitation. The Witnesses asked others to purchase religious literature or contribute toward the publication of the literature; if a contribution was received, the Witnesses would deliver a pamphlet on the condition that it be read.[42] The Witnesses also asked for permission to play phonograph records describing the books being sold.

The first issue for the Court was the conviction of the Witnesses under a statute prohibiting solicitation for a religious or charitable cause without a license from the Secretary of the Public Welfare Council. The Secretary was to determine whether the cause was actually religious or charitable; if so, he was to issue a license; if not, any solicitation was punishable by a fine, imprisonment, or both.[43]

The Court found the application of this statute to the Jehovah's Witnesses unconstitutional. First, the Court ruled that the Fourteenth Amendment's Due Process Clause incorporated First Amendment liberties; the Religion Clauses were therefore applicable to all levels of government, and not only to Congress.[44] The Court found that the statute functioned not as a general regulation of solicitation, but as a prior restraint on free exercise subject to the whims of the Secretary of the Public Welfare Council; therefore, the statute's application to the Witnesses was unconstitutional.[45] This diverged from the *Reynolds* standard, which would have held that the statute was a valid regulation of conduct.

The second issue for the Court was the conviction of one of the Jehovah's Witnesses for inciting others to breach the peace. Jesse Cantwell had stopped two men on the street and received their permission to play a phonograph

40 Id., 164.
41 Ibid.
42 *Cantwell v. Connecticut*, 310 U.S. 296 (1940), at 301.
43 Id., 301-2.
44 Id., 303.
45 Id., 305-7.

record. The record, "Enemies," attacked the Catholic faith and church, angering the two men, who were both Catholics. One man testified that he felt like hitting Cantwell, and the other that he was tempted to throw Cantwell off the street. Instead, the two asked Cantwell to leave, and Cantwell did. The Court examined the common-law concept of breach of the peace and found it indefinite and broad; accordingly, in the absence of a statute "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State," Cantwell's conviction was unconstitutional.

In *Cantwell*, the Court maintained the *Reynolds* distinction between thoughts and actions, identifying freedom of belief with the Establishment Clause and freedom to act with the Free Exercise Clause:

> 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. The first is absolute, but the second cannot be. Conduct remains subject to regulation for the protection of society.[46]

Cantwell reinforced the distinction between belief and action as central to understanding the First Amendment's protection of religious liberty. It also clarified the declaration in *Reynolds* that government was "left free to reach actions which were in violation of social duties or subversive of good order."[47] The government's authority over actions did not give it unlimited means: "in every case, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[48] Though Connecticut's interest in peace and good order was a permissible end, Cantwell's conviction for a breach of the peace was an undue infringement on his freedom of religious exercise. In clarifying that conduct was protected by the Free Exercise Clause, *Cantwell* departed from the *Reynolds* Court's ruling that any otherwise valid law was automatically valid as applied to religious objectors.

In *Jones v. Opelika*, 316 U.S. 584 (1942), the Court for the first time ruled that while the Free Exercise Clause did protect conduct as well as belief, the religiously motivated action in question was not properly considered an

46 *Cantwell v. Connecticut*, 310 U.S. 296 (1940), 303-4.
47 *Reynolds*, 164.
48 *Cantwell*, 304.

exercise of religion. *Opelika* upheld licensing fees for peddlers as applied to Jehovah's Witnesses, who considered the distribution of religious pamphlets for which they solicited payment or donations a religious duty. The Court wrote,

> The freedoms claimed by those seeking relief here are guaranteed against abridgment by the Fourteenth Amendment. Its commands protect their rights. The legislative power of municipalities must yield when abridgment is shown…If we were to assume, as is here argued, that the licensed activities involve religious rites, a different question would be presented. But it is because we view these sales as partaking more of commercial than religious or educational transactions that we find the ordinances…valid.[49]

The Court held that the Witnesses' actions were primarily commercial, despite the Witnesses' arguments about the inherently religious nature of their solicitation. The Court held that because the license fee did not fall on what it considered to be a "religious rite," the Free Exercise Clause was not applicable; that is, the only conduct that was protected was conduct that constituted a religious rite.

Justices Stone, Black, Douglas, and Murphy dissented from the Court's ruling on the basis that the Witnesses were, as they themselves had argued, itinerant ministers rather than salespeople. The license tax for their solicitation was unconstitutional in the same way that a fee on preaching from a pulpit would be unconstitutional.[50] Justices Black, Douglas, and Murphy had voted with the majority in *Gobitis*, but wrote an additional dissent in *Opelika* to explain that they felt both had been wrongly decided; the laws at issue in both cases, they argued, suppressed the free exercise of religious minorities in violation of the government's obligation under the Bill of Rights to accommodate minorities.[51] [52] The dissenters would have held that the Witnesses were engaging in protected religious practices, not in commercial activity, and that the license requirement could not be applied to them. The dissenters' additional objections to the majority's ruling will be discussed in the following section, which analyzes different burdens and the meaning of the word "prohibit" in the Free Exercise Clause.

Opelika was overturned by *Murdock v. Pennsylvania*, in which the Court held that the Jehovah's Witnesses solicitation was just as protected by the Free Exercise Clause as more orthodox religious practices, such as preaching from a

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49 *Jones v. Opelika*, 316 U.S. 584 (1942), 597-8.

50 Id., 621 (opinion of Justice Murphy, dissenting).

51 Id., 623-4 (opinion of Justice Black, dissenting).

52 *Minersville v. Gobitis*, 310 U.S. 586 (1940). The *Gobitis* decision is discussed beginning on page 73.

pulpit.[53] A license tax on either activity was forbidden by the Free Exercise Clause. From this point on, the Court was relatively liberal in its understanding of what types of conduct qualified as an exercise of religion. While it maintained its distinction between beliefs and action as a guide, it recognized that the line between them was often blurred.[54]

The Conscientious Objector Cases: What is Religion?

After rejecting narrow understandings of what constituted an "exercise" of religion, the Court was confronted with a related question: which convictions and beliefs count as "religious" for the purposes of the Free Exercise Clause? When legislatures make exemptions, which definitions of religion comport with the Free Exercise Clause?

The Court addressed this question at length in three cases involving conscientious objectors who wished to be exempted from the draft. Recall that the First Congress had considered and rejected a constitutional amendment to require exemptions from military service for religious objectors. Various states and the federal government have historically provided such exemptions through legislation instead.[55] In the cases of *U.S. v. Seeger*, *Welsh v. U.S.*, and *Gillette v. U.S.*, the Supreme Court considered the proper interpretation and the validity of such a legislated exemption, §6(j) of the Universal Military Training and Service Act. This section exempted from combatant training and service any person,

> Who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

In *U.S. v. Seeger*, the Court reversed the conviction of Daniel Seeger, who had applied for and been denied conscientious objector status.[56] In filling out the application, Seeger had written quotation marks around the phrase "religious belief" and declined to state whether he believed in a supreme being. Instead, his opposition to participation in war was derived from his "belief in and devotion to

53 *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), 109.

54 See, for example, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), at 220; Amish parents were convicted for their "action" of not sending their children to school as required by law, but the Court held that in that context, belief and action could not be neatly separated.

55 Dry, *Civil Peace and the Quest for Truth*, 225.

56 *U.S. v. Seeger*, 380 U.S. 163 (1965).

goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."[57] Because his claim was not based on a belief in a relation to a supreme being, his claim was denied.[58]

The Court found that Congress's use of the phrase "Supreme Being" instead of "God" reflected a deliberately broad exemption. Accordingly, the appropriate test was as follows:

> A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.[59]

The Court found that Seeger's beliefs did occupy a place in his life equivalent to the place of a traditional deity. Therefore, Seeger was qualified for an exemption under §6(j).[60]

The Court further expanded its interpretation of the exemption in *Welsh v. United States*. In his denied application for an exemption, Welsh had stricken out the phrase "religious training and," leaving only that his "beliefs" prohibited participation in any war. He stated that his beliefs were formed "by reading in the fields of history and sociology," and the Court of Appeals found that he denied that his objections were premised on religious beliefs.[61] The Supreme Court disagreed with his characterization, though, on the grounds that Welsh did not understand the true breadth of the term "religious" as used in the statute. Welsh later characterized his views as religious in "the ethical sense," though not "the conventional sense."[62]

Holding that Welsh was qualified for an exemption, the Court applied the *Seeger* test while also further expanding its interpretation of what beliefs the exemption encompassed. "If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly" qualify under the *Seeger* test.[63]

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57 Id., 166.
58 Id., 167.
59 Id., 176-7.
60 Id., 187.
61 *Welsh v. U.S.*, 398 U.S. 333 (1970), 341.
62 Id., 341-2.
63 Id., 340.

Welsh emphasized not the source of an individual's convictions, but the strength with which they were held. It interpreted the statute's command that exemptions be afforded on the basis of "religious training and belief" but *not* "essentially political, sociological, or philosophical views or a merely personal moral code" to mean that the exemption applied to all those who objected on the basis of "deeply held moral, ethical, *or* religious beliefs" (emphasis added).[64]

Three justices dissented, arguing that if Congress had the authority to choose whether or not to make exemptions, as the majority agreed it did, then it also had the authority to choose whether to exempt all objectors or only those who objected on a religious basis. After all, the First Amendment itself contained a religious classification. It was therefore not a violation of either of the Religion Clauses to accommodate only religious beliefs and not other types of beliefs.[65] The majority's interpretation defied the clear will of Congress by re-interpreting the plain language of the statute to include in the exemption a class that Congress had expressly excluded.[66]

Finally, in *Gillette v. U.S.*, the Court ruled that the language of the statute permissibly distinguished between conscientious objections to all wars and conscientious objections to particular wars. Gillette, who objected to the Vietnam War but not to wars that met certain requirements, informed by his Catholic faith, did not qualify for an exemption.[67] Since Congress had valid, neutral reasons to distinguish between an objection to participation in any war and an objection to participation in a particular war, the exclusion of the latter set of beliefs from the exemption did not violate the Constitution. Incidental burdens on religious beliefs as a result of this distinction were justified by the weight of governmental interests.

