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MOURNING BORNE

Illustrated

BY PAUL ZWOLAK

HUGH HEWITT

I am here to talk a little about religion and law today. I'm really here not because I'm a law professor, I think, so much as because I'm a journalist who reports a lot in the area of religion. I spent a full year preparing a series for PBS called *Searching for God in America* that involved interviews with leaders of religious faith—leaders as diverse as Elder Neal A. Maxwell, the Dalai Lama, Thomas Keating, a Benedictine monk, and Chuck Colson. I've interviewed Robert Funk of the Jesus Seminar, author of *The Five Gospels* and a debunker of Christ's divinity; Adin Steinsaltz, a rabbinic scholar of great tradition; Greg Laorie, a new evangelical force; and assorted New Agers. *The Celestine Prophecy,* by James Redfield—a genuinely wretched book—sold 10 million copies, so I interviewed him. Marianne Williamson is another producer of works that cannot be considered good literature at all, but they are somehow selling more than anything else available on the United States publishing scene. I like to talk with people about what they believe and why they believe it. Today I'm here as a believer talking with a community of believers.

I am an elder in the Presbyterian Church of the United States, and I think matters of faith and their intersection with law produce the most interesting debates. But I don't come as an expert. I'm not a Mike McConnell, one of the country's leading First Amendment scholars. I'm sure you have similar experts on your faculty as well. I am rather that most dangerous of lecturers, the aggressive amateur. I'm going to deliver a polemic but not a philippic.

I BELIEVE THAT THE ADMINISTRATIVE STATE, AS IT GROWS, HAS BECOME INCREASINGLY HOSTILE TO BELIEF . . . BECAUSE THE PEOPLE WHO POPULATE THE ADMINISTRATIVE STATE ARE LARGELY HOSTILE TO BELIEF.

A FIRST AMENDMENT POLEMIC

Now that's the one thing I want you to remember. Years from now, when you can't remember who I was or what I said, I will have at least introduced you to the distinction between a polemic and a philippic.

A polemic is an aggressive attack, an argument with someone, and my aggressive attack, my argument, is with Justice Scalia.

A philippic is also an aggressive attack, but it is a bitter one, drawn from Demosthenes' verbal attacks on Philip II of Macedon when Philip was attempting to take over Greece. Demosthenes was angry and bitter.

I'm not bitter about what I've seen the United States Supreme Court do in recent years regarding First Amendment protections, but I am concerned. And so my polemic, my aggressive attack, is aimed at persuading you to agree with what I say. But I'm not making a bitter argument. I think Justice Scalia remains a man of great wisdom, conviviality, and learning, but I do not understand what he has done to the free-exercise clause of the First Amendment.

THE FREE-EXERCISE CLAUSE

Many of you have probably already studied this. If you haven't, I'm going to give you a brief layman's approach to what has happened in the last seven years to the First Amendment and to the free-exercise clause. The clause says, "Congress shall

make no law respecting an establishment of religion, or prohibiting the free exercise thereof." What does this mean? Well, the Court has been struggling with the question for many years.

Before 1990 the Court had reached a way station of stability. And the rule had evolved that the government could not, without a compelling reason, substantially burden the practice of someone's religious belief, even if it didn't intend to. This is to say that if the government were driving down the street, so to speak, not minding its own business too carefully, and accidentally ran over a religious belief, the government would have to go back and correct its action.

THE *SMITH* DECISION

Then came the case of *Employment Division v. Smith.* Alfred Smith and Gaylan Black were drug rehabilitation counselors. However, they were also members of the Native American Church and, as part of the rituals of that church, they ingested peyote. Rehabilitation center officials found this practice inconsistent with continued employment—not a surprising decision on their part—and fired Smith and Black.

The two plaintiffs applied for unemployment benefits from the State of Oregon, but they were denied. In common practice, if you are discharged for cause, you're not entitled to unemployment insurance. It had long been the rule of the Supreme Court that if you were discharged for cause that was part of your religious practice, even if it did not allow you to participate in the orderly conduct of the work, then that cause could not be used to deny you unemployment benefits. For example, if you were a Seventh-day Adventist and your work compelled you to work on Saturday and as a result you quit or were fired because you refused to, then you could not be denied your unemployment benefits.

