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Title

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Journal

UCLA Pacific Basin Law Journal, 12(2)

Author

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Publication Date

1994

DOI

10.5070/P8122022057

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ARTICLES

PERSUADING THY NEIGHBOR TO BE AS THYSELF: CONSTITUTIONAL LIMITS ON EVANGELISM IN THE UNITED STATES AND INDIA

Jonathan K. Stubbs†

INTRODUCTION

Religious belief is frequently a very personal concern. Accordingly, situations in which individuals discuss beliefs with one another can result in a wide range of consequences. Such consequences may include mutual gratitude and growth as well as mutual distrust and destruction.

Nearly one quarter of the world's population lives in two nations: India and the United States. These nations assert that they are democracies and that they embrace large and diverse religious populations. Each nation has adopted provisions in its national constitution to deal with the practical issue of how so

† Associate Professor of Law, University of Richmond School of Law. Special thanks are due to my colleagues and friends at T. C. Williams School of Law and other scholars in the field who have provided intellectual and moral support. In that regard, I wish to express gratitude to Dean Joseph D. Harbaugh, and Professors Okianer C. Dark, W. Hamilton Bryson, Michael A. Wolf, Paul J. Zwier, J.P. Jones, Gary Leedes, Peter Swisher, Ann C. Hodges, Azizah al-Hibri, Michael Herbert, Lynda Frost, Robert Shepherd, and Nancy Collins. I am extremely indebted to Professor Rajeev Dhavan who freely shared his counsel from New Delhi, and my colleagues at other institutions who have been especially helpful, namely, Professors Linda S. Greene, Ved Nanda, Steve Smith, Sandy Levinson, Lawrence Beer, Marc Galanter, John Mansfield, and George Gadbois. For dedicated research help, thanks to Steve Hinckley, Director of the University of Richmond Law Library and the entire library staff, especially Lucinda Harrison-Cox, and Nancy Martin. I also wish to express gratitude to Ms. Marta Tamawsky, Reference Librarian at the University of Pennsylvania Law School, and Aparna Sen, Inter-library Loan Librarian, Harvard Law School, for expert assistance. Thanks also to my student research assistants Pamela Johnson, J.D., Jody Holyst, J.D., Gray Collins (class of 1994) and Tim Dorsey (class of 1994). Further thanks to my invaluable secretary, Anne Smith. Final thanks to the Author of all.

many people with numerous divergent views of religion can live together peacefully. The constitution of each nation has refrained from choosing any one of the many religions as *the* religion of the state. Rather, religious belief is deemed a personal matter.¹

As recent events in India dramatically illustrate, preserving national unity in the midst of religious diversity can sometimes be difficult.² Unfortunately, disturbances such as the razing of the mosque in Ayodhya in late 1992 are not the first instances of massive Indian civil unrest flowing from religious conflict.³ The tremendous loss of human life, extensive property destruction,

1. For perceptive analysis of issues involving religious freedom in India, see V. M. BACHAL, *FREEDOM OF RELIGION AND THE INDIAN JUDICIARY* (1975); MOHAMMED GHOUSE, *SECULARISM, SOCIETY AND LAW IN INDIA* (1973); P. C. JAIN, *LAW AND RELIGION: A COMPARATIVE STUDY OF THE FREEDOM OF RELIGION IN INDIA AND THE UNITED STATES* (1974); DHIRENDRA K. SRIVASTAVA, *RELIGIOUS FREEDOM IN INDIA* (1982); Rajeev Dhavan, *Religious Freedom in India*, 35 *AM. J. COMP. L.* 209 (1987). For illuminating discussions in the American context, see ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982); THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); PAUL G. KAUPER, *RELIGION AND THE CONSTITUTION* (1964); MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* (1981); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988).

2. In December 1992, for example, a large crowd of zealous Hindu adherents in the northeastern Indian city of Ayodhya stormed a Muslim mosque. Having broken through police lines, the zealots razed the mosque and began to erect a new temple to the Hindu god Ram. The Hindu fundamentalist believers asserted that the Muslim temple had been built on the site of a Hindu temple erected in honor of Ram, and that they were going to build a new Hindu temple on the site in honor of the five thousandth anniversary of their deity's birth. Interestingly, in 1528 the Muslims destroyed a famous Hindu temple in the same city and erected a mosque in its place. SRIVASTAVA, *supra* note 1, at 32.

In the aftermath of the razing of the Muslim temple, riots broke out throughout India resulting in the deaths of well over a thousand people, many of whom were victims of fire bombs, stabbings, and police bullets. See Edward A. Gargan, *Hindu Militants Destroy Mosque, Setting Off a New Crisis in India*, N.Y. TIMES, Dec. 7, 1992, at A1; Edward A. Gargan, *At Least Two Hundred Killed in India as Muslim-Hindu Riots Rage*, N.Y. TIMES, Dec. 8, 1992, at A1; Edward A. Gargan, *Hindu-Muslim Riots Intensify; Troops Fire at Crowds*, N.Y. TIMES, Dec. 10, 1992, at A14; *India Arrests 700 in a Crackdown on Rioters*, N.Y. TIMES, Dec. 14, 1992, at A14.

