THE SWEET TASTE OF IRONY

Frederick Mark Gedicks

IN THE EARLY 1970S, WHEN THE CHRISTIAN RIGHT WAS ONLY A FEW VOICES CRYING IN THE WILDERNESS, RELIGIOUS CONSERVATIVES DREAMED OF THE DEFEAT OF THE FORCES OF SECULARISM. THEY LOOKED FORWARD TO A DAY WHEN ABORTION WOULD BE ILLEGAL AND school prayer and tuition vouchers would not, a day when government and religion would be partners rather than adversaries. Back then, however, they could only dream. Despite many Republican appointments since the 1950s, the Supreme Court remained firmly committed to a secular liberalism, and the "moral majority" was more than wishful thinking in only a few southern and Rocky Mountain states. ⁂ Things change. Religious conservatives aligned themselves with secular conservatives, and together the two now dominate the Republican Party at all levels. Even among Democrats, all but the most courageous now run from the "L word." If the Reagan years marked a conservative shift in the political mood of the United States, then President Bush and the Republicans now seem positioned to consolidate that shift into a conservative Republican majority in Congress, some thing Reagan had for only a few years, and then only in the Senate. ⁂ But if the conservative revolution in Congress is still to come, the revolution in

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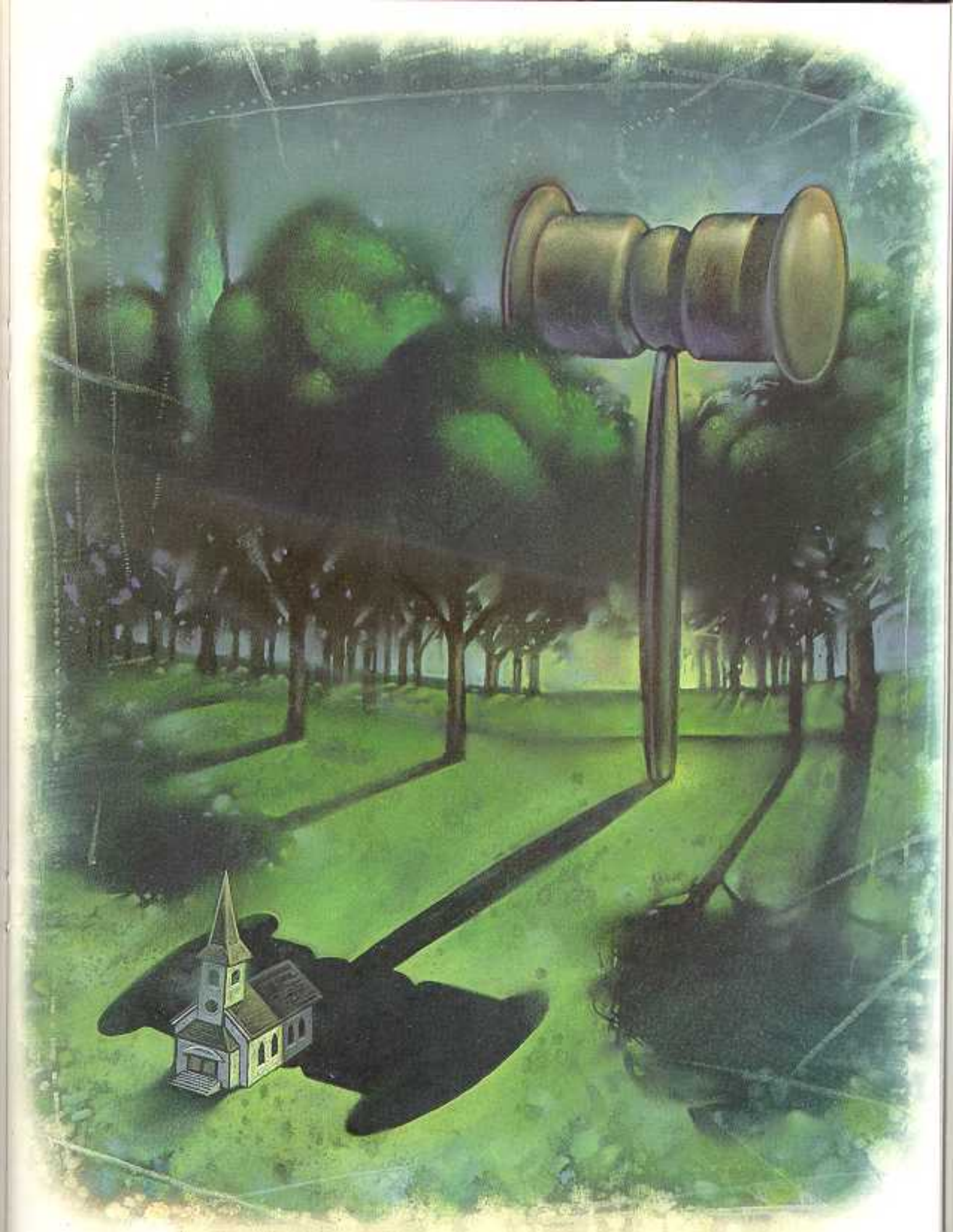