Understanding Religious Exercise

This brief analysis of the Court's holding on what constitutes a religious exercise illuminates the concept's inherent complexities. The courts have had to define which beliefs and which types of conduct fall under the category of "religious exercise" for the purposes of free exercise claims, while also accounting for the requirements of the Establishment and Equal Protection Clauses. Legislated exemptions pose even more difficult issues; first, the legislature must define for itself what beliefs and conduct are considered religious, and second, the Court must determine whether these definitions are

64 Id., 344.
65 Id., 372 (opinion of Justice White, dissenting).
66 Id., 368.
67 *Gillette v. United States*, 401 U.S. 437 (1971).

valid, as well as how they interact with the requirements of the Religion Clauses. These issues also relate to the institutional considerations discussed in Chapter Four. Can legislative majorities be relied upon to craft definitions that protect unpopular religious minorities? To what extent should courts defer to legislatures' chosen exemptions? How should courts interpret legislative intent regarding exemptions? In general, the Court has embraced a broad understanding of both "exercise" and "religion" in order to minimize decisions regarding which religious claims are legitimate, and as the conscientious objector cases show, it has taken issue with legislative definitions of religion that distinguish between different sources of convictions.

CHAPTER THREE: WHAT IS A "PROHIBITION" OF FREE EXERCISE?

What does it mean that the government cannot "prohibit" the free exercise of religion? What types of burdens on religious exercise are unconstitutional? These questions are central to the debate on the interpretation of the Free Exercise Clause. Though nuanced, the Court has set two clear precedents for this question. This section will first analyze what can be termed the "neutrality" argument: the government cannot prohibit religious exercise in and of itself, and neutral laws that serve a legitimate end and incidentally burden religious exercise are constitutional. The second argument can be termed the "effects" argument: without special justification, the government cannot take actions that have the effect of burdening an individual's religious exercise. Under the neutrality argument, exemptions for religious objectors are never required. The only way a law could be unconstitutional as applied to religious objectors would be if it were discriminatory, and therefore unconstitutional on its face. Legislated exemptions may be permissible, but are not required. Under the effects argument, an exemption is required in order to lift the burden unless the government can show an overriding reason not to allow the specific exemption. This section will examine the development and application of both interpretations in pre-*Smith* case law to show that precedent supported the effects test rather than the neutrality test.

The neutrality argument and narrow interpretations of the word "prohibit" are exemplified in the decisions in *Reynolds*; *Gobitis*; *Opelika*; a portion of the Court's opinion in *Roy* joined by three justices, which will be discussed here; and in *Smith*, which will be discussed in the next section. The effects argument is seen in *Cantwell*, *Barnette*, *Murdock*, *Braunfeld*, *Sherbert*, and *Yoder*. The selected cases best represent each argument.

Narrow Readings

In *Reynolds*, as discussed earlier, the Court upheld the conviction of a Mormon man for polygamy. The Court found that the distinction between religious beliefs and religiously motivated actions was conclusive: Congress could not burden religious beliefs in any way, but could regulate all conduct it deemed harmful in the same way, regardless of religious motivation.[68] This categorical rule meant that any law burdening a man's right to believe freely was unconstitutional, but that any burden on religiously motivated conduct was permissible under the Free Exercise Clause, so long as it was imposed by valid

68 *Reynolds v. United States*, 98 U.S. 145 (1878), 164.

and generally applicable law.[69]

In *Minersville v. Gobitis*, 310 U.S. 586 (1940), the Court upheld a regulation requiring students to salute the flag and recite the Pledge of Allegiance, as applied to Jehovah's Witnesses whose faith forbade them to salute the flag, which they considered idol worship. Justice Frankfurter wrote for the Court:

> The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects…Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.[70]

Under *Gobitis*, a regulation only functioned as a "prohibition" in the context of the Free Exercise Clause if it targeted a particular religious group. Compulsion to act contrary to one's religious beliefs, or prohibition from acts required by one's religious beliefs, did not trigger the protection of the Free Exercise Clause so long as the law was generally applicable.

The *Gobitis* opinion also included an institutional argument for this narrow understanding of the term "prohibit." The Court found that the "vital aspect" of religious toleration was that the parents of the children who objected to the flag salute retained their right to disagree with the state and to teach their children according to their own beliefs; religious freedom required only that the "remedial channels of the democratic process remain open and unobstructed." According to this argument, which will be discussed in more detail in the next section, the violation of constitutional rights was only a subject for the courts if it was "too plain for argument;" otherwise, the democratic process itself negated the burden as a legal issue.[71]

In *Jones v. Opelika*, 316 U.S. 584 (1942), the Court upheld the convictions of Jehovah's Witnesses for peddling without a license; the Jehovah's Witnesses argued that their beliefs required them to engage in religious solicitation. The Court held,

> The differences between censorship and complete prohibition…upon the one hand, and regulation of the conduct of individuals in the time, manner and place of their activities upon the other, are decisive…it is difficult to see in such enactments a shadow of prohibition of the exercise of religion.[72]

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69 Id., 166.
70 *Minersville v. Gobitis*, 310 U.S. 586 (1940), 594-5.
71 Id. at 599.
72 *Jones v. Opelika*, 316 U.S. at 596-7.

Because the licensing requirement applied to all solicitation, and because it did not control the content of solicitation or disallow it entirely, the requirement did not "prohibit" religious exercise. Recall, too, that the Court considered the Witnesses' actions commercial rather than religious, despite the Witnesses' own characterization of their proselytizing.

Gobitis and *Opelika* were swiftly overturned by *West Virginia Board of Education v. Barnette* and by *Murdock v. Pennsylvania*, respectively, as addressed below. The neutrality arguments that had been at their cores were repeated in dissents to *Barnette* and *Murdock*, but most clearly in *Barnette*. Justice Frankfurter wrote, "So long as no inroads are made upon the actual exercise of religion by a minority," striking down the flag salute requirement prioritized a minority's conscience over majority rule.[73] He argued that the issue was only whether the state could compel participation, and that there was not "any attempt by the State to punish disobedient children or visit penal consequences on their parents."[74] Justice Frankfurter maintained his view that the protections of the Free Exercise Clause were negative rather than positive:

> The constitutional protection of religious freedom terminated disabilities, it did not create new privileges…Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma…Any person may therefore believe or disbelieve what he pleases. He may practice what he will in his own house of worship or publicly within the limits of public order. But the lawmaking authority is not circumscribed by the variety of religious beliefs—otherwise, the constitutional guaranty would not be a protection of the free exercise of religion, but a denial of the exercise of legislation.[75]

I will later critique the neutrality argument more broadly, but it is important to here note particular flaws in Justice Frankfurter's arguments. First, it is at best unclear how the question of compelling participation differed from the question of enforcing the requirement of participation, and as the majority observed, there were indeed significant punishments for non-participation. If a child did not perform the flag salute, he would be expelled and not permitted to re-enroll until he complied with the requirement; meanwhile, his parents would be liable to prosecution for their child's unlawful absence.[76] Secondly, it is difficult to interpret the plain language of the First Amendment, "Congress shall make no law," as anything other than a denial or limitation on the exercise of legislation.

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73 *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), opinion of Justice Frankfurter, dissenting, at 662.

74 Id. at 650.

75 Id. at 653-4.

76 *Barnette*, opinion of the Court, 629.

In *Bowen v. Roy*, the Court ruled against a man who argued that the requirement to obtain a Social Security number for his daughter and to supply it to the government in order to receive benefits violated his Native American faith because to do so would harm his daughter's spirit. The Court held, 8-1, that Roy could not enjoin the government from generating a Social Security number for Roy's daughter, because

> the Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens…The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.[77]

The Court found that the government's own use of the Social Security number did not burden Roy's religious freedom in a way cognizable by the Free Exercise Clause.

The more complex question of burdens in *Roy* related to the requirement that Roy supply his daughter's Social Security number as part of his application for benefits. Three members of the majority—Justices Burger, Powell, and Rehnquist—would have significantly narrowed the interpretation of the word "prohibit," arguing that because the regulation only required Roy to choose between his religious beliefs and government benefits, that compulsion was not an unconstitutional burden:

> government regulation that indirectly and incidentally calls for a choice between securing a government benefits and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons.[78]

In such a case, when the law did not discriminate against particular religious beliefs or against religion in general, the appropriate standard was a rational-basis test: the regulation must be neutral, uniformly applied, and reasonably related to a legitimate end.[79]

The remaining six justices disagreed over whether the issue was ripe, given the denial of Roy's requested injunction against the provision of a Social Security number for his daughter. Justices Blackmun, O'Connor, Brennan,

77 *Bowen v. Roy*, 476 U.S. 693 (1986), 699-700.
78 Id. at 706.
79 Id. at 707-8.