3. One perceptive observer framed the issues raised by the recent violence in India as follows: "The latest flare-up of ancient animosities pose an elemental question: Can modern India, born 45 years ago in a calamitous spasm of Hindu-Muslim violence that literally divided the country, put aside politics and ethnic differences to achieve stability and sustain growth?" Marcus W. Brauchli, *Political Setback*, WALL ST. J., Dec. 15, 1992, at A1. The same observer points out that:

Conflicts over Ayodhya sank two recent governments. That is to say nothing of Indian tensions, which include the government's feud with Sikh nationalists (who assassinated Prime Minister Indira Gandhi in 1984) and its troubles with Tamil terrorists (who in 1991 killed her son, Rajiv, her successor.) Meanwhile, Kashmir, a territory in dispute with Pakistan, has large areas under Indian military control.

Id. at A14.

and damaged societal relations resulting from such events underscore the fragile social compact binding a diverse national community of nearly one billion human beings.

In contrast, the recent history of religious violence in the United States has been relatively subdued. Still, one notes with alarm the rise in American hate crimes against religious minorities — especially Jews.⁴ Such events preclude the United States from boasting of a completely successful record in protecting the rights of religious minorities.

Within the broad scope of issues concerning freedom of religion, this Article concentrates on one particular topic: religious evangelism. This Article aims to show how the legal systems of India and the United States have been compelled to confront conflicts flowing from attempts by religious believers to persuade their neighbors to adopt similar views. Governmental responses to issues flowing from religious diversity are manifested in each nation's constitution, statutes, and judicial case law. Within the context of these sources of law, this Article focuses more narrowly on how far, in each country, the national supreme court has allowed the state to limit a believer's freedom to persuade.

Part I of this Article attempts to put the freedom to persuade in context by sketching an historical overview of some responses of Indian and American society to religious diversity. Part II analyzes the relevant constitutional provisions in India and the United States. Part III considers Indian and American case law relating to the freedom to evangelize or persuade. Spe-

In these circumstances the extent to which the Indian political and juridical structure can promote or protect religious freedom has become a pressing issue. In fact, some observers are concerned with whether India can survive and continue its democratic traditions given this acute ethnic, religious, and political upheaval. *Id.*; Suman Dubey, *Rioting in India Claims Lives, Threatens Rule*, WALL ST. J., Dec. 8, 1992, at A11.

4. For example, a recent study indicates that threats, harassment, and violence against Jews in the United States have increased steadily during the past six years. While the number of such incidents slightly decreased during 1992, the same year saw an increase in personal threats against Jewish people and rising campus harassment of Jewish students. See Lynne Duke, *ADL Reports Decline in Anti-Semitic Incidents; College Outbreak Grows, Though, Group Says*, WASH. POST, Feb. 3, 1993, at A24; Anne Saker, *Study: Anti-Semitic Acts Increasing on Campuses*, Gannett News Service, Feb. 2, 1993, available in LEXIS, Nexis Library, CURRNT File; Mark W. Wright, *Anti-Semitic Actions Decline, but Personal Threats Increase*, ATLANTA J. & CONST., Feb. 3, 1993, at A5.

Even more disquieting is the attempt by some individuals and groups to promote the notion that the Nazi's murder of 6 million Jews never happened. See DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* (1993).

Furthermore, violence against Arab-Americans has also increased, especially during the 1991 Persian Gulf War. See Bill Wallace, *Jewish Group Says Hate Crimes on Rise Reports of Anti-Semitism Jump 24%*, S.F. CHRON., Feb. 7, 1991, at A2.

cial attention is given to the leading Indian case, *Stainislaus v. State of Madhya Pradesh*,⁵ and the American line of authorities beginning with *Cantwell v. Connecticut*.⁶ Part IV offers a comparative summary of the historical trends of religious freedom in each nation and concludes with some critical reflections.

I. HISTORICAL OVERVIEW

A. INDIA

1. *The Early Period*

Indian civilization is at least 4500 years old, stretching back to the Indus River societies.⁷ Early in its history India became a multi-religious, multi-ethnic, and multi-cultural society.⁸ The religious groups included Parsees, Buddhists, Christians, Muslims, a small Jewish community, and, of course, Hindus.

Scholars argue that according to the Hindu faith, a number of paths to truth may exist; people should be given freedom to choose their own path to the truth. As a result, Hindus have historically been perceived to be tolerant of other religions.⁹ However, this perception is qualified by evidence of severe social

5. 2 S.C.R. 611 (1977) (India).

6. 310 U.S. 296 (1940).

7. BACHAL, *supra* note 1, at 26-27; RAMESH C. MAJUMDAR ET AL., AN ADVANCED HISTORY OF INDIA 3-23 (1961); SRIVASTAVA, *supra* note 1, at 18.