the Supreme Court has already come and gone. With the elevation of Justice Rehnquist to chief justice and the successive appointments of Justices O'Connor, Scalia, Kennedy, Souter, and Thomas, conservatives have grown into a position of dominance on the Court Consequently, the agenda of religious conservatives has been substantially advanced by Supreme Court decisions *Roe v Wade* (1973) has been badly eroded, and is poised to topple. In a ringing endorsement of traditional religious values, the Court refused to recognize homosexual rights in *Bowers v. Hardwick* (1986) *Bowen v Kendrick* (1988) upheld federal grants to religious social service organizations to provide teenage pregnancy (but not abortion) counseling. Other government sponsorship of religious activities has been repeatedly approved by the Rehnquist Court, and recently *Mergens v Board of Education* (1990) even granted group prayer a cautious re-entry into the public schools.

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Perhaps distracted by all these victories, many religious conservatives failed to notice other, less congenial developments on the Court during the these years In *Goldman v Weinberger* (1986), a majority opinion by then–Justice Rehnquist held that the free exercise clause did not exempt an orthodox Jewish officer from military regulations that prevented him from wearing a yarmulke with his uniform, worrying that permitting the yarmulke might require the military to allow cowboy hats as well In a subsequent case, *Lyng v Northwest Indian. Cemetery Association* (1988), Justice O'Connor held for the Court that the free exercise clause did not prevent the government from building a logging road near a sacred Native American worship site, even as she acknowledged that the road would have a "devastating" impact on the tribe's religious practices In still another case, *Jimmy Swaggart Ministries v California Board of Equalization* (1990), Justice O'Connor and the Court decided that the free exercise clause did not exempt a church's sale of Bibles and other religious literature from a state sales taxes because churches were not specifically targeted by the tax

The Court applied the coup de grace in *Smith v Employment Division* (1990) In an opinion by Justice Scalia, the Court abandoned more than 25 years of case law that had protected religious free exercise. Instead, the Court decided that the free exercise clause did not exempt religious organizations and individuals from generally applicable legislation, no matter how great the burden on religious exercise and no matter how trivial the government's reason for applying the law to believers

Smith literally set free exercise doctrine back a hundred years, to the prosecution of Mormon polygamists under federal antibigamy laws In the wake of the Court's decision in *Reynolds v United States* (1878) denying Mormons a free exercise exemption from these laws (which Justice Scalia cited with approval in *Smith*), the federal government dissolved the corporate status of the Mormon church, seized its property, and appointed a receiver to administer its affairs The Supreme Court sustained all these actions against constitutional challenge It even upheld an Idaho law that required nonpolygamous Mormons to affirm, before voting, that they did not hold to Mormon beliefs about marriage. With their church on the verge of disintegration, the Mormons finally abandoned polygamy Only then did the government relent

The repeal of free exercise rights by the new "conservative" Supreme Court shows how irrelevant partisan labels have become to religious freedom American politicians today are largely divided by varying commitments to "statism" and "libertarianism " A statist generally supports government intervention and regulation; a libertarian generally opposes it Political conservatives (and especially religious conservatives) tend to be libertarian on economics and business matters, and statist on matters of personal morality; political liberals tend to be the opposite On matters of religious free exercise, however, there is no such pattern among either liberals or conservatives; free exercise statists and libertarians are evenly scattered across the political spectrum.

Religious conservatives have assumed that secular conservatives and, in particular, Supreme Court conservatives are consistently libertarian about religious free exercise; events have proven otherwise The conservative bloc of the Supreme Court is statist about religious freedom (and most other constitutional rights)—meaning that it will rarely, if ever, stand on the side of religious believers against government intrusion on religious belief and practice.

