THE FREE EXERCISE CLAUSE AS A RULE ABOUT RULES

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What kind of rule is the Free Exercise Clause? More specifically, to what does the Clause apply, and what kind of things does it regulate? Professor Michael McConnell indicates that the Free Exercise Clause means that the government may not prohibit the free exercise of religion.[1] The Clause, however, actually says "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ."[2] My claim is that Professor McConnell's interpretation is incorrect. The Free Exercise Clause is a ban on laws. It prohibits Congress from adopting certain rules. After incorporation, it does the same thing to the States.[3] It is about rules, not about specific instances or specific decisions that the government makes according to those rules.

I. A RULE ABOUT RULES

To see how this focus on rules—rather than specific cases or instances—flows from the text of the Clause, we must make a gestalt shift. Justice O'Connor's concurrence in *Employment Division, Department of Human Resources v. Smith*[4] helps us make this shift by challenging Justice Scalia's majority opinion on Justice Scalia's own ground—the Constitution's text. Justice O'Connor wrote that "a law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person's free exercise of his religion."[5] Yet while her logic is perhaps inescapable, Justice O'Connor answers the wrong question.

Justice O'Connor's approach focuses on individual cases. Judges and lawyers almost always think in terms of cases. Con-

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1. Michael W. McConnell, *Should Congress Pass Legislation Restoring the Broader Interpretation of Free Exercise of Religion?*, 15 HARV. J.L. & PUB. POL'Y 181 (1991). Consider this McConnell passage: "The crucial issue in free exercise cases is . . . whether the law in fact prohibits a religious practice." *Id.* at 185.

2. U.S. CONST. amend. I.

3. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

4. 110 S. Ct. 1595, 1606 (1990) (O'Connor, J., concurring).

5. *Id.* at 1608.

sequently, they look at the Free Exercise Clause and at the party in a particular case and ask whether that person's exercise of religion has been prohibited. That, however, is the wrong question. The Free Exercise Clause does not say that no one's free exercise of religion shall ever be prohibited. It says only that Congress "shall make no law prohibiting the free exercise" of religion. It is about whole laws, not specific cases.

Here, then, is the gestalt shift: The proper question in *Smith* was whether the Oregon law at issue was a law that prohibited the free exercise of religion.[6] Thus, the question under the Free Exercise Clause has to do with the law in the abstract—with the content of the rule it adopts—and not with the law's application in any particular case. If the Free Exercise Clause means what it says, it prohibits the enactment of certain kinds of laws. Because the Clause is a rule for legislatures, we can ask the right questions under the Clause by putting ourselves in the position of the legislature and asking whether the statute in *Smith* was a law prohibiting the free exercise of religion. Forget about the particular facts of particular cases: Imagine instead that you are a legislator trying to comply with a constitutional prohibition that is explicitly addressed to the acts of legislators.

Once the question is framed in this way, there are two possible answers, each of which corresponds to a different understanding of what it means to be a law prohibiting the free exercise of religion. One possible response—the one that is most natural—is to say that Oregon's peyote law is not a law prohibiting the free exercise of religion because it has nothing to do with religion. A law that made it a crime to conduct Mass would be a law prohibiting the free exercise of religion; a drug law would not be.

The other possible answer is to consider that there might be cases like *Smith*, in which the ban on peyote would ban a religious practice. You might then say that the peyote statute was a law prohibiting the free exercise of religion, because there might be instances in which that was its practical effect. Therefore, you could not vote in favor of it and be true to your oath

6. *See* OR. REV. STAT. § 475.992(4) (1987). The statute makes it a Class B felony to possess, knowingly or intentionally, certain controlled substances. *See id.* Among the various controlled substances the possession of which is proscribed by the statute is the drug peyote. *See* OR. ADMIN. R. 855-80-021(3)(s) (1988). Smith argued that the use of peyote was essential to the exercise of his religion.

to support the federal Constitution.[7]

Obviously, the second outcome, under which the Free Exercise Clause would invalidate a vast number of laws,[8] is an unpersuasive account of what it means to be a law prohibiting the free exercise of religion. But that means that if the Free Exercise Clause is what it appears to be—a law for lawmakers, a rule about rules—then Justice Scalia is right. The Clause forbids only laws about religion, because if it forbade all laws that might affect religion it would forbid almost everything.

