BYU Law Review

Volume 1993 | Issue 1 Article 10

3-1-1993

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Along with maybe a handful of others, I tentatively believe that Justice Scalia may have been right in *Smith*,[1] despite the manifold problems with the opinion.[2] In essence, he said that laws of general applicability may be applied to religiously motivated practices without meeting the compelling state interest test.[3] The reason that I support this holding is that judicial granting of religious exemptions from laws of general applicability would be tantamount to judicial establishment of religion. It would force the judiciary both to define religion and to assess what are acceptable religious practices, an undertaking fundamentally at odds with the spirit of the First Amendment and with the pluralism of contemporary society.

On the other hand, my eighteenth century liberalism cries out for protection of individual matters of conscience and rebels at the thought of leaving a constitutionally based liberty to the mercy of the political process.[4] Therefore, I find myself waffling on the issue because I want to be assured that individual liberty will receive sufficient protection under other headings such as freedom of expression.

This leads me to a comparison of *Smith* with cases in other areas of constitutional law, notably freedom of expression and

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1. Employment Div. v. Smith, 494 U.S. 872 (1990).

2. *Smith* has received almost universal condemnation from commentators. For two of the more devastating critiques, see Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990). By contrast, only a few authors have supported the outcome. *See* Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990).

3. *Smith*, 494 U.S. at 878-82.

4. *See id.* at 890.

establishment of religion. I find many of these cases picking up on at least one recurrent theme in today's world: the elimination of government subsidies on a number of fronts. Individual speech-actions,[5] both in the religious arena and elsewhere, are subject to this phenomenon. I will discuss *Smith* in relation to government grants that limit abortion advice, limitations on the degree to which government must provide a public forum for expression, and Establishment Clause cases that limit government subsidies to religious expression or practices. I conclude by trying to link the Establishment Clause no-subsidy command to these other developments, including *Smith*'s elimination of judicially crafted exemptions for religious practices.

The *Smith* proscription of judicial inquiry into the meaning of religion draws into question legislative exemptions and accommodations in a host of areas, including tax exemptions and personnel exemptions such as those in Title VII. As far-fetched as this assertion might seem, it parallels other developments. Elimination of legislative exemptions for religious practices may well be the next stage of separation of church and state.

I. JUSTICE SCALIA'S APPROACH TO EXPRESSIVE AND WORSHIPFUL CONDUCT

A number of cases, involving not only religion but also symbolic speech and hate speech, make it apparent that Justice Scalia is out to rewrite First Amendment law, with the apparent approval of a large segment of the existing Supreme Court.[6] The emerging nature of his First Amendment analysis is that the Amendment creates no individual rights but instead erects limits on how government may conduct its business. This is not a meaningless distinction because the limit on governmental behavior is purpose-based rather than result-based. In Justice Scalia's view, the First Amendment prevents government from taking action directed toward a particular religious practice or subject of expression;[7] it does not protect religion or expression from "law[s] of general applicability."[8]

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5. This term refers to any communication by speaking or writing.

6. *See, e.g.*, R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992); Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2463 (1991) (Scalia, J., concurring).

7. *Smith*, 494 U.S. at 878-82.

8. *Id.* at 886 n.3 (quoting opinion of O'Connor, J., concurring).

After reading *Smith*, my initial reaction was, "Okay, now we just argue claims for religious exemptions as claims for freedom of expression." Professor Greenawalt forecast this approach, calling it "reductionist" because it would reduce religion to expression.[9] As Professor Greenawalt also predicted, this approach does not protect very much, at least as Justice Scalia would apply it.

This position is easily tested by asking whether a claim similar to that made in *Smith*—exemption from generally applicable criminal laws for religious use of peyote—would have prevailed as an expression claim. Justice Scalia gave a clear answer at the first opportunity, in *Barnes v. Glen Theatre, Inc.*[10] His concurring opinion in *Barnes*, rejecting a claim for constitutional protection of nude dancing as a form of expression, emphasized repeatedly that government may declare any practice unlawful. He maintained that such declarations need be based on no more compelling grounds than that a majority find the practice objectionable or immoral, so long as the prohibition is of general applicability—meaning that it is not aimed at "conduct *precisely because of its communicative attributes.*"[11] Much of his concurring opinion in *Barnes* was taken directly from the *Smith* opinion, which he acknowledged by citing *Smith* for the proposition that "general laws not specifically targeted at religious practices did not require heightened First Amendment scrutiny even though they diminished some people's ability to practice their religion."[12]

With respect to symbolic expression, Justice Scalia quoted language from his own dissenting opinion, written as a circuit court judge, in *Community for Creative Non-Violence v. Watt*[13] (the sleeping on the lawn case):

> [T]he only First Amendment analysis applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court

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9. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 756-57 (1984).