Marshall, and White, in a total of three opinions, argued that the case could not be distinguished from other cases involving government benefits, in which the Court had found that preventing the receipt of benefits was indistinguishable from other types of burdens. Those five Justices argued that the question required the balancing test of *Sherbert v. Verner*, in which the Court ruled that an unemployed Seventh-Day Adventist whose beliefs precluded working on Saturdays could not be denied benefits on the basis that she was unavailable for work without good cause.[80]

Eight of the nine justices in *Roy* agreed that the government's internal practices, such as the use of Social Security numbers, could not constitute an impermissible burden on religious exercise. The Court split over whether to distinguish burdens on the ability to obtain government benefits from other types of burdens, with three justices favoring such a distinction and the application of the low rational-basis standard to burdens on benefits and five justices opposed. Justice Stevens argued that whether Roy had to provide the Social Security number was either moot or not ripe, while Justice White would have applied the *Sherbert* compelling-interest test to both the requested injunction against the creation of a Social Security number and the requirement to provide that number in order to receive benefits.[81]

As set out in the cases discussed above and in others, the neutrality-focused interpretation of the Free Exercise Clause is predicated on the idea that the free exercise of religion is unconstitutionally prohibited only if it is burdened because of its religious nature. Regardless of the weight of the burden on religiously motivated conduct, the centrality of that conduct to a claimant's religious exercise, or the importance of the interest being pursued, the only question for the courts is whether religious conduct was deliberately targeted. In other words, so long as the end was legitimate, any non-discriminatory means was acceptable, and the courts could not question the legislature's choice of means. Of these cases, recall that *Gobitis* and *Opelika* were overturned three years and one year after being decided, respectively; meanwhile, the narrow concept of burdens in *Roy* was embraced by only three justices. The 8-1 vote that internal government practices could not constitute an impermissible burden reflects not a narrow neutrality focus, but a type of effects test; the government's internal practice did not "itself in any degree impair Roy's freedom to believe, express, and exercise his religion," and therefore did not burden it impermissibly.[82] That left only *Reynolds* still standing for the interpretation that any non-discriminatory law, no matter how burdensome to religion, is valid.

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80 *Sherbert v. Verner*, 374 U.S. 398 (1963); see the second portion of this section for a full discussion.

81 Roy, 476 U.S. at 717 and 733.

82 Roy, 476 U.S. at 700-1.

Expansive Readings

The vast majority of case law on the Free Exercise Clause, including cases such as *Braunfeld v. Brown*[83] and *U.S. v. Lee*,[84] in which exemptions were not granted, rests on a far broader understanding of what it means to unconstitutionally "prohibit" free exercise. This approach begins with an effects test: if a law compels action forbidden by religious beliefs, criminalizes action required by religious beliefs, or impedes the ability to obtain a government benefit without violating religious beliefs, then the law does interfere with free exercise rights regardless of the law's neutrality. If there is an interference, then the Court must weigh the state's interest in applying the law to religious objectors against the burden application would impose on their free exercise. An exemption is required to lift the burden that was imposed by the government unless there is a particularly important reason not to allow an exemption.

This broad reading of religious freedom began with *Cantwell v. Connecticut*, and grew more expansive—though not steadily—over time before being reversed by *Smith*. Recall that in *Cantwell*, the Court considered whether Jehovah's Witnesses could be forbidden to solicit funds without being granted a license at the discretion of a local official, and whether a Jehovah's Witness could be convicted for inciting others to breach the peace by playing, with their permission, a phonograph record that went on to insult the listeners' faith. On both questions, the Court ruled that application to the Jehovah's Witnesses violated their free exercise rights.[85]

Cantwell included crucial observations about religiously motivated conduct. First, it established, contrary to *Reynolds*, that not every regulation of conduct with a legitimate aim was constitutional: "conduct remains subject to regulation for the protection of society…In every case, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[86] In every case, once a permissible end was established, "the question remain[ed] whether the method adopted by [the state] to that end transgress[ed] the liberty safeguarded by the Constitution."[87] *Cantwell* established a balancing test:

> Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests…We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the Federal Constitution, lie wholly within the

83 *Braunfeld v. Brown*, 366 U.S. 599 (1961).
84 *United States v. Lee*, 455 U.S. 252 (1982).
85 *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
86 Id. at 303-304.
87 Id. at 304-305.

> State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.[88]

The most explicit early expression of what types of burdens denied religious freedom was in the opinion of the District Court for the Southern District of West Virginia in *Barnette v. West Virginia State Board of Education*. Following the Supreme Court's decision in *Gobitis*, West Virginia had instituted the flag salute as a requirement for students throughout the state. The District Court, however, observed that since *Gobitis*, a majority of the Court had expressed their opinion that it had been wrongly decided.[89] The District Court therefore denied that *Gobitis* was binding precedent. Considering the issue afresh, the District Court defined burdens under the Free Exercise Clause:

> If [religious objectors] are required to salute the flag, or are denied rights and privileges which belong to them as citizens because they fail to salute it, they are unquestionably denied that religious freedom which the Constitution guarantees. The right of religious freedom embraces not only the right to worship God according to the dictates of one's conscience, but also the right to do, or forbear to do, any act, for conscience[']s] sake, the doing or forbearing of which, is not prejudicial to the public weal.[90]

Once the interference with free exercise was established, the District Court followed *Cantwell* in holding that only a "clear justification" could justify overriding religious objections.[91] No such justification existed, and the District Court ruled that conscientious objectors to the flag salute could not be required to participate in it.

On appeal, the Supreme Court upheld the District Court's judgment on broader grounds, overturning *Gobitis*. It did not reach the question of religious exemptions because it found that the state lacked the authority to compel anyone to participate in the flag salute, whether they objected on religious grounds or not.[92] The Court therefore did not consider specifically burdens on free exercise, noting, however, that "freedoms of speech and of press, of assembly, and of worship…are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."[93] Justice Murphy

88 Id. at 307.
89 *Barnette v. West Virginia State Board of Education*, 47 F. Supp. 251 (S.D. W. Va. 1942).
90 Id. at 253.
91 Id. at 253-254.
92 *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).
93 Id. at 639.

concurred in the judgment, as did Justice Black, joined by Justice Douglas. All three had voted in the majority in *Gobitis*; all three now voted to overrule it on free exercise grounds, applying a balancing or strict-scrutiny test.[94]

In *Braunfeld v. Brown*, the Court upheld the application of Sunday closing laws to Orthodox Jewish business owners who argued that because their faith required them to close on Saturdays to keep the Sabbath, the negative economic impact of having to remain closed on a second day, Sunday, was an unconstitutional burden. While the Court upheld the laws, its analysis of the free exercise issue was rooted in an expansive reading of the Free Exercise Clause.

One crucial aspect of the *Braunfeld* ruling, which will later illuminate the flaws of *Smith*, is the distinction between direct and indirect burdens on religious exercise. The Court began by discussing direct burdens, citing *Prince v. Massachusetts*, 321 U.S. 158 (1944), and *Reynolds* as examples. The former was cited as an affirmation of the application of child labor laws to solicitation by Jehovah's Witnesses. The Court plurality observed:

> In the two cases just mentioned, the religious practices themselves conflicted with the public interest. In such cases, to make accommodation between the religious action and an exercise of state authority is a particularly delicate task, because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.[95]

In both cases, the laws at issue were entirely neutral as to religion and were generally applicable. The key was not whether the law targeted religious actions only, but the *effect* on a religious objector: a direct burden meant that a given action was required by faith, but made criminal by law, forcing the individual to choose between betraying his conscience and being prosecuted. The Court observed that a direct burden required careful accommodation between the competing interests.

> The Sunday closing laws, however, imposed an indirect burden:
>
> Fully recognizing that the alternatives open to appellants and others similarly situated…may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.[96]

94 Id. at 646 (opinion of Justice Murphy) and 643-644 (opinion of Justice Black).
95 *Braunfeld v. Brown*, 366 U.S. 599 (1961), 605.
96 Id. at 606.

Note here that "mak[ing] a religious practice itself unlawful" refers not to targeting the practice because it is religious, but to even neutral and generally applicable laws as in the cases cited as examples, *Prince* and *Reynolds*.

The Court cited the following standard, following from its precedent, for cases with indirect burdens on free exercise:

> If the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.[97]

This was a multi-part test: Was the purpose of the law a legitimate aim? Was the effect of the law secular? Could the State achieve its purpose in another way? This last question is the same as: Would granting an exemption harm the State's purpose? The majority concluded that an exemption would indeed undermine the state's goal; therefore, the exemption was not constitutionally required.[98]

The plurality held, too, that any law whose "purpose or effect [was] to impede the observance of one or all religions or [was] to discriminate invidiously between religions, that law [was] constitutionally invalid even though the burden may be characterized as being only indirect."[99]

The plurality clearly established standards for each type of burden on religious exercise. If a law's purpose or its effect was discriminatory, it was automatically unconstitutional, whether the burden was direct or indirect. If a law imposed an indirect burden—that is, if it burdened religion in any way other than actually requiring a choice between following a religious practice and following the law—then the state had to show that the law had a secular purpose and effect and that the purpose could not be achieved through a non-burdensome means, i.e., that an exemption would actually harm the state's interest. Finally, if a law imposed a direct burden by forcing a choice between religious practice and obedience to the law, regardless of the neutrality or general applicability of the law, then it was up to the courts to accommodate the competing interests; this was especially delicate because of the high cost to the religious objector.