I readily admit that my reading has a consequence that must seem rather strange: Laws stand or fall as a whole. One could re-phrase this idea by stating that under the Free Exercise Clause, all laws not facially invalid are valid in every application. Perhaps that seems odd, but it is not really all that strange. First, consider the circumstances under which the Constitution and the Bill of Rights were formulated. The Framers, having just established a new government, were deciding what Congress could do, and so naturally they passed a law about the kinds of laws Congress could pass. The Free Exercise Clause was a "meta-law," if you will—a law about laws, a rule about rules. There is nothing really unnatural about that. We tend to miss this possibility because we are more familiar with a different kind of constitutional provision, the sort that privileges certain kinds of individual rights or conduct against any government interference.

The second point to consider is that we are not complete strangers to rules about rules. We do not think about them in all contexts—perhaps because they do not have a name—and we rarely distinguish "meta-rules" from other kinds of prohibitions. Professor McConnell, however, introduced the idea of "meta-rules" when he referred to anti-discrimination provi-

7. *See* U.S. CONST. art. VI ("The Senators and Representatives . . . and the Members of the several State Legislatures, . . . both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

8. Consider, for example, the resolution of the following cases under the second decision rule proposed: Hernandez v. Commissioner, 490 U.S. 680 (1989) (rejecting a free-exercise challenge to income tax provisions alleged to deter adherents from engaging in certain church-related activities); United States v. Lee, 455 U.S. 252 (1982) (granting no relief to an Amish employer who failed, for religious reasons, to contribute to the social security tax system); Gillette v. United States, 401 U.S. 437 (1971) (sustaining the military selective service system against the claim that it violated the Free Exercise Clause by conscripting persons who opposed a particular war on religious grounds).

sions,[9] which are generally understood to be rules about rules. When we say that under the Equal Protection Clause,[10] a statute with a discriminatory impact violates the Constitution only if it was enacted with a discriminatory *purpose*,[11] what we mean is that the governmental conduct we are looking at shall be invalid only if it was based on the use of a principle or criterion that is forbidden: Criteria and principles are rules.

The best known such criterion is race. To say that white children must go to school *A* and black children to school *B* is to have a rule based on race.[12] On the other hand, to say that lawmakers must not discriminate on the basis of race is to say that you cannot have that kind of rule. The non-discrimination rule is a "meta-rule." In the anti-discrimination area, when we say that the Equal Protection Clause does not have an effects test,[13] we mean that in applying the Clause we will focus on the government's rule-making activities rather than any particular result or pattern of results that the rule produces.

In fact, the serious difficulties lie not with meta-rules, which merely take some getting used to, but with the approach Professor McConnell and Justice O'Connor urge. My interpretation (and in particular its unusual consequence that laws are always either facially invalid or facially valid) has the enormous advantage of getting rid of the great problem of the pre-*Smith* Free Exercise Clause jurisprudence that Justice O'Connor and Professor McConnell would like to bring back. If the Clause operates on a case-by-case basis, then religionists are either uniformly exempt from all laws that happen to ban their reli-

9. *See* McConnell, *supra* note 1, at 181.

10. U.S. CONST. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). My reference to orthodox equal protection jurisprudence should not be taken as an endorsement of the prevailing theory of § 1 of the Fourteenth Amendment. Much the better view of § 1's original meaning is that the Privileges or Immunities Clause, rather than the Equal Protection Clause, is the primary guarantee of equal citizens' rights. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 342-351 (1985).

11. *See* Washington v. Davis, 426 U.S. 229, 239-40 (1976) (establishing "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose"); *see also* Mobile v. Bolden, 446 U.S. 55, 65-66 (1980) (holding that Mobile's at-large voting scheme would violate the Equal Protection Clause only if it were enacted for the purpose of discriminating against blacks); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977) (holding that proof of a discriminatory intent or motive is required to show a violation of the Equal Protection Clause).

12. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

13. *See* cases cited *supra* note 11.

gious practices,[14] or they are sometimes exempt and sometimes not.[15] Neither of these choices is appealing. If we take the first result, religious practice has an absolute privilege against the state and human sacrifice in the name of religion becomes a constitutional right. If we are not prepared to live with that outcome—if we think that the laws against murder and maybe even the laws against drug use apply to religious practices but that laws against littering might not[16]—then we need a principle that tells us when religious conduct is exempt from government regulation and when it is not. As Professor McConnell said, in the old days that principle usually involved public health or safety[17]—basically, the protection of third parties. Today, we know that principle as the compelling state-interest test.[18]

It is easy to make fun of the compelling state-interest test, and Justice Scalia does a good job of it in *Smith*.[19] No one really knows how to distinguish compelling and non-compelling state interests. That is surely a problem—because constitutional rules should be capable of principled, neutral application—but the real problem is that the doctrine, in its old or new form, has no textual hook in the Constitution. It has no place in the Free Exercise Clause. Unlike some of the earlier state constitutions,[20] the First Amendment says nothing that would save laws

14. *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943):

> 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 . . . freedom of worship . . . may not be submitted to vote; [it depends] on the outcome of no elections.

15. *Compare* United States v. Lee, 455 U.S. 252 (1982) (granting no relief to an Amish employer who failed, for religious reasons, to contribute to the social security tax system) *with* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (invalidating compulsory school attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).

16. *Cf.* Schneider v. State, 308 U.S. 147, 162 (1939) (holding that a city's interest in keeping its streets free of litter is insufficient to justify the city's limitation on the defendant's free speech and press rights to distribute leaflets).

17. *See* McConnell, *supra* note 1, at 181.

18. *See Smith*, 110 S. Ct. at 1608-09 (O'Connor, J., concurring); *Yoder*, 406 U.S. at 215.

19. 110 S.Ct. at 1604-05.

20. For example, the New Hampshire Constitution of 1784 recognized every individual's "right to worship GOD according to the dictates of his own conscience, and reason . . . provided he doth not disturb the public peace, or disturb others, in their religious worship." N.H. CONST. of 1784, pt. I, art. V. These early state constitutions are discussed in Professor McConnell's superb article, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1455-58 (1990) (collecting provisions).

that protect third parties, let alone anything about compelling state interests. The doctrine that Justice O'Connor wants is problematic because a crucial part of it is simply manufactured.

To sum up, if we are not prepared to live with doctrinal caveats that are imposed by fiat, nor with permitting Moloch worshippers to engage in human sacrifice, then we are driven back to the choice I posed earlier: The Free Exercise Clause must be a ban on laws, and the important question is whether it is a ban on laws about religion or a ban on all laws that might have the effect of prohibiting a religious practice. Given that choice, it is almost certainly the former. A serious reading of the language of the Clause thus will rule out every reading but the one I suggest as either textually insupportable or simply ridiculous. The reading I urge is not strange if we think about the Free Exercise Clause in the context of the framing, rather than in the context of 200 years of judicial review and case-by-case decision in the wake of *Marbury v. Madison*.[21] It is perfectly reasonable to formulate parts of a Constitution as rules for the legislature—rules about rules, laws about laws.

II. Section 1, Section 5, and the Humpty Dumpty Power

Professor McConnell suggests that Congress has power under Section 5 of the Fourteenth Amendment in effect to decide what the proper scope of Section 1 is, and therefore to undo *Smith*. I do not agree. On the contrary, I think that the same close attention to constitutional text that I urged in interpreting Section 1 should be applied in interpreting Section 5. If we give the text that close attention, and ignore more general considerations of federalism and separation of powers, as well as general notions about the overall meaning of Reconstruction, we will conclude that Section 1 means what it means, not what Congress says it means.

In order to sharpen our understanding of the text and of its history, we should examine its drafting. The text of Section 1 and Section 5 of the Fourteenth Amendment[22] derives from a

21. 5 U.S. (1 Cranch) 137 (1803).