10. 111 S. Ct. 2456, 2463 (1991) (Scalia, J., concurring).

11. *Id.* at 2466.

12. *Id.* at 2467.

13. 703 F.2d 586 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd sub nom.*, Clark v. Community for Creative Non-Violence, 486 U.S. 288 (1984).

> then proceeds to determine whether there is substantial justification for the proscription.[14]

The most surprising part of this formulation is that no First Amendment protection exists for the individual engaged in expressive conduct; the only limitation is that government may not *target* communication. This approach is identical to the *Smith* formulation that asks, with regard to religious practices, only whether the government purpose is to suppress religion.[15] And the *Watt* statement does not even require a compelling state interest when the proscription is targeted at communication; it merely requires a "substantial justification."

Both *Smith* and *Barnes*, then, shift away from emphasis on the interest of the individual and move toward inquiry into the governmental purpose. This occurs despite frequent Supreme Court pronouncements that it will not inquire into the intent of the legislature but will examine a law's validity on the basis of the impact that it actually has on protected interests.[16] I have often told my students that defining rights is not a good way to think about individual liberties. We should think of the Bill of Rights as limitations on government rather than definitions of protected rights, and these limitations should be explored in terms of the legitimate necessities of the governmental enterprise. But I never meant for my students to believe that government is free to do whatever it wishes so long as it does not intend to suppress communication or religion; rather, I merely intended to force the analysis to focus on the strength of the governmental justification in a pre-weighted balancing process.

The Scalia *Smith-Barnes* formulation regarding laws of general applicability is said to apply only in the arena of expressive conduct. Justice Scalia was careful in both opinions to point out that First Amendment protections require

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14. *Barnes*, 111 S. Ct. at 2467 (quoting *Watt*, 703 F.2d at 622-23).

15. *Smith*, 494 U.S. at 878-82.

16. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980); United States v. O'Brien, 391 U.S. 367, 383-84 (1968). Professor Ely and Professor Tribe have pointed out that it is more appropriate for the Court to inquire into legislative motive when some *negative prohibition* of the Constitution is at stake than when the question is the initial power to enact the provision. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 814-20 (2d ed. 1988); John H. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). But neither Ely nor Tribe suggests that impact becomes irrelevant, as Justice Scalia seems to indicate in *Barnes* and *Smith*.

heightened scrutiny when "speech" is restricted, but there may be little in this protection.[17] Having seemingly created a category of protected activity known as communication, he then collapsed the distinction. In *Barnes*, he argued that "virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose."[18] It is obvious that any form of communication requires the act of speaking or writing—a "speech-act." Thus, the conduct portion of any communication can be regulated by a "law of general applicability" so long as the target of the regulation is not the expression. The result is that no constitutional protection exists for sound trucks, picketing, or flag burning (to use Scalia's own examples)[19] if government applies a restriction unrelated to the message.

The rule that government cannot target communication is said to provide comfort against conscious repression. But expression can be either self-expression, communication with another, or both. Under *Smith-Barnes*, a religious "practice" might be protected by the Constitution from a regulation aimed at communication but not from one aimed at self-expressive acts. Focusing on the latter aspect of expression would allow the government to target the noncommunicative portion, despite any spillover into suppression of communication. That is why nude dancing, even in fully consensual settings and even recognizing its expressive components, can be suppressed with only the justification that the majority finds it unappealing. Under this formulation, the targeting of conduct by the Hialeah small-animal ordinances[20] would be valid despite their impact on self-expression. What made the ordinances unconstitutional is that they targeted a particular form of expression precisely because of its religious nature.[21]

The targeting rationale can also make the First Amendment stand for the proposition that government must suppress in neutral fashion all communication of a certain type if it suppresses any portion. This proposition was part of

17. *Smith*, 494 U.S. at 885-86; *Barnes*, 111 S. Ct. at 2465-66 (Scalia, J., concurring).

18. *Barnes*, 111 S. Ct. at 2466.

19. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2544-45 (1992).

20. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993).

21. *Id.* at 2233.