This was not only the plurality's interpretation. Each of the *Braunfeld* judges stated a similar interpretation of burdens on free exercise, paying careful attention to the effects on the religious claimant. Justices Frankfurter and Harlan concurred in the judgment, having already written on the free exercise issue in

97 Id. at 607.
98 Id. at 608.
99 Id. at 607.

McGowan v. Maryland, which also upheld Sunday closing laws. Citing *Cantwell*, they wrote:

> This is not to say that governmental regulations which find support in their appropriateness to the achievement of secular, civil ends are invariably valid under the First or Fourteenth Amendment, whatever their effects in the sphere of religion. If the value to society of achieving the object of a particular regulation is demonstrably outweighed by the impediment to which the regulation subjects those whose religious practices are curtailed by it, or if the object sought by the regulation could with equal effect be achieved by alternative means which do not substantially impede those religious practices, the regulation cannot be sustained.[100]

Frankfurter and Harlan also carried out the same analysis as the *Braunfeld* plurality, distinguishing the laws' indirect burden from the heavier burden that would be imposed by a direct criminalization of or civil disability imposed on a religiously required practice.[101] Explicitly using a balancing test, they agreed with the plurality that an exemption was not required.[102]

Justices Brennan, Stewart, and Douglas dissented from the Court's ruling on the free exercise issue. Justice Brennan explicitly rejected a rational-basis test, requiring instead that the state justify the indirect burden by a compelling interest that could not be pursued by an alternative means.[103] This test was fundamentally similar to the plurality's, but Justice Brennan, conceiving of the state's interest differently from the plurality, found the balance in favor of the religious claimants. Justice Stewart agreed with Justice Brennan's analysis and with an effects test, writing, "I think the *impact* of this law upon these appellants grossly violates their constitutional right to the free exercise of their religion" (emphasis added).[104] Justice Douglas stood alone in finding that Sunday closing laws violated the Establishment Clause, and his dispensation of the free exercise issue flowed from that finding. However, he joined the remaining eight *Braunfeld* justices in insisting that religious liberty could not be violated in any manner, direct or indirect, with a mere justification of reasonable relation to a legitimate aim.[105]

Though not as expansive as rulings to follow, the rule established by *Braunfeld*—and agreed to by every justice, as shown above—was that a law

100 *McGowan v. Maryland*, 366 U.S. 420 (1961), opinion of Justice Frankfurter, concurring, 462.
101 Id. at 520-521.
102 Id. at 520-521.
103 *Braunfeld*, 366 U.S. at 611-612, 614, opinion of Justice Brennan, dissenting in part.
104 Id. at 616, opinion of Justice Stewart, dissenting in part.
105 *McGowan* 366 U.S. at 575-576, opinion of Justice Douglas, dissenting.

whose purpose or effect was discriminatory was automatically invalid, and that neutral laws were subject to a test that required balancing the state interest against the free exercise claim and demonstrating that an exemption would harm the state interest. That is: the state's interest could not otherwise be served. The weight of the burden and the delicacy of the balancing involved was determined by whether it was direct or indirect, that is, the nature of the law's *effect* on a religious objector.

Braunfeld set the stage for *Sherbert* v. *Verner*, which further expanded the protections of the Free Exercise Clause. In *Sherbert*, the Court ruled in favor of a Seventh-Day Adventist who had been denied unemployment benefits because her unwillingness to work on Saturdays meant that she was unavailable for work without "good cause."[106] The state supreme court had upheld the denial of benefits, ruling that the denial of benefits did not restrict Sherbert's right to exercise her religion or follow her conscience.[107]

The Court cited *Braunfeld*'s holding regarding the harm of even indirect burdens, stating:

> The ruling forces [Sherbert] 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. Governmental imposition of such a choice puts the same kind of burden upon the free exercise as would a fine imposed against appellant for her Saturday worship.[108]

As in *Braunfeld*, it was the effect on Sherbert that determined that there was a burden despite the neutrality of the law. The Court declined to distinguish between rights and privileges or benefits; Sherbert's free exercise was penalized in any case.[109]

The denial of benefits could be upheld only if the state could prove that it was justified by a "compelling" or "paramount" interest; furthermore, the state would have to show that no less-restrictive means would satisfy that interest.[110] The state failed to meet this high bar, and the Court ruled that it was a violation of the Free Exercise Clause to not consider religious requirements "good cause" to be unavailable for work. To hold otherwise would be to allow South Carolina to constrain Sherbert to abandon her religious principles regarding a day of

106 *Sherbert v. Verner*, 374 U.S. 398 (1963).
107 Id. at 401.
108 Id. at 404.
109 Id. at 406.
110 Id. at 406-407.

rest.[111] By lifting a government-imposed burden, the exemption fulfilled the government's obligation of neutrality in the face of religious differences.[112]

The majority distinguished the result in *Sherbert* from that in *Braunfeld* as follows:

> [T]he state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in Braunfeld v. Brown, supra….[that statute] was nevertheless saved by a countervailing factor which finds no equivalent in the instant case - a strong state interest in providing one uniform day of rest for all workers. That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable. In the present case no such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive benefits.[113]

As Justice Stewart's concurrence in the result notes, it is unclear why the burden in *Sherbert* of not receiving time-limited unemployment benefits was considered more direct than the *Braunfeld* burden of criminal prosecution if the business owners violated the Sunday-closing laws or being forced to close their businesses due to financial losses.[114] Justice Douglas and Justice Stewart both concurred in the result while indicating that the ruling was inconsistent with *Braunfeld*; Justices Harlan and White dissented, arguing that the result necessarily overruled *Braunfeld*.[115]

Determining whether the *result* in *Sherbert* was consistent with the result in *Braunfeld* would require judging whether the relative weights assigned to the burdens and to the state interests in both cases were consistent, as well as whether the Court's consideration of the workability and harms of exemptions was consistent. This judgment will not be made here. However, the *tests* used in the two cases were nearly identical: whenever a religious practice was burdened, even indirectly, and even by a neutral law, the state had to demonstrate that that

111 Id. at 410.
112 Id. at 409.
113 Id. at 408-409.
114 Id. at 417, opinion of Justice Stewart, concurring in the result.
115 Id. at 411 (Justice Douglas), 417 (Justice Stewart), and 421 (Justices Harlan and White).

was the least-restrictive means of pursuing a particularly important interest. The Court's actual application of that test appears to have been more expansive in *Sherbert*, but the foundation was *Braunfeld*'s careful analysis of both direct and indirect burdens under the Free Exercise Clause.

The Court continued this expansive interpretation in *Wisconsin v. Yoder*, ruling that Wisconsin could not constitutionally require the Amish to send their children to school after eighth grade.[116] The Court summarized the history of its expansive reading of free exercise rights: "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."[117] The Court engaged in a lengthy analysis of the effects that an exemption for the Amish would have on the state's important interest in educating minors, concluding that due to the Amish's own system of experiential learning, the harm to the state's interest was limited, and insufficient to outweigh the destruction of the Amish way of life that would result from applying the state's neutral and general school attendance law. Though the Court did not use *Braunfeld*'s terminology of direct and indirect burdens, the burden in *Yoder*, triggering strict scrutiny, was clearly direct: on pain of prosecution, the Amish were required to violate their religious beliefs regarding "worldly influence."[118]

Positive Rights and the Balancing Test

Leading up to *Smith*, then, the Court had varied somewhat in its understanding of the term "prohibit" in the Free Exercise Clause, but the vast majority of its case law embraced an expansive interpretation of that Clause's protections. Even in cases in which it denied that an exemption was constitutionally required, the Court required that the state show an especially strong interest and show that that interest would be harmed by an exemption. In *U.S. v. Lee*, for example, the Court upheld the requirement that employers withhold social security taxes as applied to Old Order Amish. The law was neutral and generally applicable, with some few legislated exceptions for self-employed religious objectors. Nevertheless, it imposed a burden on free exercise, and the state could only justify that burden "by showing that it is essential to accomplish an overriding governmental interest."[119] The Court's opinion, joined by eight justices, carried out this analysis and found that an exemption would be

116 *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
117 Id. at 215.
118 Id. at 210.
119 *U.S. v. Lee*, 455 U.S. 252 (1982).

unworkable, and was therefore not required by the Constitution.[120] Whether the burden was direct or indirect, and even if the law was neutral and generally applicable, the competing interests had to be weighed by the courts, and the workability of an exemption had to be considered.

120 Only Justice Stewart, concurring in the judgment, suggested a different standard: for neutral, general laws, he would have held, "it is the objector who must shoulder the burden of demonstrating that there is a unique reason for allowing him a special exemption from a valid law of general applicability." *U.S. v. Lee*, 455 U.S. 252, at 262. To borrow from Justice O'Connor, "the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs"; the "unique reason" is because of a claimant's particular religious beliefs, he is harmed by even a neutral and generally applicable law. *Employment Division v. Smith*, 494 U.S. 872, at 897 (opinion of Justice O'Connor, concurring in the judgment).

CHAPTER FOUR: THE ROLES OF THE LEGISLATURE AND THE JUDICIARY

The final major issue dividing narrow and expansive interpretations of the Free Exercise Clause's protection is institutional. What are the proper roles of the legislature and of the judiciary in conflicts between state authority and religious freedom? Which should weigh the competing interests to determine whether an exemption should be granted? This involves normative questions about ideal roles as well as pragmatic questions about each institution's capacity to evaluate the issues at stake. Deference to legislative judgments is consistent with a narrow interpretation of the Free Exercise Clause, under which all non-discriminatory means are left to the discretion of the legislature, while an expansive interpretation of the Free Exercise Clause interposes the judiciary to check legislative judgments and guard against majoritarian excess.

The debate over institutional roles is exemplified in *Gobitis* and *Barnette*; as discussed earlier, *Gobitis* upheld a requirement that students, including Jehovah's Witnesses who objected on religious grounds, salute the flag, while *Barnette* struck down both the flag-salute law and *Gobitis*. The two decisions and the separate opinions that accompanied them explicitly argued about the purpose of the Bill of Rights and what that purpose meant for institutional roles. The argument for judicial deference to the legislature, presented in *Gobitis* and in the dissent in *Barnette*, will be examined first, followed by the argument for strong judicial involvement, which is found in the dissent in *Gobitis* and the decisions of both the District Court and the Supreme Court in *Barnette*.

