1st Amendment

Free Exercise, No State Religion, Freedom of Expression & Assoc

"***Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.***"

Historic Origins of 1st Amendment

Although State religion was prevalent among the original American Colonies, the Great (Evangelical) Awakening of the 1740s fueled the growth of new churches, and the arguments of Roger Williams, William Penn and John Locke enjoined mutual tolerance. After Revolution, in his *Memorial & Remonstrance Against Religious Assessments*, James Madison opposed a tax to raise money for religion, arguing that the right to uncoerced religious belief is more basic than "the claims of Civil Society." Madison effectively argued that freedom of conscience underlies freedom of belief, that people of conscience might reject belief in the Deity, and could never be persuaded to a contrary belief by coercion. He further argued that protecting the right to cleave to any of the many sects of Christianity against the threat of domination by one of them required extending protection to the right to disbelieve. In 1776, as a Virginia legislator, Madison successfully fought to include a declaration that "all men are entitled to the full and free exercise" of religion in Virginia's bill of rights. Madison's influence on the First Amendment appears in the free exercise and non-establishment clauses. His influence is generally conceded to have been one of the prime reasons for why the First Amendment reads as it does.

The Establishment Clause, Interpreted to Forbid "Non-Entanglement," Provides Privacy for Church Operations

In *Surinach v. Pequera de Busquets,* 604 F.2d 73 (1st Cir. 1979), a federal appeals court quashed a subpoena from a Puerto Rican government agency that had been served on the Superintendents of the Roman Catholic schools on the island, demanding production of extensive records about how the Catholic schools were being operated. The First Circuit held that the very demand to produce the records chilled free exercise.

The Establishment Clause, that forbids the government from becoming "entangled" in the internal affairs of religious groups, was offended by the government's effort to pry into the Church's private affairs: "*This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.*"

Like Secular Speech, Religious Practices are Protected From Prior Restraints by the Free Exercise and Free Speech Clause

Prior Restraint and Licensing Fees for Religious Exercise Unconstitutional: "Religious freedom, i.e., free exercise, must not be subject to prior restraint." *Follett v. Town of McCormick,* 321 US 573, 576 (1944)(Jehovah's Witness refused to pay dollar-a-day city tax to sell books in town)(Emphasis added). "The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down." *Murdock v. Pennsylvania*, 319 US 105, 113 (1943) "It is a license tax — a flat fee imposed on the exercise of a privilege granted by the Bill of Rights. A State may not impose a charge for the enjoyment of a right granted by the Federal Constitution." *Murdock*, 319 US at 113. "Freedom of speech, freedom of press, freedom of religion are available to all, not merely to those who can pay their own way." *Murdock*, 319 US at

111.

Licensure of Religious Exercise Imposes "Forbidden Burdens": "[T]o condition aid for the solicitation of religious views or systems upon a license, the grant of which rests in the determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty forbidden by the Constitution." *Cantwell v. Connecticut,* 310 US 296 (1940); *Near v. Minnesota,* 283 US 697 (1931)(holding unconstitutional statute that established judicial procedure for barring publication of newspapers adjudicated to be scandal sheets).

Financial burdens on free exercise may be unconstitutional, if they are directed at chilling free exercise, but not if they are part of a general taxation scheme.

The Right to Speak Cannot be Restricted to "Truthful Statements Only".

Legislatures may not limit "the preliminary freedom [to speak and publish]," which "does not depend … on proof of truth," because, if a statute authorizing "injunction on such a basis" were constitutional, any publisher could be "required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined [which would leave us] but a step to a complete system of censorship." *Near v. Minnesota,* 283 US 697, 714 (1931). "The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false." *Near v. Minnesota,* 283 US at 721, citing *Patterson v. Colorado,* 205 US 454, 462 (1907)(upholding punishment for contempt for publishing statements in violation of injunction, and disregarding defense that the injunction blocked publication of the truth). *Patterson* illustrates the distasteful side of this doctrine that truth can't be made a prerequisite to publication, and at least one modern commentator (this writer) thinks Harlan's dissent makes more sense than the majority opinion.

Free Expression of Religious Doctrine includes Books Sales and Solicitation of Donations

An "itinerant evangelist" does not become "a mere book agent by selling the Bible or religious tracts to sustain … him;" thus, a "flat tax imposed on the exercise of a privilege granted by the Bill of Rights," religious book sales, is an "unconstitutional exaction." *Follett v. Town of McCormick,* 321 US 573, 576 (1944)(overturning S.Carolina Sup. Ct. decision that "license was required for the selling of books, not for the spreading of religion.")