22. The Fourteenth Amendment, Sections 1 and 5, reads as follows:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process

draft by Representative John Bingham:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several states equal protection in the rights of life, liberty, and property (5th Amendment).[23]

Bingham's text was changed so that Congress would have a little less power. Unlike Bingham's proposal, the actual Fourteenth Amendment includes a series of rules for the States—the citizenship rule, the privileges or immunities rule, the due process rule, and the equal protection rule—and a grant of power to Congress in Section 5 to enforce all those rules. Bingham's proposal had contained no rules of its own; it was simply a grant of power to Congress. But Section 1, as adopted, does contain a rule, and Section 5 grants a power to enforce that rule. This means, as a simple textual matter, that the content of Section 1 must be the ultimate touchstone of Congress's authority under Section 5.

During Reconstruction there was considerable controversy in Congress over what it could do under Section 5. That struggle is very instructive, primarily because of what was *not* at issue. To see my point, consider the progression of enforcement measures enacted during Reconstruction. Congress clearly had the power under Section 5 to provide a federal criminal penalty for state officials who violated federal rights—indeed, Congress had done so earlier in the Civil Rights Act of 1866.[24] At the time, this action was quite shocking. The next step under Section 5 was to provide a private cause of action against state officers and people acting under color of state law who had invaded federal rights. That too was quite something at the time, and Congress did it in the Ku Klux Act of 1871.[25]

The next step on the road to increasingly aggressive congressional enforcement of Section 1 of the Fourteenth Amend-

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> of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> . . . .
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> SECTION 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend XIV.

23. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

24. Ch. 31, 14 Stat. 27.

25. Ch. 99, 16 Stat. 433.

ment was highly controversial at the time, and it is questionable whether it was actually authorized by Section 5. When a State had failed to perform its duty under the Equal Protection Clause (for example, when the States were not protecting victims of Klan violence from the Klan, or when the States were not protecting people's common-law right of access to common carriers when the common carriers discriminated on the basis of race), could Congress step in directly and supply those protections itself, by giving one private person a cause of action against another private person, rather than trying to coerce the States into doing what was primarily their job?[26] Congress sought to do so in the Ku Klux Act and the Civil Rights Act of 1875.[27]

Another enforcement question is more familiar to us today. Can Congress adopt intentionally overbroad rules? That is, can Congress eliminate something that everybody agrees is a violation of Section 1, by banning a category of actions that includes a lot of violations of Section 1, but does not consist entirely of such violations? Literacy tests, for example, frequently have been used for racial discrimination,[28] but literacy tests themselves, if adopted for non-racial reasons, do not violate the Constitution.[29] Can Congress simply ban literacy tests, as opposed to literacy tests that actually violate the Fifteenth Amendment? If so, then perfectly innocent literacy requirements are banned along with the culpable ones.

I ask this progression of harder and harder questions, not so much to show that Reconstruction does not provide support for the most expansive reading of Section 5, but in order to point out that even as Congressional power gets bigger and bigger, Congress is never given the authority to go hunting for something that is not a violation of Section 1. That is so because every time, in order to answer the question under Sec-

26. The debates concerning the Ku Klux Act focused on Congress's power to protect individuals from the depredations of other private people such as the Klan. The debate on the Civil Rights Act of 1875 focused on Congress's power to grant access to common carriers, who were private persons. Then-Representative James A. Garfield discussed this issue in detail, and presented the moderate Republican position, during the Ku Klux Act debate in 1871. A useful modern guide to the question is Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964).

27. Ch. 114, 18 Stat. 335, 336-37.

28. *See* Guinn v. United States, 238 U.S. 347 (1915).

29. *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

tion 5, we need to get back to Section 1. Once we get back there, we are faced with an ordinary interpretive problem of understanding what Section 1 means. But there is no suggestion in the language that Section 1 is different from any other provision of the Constitution.

This is not to say that Congress's power under Section 5 cannot in some sense resemble a power to determine the meaning of Section 1. In particular, a Congressional power to adopt prophylactic rules, such as the general ban on literacy tests, if valid, has the same effect as a constitutional ban on literacy tests. But although the two are alike, they are not the same: No one would suggest that the ban on literacy tests is valid because the Constitution itself now forbids them, any more than the validity of a criminal penalty for violations of Section 1 by state officials implies that the Constitution itself imposes such a penalty.