Deference to Legislative Judgments

Justice Frankfurter wrote for the Court in *Gobitis*:

> Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than the courts is committed the guardianship of deeply cherished liberties. Where all the effective means of inducing political changes are left free from interference…to fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies, rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.[121]

The majority held that "except where the transgression of constitutional liberty is too plain for argument," the issue should be resolved not through courts, but

121 *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), 600.

through the democratic process.[122] In this case, the transgression was deemed not to be "too plain for words;" the Court argued that since the aim pursued was legitimate, the Court would not question the legislature's choice of means and its decision not to provide an exemption for religious objectors.[123]

This was not only normatively preferable as the better means of vindicating the people's self-confidence, but the only role appropriate for the courts:

> The courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of a democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances. So to hold would , in effect, make us the school board for the country. That authority has not been given to this Court, nor should we assume it.[124]

As was made even clearer by Justice Frankfurter's later dissent in *Barnette*, unless the democratic process was itself infringed upon, the Court should not go beyond a rational-basis test; to do so would be to interfere with the political power of the majority: "the Court's only and very narrow function is to determine whether, within the broad grant of authority vested in legislatures, they have exercised a judgment for which reasonable justification can be offered."[125] In fact, in Justice Frankfurter's view, the "basic function" of the Supreme Court was only to be "the mediator of powers within the federal system."[126]

Finally, proponents of deference to the legislature argue, legislatures are far better suited than courts to making exemptions for religious objectors. The question of whether courts or legislatures should do so

> is no dry, technical matter. It cuts deep into one's conception of the democratic process—it concerns no less the practical differences between the means for making these accommodations that are open to courts and to legislatures. A court can only strike down. It can only say 'This or that law is void.' It cannot modify or qualify, it cannot make

122 Id. at 599-600.
123 Id. at 598.
124 Id. at 598.
125 *Western Virginia State Board of Education* 319 U.S. at 649 (opinion of Justice Frankfurter, dissenting). See also 662, on majority power.
126 Id. at 667.

> exceptions to a general requirement. And it strikes down not merely for a day.[127]

Thus, even if it would be wisest to make an exemption, the courts could not do so, and should be extremely hesitant to instead strike down the law entirely. Judicial determinations of what did or did not qualify as a religious claim were dangerous, and courts should avoid imposing their own opinions of means and of the relative weights of social interests.[128]

In *Gobitis* and *Barnette*, Justice Frankfurter presented a variety of arguments in favor of deference to the judgment of the legislature on laws challenged on free exercise grounds. First, using the political process rather than the judiciary to eliminate bad laws was healthier for a democracy, because judicial review prevented "the full play of the democratic process."[129] Second, the Court lacked the authority and expertise or competence to make judgments about means; it could and should only determine whether there was some reasonable justification for the legislature's judgment. Finally, while legislatures had the tools to carve out exemptions, courts did not, and had only the blunt tool of striking down a law entirely. This approach was founded on the majoritarian principle that the legislatures, rather than the courts, were in this field the primary protectors of civil liberties, and were better suited to it.[130]

Courts as Checks on the Legislature

The contrary view, emphasizing the role of the judiciary in defending religious freedom, is presented in the dissent in *Gobitis* and in the opinions of the District Court and the Supreme Court in *Barnette*, among other places.

Justice Stone, dissenting from the Court's judgment in *Gobitis*, argued:

> where there are competing demands of the interests of government and of liberty under the Constitution, and where the performance of governmental functions is brought into conflict with specific constitutional restrictions, there must, when that is possible, be reasonable accommodation between them so as to preserve the essentials of both, and…it is the function of courts to determine whether such accommodation is reasonably possible.[131]

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127 Id. at 651-652.
128 Id. at 658.
129 Id. at 650.
130 Id. at 648 and 667.
131 *Minersville v. Gobitis*, 310 U.S. 586 (1940), 603 (opinion of Justice Stone, dissenting).

Moreover, Justice Frankfurter's criticism of judicial involvement as preventing the "full play" of the democratic process was precisely the point. Rather than undermining democratic governance, it upheld *liberal* democratic governance by checking the tyrannical majority. To automatically defer to the legislature constituted "the surrender of the constitutional protection of the liberty of small minorities to the popular will."[132]

Two years after *Gobitis*, the District Court for the Southern District of West Virginia considered a statewide requirement to salute the flag. The District Court, predicting that *Gobitis* would be overruled, denied that it was binding precedent, and considered the question afresh, holding that the Free Exercise Clause required exemptions for conscientious objectors.[133] The District Court echoed Justice Stone's *Gobitis* dissent in emphasizing that automatic deference to legislative judgments effectively "nullif[ied] the constitutional guaranty."[134] After all, every religious persecution was justified in the eyes of those engaging in the persecution; every law prohibiting free exercise was justified in the eyes of the legislators.[135] The judiciary's responsibility to check legislative judgments was "the most important duty which rests on them under the Constitution," because the Bill of Rights was intended to protect against majority tyranny, and, as part of the fundamental law, it was for the courts to enforce that protection.[136]

The Supreme Court upheld the District Court's judgment on broad grounds: the state lacked the authority to compel *anyone* to salute the flag, whether their objections were rooted in religious beliefs or not.[137] First, the Court's response to Justice Frankfurter's emphasis on the democratic process was the same response that had been stated by Justice Stone and by the District Court: liberal government inherently limited the power of the majority, as well as it should; judicial checks were indispensable.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[138]

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132 Id. at 605-606.
133 *Barnette v. West Virginia State Board of Education*, 47 F. Supp. 251 (S.D. W. Va. 1942).
134 Id. at 254.
135 Id. at 253.
136 Id. at 254.
137 *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).
138 Id. at 638.

Regarding Justice Frankfurter's critique of the Court's competence to judge educational policy, or more broadly to balance the competing interests at stake, the Court answered, "we act in these matters not by authority of our competence, but by force of our commissions."[139] Even if other institutions *were* better suited to such tasks, the Court was nevertheless required to uphold its role of protecting liberty.

Finally, Justice Frankfurter was right that the Court's method in this case was blunt: it struck down the law entirely, and set a precedent denying similar authority to every level of government thereafter. Again, the Court's reply was simple. Blunt or not, it was the correct decision, and "observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise."[140]

The Courts as the Bulwarks of Liberty[141]

After *Barnette* overturned *Gobitis*, the Court consistently defended its role in protecting individuals and minorities from illiberal majoritarianism. That role required it to independently weigh the competing interests at stake to determine whether a burden on religious exercise was constitutional, rather than automatically accepting legislative judgments. Determinations that a law was unconstitutional as applied to a particular individual or group provided the courts with a more refined tool that allowed courts to require exemptions rather than striking down laws entirely. Finally, while the courts struggled with the difficulties inherent in evaluating the legitimacy of religious claims and in determining the weight of a burden on religious practice, that difficulty was no reason to abdicate their role. Such tasks were necessary, and courts, not legislative majorities, were better suited to undertaking them to preserve civil liberties. With notable exceptions for the military and for prisons,[142] this wholehearted refusal to defer to legislative judgments was the Court's position until *Smith*.

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139 Id. at 639.

140 Id. at 637.

141 See Federalist 78, authored by Alexander Hamilton, arguing for lifetime appointments for federal judges so that the courts might serve "as the bulwarks of a limited Constitution against legislative encroachments."

142 See, for example, *Goldman v. Weinberger, Secretary of Defense, et al.*, 475 U.S. 503 (1986). The Court upheld the Air Force's refusal to allow an Orthodox Jewish officer to cover his head while indoors, explicitly stating that its standard of review for military regulations was "far more deferential" than for regulations of civilian society (at 507). Justices Brennan, Marshall, Blackmun, and O'Connor dissented, arguing that such deference was both unnecessary and unconstitutional.

CHAPTER FIVE: *EMPLOYMENT DIVISION V. SMITH* AND THE COURT'S REVERSAL

In 1990, the landmark decision in *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 dramatically altered the legal landscape of the Free Exercise Clause. The Court "largely abandoned" its previous, expansive understanding of the Free Exercise Clause, which had often required strict scrutiny, and substituted a restrictive interpretation of the Clause that allowed uniform application of neutral laws regardless of the burdens imposed on religious practices.[143] The majority's opinion in *Smith* is inconsistent with precedent, which is mischaracterized by the majority in an attempt to convince its audience otherwise, and is deeply destructive of the principles of American religious liberty. To evidence this claim, John Locke will be invoked. His work demonstrates the potential harm to religious liberty posed by *Smith*'s neutrality standard, showing that *Smith* rests on a fundamentally flawed understanding of state authority over matters of civil interest.

The Court's Decision

Respondent Alfred Smith, a member of the Native American Church, was fired from his job at a private drug rehabilitation organization after ingesting peyote, a hallucinogen prohibited by Oregon law, for sacramental purposes. Smith was then denied unemployment benefits because it was determined that he had been fired for work-related misconduct. The Oregon Supreme Court, following *Sherbert v. Verner*, ruled in Smith's favor; while even sacramental use of peyote fell within the criminal prohibition, Oregon's interest in denying unemployment benefits was inadequate to justify the burden imposed on Smith's religious practice.[144]

The immediate question before the Supreme Court—and both parties' arguments— concerned the balance between Smith's religious freedom and Oregon's interest in enforcing its drug laws through inclusion of even sacramental drug use in the "misconduct" section of the unemployment benefits regulations. The Court instead reconsidered the standard for free exercise cases entirely, and applied its new standard to the case.[145]

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143 David M. Ackerman, "The Religious Freedom Restoration Act and The Religious Freedom Act: A Legal Analysis," Congressional Research Service, April 17, 1992, p. 1.

144 *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990), 874-5.

145 Michael McConnell, "Institutions and Interpretation: A Critique of *City of Boerne v. Flores*," 111 *Harvard Law Review* 153 (1997), p. 158.

Justice Scalia's opinion for the Court, joined by Justices Rehnquist, White, Stevens, and Kennedy, began by drawing the now-familiar distinction between religious beliefs and religiously motivated conduct, quoting *Reynolds*: "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[146] From this, the majority derived the rule that "if prohibiting the exercise of religion… is not the object of the [statute], but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[147] Otherwise phrased, "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)."[148]

The Other Four: An Expansive Reading of the Free Exercise Clause

Justice O'Connor concurred in the judgment, and Justice Blackmun's dissent was joined by Justices Brennan and Marshall. Justices Blackmun, Brennan, and Marshall all joined Justice O'Connor's opinion except as to the judgment.