In 1990 Justice Scalia—in an opinion strongly supported by his colleagues on the bench—repealed the effects test and embraced a much more sweeping test, one more adverse to religious belief: If a law is neutrally conceived and neutrally applied, no matter what its effects are on religious belief, it will be upheld against the charge that it is interfering with the exercise of religion. Justice Scalia wrote that any society adopting such a system as an effects test is courting *anarchy.* And the danger, in his opinion, increases in direct proportion to the society's diversity of religious beliefs. In other words we *can't possibly* accommodate the free exercise of all the religions that we have in the United States, and as a result we're just going to have to stop proceeding on a case-by-case, effects-test basis.

THE LAW: A GODSEND

The reaction to this was swift. By 1993 a coalition for the free exercise of religion, larger than any previous political coalition organized on a matter of religious belief, had sprung into being, and it was *so* powerful that by near-unanimous votes the House and the Senate passed and President Clinton signed into law the Religious Freedom Restoration Act of 1993 (RFRA). It is a small act, which is itself remarkable, but it said simply that it was about restoring the prior test, prior to *Smith*, and I quote:

Government shall not substantially burden the person's exercise of religion, even if that burden results from a rule of general applicability unless the government demonstrates that the application of a burden to the person (1) is in furtherance of a "compelling governmental interest" and (2) is the least restrictive means of furthering that interest.

So the Congress attempted to send the law back to where it had been; RFRA was a rejection of the *Smith* approach, a rejection of the idea that here neutrality wins. Ninety-five cases quickly followed. RFRA was a powerful tool for people like me, who are occasionally in a pro bono or some other setting representing an interest of a church. I've made that a hobby of mine because I believe that the administrative state, as it grows, has become increasingly hostile to belief. It is aggressively hostile to belief because the people who populate the administrative state are largely hostile to belief. Therefore, individuals like me, who are believer-lawyers, must be

willing to defend the church against burdens placed upon it.

RFRA was a godsend. It allowed me to walk into any city council meeting armed with a clear statute. And that's where I normally find the intersection of church/state problems: land use and churches—and city councils that don't care about the architecture of worship.

One such case, not one of mine, involved a small Roman Catholic church in the city of Boerne, Texas (*City of Boerne v. Flores)*. The church had been there for many years and could only hold 230 worshipers. About 40 to 60 people were turned away from each mass. The city council denied the congregation permission to tear down the old church and expand, arguing that the church could simply add a few more masses, bring in another priest, or do whatever was necessary.

Acting through its archbishop, the Roman Catholic Church said, "No, we have a right to tear down our church. We have a right to build our new church. The architecture of worship matters." To me this is a truism. Evidently it is not for people who are not believers.

I don't believe you can simply turn over the architecture of worship to a historic landmark commission and declare, as the city of Boerne did, "What you decide about a church is the last word." The suit proceeded, and the church won under RFRA because it is a burden on a church to prevent its expansion.

A SETBACK

Just this past summer, however, the court struck down in this case the Religious Freedom Restoration Act—and not by a close margin. J. Brent Walker, general counsel of the Baptist Joint Committee for the Commission on Public Affairs, wrote recently for a symposium I edited on *Boerne,* and said, "Only a handful of people thought RFRA was poor policy or thought it was unconstitutional. That is the good news. The bad news is that seven of them sit on the United States Supreme Court" (2 Nexus 2, Fall 1997).

Two levels of argument exist in *Boerne*. One that I will not discuss is the extent to which the 14th Amendment allows enabling legislation to be passed. That's a different area of constitutional law. The other level is the discussion about the 1990 *Smith* case. Today's talk is all about *Smith.* It's about the role of religion in the United States. It's about the role of religious belief and how much deference ought to be paid to that. It's about what the Framers thought about the Constitution.