8. BACHAL, *supra* note 1, at 26-30; MAJUMDAR ET AL., *supra* note 7, at 3-141; SRIVASTAVA, *supra* note 1, at 18.

9. BACHAL, *supra* note 1, at 18-41; JAIN, *supra* note 1, at 17-21; SRIVASTAVA, *supra* note 1, at 21-26. For example, Dr. Bachal states:

One very important distinguishing feature of the ancient Hindu state was the remarkable degree of religious freedom and tolerance. "The Hindu view of life, which attaches greater importance to the future evolution of man and the ultimate absorption of the human personality in the absolute, necessarily leads the Hindus to attach less importance to individual religious beliefs and makes for toleration. A basic doctrine of Hindu philosophy holds that the spiritual liberation of man can be reached in many ways, and Hindu society, therefore, embraces in its fold diverse, contradictory and even conflicting beliefs and practices. Hindu philosophy claims the unique distinction that it has tolerated the existence of different philosophic views and never insisted on the rigidity of uniformity. It has been inspired by a quest for truth, unhampered by faith and dogma."

This basic philosophic approach of the Hindus was primarily responsible for the toleration of various faiths and denominations by the ancient Hindu state. The Hindu state never attempted to impose any particular faith upon its people and various creeds were not only permitted to practice their faiths but they were allowed to propagate their faiths, establish religious institutions for worship, manage their properties in their own ways. This religious toleration of the ancient Hindu state has necessarily created the foundations of a secular state in India.

BACHAL, *supra* note 1, at 27-28 (footnotes omitted).

ostracism and economic privation associated with the Hindu caste system.¹⁰

2. *The Rise of Islamic Influence*

Following the death of the prophet Mohammed in 632, Islam exploded from its relatively circumscribed Middle Eastern home and spread across much of North Africa and the western half of Asia.¹¹ Within fifty years of the prophet's demise, Muslim traders reached India.¹² Approximately 350 years later, the traders were replaced by Muslim soldiers ready, among other things, to do battle.¹³

Following initially mixed results, the Muslims established domination of the Indian subcontinent by about 1206, even though they were vastly outnumbered by the Hindu population.¹⁴ The Muslims adopted a policy of proselytizing and forcing individuals to convert to Islam, which was actually less oppressive than some might have expected.¹⁵ Indeed, some Islamic rulers became patrons for local Hindu shrines, as had the Hindu Rajas who ruled before them.¹⁶ The Islamic period is also noteworthy in that one of its leading figures, Emperor Akbar, created and propagated a new syncretistic religion in the face of significant religious diversity.¹⁷

10. BACHAL, *supra* note 1, at 28. Furthermore, one wonders about the answer to a paradox: How tolerant is a religious tradition which sanctions untouchability? Moreover, from an historical perspective, how can we really know to what extent religious toleration was the norm before the Muslim military invasions of the eleventh and twelfth centuries? No evidence seems to exist that widespread interreligious physical violence existed in India before the conquests of the Muslim armies. SRIVASTAVA, *supra* note 1, at 21; MAJUMDAR ET AL., *supra* note 7, at 3-272. In that sense, one may be able to assert more confidently that in much earlier times, interreligious tolerance prevailed.

11. SRIVASTAVA, *supra* note 1, at 29; MAJUMDAR ET AL., *supra* note 7, at 275-365.

12. SRIVASTAVA, *supra* note 1, at 29.

13. *Id.*; BACHAL, *supra* note 1, at 28.

14. SRIVASTAVA, *supra* note 1, at 17; BACHAL, *supra* note 1, at 28.

15. GHOUSE, *supra* note 1, at 21-22. For different views on the degree of Muslim intolerance and persecution, see BACHAL, *supra* note 1, at 28-29. Srivastava suggests that Muslims and Hindus essentially established a working relationship following the advent of Muslim rule. SRIVASTAVA, *supra* note 1, at 37.

16. GHOUSE, *supra* note 1, at 23-26; SRIVASTAVA, *supra* note 1, at 36.

17. BACHAL, *supra* note 1, at 29; SRIVASTAVA, *supra* note 1, at 32-34. Akbar hoped that his Din-e-Ilahi religion would unite India and the world beyond: [M]any Muslim rulers far from desecrating non-Muslim places of worship, permitted their building and gave generous grants for their support and maintenance. Of course, in this regard, Akbar's name should come first. He removed all restrictions on public religious worship and the building of places of worship of non-Muslims. Hence during his reign a number of Hindu temples and places of worship were built. SRIVASTAVA, *supra* note 1, at 36.