These four justices would have maintained the Court's previous, expansive reading of the Free Exercise Clause as protecting religious practices from any government interference unless the state could demonstrate a compelling interest that could not be furthered by narrower means; that is, unless the weight of the government's interest in applying the law to a religious objector exceeded the weight of the free exercise claim. Justice O'Connor argued that Oregon's prohibition of peyote would have survived strict scrutiny; Justices Blackmun, Brennan, and Marshall argued that it would not have survived.[149]

Justice O'Connor and the dissenters argued that the majority's distinction between targeted and neutral laws was both unprecedented and inconsistent with the purpose of the Free Exercise Clause. Whether or not the Free Exercise Clause was implicated depended not on the neutrality of the law, but on its effect; that is, on whether it did burden or prohibit religious conduct:

> A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law

146 *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990), 879, internal citations omitted.
147 Id. at 878.
148 Id. at 879.
149 Id. at 903 and 921, respectively.

> prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons…If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice…such a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides.[150]

As discussed above, this understanding of the Free Exercise Clause is fundamentally different from that expressed by the majority.

Justice O'Connor had previously elaborated on the relation between the Free Exercise Clause and strict scrutiny. In *Goldman v. Weinberger, Secretary of Defense, et al.*, 475 U.S. 503 (1986), the Court ruled that the Free Exercise Clause did not require an Orthodox Jew to be exempted from Air Force uniform requirements that prohibited him from covering his head while indoors. The majority applied a "far more deferential" standard in the military context, deferring to the military's own judgment of the importance of its interests and the harm that an exemption would do to those interests. The Court's opinion therefore embraced a balancing test, but left the balancing to the Air Force, restricting itself to judging that the regulations were "reasonabl[e] and evenhand[ed]."[151]

Justice O'Connor's dissent was joined by Justice Marshall. They argued that strict scrutiny should be applied; while the military context affected the relative weight of the interests behind the uniform regulations, it did not fundamentally alter the protections of the Free Exercise Clause or the Court's role in upholding individual rights. Justice O'Connor reviewed extensive precedent, concluding that despite some variations in terms—for example, whether the state interest must be "compelling," "overriding," or "of the highest order"—the Court had consistently ruled that to deny a religious exemption, the state must show an unusually important interest and show that an exemption would substantially harm that interest. These requirements were rooted in the nature of the Free Exercise Clause:

> First, because the government is attempting to override an interest specifically protected by the Bill of Rights, the government must show that the opposing interest it asserts is of especial importance before there is any chance that its claim can prevail. Second, since the Bill of Rights is expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state, the government must show that

150 Id., 894 (opinion of Justice O'Connor, concurring in the judgment).

151 *Goldman v. Weinberger, Secretary of Defense, et al.*, 475 U.S. 503 (1986), at 507, 510.

> the interest asserted will in fact be substantially harmed by granting the type of exemption requested by the individual.[152]

This argument for strict scrutiny, Justice O'Connor and the dissenters reiterated in *Smith*, stood regardless of the neutrality or general applicability of the law at issue. The essence of a free exercise claim was relief from a burden imposed by government, regardless of how that burden was imposed.[153]

Smith versus Precedent

The majority opinion diverges sharply from precedent in many ways, though, as the dissenters note, it also mischaracterizes that precedent in order to claim its support.[154] Again, this analysis will address the Court's definition of the "exercise" of religion first, then its treatment of burdens, and finally its discussion of institutional roles. This will demonstrate the extent to which *Smith* overturns precedent in all but name.

Insofar as the *Smith* majority that religious conduct was not absolutely protected under the Free Exercise Clause in the same way as religious belief, it was consistent with the Court's previous definitions of the "free exercise" of religion. However, contrary to every case still standing since *Reynolds*, the *Smith* formulation effectively removes religiously motivated action from the protection of the Free Exercise Clause entirely. Under *Smith*, a law burdening religious action would be unconstitutional only if it burdened that conduct *because of* its religious motivation or nature; any burden, of any weight, could be justified by any legitimate state interest so long as the law was neutral. As Michael McConnell notes, this understanding of the Free Exercise Clause differs dramatically from previous conceptions:

> Under one view, the clause, like that governing free speech, protects a specified *freedom*: presumptively, all people may worship God in accordance with the dictates of their own conscience, subject only to governmental interference necessary to protect the public good. Under a second view, the Free Exercise Clause, like the Equal Protection Clause,

152 Id., opinion of Justice O'Connor, dissenting, at 530-1.

153 *Smith*, opinion of Justice O'Connor, concurring, at 897.

154 *Smith*, opinion of Justice Blackmun, dissenting, at 908. See also the opinion of Justice O'Connor, concurring, at 891 ("today's holding dramatically departs from well settled First Amendment jurisprudence") and 893 ("To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.")

> protects against a particular kind of governmental *classification* or *discrimination*: the government may not 'single out' religion (or any particular religion) for unfavorable treatment.[155]

Under the *Smith* approach, religious practices are not themselves protected; there is no individual right to engage in religious activity. Instead, individuals are protected from being targeted on account of their religion. In other words, *Smith* held, without stating as much, that religious conduct was protected only under the Equal Protection Clause, and not at all under the Free Exercise Clause.

The Court had considered this interpretation in previous cases and rejected it outright. In *Yoder*, the state had argued that religiously grounded actions were not protected by the First Amendment. The Court responded,

> Our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare…But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment, and thus beyond the power of the State to control, even under regulations of general applicability.[156]

Thus, the *Smith* understanding of exercise as effectively limited to beliefs was inconsistent with precedent.

Even more crucially, *Smith* diverged from precedent on which test to apply when a law burdens religious exercise. While previous case law had consistently applied a balancing test, as discussed in the previous section on burdens, *Smith* created a new, categorical rule. The majority acknowledges this change without justifying it or distinguishing *Smith* from precedent, citing *Lee* as the most recent decision "involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion" and acknowledging that the *Sherbert* test was applied in *Lee*.[157] The majority merely observes that the *Sherbert* test had not been used to invalidate a law criminalizing a particular form of conduct, and apparently substitutes this result for the validity of the test. Since the test had not led to exemptions, the majority concluded that that outcome meant the test was not required —a new and confusing legal principle, to say the

155 McConnell, "Institutions and Interpretation," 157.
156 *Wisconsin v. Yoder*, 406 U.S. 205 (1972), 219-220.
157 *Smith*, 880, 884-5.

least.[158] The Court's decision in *Smith* cited the outcomes of *Lee* and other cases as support despite recognizing that *Lee* and other case law had mandated a balancing test rather than *Smith*'s categorical test.

Careful attention to the terminology in *Smith* reveals that the foundation of its reversal of Free Exercise jurisprudence is a new, narrow understanding of burdens. The Court ruled that "if prohibiting the exercise of religion…is not the object of [a law], but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[159] The *Smith* majority distinguished, therefore, between burdens resulting from discrimination and all other burdens; the latter type was deemed "incidental," and the former, which the Court does not name, termed "targeted." Under the *Smith* rule, *only* targeted burdens constituted a prohibition in the meaning of the Free Exercise Clause. As support for this, the majority cites *Gobitis*, which held that conscientious scruples never "relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[160] It is telling—though the majority makes no mention of it—that *Gobitis*, the majority's main support for its conception of burdens, was overruled after just three years. The narrow interpretation of burdens used in *Gobitis* and *Smith* is not consistent with the Court's other rulings.

Recall the three-part discussion of burdens laid out by the *Braunfeld* plurality and supported by each of the other justices: if a law targeted religious conduct, then it was automatically unconstitutional; otherwise, it was either a direct burden or an indirect burden and required balancing and consideration of exemptions either way. The *Smith* majority does use the difference between direct and indirect burdens to distinguish the case from *Sherbert* and similar cases, which "have nothing to do with an across-the-board criminal prohibition on a particular form of conduct."[161] *Smith*'s reversal of case law turns on the following: while *Sherbert*, *Braunfeld*, and other precedent argued that direct burdens were especially heavy and required particular attention to balancing, *Smith* argued that precisely because the burden at issue was direct, a *lower* standard should be applied.

This drastic change was the result of *Smith* majority's substitution of a narrow, neutrality-focused interpretation of the Free Exercise Clause for the Court's previous, expansive interpretation, though even that does not fully explain the Court's holding. The majority argues in one place that the standard

158 See Justice O'Connor's concurrence, ibid., at 896-7: "that we rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us."

159 *Smith*, 878.

160 *Minersville School District Board of Education v. Gobitis*, 310 U.S. 586, at 594-5.

161 *Smith*, 884.

should be mere rational-basis because the law is neutral and generally applicable, and in another that it is because the burden is direct. Under the neutrality interpretation, however, it is not clear why the distinction between direct and indirect burdens is relevant. It mattered to the Court in earlier cases because it affected the relative weight of the burden and the possibility of an exemption, but under the neutrality interpretation, all that matters is whether the burden is targeted. The majority's opinion does not explain this apparent inconsistency, which appears to be rooted in the Court's need to distinguish the case from *Sherbert*; the neutrality issue alone could not make the distinction, and so the direct/indirect typology was used despite its irrelevance to the majority's neutrality focus.

Finally, the *Smith* majority reverted to the institutional arguments that had been embraced in Gobitis and rejected in the case law that followed. Justice Scalia wrote,

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process…It may fairly be said that leaving accommodation to the political process will place at a 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.[162]

In so holding, the majority failed even to mention its previous decisions explicitly denying that the Bill of Rights left minorities vulnerable to majority tyranny:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[163]

In *Smith*, the majority at least recognized its role in protecting the constitutional norm of racial equality by protecting minorities from hostile or

162 Id. at 890.
163 *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), 638.

uncaring majorities.[164] But when it came to the issue of protecting individuals' consciences and religious beliefs from those same majorities, the Court declined even to recognize such protection as constitutionally mandated, much less to uphold its role in liberal government.