If you read these opinions, you'll see two great friends—Justice O'Connor and Justice Scalia—*screaming* at each other through the footnotes over who knows the original intent of the Constitution better. They can marshal their experts on one side or the other. I could walk you through what they say, but I couldn't give you a dispositive answer. However, I think that if you put the proposition to the Framers that church architecture should be decided by those who are not members of the church, the Framers would find the idea to be a bracing assertion and one that was not part of their tradition.

Four questions come out of *Boerne*. The first is a trio of technical problems. What do we do with RFRA now? Does it still apply to federal law? Should we pass many RFRAs around the nation?

The second is, Are churches really vulnerable? And for those of you who are Mormons, you might ask, Is the Mormon church vulnerable because of *Boerne?*

The third question is, What was Justice Scalia, this hero of the conservatives, thinking about? Can we carefully examine his opinion and ask, What was this very brilliant justice trying to accomplish?

And, finally: What are people of faith to do as a result of this?

TECHNICAL MATTERS

As to the technical problems, I will only say cases are presently being litigated over whether RFRA still applies to federal law. There's a good argument that it does. If it does, then what about a church I once represented that could not build on land it had long held because the endangered California gnatcatcher was found on the property? This case will be an argument about whether that church can go forward under the old RFRA. In every state of the union where the coalition continues to organize, an effort exists to have states pass their own RFRAs because, as you know, states can protect rights to a greater degree than the feds can if they choose to do so. Free exercise might mean a lot more to the legislature of California than it did to the Supreme Court majority of seven. And so the debate over many RFRAs is going on around the country. It's kind of a traveling road show. Marci Hamilton, a professor at Benjamin Cardoza Law School in New York, testifies, "What a horrible thing; you can't do this. It violates the establishment clause—bad, bad, bad." And then a whole bunch of other people show up that say, "No we need this; our church is being imposed upon."

CHURCHES ARE VULNERABLE

Are churches vulnerable? This is where the experience of practice informs my professorial and my journalistic approach. If you only knew what went on regarding churches in planning commissions across the United States. If any of you have had personal experience of what the culture of disbelief now does to believers who attempt to organize and practice their faith, you understand that churches are not only vulnerable, they are *very* vulnerable.

I will give you a couple of examples.

In my own Presbyterian church, where we recently built a sanctuary, the building inspector arrived and said, "You have a little step-up (actually two step-ups), and so we want handrails onto the platform where worship is conducted." Of course, no one goes up there except the pastor. That's where he preaches. So we engaged in an ultimately successful eight-week rigmarole that exhausted us and took much effort. We had to organize and use up political capital and approach the city council to get the requirement of handrails removed from ruining our architecture of worship.

You might say, "Well, that's not really a big deal is it, Hugh? That's something that you ought not to have to be able to cite RFRA for." But I would ask you: "If a handrail can be required, why not then a veil? If a veil can be required, why not a

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wall? And if a wall, why not then regulate the entire architecture of worship?"

Anyone connected with church work throughout the United States will tell you that the current U.S. administrative state—the regulatory apparatus, be it environmental, be it land use, be it any of a thousand faces that state, local, and federal governments show—is hostile to belief.

Professor Phillip Johnson, a well-known evangelical Christian from the University of California, Berkeley, Law School and a prolific author and a constitutional scholar of no small note, believes that the court and elite opinion (especially within the administrative state) have "a long-term program of making constitutional law congruent with agnostic liberal rationalism" (2 Nexus 2, Fall 1997).

I agree with that. There is an active hostility to belief in the United States culture of elite opinion right now. Johnson also quotes approvingly from psychologist Peter Berger: "If India is the most religious country in the world and Sweden is the least religious, then the United States of America is a country of Indians who are ruled by Swedes" (Id.).

The trend is ominous because the antibelief mind-set, the culture of disbelief, comes at a time and in a culture of mockery where, if you are a person of faith and you take that faith into the secular world, you will not only be met by argument but more often than not you'll be met by mockery. "It Is Irrational to Believe" is the U.S. cultural context I'm talking about. The ability to destroy belief without really ever engaging with it is so dominant that churches are being stripped of the one constitutional protection that was originally theirs. At least the free-exercise clause had occasionally slowed down the state in its collision with organized faith, until *Smith* came along with its hostility to faith and the Supreme Court destroyed the one protection that was there, the effects test. Then it struck down RFRA. In other words, it's raining very hard, and the government is busy taking down the levies. That's what the Supreme Court did. That's why I argue with Scalia.