3. *European Influences*

a. Portuguese and Dutch Efforts

In the late fifteenth century the Portuguese explorer Vasco de Gama reached the shores of India and brought news of his discovery back to Europe.¹⁸ The Portuguese attempted to establish trading and missionary centers in India, but their efforts floundered, partly because of the relatively intolerant attitude which they assumed toward local religious communities.¹⁹

Largely at Portuguese expense, the Dutch established a number of commercial outposts in India in the early seventeenth century.²⁰ With the contemporary increase of British commercial activity in India, intense competition flared between the Dutch and British.²¹ While the Dutch gradually focused their attention on the archipelago which constitutes present day Indonesia, their rivalry with the British in India continued through the mid-eighteenth century.²²

b. British Domination

The British learned from the mistakes of the Portuguese. In 1600 the British East India Company ("Company") acquired its charter, giving it a trading monopoly in southern Asia.²³ Emphasizing the commercial nature of its venture in India,²⁴ the Company initially did little to encourage Christian missionary activity. Gradually, despite some conflicts with local political leaders, it extended its domination throughout much of India.²⁵ During the next century, the Company replaced the Muslims as the dominant political force in India.²⁶

The British Parliament renewed the charter of the Company in 1813 and Christian missionaries were sent to India shortly

18. MICHAEL EDWARDES, *A HISTORY OF INDIA* 143 (1961); MAJUMDAR ET AL., *supra* note 7, at 352, 631; VINCENT A. SMITH, *THE OXFORD HISTORY OF INDIA* 331 (2d ed. 1923); SRIVASTAVA, *supra* note 1, at 38-39.

19. BACHAL, *supra* note 1, at 30; EDWARDES, *supra* note 18, at 145; MAJUMDAR ET AL., *supra* note 7, at 632; SMITH, *supra* note 18, at 335.

20. MAJUMDAR ET AL., *supra* note 7, at 634.

21. *Id.* at 634-35.

22. *Id.*

23. BACHAL, *supra* note 1, at 30; VIDYA D. MAHAJAN, *CONSTITUTIONAL DEVELOPMENT AND THE NATIONAL MOVEMENT IN INDIA* 1 (12th ed. 1985); MAJUMDAR ET AL., *supra* note 7, at 633, 636; SMITH, *supra* note 18, at 337; SRIVASTAVA, *supra* note 1, at 39.

24. BACHAL, *supra* note 1, at 30; MAHAJAN, *supra* note 23, at 1; SRIVASTAVA, *supra* note 1, at 39.

25. EDWARDES, *supra* note 18, at 207; MAJUMDAR ET AL., *supra* note 7, at 655-66; SRIVASTAVA, *supra* note 1, at 39.

26. EDWARDES, *supra* note 18, at 209, 254; MAHAJAN, *supra* note 23, at 2.

thereafter.²⁷ The collective expenses of the missionaries were often paid from Company revenues. This no doubt contributed to the perception that they were an active "arm" of the colonial power. In fact, some of the Anglican bishops assigned to India were paid from the monies that the Company obtained through its Indian ventures.²⁸

Parliament extended the charter of the Company again in 1833, and provided that the Company would no longer serve commercial functions but rather political ones. Parliament also codified some of the conflicting sources of law in India and authorized the appointment of bishops in Calcutta, Madras, and Bombay for the benefit of Indian Christians.²⁹

With the increase in missionary activity, it is not surprising that conflict between Christian missionaries and the local religious laws of both the Islamic and Hindu communities arose. For example, the customary law of Islam and Hinduism provided for the disinheritance of persons who converted to other faiths.³⁰ The missionaries found this a great deterrent to their efforts and lent their support to the Caste Disabilities Removal Act of 1850, which protected the property interests of individuals who converted to Christianity.³¹ Presumably, little could be done about the social ostracism that such persons would endure from members of their former religious communities. This Act facilitated the proselytization efforts of the missionaries but alarmed and antagonized the Hindus and Muslims, who saw it as a threat to their communities' stability.³²

In 1853, Parliament again breathed new legislative life into the Company.³³ However, the 1858 Indian Revolt³⁴ prodded the British government to take control of the Company's Indian Em-

27. BACHAL, *supra* note 1, at 31; EDUARDES, *supra* note 18, at 238; MAHAJAN, *supra* note 23, at 23; SMITH, *supra* note 18, at 783.

28. BACHAL, *supra* note 1, at 31; SRIVASTAVA, *supra* note 1, at 40.

29. EDUARDES, *supra* note 17, at 249; MAHAJAN, *supra* note 23, at 26-30.

30. BACHAL, *supra* note 1, at 30; MAJUMDAR ET AL., *supra* note 7, at 821; SRIVASTAVA, *supra* note 1, at 41-42.

31. MAJUMDAR ET AL., *supra* note 7, at 821; SRIVASTAVA, *supra* note 1, at 42.

32. SRIVASTAVA, *supra* note 1, at 42.

33. Parliament extended the Company's charter, but instead of a twenty-year extension as legislated in 1813 and 1833, it left open the possibility of the Crown taking over the possessions of the Company. This possibility was actually presaged in the 1833 Act, which provided that the possessions of the Company were to be held in trust for the Crown. MAHAJAN, *supra* note 23, at 27; SMITH, *supra* note 18, at 727.