Smith, Locke, and the Principles of American Religious Liberty

In addition to *Smith*'s sharp divergence from precedent, the majority's holding was inconsistent with the norms of positive religious freedom. The neutrality standard provides little to no protection of religious conduct, as demonstrated by the examples of John Locke, whose arguments for state neutrality are mirrored in *Smith*.

Locke argues that the state can neither compel the use of any particular rite or ceremony nor forbid the use of rites or ceremonies practiced by a church.[165] However, general rules prohibiting certain conduct are to be equally applied to religious conduct: "these things are not lawful in the ordinary course of life, nor in any private house; and therefore neither are they so in the Worship of God, or in any religious Meeting."[166] Thus, in a state in which killing a calf was permitted in general, an individual could kill a calf and make a burnt offering, "for no Injury is thereby done to any one, no prejudice to another mans [*sic*] Goods." If, however, there were a general prohibition on killing calves—for example, to replenish livestock populations after widespread disease—then "who sees not that the Magistrate, in such a case, may forbid all his Subjects to kill any Calves for any use whatsoever?" The central issue is "that in this case the Law is not made about a Religious, but a Political matter: nor is the Sacrifice, but the Slaughter of Calves thereby prohibited."[167]

Locke's example of conduct that cannot be compelled by the state is baptism: "if the Magistrate understand [the washing of an infant with water] to be profitable to the curing or preventing of any Disease that Children are subject unto, and esteem the matter weighty enough to be taken care of by a Law, in that case he may order it to be done."[168] The Magistrate cannot, however, order baptism itself, as the state has no power to require religious rites. The livestock example, however, makes clear that if the Magistrate understood the washing of infants with water to be a *harmful* practice, and one weighty enough to be dealt with by law, then he could ban the practice in general. This would have the effect of prohibiting the religious rite of baptism, but the law itself would be made

164 *Smith*, 886.
165 John Locke, A Letter Concerning Toleration, Hackett Publishing Co., 1983, p. 41.
166 Id. at 42.
167 Ibid.
168 Id. at 40.

about a political matter, not a religious one.

The key restriction on the state, in Locke's view, is that religious and secular actions be treated alike: "whatsoever is lawful in the Commonwealth, cannot be prohibited by the Magistrate in the Church…But those things that are prejudicial to the Commonweal of a People in their ordinary use, and are therefore forbidden by Laws, those things ought not to be permitted to Churches in their sacred Rites."[169] The state remains bound, of course, by the requirement that it serve the public good, which is "the Rule and Measure of all Law-Making. If a thing be not useful to the Commonwealth…it may not presently be established by Law."[170]

Who, though, is to judge whether a law serves the public good? "What if the Magistrate believe that he has the Right to make [a certain law], and his Subjects believe the contrary? Who shall be Judge between them? I answer, God alone. For there is no Judge upon earth between the Supreme Magistrate and the People."[171] Until that judgment, then, subjects could choose to obey laws despite their conscientious objections or to follow their consciences and suffer the legal consequences.[172]

Smith's holding that neutral, generally applicable laws are constitutional regardless of the burdens they impose on religious practices follows Locke's neutrality standard. And, like Locke, *Smith* provides for only the narrowest concept of religious freedom, which is predicated on the idea that equality satisfies the demands of liberty. As shown by my discussion of Locke, mere religious equality can be achieved even if fundamental religious rites are criminalized. Even the *Smith* majority recognizes that this leaves religious minorities particularly vulnerable, but the majority dismisses this as an "unavoidable consequence of democratic government."[173] This is entirely contrary to the goal of a limited, liberal government, which seeks to protect minorities from the whims of an uncaring or hostile majority, and to the very purpose of a Bill of Rights, as shown earlier.

Finally, with regard to institutions, *Smith*'s treatment of legislative authority left it unchecked despite its theoretically limited jurisdiction. Recall the Court's holding ever since *Reynolds*, borrowed from Jefferson: "it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."[174] This is in turn derived from Locke's argument that the government should concern itself only with civil interests; if an action does no harm to society, then the state has no

169 Ibid.
170 Id. at 39.
171 Id. at 49.
172 Id. at 48.
173 *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990), 890.
174 *Reynolds v. United States*, 98 U.S. 145 (1878), 163.

authority over it. Under an expansive view of free exercise and a correspondingly high standard for constitutionality, the state could not burden a religious practice unless it could prove that that conduct in general and allowing a religious exemption in particular would actually be harmful to society, thus outweighing the positive freedom of religious exercise. The balancing test therefore provided a judicial check against legislative interference in matters not related to civil interests. The *Smith* standard, in contrast, did not require the slightest consideration of how a religious practice actually affected society. For Locke, God was the only judge of whether a particular law actually pursued the public good; under *Smith*, so long as the law was neutral and generally applicable, the majority's judgment could not be questioned. The Court rejected this illiberal reasoning when it overturned *Gobitis*; it should not have endorsed it in *Smith*.

The Supreme Court's holding in *Smith* was therefore inconsistent both with the Court's previous interpretation of the Free Exercise Clause and with the normative goals of the Constitution.

CHAPTER SIX: FROM *SMITH* TO THE PRESENT DAY

Congress responded to *Employment Division v. Smith* with the Religious Freedom Restoration Act of 1993 (RFRA). In its final form, the RFRA created a statutory prohibition on governmental action that substantially burdened free exercise, even if the burden resulted from a generally applicable rule, unless the government showed first that the application to a religious objector 1) furthered a compelling governmental interest and 2) was the least restrictive means of furthering that interest.[175] This applied to government at any level, and was enacted through Congress's power to enforce the Fourteenth Amendment under section 5 of that amendment.[176]

The RFRA was based on the findings that "neutral" laws burdened religious exercise as surely as laws that were intended to do so, that *Smith* had "virtually eliminated" the requirement that the government justify burdens on religious exercise imposed by neutral laws, and that government at any level should not substantially burden religious exercise without a compelling justification. Considering the compelling interest test of pre-*Smith* case law "a workable test for striking sensible balances between religious liberty and competing prior governmental interests," Congress therefore sought to "restore" that test, that is, to return to the high standard for legislative action that *Sherbert* and other case law had required.[177]

The RFRA and its overwhelming support in Congress emerged from deep concern about the history and future of religious liberty in light of *Smith*. The House Committee on the Judiciary noted in its report that,

> The clarity of the Constitution has not prevented government from burdening religiously inspired action. Though laws directly targeting religious practices have become increasingly rare, facially neutral laws of general applicability have nefariously burdened the free exercise of religion in the United States throughout American history.[178]

The Committee endorsed Justice O'Connor's critiques of the majority position and expressed concern that *Smith* had "created a climate in which the free exercise of religion is continually in jeopardy."[179] Under *Smith*, "claimants will be forced to convince courts that an inappropriate legislative motive created statutes and regulations. However, legislative motive often cannot be determined, and

175 H.Rep. No. 1308, at 3 (1993).
176 S.Rep. No. 103-111, at 14 (1993).
177 H.Rep. No. 1308, at 1 (1993).
178 H.Rep. No. 103-88, at 2 (1993).
179 Id. at 5.

courts have been reluctant to impute bad motives to legislators."[180] Furthermore, the political process was not the appropriate means for combatting burdens on religion; quoting *Barnette*, the Committee emphasized that the very purpose of the Bill of Rights was to protect fundamental rights against majorities and officials.[181] By requiring a showing of a compelling interest and the unavailability of less-restrictive means before imposing a burden on religious liberty, the Committee hoped the RFRA would fulfill the First Amendment's mandate of "preserving religious liberty to the fullest extent possible in a pluralistic society."[182]

In additional statements included at the end of the House Committee Report, seven members of the Committee supported enactment of the RFRA—the committee voted 35-0 to report the bill[183]—but expressed their concern that the RFRA did not go far enough.

> Even prior to *Smith*, it is well known that the 'compelling state interest' test had proven an unsatisfactory means of providing protection for individuals trying to exercise their religion in the face of government regulations. Restoration of the pre-*Smith* standard, although politically practical, will likely prove, over time, to be an insufficient remedy.[184]

These members of the Committee had supported an amendment, not adopted by the Subcommittee in its markup, that would have explicitly defined the term "compelling state interest," which they considered preferable to "allowing unlimited judicial discretion."[185] Without this amendment, "both the benefits and [the] frustrations faced by religious claimants" prior to *Smith* would be preserved, giving claimants a fighting chance, though not as much protection as these members would have preferred.[186]

The Senate Committee's Report contained a similar analysis of the effects of *Smith* on religious freedom and the hoped-for effects of the RFRA.[187] The Committee expressed its concern that in *Smith*, "a closely divided Court abruptly abandoned the compelling interest standard and dramatically weakened the constitutional protection for freedom of religion."[188] *Smith*'s lower standard jeopardized free exercise and the fates of religious minorities, whom state and

180 Id. at 6.
181 Ibid.
182 Ibid.
183 Id. at 2.
184 Id. at 16.
185 Id. at 16-7.
186 Id. at 17.
187 S.Rep. No. 103-111, at 14 (1993).
188 Id. at 5.

local legislative bodies could not be relied upon to protect through exemptions.[189] The Committee voted by 15-1 to report the bill to the full Senate; Senator Simpson (R-WY) voted against reporting, appending to the report his concerns about the application of the RFRA to claims brought by prisoners.[190] Apart from this issue, however, he "basically support[ed]" the RFRA, and later voted to pass it.[191] The Committee's report argued that the compelling-interest standard was "sufficiently sensitive" to the demands of prison management and had proved workable in the prison context in the past.[192]

The RFRA attracted an astonishing 170 co-sponsors in the House, and passed the House by a unanimous voice vote in May 1993. In October, it passed the Senate by a vote of 97-3. The RFRA became public law no. 103-141 in November of 1993.[193]

Interlude: Applying *Smith*

While Congress considered the RFRA, the Supreme Court heard the case of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, and issued its decision in June of 1993, after the House had passed the RFRA and before the Senate had done so. In *Church of Lukumi*, the Court considered an issue strikingly similar to Locke's example contrasting a valid law prohibiting animal slaughter and an invalid law prohibiting animal sacrifice. At issue were several town ordinances regulating the killing of animals. The ordinances' patchwork application functioned to achieve what was found to be the city council's illegitimate aim: to prohibit members of the Santeria religion from practicing animal sacrifice, one of its principal forms of worship.[194] The Court applied the *Smith* tests of neutrality and general applicability, found that the ordinances failed both requirements, and undertook strict scrutiny. The ordinances were unanimously found unconstitutional.