Justice Scalia's message in *R.A.V. v. City of St. Paul*,[22] the "hate speech" case. Holding that the St. Paul ordinance was defective because it singled out certain categories of hate speech but not others,[23] Scalia was accused by concurring Justices of adopting a test of "underinclusiveness."[24] Scalia responded that he was not condemning the law for its failure to restrict more speech, but because it singled out certain categories of unprotected speech on the basis of their content.[25] Again, *R.A.V.* deals with expressive behavior—burning a cross—but the ordinance and the opinion would reach all forms of communication with the prohibited content. In Justice Scalia's formulation, then, government is apparently allowed to prohibit all speech that the speaker should know would cause "anger, alarm, or resentment,"[26] but it is impermissible to single out speech that would cause "anger, alarm, or resentment" on the basis of the listener's race, creed or gender.[27]

Prior to *Smith*, *Barnes*, and *R.A.V.*, I told my students that they should view all human communicative activity on a spectrum, from "thought" at one end to "action" at the other. The point on the spectrum at which we place a certain speech-act would depend on the propensity of the statement to affect another person. The more likely it is that the statement affects others, the less justification would be required for government intervention. This approach is similar, if not identical, to Judge Learned Hand's formulation in *Masses Publishing*.[28] By contrast, Justice Black insisted on a rigid distinction between speech and conduct,[29] and the frequent approach of the Supreme Court was to treat differently speech that had an impact and conduct that had elements of communication. The former could be protected under the "clear and present danger" test while the latter could be protected to some extent under the complex four-part *O'Brien* test.[30]

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22. 112 S. Ct. 2538 (1992).
23. *Id.* at 2542-47.
24. *Id.* at 2553 (White, J., concurring).
25. *Id.* at 2545.
26. *Id.* at 2547-49 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990) (St. Paul Bias-Motivated Crime Ordinance)).
27. *Id.*
28. Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917).
29. *See* Ginzburg v. United States, 383 U.S. 463, 476-82 (1966) (Black, J., dissenting); *see also* Welsh v. United States, 398 U.S. 333, 372 (1970) (White, J., dissenting).
30. United States v. O'Brien, 391 U.S. 367, 376-77 (1968). According to the

I prefer my (and Judge Hand's) formulation because it takes into account both the communicative aspects of behavior and the behavioral aspects of communication. However, if Justice Scalia is successful in rewriting this aspect of the First Amendment, none of these formulations will have much influence: Justice Black's distinction becomes irrelevant because government can regulate the behavioral aspects of speech, the traditional approach fails because it focuses on the speaker rather than on government, and my formulation fails to capture the ability of government to regulate at every point on the spectrum so long as it does so without basing its restrictions on the content of the speech. The only safe harbor is the realm of the mind; once the thinker opens his or her mouth, government obtains a regulatory power, and the greater the restriction, the less objectionable it is constitutionally.

II. ENDING GOVERNMENTAL SUBSIDIES FOR SPEECH

The laws-of-general-applicability proposition goes hand in hand with an emerging notion, both on the Court and in the political arena, that government subsidies are not constitutionally compelled and indeed may be constitutionally repugnant. The general-applicability concept addresses whether government is required or allowed to provide exemptions for either speech or religion; the subsidy question addresses whether government may refuse to support, or is even prohibited from supporting, expression or religious practices. This section looks at subsidies for speech, which will lead to a short discussion of the Establishment Clause in the next section.

The primary cases in the speech area are *Rust v. Sullivan*[31] (upholding the "gag rule" on abortion advice), *Forsyth County v. Nationalist Movement*[32] (striking down some permit fees for parades), and *International Society for Krishna Consciousness, Inc. v. Lee*[33] (upholding some limitations on Hare Krishna activities in airports). *Rust* is an

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Court in *O'Brien*, even if it is determined that conduct is "protected expression," the government may nevertheless suppress or regulate it if such action (1) "is within the constitutional power of the Government"; (2) "furthers an important or substantial governmental interest"; (3) "is unrelated to the suppression of free expression"; *and* (4) there are no less restrictive alternatives.

31. 111 S. Ct. 1759 (1991).

32. 112 S. Ct. 2395 (1992).

33. 112 S. Ct. 2701 (1992).

example of market economics applied to the government as a purchasing agent for the consumer. If the government is just a buyer, then the government merely purchases a service from a doctor and cannot be required to pay for that which it does not choose to buy, such as gratuitous advice and information about abortion. This is not terribly noteworthy so long as the doctor is not a full-time employee of the government and so long as the government is not able to exercise market dominance, becoming a regulator through its entrepreneurial role.