Comment re Visionary Religion: Many Visionary Churches are uncertain about whether taking money for performing ceremonies undermines their claim of religious legitimacy. The law doesn't shed a lot of light here. Visionary Religions have caregiving responsibilities that require funds to provide, and the work of running a Visionary Church can be as demanding a labor as any other social, charitable, and educational work, and as worthy of compensation. However, wise caution counsels having a legitimate rationale for any fee to attend a religious service where the assertion might be made that a fee is being paid to obtain a controlled substance, making it a "delivery for consideration."

Systems for Allocating Exemptions from General Law Must Not Have a Bias Against Unconventional Religious Beliefs

This right is protected by both the Establishment Clause and the Free Exercise Clause. *See discussion infra at Blackhawk v. Pennsylvania*, 225 F.Supp.2d 465, 476 (2002)(Native American entitled to permit to keep bears where permits to keep wild animals for secular purposes had been freely given), affirmed, 381 F.3d 202, 209 (2004). Both the District Court and the affirming appellate opinion are worth reading. Justice Alito's opinion, affirming the District Court on all grounds, penned while during his tenure as a Third Circuit Justice, provides excellent summaries of the holdings in

three important cases. Judge Alito first reviewed the holding in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 US 520 (3rd Cir. 1993) (ordinance unconstitutional that allowed virtually everybody to kill animals except Santerians). Second, Justice Alito analyzed *Fraternal Order of Police v. Newark*, 170 F.3d 359 (3rd Cir. 1999) (holding unconstitutional a police conduct rule that allowed police to wear beards for "health reasons" but barred wearing a beard for religious reasons), and distilled the rationale for the decision: government agencies may not use government policy to impose "a value judgment" that secular reasons "are important enough" to justify exceptions from the general rule, "but that religious motivations are not." The third case Justice Alito cited, *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3rd Cir. 2002), held unconstitutional the City of Tenafly's refusal to allow Orthodox Jews to use power poles to string fibers from to create an "eruv," a magical space where observant Jews can carry or push things on the Sabbath without breaking their vows. The disparate impact of the City of Tenafly's refusal to accommodate the eruv was evident, said Justice Alito, because everybody else was allowed to hang papers and other things on the power poles. Thus, the city's denial of the request "violates the neutrality principle … judging [the religious rationale] to one of lesser import than nonreligious reasons," and thus singles out "religiously motivated conduct for discrimination." *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209. Justice Alito's decision in *Blackhawk* gives us some reason for confidence that he, and perhaps other members of his voting block on the Supreme Court, would be receptive if disparate impact arguments were asserted against administrative agencies that fail to give the needs of religious practitioners of Visionary Religion the same weight as they give to secular demands for services.

Access to Public Forums for Free Exercise & Free Religious Expression Cannot be Subjected to Executive Discretion

Leafleting: *Lovell v. City of Griffin,* 303 US 444 (1938)(ordinance prohibited distribution of "literature of any kind... without first obtaining written permission from the City Manager").

Parades: *Shuttlesworth v. City of Birmingham,* 394 US 147, 153 (1969) ("[This Court] ha[s] consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places.").

Charitable Solicitation: *Sec. of State of Maryland v. J.H.Monson,* 467 US 947 (1984)(Supreme Court struck down as overbroad a Maryland statute prohibiting charitable organizations from paying more than 25% of the amount raised to fundraising activities because the statute operated on the "fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud".).

News-vending: *City of Lakewood v. Plain Dealer Pub'g,* 486 US 750 (1988)(holding unconstitutional a statute giving unfettered discretion to city's mayor to grant or deny permits to place newsracks on public property).

Political Demonstrations: *Forsyth County v. Nationalist Movement,* 505 US 123, 137 (1992)(permit fee "invalid because it unconstitutionally ties the amount of the fee to the content of the speech and lacks adequate procedural safeguards").

"Standards" for Prior Restraints

1. Burden is on the censor to initiate proceedings and carry burden of proof.
2. Restraint must be brief, only so long as it takes to get swift appellate review.
3. Prompt final judicial determination must be assured.

Freedman v. Maryland, 380 US 51 (1965).