WHAT WAS SCALIA THINKING?

What was Justice Scalia thinking about in the *Smith* decision? He said in effect that any society adopting such a system, an effects test, is courting anarchy, and the danger increases in direct proportion to the society's diversity of religious beliefs.

Clearly we do have a lot of fringe faith in the United States. Remember Heaven's Gate? Folks who depart from their San Diego mansion to join comet Hale-Bopp are not by any means orthodox.

You have the Koresh disaster and tragedy in Waco, Texas.

You have the Jim Jones People's Temple.

I can find you fringe cults in any U.S. city that will scare you and everyone else concerned about fringe cults. There are many, and those concerns are well based, theologically. We have to worry about them.

Nevertheless, are they more dangerous than the resulting loss of freedom? Was Scalia really concerned about our safety? Whereas there will occasionally be headline-grabbing disasters like those I've just named, it's not really an issue that drives most people through their daily lives.

Perhaps he may have been suggesting a kind of Darwinian approach to organized religion: truth will win out, and genuine faith will prosper. Therefore, an effects test will only protect that which ought not to be protected. If there is transcendental truth and it can be discovered, then genuine faith will find its way out.

This is not, however, what I think he was saying. His argument is only "We can't afford to do this."

Is he thinking of a test that he really can't put forward (because it would be considered so absurd in political and legal circles), which is that this is an overwhelmingly Judeo-Christian nation, and, as a result, the free-exercise clause protects the free exercise of Christianity and Judaism? If you go back to Washington's letter to the Newport congregation, however, the concept would be included among the founding documents.

If you proffer that argument in today's America, the PC police will lynch you before you get home. You cannot make that argument anymore.

I think Justice Scalia ought to have supported an effects test that leans toward traditional religion. That's how I want to conclude today, by talking about what ought to be the response of people of faith to this opinion and to this turn of events.

CAN WE CORRECT THE SITUATION?

I have recently finished a book called *The Embarrassed Believer: Reviving Christian Witness in the Age of Unbelief,* and it's about trying to correct the last 45 years of cultural attack on religious faith in the United States. This attack is now triumphant, and outside the religious ghetto, outside what I call the parallel universe of believers, you can find very few instances showing that the United States is generally a people of great faith. Yet *every* week 100 million Americans will go to their church, their temple, their synagogue, their mosque, whatever—100 million!

In spite of this fact, if you look deeply at modern American culture, you will find that this faith is not reflected there at all. There is a *mocking* aspect toward those who believe, manifest in high culture by the opinion elite, that is pervasive. How did we get there?

Proposition One has been a problem since the Enlightenment. Those who believe that rationality simply cannot be reconciled with religious conviction have triumphed in many ways. They're winning the field. My book *The Embarrassed Believer* plays off that of another book, this one from the early '50s: *The True Believer* by Eric Hoffer, a longshoreman turned charming philosopher-rogue.

Hoffer wrote from the rationalist perspective. He's a great intellectual and a fine writer who had a powerful effect on the culture of the '50s, which has carried forward. Hoffer said, "Don't believe in anything. It's all a fraud. The genuine person of integrity is not part of a project that involves many people." This posture has a profound attraction to those who want to be unique and have a great deal of praise

from the community. It is particularly attractive to journalists. The media loves practicing the oppositional theory against the true believer.

Pick up a copy of the *True Believer,* and you'll be astonished. You will see Christianity being equated with communism and fascism. Hoffer's argument is subtle and well developed, but it's there. His argument that all beliefs are alike—religious belief, political belief, ideological belief—and that all leaders are alike—Stalin, Hitler, Christ, the Pope—made it easy for the mass media (which was just coming of age in the United States then) to adopt a hostility toward belief. It is a hostility that now infects the courts and infects decision makers vis-à-vis religious practice. So what are we supposed to do in this culture? If you carry your faith out of your law school and into any kind of work setting, you will be sanctioned, or you will be finding yourself marginalized. What is a believer to do when we have this constitutional new structure that says "no intent to harm, no protection?"