If *Rust* applied to a full-time employee whose entire professional life were purchased by the governmental entity, then state law school professors, as well as county clerical employees, would have no claims for freedom of speech against an employment policy restricting the subjects on which they could speak. Traditionally, a law school professor has been told to teach a particular class (e.g., Civil Procedure) and could be fired for failing to teach that subject, but he or she could not be fired for teaching either Marxist or neo-classical economic theory as the basis for Civil Procedure. The law school professor has even enjoyed the freedom to criticize openly the content of Civil Procedure as well as the desirability of teaching the course. Similarly, the county clerical employee (although subject to a silly distinction protecting speech on matters of public interest but not on matters of personal interest)[34] has enjoyed some right to speak even on company time.

In both the law school and the county clerk's office (and also in the *Rust* formulation) the employee is free to say whatever he or she wishes when acting outside the zone of employment. This freedom could quickly disappear if the workday were redefined as a twenty-four hour day. One could then argue that the government has purchased the entire time of the employee and need not pay for undesired conversation.

The *Rust* opinion took some pains to distinguish the purchase of services from the provision of a public forum such as a university.[35] What the Court said about the public forum, however, was carefully circumspect and should be read in light of other public forum cases. In the first place, the Court stated that "the existence of a government 'subsidy' . . . does not justify the restriction of speech in areas that have 'been

34. *See* Rankin v. McPherson, 483 U.S. 378 (1987).
35. *Rust*, 111 S. Ct. at 1776.

traditionally open to the public for expressive activity' or have been 'expressly dedicated to speech activity.' "[36] Maybe the *subsidy* does not justify it, but, according to *Barnes*, *public opinion* might.

With regard to public universities, the *Rust* Court merely said that they are "a traditional sphere of free expression so fundamental to the functioning of our society" that they are protected "by the vagueness and overbreadth doctrines of the First Amendment."[37] In other words, the university and other public fora can be subjected to controls that reflect the morality of the majority so long as those controls are specifically stated. What overbreadth would protect after *R.A.V.* and *Barnes* is a mystery. The old rules on public fora permitted pure speech in traditional public fora unless government could find a compelling interest to suppress such speech. A compelling interest usually meant an interest unrelated to the expression (i.e., time, place, and manner regulations).[38] Now, nothing prevents government from simply declaring that previously open fora are no longer available for free speech. For example, a public park could be closed to speeches offered to anyone outside the speaker's family, or a university campus could prohibit structures such as the shanties protesting South African investments.

Other public forum cases also seem to be moving in the direction of terminating governmental subsidies for speech activities. The county ordinance in *Forsyth County* was struck down not because it exacted a fee for parades but because the amount of the fee was determined by the likelihood of hostile reaction and the need for police protection.[39] The implication is that a set fee or a fee graduated only by the size of the parade would be acceptable. More recently, in *International Society for Krishna Consciousness, Inc. v. Lee* (*ISKCON*),[40] the Court returned to the troubling problem of solicitation in public places, particularly airports. The Court split five to four on two different issues, with Justice O'Connor the swing vote, upholding a ban on solicitation and striking down a ban on

36. *Id.* (citations omitted).
37. *Id.*
38. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
39. *Forsyth County*, 112 S. Ct. at 2403-04.
40. 112 S. Ct. 2701 (1992).

distribution of literature in airports.[41] Generally speaking, all Justices agreed that there are certain areas known as traditional public fora, some that are designated public fora, and some that are neither.[42] As Justice Kennedy pointed out, however, nothing other than history and governmental choice distinguishes among these areas.[43] Therefore, a court has no firm basis on which to overturn the managing agency's categorization of a particular area.

ISKCON is problematic because government was not only providing the physical forum but also the audience. The travelers were brought to the airport for one purpose and then became captive targets of solicitation and distribution of literature. The airport authority believed that it was not required to provide both the forum and the audience, that allowing the display of information was a sufficient use of the public forum as defined by the nature of the use to which the building was put, and that it could protect the audience members by restricting personal contact. According to the shifting majorities of the Court, this rationale works only to a limited degree. *ISKCON* seems to stand for the proposition that some degree of subsidy for speech-like activities in "traditional public fora" is required by the First Amendment, but two points make this conclusion shaky. First, privatization of governmental facilities could radically alter the "tradition" attached to various fora. Second, the choice of tradition seems malleable by the Court itself, subject to changing majority attitudes toward what speech activities *ought* to be permitted in what places.