Fifth Amendment

Freedom from Compelled Self-Incrimination

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Historic Origins of 5th Amendment Prohibition of Compelled Self-Incrimination

In the Middle Ages, compelling confessions by threat or torture was common in trials for common crimes and heresy, by secular or ecclesiastical courts. Reaction against the infamous Star Chamber practices arose in 12th Century England, and courts began excluding compelled confessions. In the revolutionary era, the Founding Fathers made freedom from compelled self-incrimination a fundamental right. In *Brown v. Walker,*[i] the Supreme Court stated:
"So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." *Brown v. Walker*, 161 US 591, 596-597 (1896).

The Right to Be Free of Self-Incrimination Protects "the Nature of A Free Man"

"The privilege historically goes to the roots of democratic and religious principle. *It prevents the debasement of the citizen which would result from compelling him to "accuse" himself before the power of the state*. *The roots of the privilege … go to the nature of a free man and his relationship to the state*."
McKay, *Self-Incrimination and the New Privacy*, at 210 (emphasis added), *citing United States v. Wade*, 388 U.S. 218, 261 (1967). The Supreme Court Review, Vol. 1967 (1967), pp. 193-232

Legal Regimes that Attempt to Institute Compelled Self-Disclosure of Potentially Criminal Conduct Are Unconstitutional

Communist Party Can't Be Compelled to Disclose its Membership List, And Has Standing to Present the Objection of Its (Undisclosed) Members

Albertson v. Subversive Activities Control Board, 382 US 70 (1965) held that the Communist Party of the United States could not be required to disclose a list of its members over the organization's Fifth Amendment objection, asserted on behalf of its members. *Albertson v. SACB*, 382 US at 78. However, the Fifth Amendment privilege may not be asserted by a corporation or other "collective entity." *Braswell v. United States,* 487 US 99, 105 (1988). The Court had distinguished *Sullivan* on the grounds that the bootlegger who didn't want to answer questions on the income tax form, was merely being asked "neutral" questions that were "directed to the public at large;" but the Subversive Activities Control Board ("SACB")

had focused on the Communist Party as "*a highly selective group inherently suspect of criminal activities ... where responses to any of the form's questions ... might involve ... admission of a crucial element of a crime*."[1] As a result, the SACB's demand to learn "the organization of which the registrant is a member, his aliases, place and date of birth, a list of offices held in the organization and duties thereof—might be used as evidence in or at least supply investigatory leads to a criminal prosecution."

Bookmakers Can't Be Compelled to Buy A Stamp to Be Posted In Their Wagering Place that Confesses that They Are Engaged in Unlawful Gambling

"Prospective registrants [under the Wagering Act] can reasonably expect that registration and payment of the occupational tax will significantly enhance the likelihood of their prosecution for future acts, and that it will readily provide evidence which will facilitate their convictions. Indeed, they can reasonably fear that registration, and acquisition of a wagering tax stamp, may serve as decisive evidence that they have in fact subsequently violated state gambling prohibitions."

United States v. Marchetti, 390 US 39, 55 (emphasis added).

Marihuana Buyers & Sellers Cannot be Compelled to Pay Tax on Substance That is Illegal to Sell or Possess Under State Law

US Supreme Court held that the Marihuana Tax Act compelled Dr. Leary to "expose himself to a real and appreciable risk of self-incrimination [requiring him] to identify himself as a transferee of marijuana ... who had not registered [and further directed] that this information be conveyed by the Internal Revenue Service to state and local law enforcement...." 395 US at 18. Fundamental to Dr. Leary's success before the Supreme Court was his "proper invocation" of the privilege. *Leary v. United States*, 395 US 6, 18 (1969).

The Supreme Court Has Rejected Several Arguments that Would Undermine the Fifth Amendment Privilege

Fifth Amendment protections are not abrogated by registration schemes that purport to be voluntary, when the only "choice" to be made is to refrain from engaging in the criminally proscribed activity that the registration scheme seeks to uncover by compelled disclosures.

"[If] an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would ... ultimately license widespread erosion of the privilege through 'ingeniously drawn legislation.'" ... We cannot agree that the constitutional privilege is meaningfully waived merely because those 'inherently suspect of criminal activities' have been commanded either to cease wagering or to provide information incriminating to themselves, and have ultimately elected to do neither."