34. The causes of the Revolt were numerous, including disaffection within the predominantly Indian armed forces, the perception of increasing Western influence, and a pervasive frustration with colonial rule. See, e.g., MAJUMDAR ET AL., *supra* note 7, at 770-83.

pire and bring it under British governmental administration.³⁵ In asserting domination over India, the Crown stated that:

[W]e disclaim alike the right and desire to impose our convictions on any of our subjects. We declare it to be our Royal will and pleasure that none be in anywise favoured, none molested or disquieted, by reason of their religious faith or observances, but that all shall alike enjoy the equal and impartial protection of the law; and we do strictly charge and enjoin all those who may be in authority under us that they abstain from all interference with the religious belief or worship of any of our subjects on pain of our highest displeasure.³⁶

Despite the Queen's laudable statement of purpose, the policies and attitudes implicit in legislation like the Caste Disabilities Act doubtlessly contributed to the development of nationalist sentiment among the Indian population. Sensing the possibility of a united local opposition to their rule, the British adopted a strategy of "divide and rule."³⁷ Ethnic, religious, economic, and other differences among the Indians were used to prevent them from unifying to oppose British governance.

In 1909, Parliament passed the India Councils Act. This law provided for a limited system of elections in India and the enfranchisement of Muslim citizens.³⁸ The reforms allowed a tiny group of Indians to vote for representatives, but the system of elections was indirect. For example, individuals elected to local representative bodies were required to elect members of an electoral college. The electoral college then chose members to be part of a provincial legislature,³⁹ and this body in turn selected members to be part of the "Imperial Legislature."⁴⁰

Despite the tremendous limitations inherent in the reforms, the British made a significant decision when they chose to create a separate electorate which enfranchised a small group of Indian Muslims. Some Muslims felt that the Hindu majority tended to override or dilute their specific concerns.⁴¹ The franchise facilitated increased loyalty to the British government among certain members of the Islamic community and generated resistance to

35. MAHAJAN, *supra* note 18, at 34-41; SRIVASTAVA, *supra* note 1, at 42.

36. BACHAL, *supra* note 1, at 30 (quoting Queen Victoria's Proclamation) (footnotes omitted).

37. MAHAJAN, *supra* note 23, at 58-66; SRIVASTAVA, *supra* note 1, at 42-45. See also Dhavan, *supra* note 1, at 211.

38. MAHAJAN, *supra* note 23, at 61; MAJUMDAR ET AL., *supra* note 7, at 913-15.

39. MAHAJAN, *supra* note 23, at 61.

40. This attenuated electoral system caused the voting population to feel little allegiance to laws that their "representatives" enacted. Moreover, women were totally excluded from the electoral process and the members of the Imperial Council elected in this manner were outnumbered by political appointees of the British government. *Id.* at 59-60.

41. *Id.* at 58-59.

the policies of the embryonic Indian National Congress.⁴² Moreover, in 1919 Parliament passed the Government of India Act and extended the separate electorates to a number of other constituencies.⁴³ The legislation establishing the separate electoral rolls was reenacted in 1935.⁴⁴

Following World War II, the segregated political system, coupled with lingering ill feelings flowing from past experiences among members of the Indian faith communities, led to the unfortunate but unsurprising strife that Prime Minister Jawaharlal Nehru described as follows:

During the last three weeks, I have wandered about West Punjab and East Punjab, and my mind is full of the horror of the things that I saw and heard. During the last few days in the Punjab and Delhi, I have supped my fill of horror. That indeed is the only feast that we can have now A maddened people, influenced day after day by stories of terrible events, has gone completely mad and behaved as only mad people can do Is this the realization of our dream? [Is] all the good work that we have done in these many years . . . not going to bear fruit at all.⁴⁵

42. *Id.* at 59. Mahatma Gandhi said the reforms continued a process which was the "undoing" of Indian nationality. According to Gandhi, "[h]ad it not been for separate electorates then established, we should have settled our differences by now." *Id.* at 61-62. Moreover, Jawaharlal Nehru contended that the separate electorates created a "political barrier" that isolated Muslims from the rest of India. *Id.* at 62. The colonial government thereby succeeded in

reversing the unifying and amalgamating process which had been going on for centuries This barrier was a small one at first for the electorates were very limited, but with every extension of the franchise it grew and affected the whole structure of political and social life, like some canker which corrupted the entire system. It poisoned the municipal and local self-government and ultimately it led to fantastic divisions. There came into existence (much later) separate Muslim Trade Unions and students' organizations and merchant chambers [T]hese electorates, first introduced among the Muslims, spread to other minorities and groups til India became a mosaic of these separatist compartments Out of them (communal electorates) have grown all manner of separatist tendencies and, finally, the demand for a splitting up of India.

Id.

Thus, while the ideal of representative government seems to have been vaguely reflected in these reforms, such cosmetic changes inflicted significant damage upon the Indian independence movement.