The *Rust* approach is noteworthy because it allows government to refuse subsidies for undesired communication. The public forum cases make the future of governmental subsidization of communication very much a matter of judicial attitude. Religion cases have shown a similar tendency, at least in the establishment context.

III. ELIMINATING SUBSIDIES THROUGH THE ESTABLISHMENT CLAUSE

Lee v. Weisman[44] and *County of Allegheny v. ACLU*[45]

41. *Id.* at 2711.
42. *Id.* at 2705-06; *id.* at 2711-12 (O'Connor, J., concurring); *id.* at 2724-25 (Kennedy, J., concurring); *id.* at 2717-20 (Souter, J., dissenting).
43. *Id.* at 2717-20 (Kennedy, J., concurring).
44. 112 S. Ct. 2649 (1992).

both involved governmental subsidization of religious messages on government property or government time. *Lee* was fairly simple to resolve because it involved direct governmental support of religious speech without much countervailing argument regarding the need for access to the forum in question. *Allegheny*, on the other hand, troubled and split the Court because of the apparent legitimacy of the claim by religious groups for access to the forum. The Court delved deeply into the mechanics and settings of the different displays to determine the extent to which each represented impermissible governmental support (variously described as support, endorsement, or proselytization) for each group.[46] The trouble with this approach, which stems from the "Reindeer Rule" developed in *Lynch v. Donnelly*,[47] is that it makes the validity of every instance of religious access to a public forum dependent on a weighing of facts and circumstances by the Supreme Court.

As Dean Nichol recently pointed out, both the left and the right are currently irritated by the lack of certainty in constitutional adjudication.[48] The *Lemon*[49] test, as applied in cases such as those involving religious displays, is a prime target for this type of attack. The "test" is a good statement of why some types of governmental services to religion are inappropriate, namely those that cannot be offered without requiring government to monitor the use of the aid to determine whether it is being used for a sectarian purpose, but it is not a good "test" for deciding cases. The last two prongs of the *Lemon* test create an apparent conundrum—aid must not be used primarily for sectarian purposes, but government cannot monitor the use of the aid. By implication, if monitoring the use of the aid to comply with the second prong would require governmental dictation of religious practices, then the aid itself is invalid.

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45. 492 U.S. 573 (1989).

46. *Id.* at 608.

47. 465 U.S. 668 (1984) (indicating that although the Establishment Clause would be violated by a city-sponsored crèche display, it would probably not be violated by a display of Santa Claus and his reindeer).

48. Gene R. Nichol, *The Left, the Right, and Certainty in Constitutional Law*, 33 WM. & MARY L. REV. 1181 (1992).

49. Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that government does not establish religion if the statute or governmental practice in question (1) has a primary secular purpose, (2) does not advance religion, and (3) does not involve "government entanglement" with religion).

The *Lemon* test is flawed, not because of the theme it strikes, but because it is used to decide specific cases rather than set out general rules. If *Lemon* were used to lay down rules that could be applied with certainty, less ambiguity about the test would exist. For example, in the field of education subsidies, *Lemon* could stand for the proposition that payments to parochial schools for books and supplies are permissible, but that payments for salaries are not. The salaries fail to meet the *Lemon* test because monitoring a teacher to see how the salary is spent requires the state to determine what the teacher does with regard to her religious beliefs. Why does the prohibition of subsidies not apply to tuition and books for parochial schools as well as to salaries of teachers? This reflects a more practical accommodation to reality—state governments currently need help to produce quality education, and the parochial schools can provide a subsidy to government by absorbing some of the costs of education if government also absorbs some of the costs.[50] We have always allowed some subsidies to religion in the form of municipal services,. and payments for books and tuition can be viewed as such a neutral subsidy. *Lemon* works fine as an explanation for why some categories of subsidies are impermissible; it does not work well, however, as a case-by-case test for particular subsidies.

With this explanation of *Lemon*, *Lee* becomes an even easier case. A subsidy to religion provided by use of a governmental forum for prayers at official ceremonies would require governmental monitoring of the prayer to assure that it is not an endorsement of a particular religion. As soon as government involves itself in this way, it is simultaneously trampling on free exercise and establishment rights. The notion of an officially approved "American civic religion"[51] should be so deeply offensive to religious people as to ensure the demise of all government-sponsored prayer.

Had it been argued in *Lee* that religious speakers were entitled to have access to a public forum as in *Allegheny*, then the free exercise claim would have to be answered. But *Lee* does not involve a public forum. The forum there, as in most official ceremonies or events, was not open. Appearance on the

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50. Mueller v. Allen, 463 U.S. 388, 395 (1983).