Marchetti v. United States, 390 US at 52; *accord, Schneckloth v. Bustamante*, 412 US 218, 237, n. 18 (1973) ("We reasoned that there could be no choice when the gambler was faced with the alternative of giving up gambling or providing incriminatory information.").

[1] *Id.*, 382 US at 79.

Fifth Amendment protections are not abrogated by registration schemes that require disclosure only of the intent to commit crimes in the future.
"[T]he central standard for the privilege's application [is] whether the claimant is confronted by substantial ... hazards of incrimination," a principle that "does not permit the rigid chronological distinction adopted in *Kahriger* and *Lewis.*"
Marchetti v. United States, 390 US at 54.

Administrative Waiver of the Fifth Amendment Under The Required Records Doctrine: Fifth Amendment protections for personally identifying information in Church Records would be abrogated by the Required Records doctrine as applied in *Shapiro v. United States*, 335 US 1 (1948), the seminal opinion on the Required Records doctrine.

Religious Freedom Restoration Act

(a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.
(c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.
42 USC §2000bb-1.

Historic Origins of RFRA
Congress enacted RFRA to legislatively overrule the central holding of *Employment Division v. Smith*, 494 US 872 (1990).[2] RFRA directs the Federal Courts to apply a "strict scrutiny" when religious people or churches are prosecuted, or threatened with prosecution, for religious acts that are unlawful "under a rule of general applicability." RFRA can be asserted by individuals, churches, and corporations to seek variances and exceptions from any legal restrictions imposed by Federal law. RFRA has been held unconstitutional as applied to states and local governments, but several states have adopted state versions of RFRA.

RFRA Legislates Strict Scrutiny
"[T]he Religious Freedom Restoration Act … prohibits the Federal Government from substantially burdening a person's exercise of religion, unless the Government 'demonstrates that application of the burden to the person' represents the least restrictive means of

[2] S*mith* remains viable in other respects; se Justice Alito's application of Smith in *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3rd Cir., 2004).

advancing a compelling interest. 42 U.S.C. § 2000bb-1(b)."
In the seminal case of *Gonzales v. O Centro Espírita Beneficente União do Vegetal,* 546 US 418, 423 (2006),

The Court held that the Government bears the burden of proving the existence of a "compelling interest" sufficient to outweigh a RFRA exemption for the use of a DMT-containing tea. *O Centro* at 429.

First, the Court found that the Government's interest in maintaining a "closed regulatory system" was not a "compelling interest" within the meaning of RFRA. Additionally, the Court held that the "well-established peyote exception also fatally undermines the Government's broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA [because] there is no evidence that it has 'undercut' the Government's ability to enforce the ban on peyote use by non-Indians." *Gonzales v. O Centro, id.* at 434. *Second,* the Court held that the Government's asserted interested in complying with the 1971 United Nations Convention on Psychotropic Substances, did not rise to the level of a compelling interest. "[I]nvocation of such general interests, standing alone, is not enough." *O Centro id.* at 438.

"Like it or not, when religious objectors raise RFRA as a defense to prosecution under the CSA, RFRA requires courts to 'strike sensible balances' on a case-by-case basis, in light of 'the particular practice at issue.'" *United States v. Christie,* 825 F.3d 1048, 1060-1061 (2016), *quoting O Centro,* 546 U.S. at 435-36, 126 S.Ct. 1211 (emphasis added).

President Trump's Executive Order #13798.

AG Sessions' "Federal Law Protections for Religious Liberty"
Executive Order 13798 82 Fed. Reg. 21675 (May 4, 2017), and the Attorney General's Memorandum on Religious Freedom and the Application Memo to the DOJ.

On October 6, 2017, pursuant to Presidential Executive Order No. 13798,[3] the Attorney General sent a Memorandum (the "AG's Memo") to "All Executive Departments and Agencies" that articulates twenty principles federal agencies must apply when "interpreting religious liberty protections in federal law." Observing in the introductory statement that "religious liberty is a foundational principle of enduring importance in America, enshrined in our Constitution and other sources of federal law," the AG's Memo teaches that religious liberty "encompasses religious observance and practice; therefore, to the greatest extent practicable or permitted by law, religious observance and practice should be accommodated in all government activity." (AG's Memo, Intro., Exhibit J, p. 1.)
After setting forth nine familiar principles of First Amendment Free Exercise jurisprudence, with the Tenth Principle, the AG's Memo turns to application of RFRA, reciting the now-familiar

[3] 82 Fed. Reg. 21675 (May 4, 2017).