A RETURN TO APOLOGETICS

First, it's my belief that our important project for early next millennium is apologetics. People of faith who have intellect have to make belief respectable again in the culture at large. Because people of faith have abandoned the public square and have generally not engaged in the apologetic project, it allows a group of the faithless—largely drawn to politics because they need meaning and significance in their lives—to take an "Oh, religion; it's like the Rotary; and the Rotary's like a school; and it's like . . ." They'll lump together the variety of clubs in the category of communities. They'll treat any religion as just another club, because the apologetic project has completely failed.

Nonbelievers think we're all nuts because we really take this stuff seriously, that it's some kind of imbalance in our chemistry. We haven't helped them understand that we believe it because it's rational—something that is defensible.

Much of this has to do with the defeat of fundamentalism in the *Scopes* trial, where the appeal to naked prejudice and the appeal not to reason but to orthodoxy lost a lot of attraction for intellectual leaders. As a result, in academia around the country today you will find very few believers outside a sectarian enterprise like BYU, Notre Dame, and the like (at least very few who are public about it, fearing as they do the swift and certain punishment within an academic atmosphere).

So how do we get back to apologetics? I interviewed LDS Elder A. Neal Maxwell last year for *Searching for God in America.* He's an apologist. He's attempting to make rational the beliefs of LDS people for an unchurched PBS audience. There is a great desire for rational, smart, even somewhat schooled people to explain why their faith, which they intuitively know through revelation to be true, is also consistent with the natural order that we can see and discover through the scientific process. We need to address this desire.

As more of that occurs, and it needs to occur in a huge volume, this adverse culture can at least be neutralized if not turned. In a neutral culture a historic landmark commission will *know* how important it is that the church be allowed to organize its masses according to a schedule and in a sanctuary it designed. They would know that, for example, a new Mormon stake center must be controlled for theological reasons by the church, not by local land-use authorities. By changing the culture, then, you can neutralize the *Smith* decision.

DEFENDING TRADITION

Second, I think it's very important to defend the historic tradition of America—and this may be a hidden motive of Justice Scalia. I know that you're not supposed to say on the air—though I occasionally say it—"It's a Christian country, folks. That's what is was originally. That's what it remains predominantly." We've got to be able to name that which is traditional and revered in the United States in order to protect it—and to do so without fear of being thought intolerant. It is common sense that the traditions of the United States, when it comes to religion, are Judeo-Christian traditions.

Now, finally, I don't know if the court can adopt a traditions test. I'm not advocating that. It would require a great deal of courage to define free exercise as meaning something other than free exercise for all, anytime, for anything that calls itself religion—because if Justice Scalia is correct, U.S. prisons would have to permit animal sacrifice. This is a caricature of the argument, but it's true to a certain extent. If you allow everyone to practice their religion free of substantial burden, and animal sacrifice is part of that ritual (as it has been in the Caribbean-based religions now prevalent in Texas and Florida), and prisoners feel the need to practice their religion within prison systems, then, Justice Scalia's argument runs, "Slippery slope—you're going to have animal sacrifice in the prisons. Since we can't go there, we have to have a neutral law test."

I don't think we have to go there. If you use some common sense about the traditions on which free exercise is hung, you'll be okay. Those are Old or New Testament traditions.

POLITICAL DIRECTNESS

Let me close with the last argument: politics, and the extent to which there ought to be religious politics in the United States. This is a divisive issue—something I struggle with because there is a great danger in politicizing faith and in saying that "my faith made me do it." Still, it seems to me that, at least for the short term, people of faith have to become more active in asserting the primacy of faith in U.S. politics. And that means asking not just the president but especially local officials what their views on belief are—not what they believe but what their views are on the centrality of belief.

Does religious freedom have a future? Yes! But only to the extent that those who believe in it pursue it vigorously.

Hugh Hewitt is a journalist, lawyer, and law professor from Irvine, California. This article was adapted from a speech given at the J. Reuben Clark Law School on February 5, 1998.