This argument may create the impression that when I talk about the content of Section 1, I am implicitly saying "Section 1 as the Supreme Court understands it." Perhaps Congress sees things differently. Am I making the criticism that is often made of *Katzenbach v. Morgan*,[30] that the expansive reading of Congress' power under Section 5 fails to understand the nature of judicial review, and in particular fails to understand that questions of constitutional law are for the courts? Am I simply equating the meaning of Section 1 with what the courts *say* is the meaning of Section 1?

I can assure you that I am not making that mistake.[31] None of the branches is Humpty Dumpty, but principles must be applied consistently. Although courts only decide cases, *only* courts decide cases. When a court has a case to decide, the question it must answer is whether Congress has correctly interpreted its own powers in enacting certain legislation. The court must make that decision for itself. Congress cannot make it, because Congress has no power under Section 5 to change the meaning of Section 1.

If a Senator or Representative sincerely believes that *Smith* was wrongly decided, there is nothing to be done about it. If

30. 384 U.S. 641 (1966).

31. Indeed, I spoke against that error at the Federalist Society's National Symposium four years ago. *See* John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371 (1988).

the Court has not changed composition and if the Justices are going to stick to their guns, Congress would be wasting its time if it tried to change the Court's interpretation through legislation.

In conclusion, I shall relate a Reconstruction story. A law that Professor McConnell mentions, the Civil Rights Act of 1875,[32] was originally proposed by Senator Charles Sumner. It rested on a particular view of the Privileges or Immunities Clause of Section 1, the view that the privileges and immunities to which it applied included the state-law rights with which the Act was concerned, such as the right to ride on a common carrier or stay at an inn on equal terms with other members of the public.[33] While Congress was debating the 1875 Act, the Supreme Court decided the *Slaughter-House Cases*.[34] This decision destroyed the Privileges or Immunities Clause as a potential support for the legislation, because the Court held that the Clause applied only to rights of distinctively national citizenship, not ordinary common law rights.[35]

People in Congress responded differently to *Slaughter-House*. George Boutwell, a Congressman from Massachusetts and an ardent radical Republican, in effect said "Who cares about the Supreme Court? Let's do this anyway."[36] He did not, however, say, "The Supreme Court is going to have to follow what we do." Matthew Hale Carpenter of Wisconsin, who was probably the leading Republican lawyer in the Senate at the time and who was no great fan of the Supreme Court, having litigated *Ex Parte McCardle*[37] on behalf of the government, said exactly what I would say: Congress was wasting its time because the Court

32. *See* McConnell, *supra* note 1, at 189, n.29.

33. To be more precise, it probably rested on two different but related views of privileges or immunities. Most supporters of the 1875 Act probably believed that the Privileges or Immunities Clause in effect forbade race discrimination with respect to the rights of state citizenship, rights that include access to common carriers, inns, and places of public amusement. *See, e.g*, CONG. GLOBE, 42nd Cong., 2d Sess. 760-763 (1872) (Senator Carpenter). Other Republicans may have thought that under the Clause, control over the privileges and immunities of citizens—and hence control over the content of most state law—had simply been transferred to Congress. For a discussion of expansive views of Congressional power over private law, see Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986). As it happened, the equality-based view was right, but both were undone by the Supreme Court.

34. 83 U.S. (16 Wall.) 36 (1873).

35. *See id.* at 74.

36. More specifically, Boutwell said that *Slaughter-House* was not law beyond that case and "dismissed it as a legislator." 3 CONG. REC. 1792 (1875).

37. 74 U.S. (7 Wall.) 506 (1869).

had said that such legislation was not authorized by the Fourteenth Amendment.[38]

Congress went ahead and passed the Civil Rights Act of 1875 anyway. In the *Civil Rights Cases*,[39] the Court said the Act was unconstitutional. Senator Carpenter was right, as both prophet and constitutional interpreter. Whether the *Civil Rights Cases* are correct is a difficult question, but I do not think that it is a difficult question whether Congress's view of its own authority had anything to do with the proper disposition of that case. There is no Humpty Dumpty. The Constitution means whatever it means.

That leads us back to the opening question of this debate: If we are prepared to take the radical step of believing that the Constitution means what it means, perhaps we can be truly radical and conclude that it means what it says, so that the First Amendment, when it says Congress, means Congress.

38. 3 CONG. REC. 1861-1863 (1875).
39. 109 U.S. 3, 25-26 (1883).