51. Stein v. Plainwell Community Sch., 822 F.2d 1406, 1409 (6th Cir. 1987); *see also* Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L.J. 1237 (1986).

program was by official invitation only.[52] The agenda was limited just as much as the agenda and the right of the floor are limited in a legislative session or a judicial proceeding. If the agenda includes an open forum, as is sometimes the case in a city council meeting, then government officials can hardly censor the speech of citizens on that agenda by preventing them from praying during the time allocated for public access. But, as will be explained, nothing in the Free Exercise Clause demands that a closed agenda be opened.

IV. FREE EXERCISE AND SUBSIDIES

In essence, the Establishment Clause states that government may not subsidize religion, at least not in a way that favors some religions or requires governmental control of religion. Does anything in the Free Exercise Clause demand that otherwise closed fora be opened? First, let us compare the Free Exercise Clause to what is required by the Free Speech Clause. Because subsidies for religious exercise are constrained by establishment principles, it would seem that the Free Exercise Clause ought to contain less than the Free Speech Clause. And we have seen that the Free Speech Clause requires subsidies in the form of public fora only if tradition or government choice dictates. Under this view, *Smith* is right because an exemption for accommodation purposes is not required and may not even be permissible.

It may be argued that such a statement makes too great a leap from prohibiting subsidies to prohibiting accommodations. The argument would claim that an exemption is not a subsidy. But the reason for prohibiting the subsidy is the same as the reason for prohibiting the accommodation. To administer either would require the government to decide what is a qualifying religious practice and to ensure that neither the subsidy nor the accommodation is used for support of a particular religion. That is the same two-horned dilemma posed by *Lemon* and is impossible to meet in many contexts. What *Smith* accomplishes is elimination of judicial control of religion or favoritism for particular religions.

Justice Scalia seems to say that there is a good reason for a constitutional prohibition of subsidization of religion through the Free Exercise Clause. A constitutionally based subsidy

52. *Lee*, 112 S. Ct. at 2652.

would require courts to decide what religious practices are entitled to the subsidy, which would require courts to define religion for purposes of the American Constitution.[53] Scalia says that judicially defined religion would be unacceptable, and good arguments support his position. A judicial definition of religion could easily become an establishment. It would grant exemptions only to religious practices favored by the judiciary.

The remaining question is whether *Smith* is a threat to all government subsidies in the form of exemptions and accommodations. If courts are not entitled to decide what qualifies as a religion, why is the legislature or executive entitled to make similar decisions? The First Amendment seems to be emphatic about preventing the legislature from making any law that tends toward (respects) an establishment of religion. Exemptions that are not required by the Free Exercise Clause tend toward an establishment. Moreover, they interfere with the self-definition of religious practice.

As an extreme example, consider the application of Title VII to the priesthood of the Catholic Church by elimination of the religious exemption in Title VII. The statute would then be a law of general applicability, not targeted at either religion or communication. Would there be any free exercise claim for the religious basis of the employment practices of the church? Not according to *Smith*. Take the argument a step further. Is the religious exemption unconstitutional? The Court held in *Corporation of the Presiding Bishop v. Amos*[54] that it was not. But the anti-exemption language of *Smith* is difficult to square with that result. Moreover, the institutional nature of churches makes them even less likely candidates for exemptions than are individuals.[55]

V. CONCLUSION

There is a certain attraction in *Smith*'s impetus toward keeping the courts, and by implication the other branches of government, out of the business of defining religion. But the demise of governmental subsidies for expression and the collapsing of all distinctions between speech and conduct offend

53. *Smith*, 494 U.S. at 886-87.

54. 483 U.S. 327, 337 (1987).

55. *See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680 (1989); Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985); *see also* William P. Marshall, *The Inequality of Anti-establishment*, 1993 B.Y.U. L. REV. 63, 70.

my eighteenth century respect for individual liberty and conscience. If Justice Scalia were willing to acknowledge exemptions from governmental controls for expressive conduct in a wide variety of circumstances, then I would agree with his position that the Free Exercise Clause merely protects freedom of expression. Where I part company with him is in the lack of protection he affords to expressive conduct. He leaves us with exemptive protections only for pure speech, a position that I thought we had abandoned decades ago for very good reasons.

At this juncture, ending all religious exemptions would be too much rationality too fast. Eventually, perhaps, we should eliminate both subsidies and exemptions for religious institutions, but more protection for individual expression should be given in return.