The Court's decision, however, was quite complex, with seven justices joining one portion of the Court's opinion, six joining a second part, and five joining a third. One portion of Justice Kennedy's opinion, which was otherwise the opinion of the Court, was joined only by Justice Stevens. Justice Scalia wrote a concurrence in part, which was joined by Justice Rehnquist. Justice Souter also wrote a partial concurrence. Justices Blackmun and O'Connor concurred only in

189 Id. at 8,
190 Id. at 16, 18.
191 Id. at 18.
192 S.Rep. No. 103-111, at 11 (1993).
193 Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-4).
194 *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), 520.

the judgment.

The difficulty of applying *Smith* and continued division over its correctness were to blame for this fracturing of a unanimous judgment. The Court described the "neutrality" and "general applicability" requirements as interrelated, and declined even to define the standard used to evaluate general applicability.[195] Justice Scalia, whose opinion for the Court in *Smith* established the neutrality and general applicability requirements, wrote separately in part to disagree with the Court's distinction between the terms, but emphasized that the distinction was not necessary because the terms actually had substantial overlap; a law that was not generally applicable was not neutral, and a law that was not neutral was not generally applicable.[196]

Justice Scalia's main reason for writing separately was his disagreement with Justice Kennedy and Justice Stevens' inquiry into the motivations of the members of the city council. Justice Scalia was joined by Justice Rehnquist in arguing that such an inquiry was inappropriate and irrelevant in this case. The key was not the intent of the lawmakers, but the actual effect of the law.[197] It is difficult to reconcile Justice Scalia's emphasis here on effects with his focus in *Smith* on mechanisms; in *Smith*, what mattered was not what burden was imposed on religious practice, but whether the law that imposed it was neutral and generally applicable. In *Church of Lukumi*, Justice Scalia writes that it does not matter "that a legislature consists entirely of the purehearted, if the law it enacts in fact singles out a religious practice for special burdens."[198] It would appear more consistent with this effects test to have decided in *Smith* that it mattered not whether a law was written to be neutral and generally applicable, if it in fact burdened a religious practice.

Justice Souter also concurred in part and in the judgment, using his separate opinion to express his doubts about the correctness of *Smith*, which he argued should be reconsidered, and about its relevance to the case at hand. Justice Souter's concurrence emphasized that the Free Exercise Clause, properly understood, required not merely the formal neutrality of *Smith* but also substantive neutrality, which would secure religious liberty as a positive right, defended against unnecessary interference by the state.[199] Justice Souter went on to critique *Smith* at length as inconsistent with precedent.

Finally, Justice Blackmun was joined by Justice O'Connor in concurring only in the result and not at all in the majority's reasoning. Justices Blackmun and O'Connor maintained that *Smith* was wrongly decided because it "ignored the value of religious freedom as an affirmative individual liberty and treated the

195 Id. at 543.
196 Id. at 557-8.
197 Id. at 558-9.
198 Id. at 559.
199 Id. at 561-2.

Free Exercise Clause as no more than an antidiscrimination principle."[200] Applying pre-*Smith* case law, they concluded that the Hialeah ordinances were not, in fact, subject to strict scrutiny; they were automatically invalid by reason of targeting religious practices for disfavored treatment.[201]

The Court's splintered reasoning but unanimous decision in *Church of Lukumi* demonstrated the imprecision of *Smith*'s terms, the difficulty of determining how to measure a law's validity, and, most of all, deep division over *Smith*'s correctness.

The Court's Response to the RFRA

Four years after the RFRA was enacted, the Supreme Court ruled that it was unconstitutional as applied to state and local governments. In *City of Boerne v. Flores*, the Court found that Congress's enforcement power under section 5 of the Fourteenth Amendment was limited to preventive or remedial power. The RFRA, however, was an attempt to confer a substantive right against states; rather than enforcing the Free Exercise Clause, it attempted to alter the Clause's meaning. The RFRA therefore violated both the separation of powers, by infringing on the Court's authority to interpret the Constitution, as well as principles of federalism, by interfering with the authority of the states.[202]

Michael McConnell, then a professor at the University of Utah College of Law and later a Circuit Judge of the Court of Appeals of the Tenth Circuit, criticized the decision, as did other scholars. In addition to his criticisms of the *Smith* decision itself, he argued that the RFRA was "precisely the sort of enforcement statute envisioned by the Fourteenth Amendment."[203] The purpose of the Fourteenth Amendment was to ensure that the basic civil rights of all citizens were consistent throughout the nation. As the *Smith* Court had acknowledged, its reading of the Free Exercise Clause was not the only permissible reading; according to McConnell, it was therefore a valid exercise of Fourteenth Amendment enforcement power to impose a more protective reading in order to equally protect the free exercise rights of all.[204]

200 Id. at 578.
201 Id. at 580.
202 *City of Boerne v. Flores*, 521 U.S. 507 (1997), 507-8.
203 Michael W. McConnell, Institutions and Interpretations: A Critique of *City of Boerne v. Flores*, 111 Harv. L. Rev. 153 (1997), 195.
204 *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990), 878.

From *City of Boerne v. Flores* to Today

Though it was not mentioned in *City of Boerne*, the RFRA still applied to federal legislation. This was confirmed in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) in which the Court held that the Department of Health and Human Services could not require closely held corporations to provide health insurance coverage for contraception methods that violated the religious beliefs of the companies' owners. Because a less-restrictive means of achieving the government's interest was available, the enforcement of the mandate against the religious claimants violated the RFRA.[205]

The compelling-interest and least-restrictive-means test championed by Justice O'Connor and the dissenters in *Smith*, therefore, remains the applicable standard at the federal level even for neutral and generally applicable laws.

Furthermore, many states have enacted their own RFRAs, beginning even before the federal RFRA's application to the states was overturned in *City of Boerne*. The National Conference of State Legislatures reports that since 1993, twenty-one states have enacted RFRAs, most recently in 2015.[206] Legislation is under consideration elsewhere. At least 8 states without RFRAs have interpreted their constitutions to provide similar protection to religious exercise.[207] The controversy over the proper standards for evaluating burdens on religious exercise imposed by neutral, generally applicable laws therefore remains "live"; at the federal level, the RFRA of 1993 imposes a statutory prohibition enforcing a higher standard than is imposed by the Court's interpretation of the Free Exercise Clause in *Smith*, and at the state level, the country is divided.

An example of the continuing relevance of the debate over whether to exempt religious objectors from general laws is the application of anti-discrimination laws to business owners whose religious beliefs lead them to deny service to same-sex couples. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 138 S. Ct. 1719 (2018), the Supreme Court considered Colorado's finding that a baker had violated its Anti-Discrimination Act by refusing to create a cake for a same-sex wedding. Because the Court found that the law was applied not neutrally, but with hostility toward the baker's beliefs, it concluded that Colorado violated the First Amendment.[208] The Court did not reach the question of whether to apply the *Smith* rational-basis test or strict scrutiny, as the baker asserted both free exercise and free-speech claims, possibly

205 *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014), 1-3.

206 *State Religious Freedom Restoration Acts*, National Conference of State Legislatures, http://www.ncsl.org/research/civil-and-criminal-justice/state-rfrastatutes.aspx (May 4th, 2017).

207 *Religious Freedom Acts by State*, FindLaw, https://civilrights.findlaw.com/discrimination/religious-freedom-acts-by-state.html (2019).

208 *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 138 S. Ct. 1719 (2018), 3.

making it a "hybrid" case of the type discussed in *Smith*. The "hybrid claims" doctrine therefore remains unclear. Additionally, the members of the Court in *Masterpiece Cakeshop* disagreed strongly about whether the law should have been considered neutral in its application, demonstrating the difficulty of such assessments.[209] Cases like this bring up difficult questions regarding the extent of religious liberty and the proper balance between competing rights, questions further complicated by the fact that in states with RFRAs and at the federal level, the free exercise claim will trigger a higher standard of review than in states without RFRAs. Under the compelling-interest test, courts must actually balance the competing interests at stake; under *Smith*'s neutrality test, the question is left solely to legislative majorities when crafting anti-discrimination laws.

209 Id. at 12, 3.

CONCLUSION

The overwhelming majority of the case law of the Supreme Court and examination of the basic principles of religious liberty in the United States—demonstrated by near-unanimous Congressional support for the RFRA—prove that religious freedom ought to be a positive right, complemented by a permissive and flexible reading of the Establishment Clause. Otherwise, as seen from the implications of the *Smith* rule, religious minorities, both groups and individuals, can be left with no legal recourse against the tyranny of the majority. The First Amendment's promise of free religious exercise should again be construed to protect the right to act in accordance with one's conscience except when the burdens of state interference are absolutely necessary. Nothing less can be consistent with liberty.


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