43. SRIVASTAVA, *supra* note 1, at 44. *See also* BACHAL, *supra* note 1, at 33; MAHAJAN, *supra* note 23, at 79-83. Each particular group voted separately for its own political candidates. Having Muslims, Sikhs, Europeans, Hindus, Indian Christians, and Anglo-Indians all voting separately for their own candidates tended to reinforce notions of competitive and even antagonistic group relationships rather than notions of a unified national identity. MAJUMDAR ET AL., *supra* note 7, at 911, 919.

44. BACHAL, *supra* note 1, at 33; MAHAJAN, *supra* note 23, at 139; MAJUMDAR ET AL., *supra* note 7, at 912; SRIVASTAVA, *supra* note 1, at 45.

45. GHOUSE, *supra* note 1, at 8.

Nehru's comments illustrate the intense interfaith conflict and attendant suffering and destruction that has periodically affected India.⁴⁶

It is in the historical context of the post-World War II partition of India that the Indian Constituent Assembly debated what was then Article 19 of the draft Indian Constitution, which concerned the degree of legal protection to be afforded to religious proselytization.⁴⁷ Over a two-day period, a very spirited debate ensued regarding the word "propagate" in Clause 1.⁴⁸ A number of speakers argued that giving individuals the right to propagate their religion would cause "a nuisance to others."⁴⁹

In addition, it was argued that evangelistic activity ought to be strictly regulated in circumstances where individuals were institutionalized because of age, youth, or some other disability.⁵⁰ Some Hindus argued that propagation of religion might well lead to "the complete annihilation of Hindu culture, the Hindu way of life and manners."⁵¹ As one opponent of Article 19 stated:

Islam has declared its hostility to Hindu thought. Christianity has worked out the policy of peaceful penetration by the backdoor on the outskirts of our social life. This is because Hinduism did not accept barricades for its protection. Hinduism is just an integrated vision and a philosophy of life and cosmos, expressed in organised society to live that philosophy in peace and amity. But Hindu generosity has been misused and politics has overrun Hindu culture. Today religion in India serves no higher purpose than collecting ignorance, poverty and ambition under a banner that flies for fanaticism. The aim is political, for in the modern world all is power-politics and the inner man is lost in the dust. . .

[I]f people should propagate their religion, let them do so. Only I crave, let not the Constitution put it as a fundamental right and encourage it. . . . Drop the word 'propagate' in article 19 at least. Civilisation is going headlong to the melting pot. Let us beware and try to survive.⁵²

46. Dhavan, *supra* note 1, at 211-12. See also sources cited *supra* note 3.

47. 7 Constituent Assembly Debates 817-40 (Dec. 3, 6, 1948) [hereinafter C.A.D.]. In relevant part (Clause 1), Article 19 was identical with Article 25(1) of the present Indian Constitution. It read as follows: "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion." 3 THE FRAMING OF INDIA'S CONSTITUTION: SELECT DOCUMENTS 524 (B. Shiva Rao et al. eds., 1967)

48. *Id.*

49. See, e.g., *Id.* at 818 (Dec. 3, 1948) (statement of Tajamul Husain).

50. See, e.g., *Id.* at 820-21 (Dec. 3, 1948) (statement of Prof. Shah).

51. See, e.g., *Id.* at 822, 824 (Dec. 3, 1948) (statement of Shri Misra).

52. *Id.* at 824.

Other arguments against propagation of religion drew upon historical circumstances and contended that Christian missionaries in essence caricatured the Hindu religion.⁵³

Responding to these arguments, a number of proponents of the Article argued that the provision would allow adequate state restriction of freedom of religion. Religious practice would be regulated subject to "public morality, public order and public health and also in so far as the right conferred . . . does not conflict in any way with the other provisions elaborated under this part of the Constitution."⁵⁴ India had a great spiritual heritage, and if the nation were to "educate the world [and] remove the doubts and misconceptions and the colossal ignorance that prevails in the world about India's culture and heritage, this right must be inherent, - the right to profess and propagate her religious faith must be conceded."⁵⁵ Others asserted that the word "propagate" was intended primarily to apply to members of the Christian community:

This word is generally understood as if it referred to only one particular religion, namely, Christianity alone. . . . [I]t is a right given to all sectional religions; and it is well known that after all, all religions have one objective and if it is properly understood by the masses, they will come to know that all religions are one and the same. It is all God, though under different names.⁵⁶

Moreover, it was contended that Article 19 was not:

[s]o much an article on religious freedom, but an article on, what [one] may call religious toleration. It is not so much the words 'All persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion' that are important. What are important are the governing words with which the article begins, viz., 'Subject to public order, morality and health.'⁵⁷

After this extensive debate, more than a dozen amendments were voted on. Each of these amendments was defeated except two minor word changes involving other sections of Article 19.⁵⁸ Accordingly, the legislative history of Article 19 during the Constituent Assembly debates suggests that the framers of the Indian Constitution carefully considered both the state's interest in reg-

53. *Id.* at 835-36 (statement of Shri Chaudhari, objecting to the lack of a constitutional provision preventing a believer from "throwing mud at some other religion").

