

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ
"Surely My Mercy overtakes My Wrath"

THE NEW FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..."

The American Constitution and Bill of Rights were adopted by men deeply involved in their respective religious communities, which in some cases had only recently been colonial governments. They also represented existing governments that would remain sovereign: their objective was to invest a national government with only limited powers to meet the common needs of these otherwise competitive parties. It was to be a political battleground of constantly changing coalitions of those parties: religious parties -- churches -- were expected to be part of the mix, unlike in Europe, where they were excluded by law.

The founders agreed to deprive the government of the power either to lend its support to one or more religious parties, or to interfere in the conduct of any religious party, particularly in its continuing participation in the new government. Had the Puritans, for example, won the presidency and a majority in Congress, they would not have gained the power to enact legislation giving Puritans advantage or Catholics disadvantage. With the state limited this way, religion would not be excluded as in Europe: the "exercise" of religion the founders sought to protect began with full political partnership and also included conscience, opinion, belief, ritual practice, and religiously mandated action within and outside their churches. The new government could not intrude in state sovereignty, which was much given to laws written in church.

This agreement was so well understood and enacted by the churchmen who formulated it that it lasted nearly a hundred years without encroachment. Today, it is gone.

The central Constitutional question here is whether the government has the power to pass a law that restricts the free exercise of religion. The First Amendment says unequivocally that it does not; but in order to suppress the Mormon practice of polygamy in 1878, the Supreme Court redefined "exercise" as belief, which is protected absolutely, and action, which is not. So the question became this: What religious conduct is protected by the Constitution from the majority? A century later, the answer is none.

The Court first struggled to decide what made a religious act subject to law. In 1960, it decided that the state could reach into religion only far enough to do what a state absolutely had to do, for example to prevent polygamy, and no further; except in the military and the prisons, where there were no such restrictions on the government.

This meant that a city could require any door-to-door solicitor to get a license except a Jehovah's Witness out proselytizing: the law couldn't reach that far. The State could forbid anyone from eating hallucinogenic peyote cactus except a member of the Native American Church in its ancient ritual: the law couldn't even reach that far. But the State could require a Jewish psychologist to take off his yarmulke while on duty in his military office, and the State could build a logging road through the ancient and sacred (but public) forest still used by several Indian tribes for religious ceremonies, since the Constitution doesn't protect religion that much.

In 1990, the Court threw out even this limited protection, deciding that the First Amendment protects belief entirely, but protects action only from laws specifically stating a religious orientation. So Jehovah's Witnesses must pay to proselytize or stop going door to door, Christian services may not legally provide wine to minors, and under general health or zoning laws, Jews and Muslims may be prevented from kosher or halal slaughter or sacrifice, unless the "general" law is passed with specific exemption for a specified religion. Apparently such an "exempting" law in respect of a particular establishment of religion would not violate the First Amendment's prohibition of laws "respecting an establishment of religion," since the Court specifically stated that such "exempting" laws were the only protection for religious acts made illegal by "religiously-neutral, general" laws.

Under this new First Amendment, Jews and Muslims have been sacrilegiously mutilated on the autopsy table; Quakers have been forced to

collect money for war from their Quaker employees; churches have been forbidden to replace their own old buildings because the city council designated them historical landmarks. Today the courts have decided that the Boy Scouts cannot require belief in God for membership; that prisoners may be prevented from gathering for their required weekly religious services; and that confessionals may contain secret government microphones: there are no sanctuaries.

Religious parties have long been excluded from the political arena through exemption from the tax codes: no tax-exempt religious organization may participate in partisan political activity. The financial support of the God-fearing for their ministries is tax deductible: the political voice of the ministry has become subdued as the value of these deductions has increased. The Court held in 1989 that a uniform tax system, free of "myriad exceptions flowing from a wide variety of religious beliefs," outweighs "whatever burden" it places on religious exercise: doctrine and belief are now grounds for denial of tax exempt status.

There is no legal distance between new First Amendment decisions already made and prohibiting prayer gatherings in private homes zoned as residential; prosecuting circumcision as mutilation; and government regulation of in-church child-care facilities, donations and assets, and pot luck dinners. There truly is no religious sanctuary respected by America's laws.

The Court has changed all this since 1984.

Congress is considering two bills, "The Religious Freedoms Restoration Act of 1991" and "The Religious Freedoms Act of 1991," to restrain government by legislation, rather than by Constitution, from "burdening religion." An Act of Congress to govern Congress is a Constitutional as well as an historical anomaly: these laws seek to govern the Court as well. The fraction the Congress might attempt to restore is vulnerable wherever the Court finds opposing purposes to outweigh it, and "uniform application of law" has already been set forth as such a purpose. Meanwhile, some State courts are finding religious exercise protected under their State Constitution but not under the new First Amendment. But laws already found Constitutional prevent women who wear religiously-prescribed head coverings from participating as teachers in public schools; forbid sitting judges from praying aloud as they take the bench for the day's calendar; and bar clergymen from mentioning faith in public school ceremonies: today America's communities of faith may not participate in the political partnership they formed two centuries ago.

The legal erosion of religious liberty began with popular opposition to the Mormons and outlawed the religious practice of polygamy for all who believe in it, including Jews and Muslims. It continued after World War II as religion came to be regarded as a private or in-church matter and its exercise to inhere in acts of individuals, not communities acting together. Having reduced the question to one of individual liberty, it was easy to obscure the origins of the Amendment's intent and erect that "wall of separation" that would have been unthinkable to the Founding Fathers. Government by its nature extends its power: it was the purpose of the whole Bill of Rights to limit that exact process, to draw absolute lines that the state could not cross.

But America has repudiated its solemn pact with the God-fearing. In 1878, with the Mormons; today, with the Jehovah's Witnesses, the Quakers, the Amish, the Indians, Hare Krishnas, Santanerians, Rastafarians, Muslims, and Jews. Truly, with all.

In the 1990 words of the Court, this is an "unavoidable consequence of democratic government." We think the Founding Fathers and men of religion will be found to differ.

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Not long after this article was published, the United States Supreme Court declared "The Religious Freedoms Restoration Act of 1991" and "The Religious Freedoms Act of 1991" to be unConstitutional and threw them out. The Justices concluded that Congress had exceeded its authority in attempting to pass them. Since then, greater protection of "free exercise" has come from State Legislatures, while federal intrusion into the affairs of the religious congregations has increased.