Believers should expect little from a Court that cannot tell the difference between a yarmulke and a cowboy hat, that deems the destruction of religious culture an acceptable cost of building a logging road, and that fails to see the coercion in government taxation of bona fide religious activities

Religious freedom in the United States now exists at the sufferance of Congress and the state legislatures; there are no

longer any free exercise arguments to make for religious persons and entities burdened by generally applicable government action Should Congress decide to draft Quakers or Jehovah's Witnesses into the military, the free exercise clause will not prevent resisters from going to jail Should Congress or the states eliminate religious exemptions in antidiscrimination laws, the free exercise clause will not protect churches whose theology prevents them from ordaining women or homosexuals to the priesthood. Should Congress decide to tax churches, the free exercise clause will not protect those who refuse to pay.

The government is now free to deal with all religions the way it once dealt with the Mormons And, like the Mormons, those who wish to survive in the United States will ultimately have to do the government's bidding

An effort is now underway to reverse the effect of *Smith* through federal legislation, the proposed Religious Freedom Restoration Act of 1991 Ironies abound in this effort For the first time in recent memory, religious conservatives find themselves on the same side of an issue as the American Civil Liberties Union The purpose of the act is to restore the protective doctrine of free exercise exemptions articulated and developed by the Great Satan of conservative politics, the Warren Court (Impeach Earl Warren!) The Warren Court's exemption doctrine is the very doctrine that has been abandoned by the current conservative Court majority whose emergence religious conservatives greeted with such celebration

Religious conservatives over the last generation believed that because their political agenda substantially overlapped that of secular conservatives, the secularists also shared the believers' conviction that religion is individually and socially valuable, sufficiently valuable to merit protection against government intrusions. In this they were badly mistaken. No American political party on the right or the left embodies the theological interests of any religion, much less that religion's primal interest in independence and survival

The corollary point is also true Liberals may value religion even though they oppose religious conservative political initiatives, a point highlighted by the resignation of Justice Marshall last summer Religious conservatives were uniformly glad to see Marshall go; he opposed virtually all of their programs Yet, Justice Marshall was a solid vote for the free exercise of religion

When President Bush nominated Judge Clarence Thomas to succeed Justice Marshall, religious conservatives showed no sign of having learned their lesson Within days of Judge Thomas's nomination, they pronounced themselves pleased with his political views As usual, religious conservatives assumed Thomas' support of their political agenda meant that he also believes in strong free exercise rights Given the free exercise views of previous Reagan-Bush appointees, that assumption is naive

Religious conservatives are now reaping the harvest sown by their political alliance with secular conservatives; they would be well advised to plant more carefully in the future

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A NEW WINDOW ✠ *CHOOSING THE DREAM: THE FUTURE OF RELIGION IN AMERICAN PUBLIC LIFE,* BY Frederick Mark Gedicks and Roger Hendrix; Greenwood Press, Westport, Connecticut, 1991; 216 pages; $42.95

The thinking of most people in this country seems super-homogenized, following cues from our national media The essays you read in one national magazine are mostly variations on a theme of the others, particularly when dealing with the Supreme Court, religion, and politics The result—a precarious stultifying of thinking and a reluctance to allow digression from the "national" opinion We fool ourselves, thinking we are diverse in our meditations and kind to those who don't share our views But it is all mostly window dressing. ✠ *So it is refreshing when someone gives us a new window through which to view a part of the world For example, Mary Ann Glendon's book* Abortion and Divorce in Western Law *gives us a fresh view of how legislation affects our attitudes on divorce and abortion* ✠ *In a similar vein, authors Gedicks and Hendrix have written* Choosing the Dream, The Future of Religion in American Public Life, *which gives a novel view of the relationship between religion and politics Perhaps what's most unique about the book is that it features issues and provides some responses to questions most of us are only vaguely aware of—deep political currents pulling us unknowingly in directions we might not choose to go* ✠ *Gedicks and Hendrix construct a convincing case that nonempirical and even some clearly irrational elements of our society are indispensable Their arguments are designed to make sense to both the devout and the secular mind-set For example, in the chapter "Religion and the Unconscious" they refer to the famed August Kekulé dream (that was a catalyst in Kekulé's discovery of the closed molecular structure of the benzene ring) to show that the unconscious mind can be an abundant fountain of knowledge and understanding* ✠ *Other chapters detail the Supreme Court's record of minimal support for religious liberty; church-state separation issues; religious repression; why the threat of religious violence is falsely attributed to all modern religious groups; and the healthy integration of public life and religion. Across the religious and political spectrum, the book offers challenges to many assumptions After absorbing this information, few will feel comfortable with the status quo.* ✠ *The one flaw a reader may notice is not in textual substance but in editing Most editors feel that 10 percent of anything written is fat* Choosing the Dream *seems to have skipped the rigorous editorial honing it needed. There are moments of verbosity and redundancy But there are more moments of brilliant, thought-provoking writing* —Charles Cranney