54. *Id.* at 831 (Dec. 6, 1948) (statement of Pandit Maitra).

55. *Id.* at 832.

56. *Id.* at 833.

57. *Id.* at 834 (Dec. 6, 1948) (statement of Hon. Shri Santhanam).

58. *Id.* at 838-40.

ulating religious adherents' evangelistic activities and the individual's interest in following the dictates of her religion.⁵⁹

This abbreviated historical context can help us better understand the response of the Indian courts to issues raised in cases on religion generally, and particularly, on the propagation of religion.⁶⁰

B. AMERICA

The relevant American history is comparatively short. Seven years following the chartering of the British East India Company, the English colonists made their first permanent settlement in the New World in Jamestown, Virginia. Many colonists came to America because they felt oppressed living under a monarchical government with a state religion that was often hostile to their individual beliefs as well as to their political and economic interests. Relatively large populations of Puritans settled in New England, Quakers in Pennsylvania, Anglicans in the Southern colonies, and Roman Catholics in Maryland.⁶¹ In some colonies, such as Virginia, settlers were legally required to attend religious services of the state church, and the expenses of the clergy were paid from public taxes.⁶² Other colonies, like Rhode Island and Pennsylvania, had no "state" church and manifested much greater openness to religious diversity.⁶³

59. The Constituent Assembly deliberated in the immediate aftermath of the partition of the country into two separate states, India and Pakistan. *Id.* at 793. It is singularly unfortunate that such conflict and its byproducts of pain, distrust, and destabilization have recently returned to haunt Indian society.

60. *See, e.g.,* C.A.D., *supra* note 47, at 817-40 (Dec. 3, 6, 1948); MAHAJAN, *supra* note 23, at 143-44.

61. *See, e.g.,* BACHAL, *supra* note 1, at 21; 5 THE FOUNDERS' CONSTITUTION 43-70 (Philip B. Kurland & Ralph Lerner eds., 1987)[hereinafter FOUNDERS' CONSTITUTION].

62. *Everson v. Board of Educ.*, 330 U.S. 1, 11 (1947). In fact, in some colonies, failure to accept prevailing Christian doctrine was a capital offense. For example, in colonial Maryland the law provided:

That whatsoever pson or psons within this Province and the Islands thereunto belonging shall from henceforth blaspheme God, that is Curse him, or deny our Savior Jesus Christ to bee the sonne of God, or shall deny the holy Trinity the ffather sonne and holy Ghost, or the Godhead or any of the said Three psons of the Trinity or the Vnity of the Godhead, or shall use or utter any reproachfull Speeches, words or language concerning the said Holy Trinity, or any of the said three psons thereof, shalbe punished with death and confiscation or forfeiture of all his or her lands and goods to the Lord Proprietary and his heires. . . .

FOUNDERS' CONSTITUTION, *supra* note 61, at 49.

63. BACHAL, *supra* note 1, at 21. Thus, for example, Roger Williams in an open letter to the town of Providence, Rhode Island in 1655 gave the following hypothetical:

Following the American Revolution, the colonists adopted the Articles of Confederation, which proved ineffective in resolving the issue of how best to govern the thirteen independent states. The Constitutional Convention of 1787 met to draft a document that would address these concerns and transform the loosely knit confederation into a "bonded" federal union. The first ten amendments, ratified in 1791, were designed to ensure that the new government expressly defended individual civil liberties.⁶⁴ The First Amendment begins with the words "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"⁶⁵ In this way American political leaders attempted to ensure that at least on the federal level there would be no repeat of the experience under English rule, which included paying taxes to support a religion in which one did not believe and suffering severe sanctions for practicing the religion in which one did believe.⁶⁶

There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth, or a human combination or society. It hath fallen out sometimes, that both papists and protestants, Jews and Turks, may be embarked in one ship; upon which supposal I affirm, that all the liberty of conscious, that ever I pleaded for, turns upon these two hinges - that none of the papists, protestants, Jews, or Turks, be forced to come to the ship's prayers of worship, nor compelled from their own particular prayers or worship, if they practice any. . . .

FOUNDERS' CONSTITUTION, *supra* note 61, at 50.

Williams went on to qualify his statement, however, by saying the following:

[N]otwithstanding this liberty, the commander of this ship ought to command the ship's course, yeah, and also command that justice, peace and sobriety, be kept in practice, both among the seaman and all the passengers. If any of the seaman refuse to perform their services, or passengers to pay their freight; if any refuse to help, in person or purse, towards the common charges or defense; if any refuse to obey the common laws and orders of the ship concerning their common peace or preservation; if any shall mutiny and rise up against their commanders and officers; if any should preach or write that there ought to be no commanders or officers, because all are equal in Christ, therefore no masters nor officers, no laws nor orders, nor corrections nor punishment . . . whatever is pretended, the commander or commanders may judge, resist, compel and punish such transgressors, according to their desserts and merits.