Supreme Court standard quoted in the previous section, and emphasizing that "RFRA applies to *all actions by federal administrative agencies, including ... adjudication*." (AG's Memo, 10th Principle, Exhibit J, p. 3; emphasis added.)The IG Memo directs all federal agencies, including the DEA, to "proactively consider the burdens on the exercise of religion and possible accommodation of those burdens," when "formulating rules, regulations, and policies."[4]

"Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law. Therefore, to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity…."[5] This principle applies to "all actions by federal administrative agencies, including rulemaking, adjudication, and other enforcement actions…." IG Memo.

The Drug Enforcement Administration

The DEA was established by Executive Order No. 11727 in 1973 by President Nixon. Executive Order 11727 "effectuated a reorganization of the parts of the executive branch dealing with drug enforcement and gave the Attorney General supervisory powers over the new drug enforcement machinery." United States v. Lippner, 676 F. 2d 456, 461 (11th Cir., 1982), citing 28 U.S.C. § 510, and 28 C.F.R. § 0.100.

The Controlled Substances Act Proscribes the Unregulated Importation, Manufacturing, Distribution, and Possession of Scheduled Substances

Regulatory Provisions of the CSA

The CSA assigns various plants, drugs and chemicals to five schedules: Schedule I, no currently accepted medical use and cannot be made safely available to the public under prescription; drugs in the other four schedules have recognized medical uses. The CSA also restricts access to 40 listed chemicals, and places "analogues" --- substances not controlled but structurally or pharmacologically similar to Schedule I and II substances, that have no accepted medical use.

- **All CS Handlers Must Register With the DEA.** Unless specifically exempted by the CSA, any person who handles controlled substances must register with the DEA, maintain detailed inventories and records of all CS transactions, file reports with the DEA, and submit to inspection of premises and records by the DEA. People receiving CS's via doctor's prescriptions are "ultimate users" whose consumption is "outside" of the "closed system" operated by the DEA. 21 U.S.C. § 827; 21 C.F.R. Part 1304: 21 U.S.C. §

[4] IG Memo, page 7: Guidance for Implementing Religious Liberty Principles / Agencies Engaged in Rulemaking.

[5] Sessions Memo, page 1, "Principles of Religious Liberty."

827(a)(3); 21 C.F.R. § 1304.21(a); 21 U.S.C. § 827(b)(3); 21 C.F.R. § 1304.04(a).

- **CS Orders Are Made on Form 222.** Registrants who distribute CS's must only distribute to customers who submit their order on a DEA Form 222, that is issued only to DEA registrants. CS's may be shipped only to the address pre-printed on the Form 222. Distributors must maintain records of shipments to purchasers. 21 C.F.R. Part 1305.
- **Only Medical Practitioners May Prescribe.** Only licensed medical practitioners can prescribe CS. 21 U.S.C. § 802(21), the term practitioner" means "a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research."
- **Hiring Restrictions.** Medical practitioners may not hire drug felons or by former registrants revoked by the DEA. 21 C.F.R. § 1301.76(a).
- **Online Pharmacies Authorized.** The Ryan Haight Online Pharmacy Consumer Protection Act of 2008 requires the DEA to modify registrations of pharmacies to allow online dispensing. Section 3(b) of P.L. 110-425, amending 21 U.S.C. § 823(f). Online pharmacies must report their total monthly dispensing unless it's below 100 scrips or 5,000 doses of CS's. 21 USC §827(d)(2).
- **Required Records.** The Required Records doctrine is applied to require production of accurate records for inspection by law enforcement officials. 21 U.S.C. § 842(a)(5).
- **CS Security.** Registrants must secure all CS's. 21 C.F.R. § 1301.71.

The Controlled Substances Act: Regulatory Requirements, B.T. Yeh, Congressional Research Service, (Dec. 13, 2012).

Statutes Proscribing Unregulated Use of Schedule I Substances

21 U.S.C. Sec. 841(a)(1) makes unlawful the importation, manufacture, distribution, and use of "any material, compound, mixture, or preparation, which contains any quantity of" a substance listed in Schedule I of the Controlled Substances Act. § 812(c). Dimethyltryptamine is listed on Schedule I.

21 USC §952 also makes it unlawful to import Schedule I or II and Narcotic drugs in Schedule II, IV, or V into the customs territory of the United States.