Id. at 50-51.

64. See, e.g., TRIBE, *supra* note 1, at 2-5, discussing "Model I" of Constitutional Law. Model One's concern revolves around the Framers' fragmentation of governmental power to protect individual liberty.

65. U.S. CONST. amend. I.

66. *Everson*, 330 U.S. at 15-16. One prominent legal scholar has argued that the historical background of the First Amendment is "ambiguous and many of today's problems were of course never envisioned by any of the Framers." TRIBE, *supra* note 1, at 1158. Professor Tribe contends that despite the ambiguity of the historical record, the United States Supreme Court has "occasionally assumed the role of constitutional historian to seek guidance in the origins and original meanings of the religion clauses." *Id.* at 1159. According to Tribe, in *Everson* the Supreme Court

Having set forth a brief historical background regarding the protection of religious freedom in the two societies involved, we now focus attention on the relevant constitutional provisions.

II. THE INDIAN AND AMERICAN CONSTITUTIONAL PROVISIONS CONCERNING FREE EXERCISE OF RELIGION

A. INDIA

Article 25 of the Indian Constitution provides that “[s]ubject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.”⁶⁷ The state may, however, make laws which regulate and restrict “secular activity” associated with religious practice. Such secular activity may be of a political, economic, or financial nature.⁶⁸

While Article 25 focuses on religious freedom for individuals, Article 26 sets out some liberties that the Constitution granted to religious denominations and sects.⁶⁹ Such religious groups have the right to establish and maintain their own institu-

enunciated a view of constitutional history in the opinions of Justices Black and Rutledge which, while reaching contrary results, shared:

three essential elements: first they seek the meaning of the clauses in the background of the period in which they were adopted; second, they view the ideas of Jefferson and Madison as the direct antecedents of the first amendment and as particularly relevant to its interpretation; and, third, they accept the posture that a union between church and states leads to persecution and civil strife.

Id. at 1160. Tribe asserts that the constitutional vision of Black and Rutledge has been assailed by legal scholars; however, one must consider their views as part of the background in determining the proper interpretation of the Free Exercise Clause in the First Amendment. *See also* CORD, *supra* note 1, at 109-33; CURRY, *supra* note 1, at vii.

67. INDIAN CONST. art. 25 goes on to state that:

(2) Nothing in this Article shall affect the operation of any existing law or prevent the state from making any law:

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

68. INDIAN CONST. art. 25(2)(a).

69. INDIAN CONST. art. 26 states: *Freedom to manage religious affairs*: Subject to public order, morality and health, every religious denomination or any section thereof shall have the right -

(a) to establish and maintain institutions for religious and charitable purposes,

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

tions for religious and charitable purposes,⁷⁰ to manage their religious affairs,⁷¹ and to own and lawfully administer property.⁷² These freedoms are all subject to regulation on behalf of "public order, morality and health."⁷³ The institutions that denominations and sects establish may be religious or philanthropic in nature, but not secular. Sects and denominations are allowed to manage religious affairs, but their right to manage nonreligious affairs seems less clear. In general, the Indian Constitution subordinates religious freedom to state interests.⁷⁴

B. AMERICA

The religion provisions of the First Amendment, as applied to the states through the Fourteenth Amendment, are commonly analyzed in terms of two clauses. The Establishment Clause states that "Congress shall make no law respecting an establishment of religion," and the Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."⁷⁵ The Indian Constitution has no provision analogous to the Establishment Clause in the First Amendment.⁷⁶ Indeed, the Indian government is actively involved in supporting and sometimes managing religious institutions.⁷⁷

This Article does not consider the American constitutional approach to establishment of religion. Rather, it focuses on case law concerning free exercise of religion in India and the United States, and more specifically, upon the propagation of religion.

III. INDIAN AND AMERICAN SUPREME COURT DECISIONS ON FREE EXERCISE AND THE FREEDOM TO PERSUADE

To facilitate our understanding of how the Indian judiciary dealt with the relevant constitutional text prior to deciding *Stainislaus*, the following section will consider several pre-*Stainis-*

70. INDIAN CONST. art. 26(a).

71. INDIAN CONST. art. 26(b).

72. INDIAN CONST. art. 26(c).

73. INDIAN CONST. art. 26.

74. Dhavan, *supra* note 1, at 230-31. See, e.g., *R. Modi v. State* 1957 S.C.R. 860, 866 (India), wherein the Indian Supreme Court upheld the conviction of an Hindu newspaper editor for "outraging the religious feelings of muslims" stating, among other things that, "[t]he right to freedom of religion . . . is made expressly subject to public order, morality and health."

75. U.S. CONST. art. I.

76. JAIN, *supra* note 1, at 22. In fact, the Indian Constituent Assembly expressly rejected a proposed provision in the Indian Constitution that stated: "The Indian Republic shall make no law respecting an establishment of religion." C.A.D., *supra* note 47, at 839.

77. JAIN, *supra* note 1, at 99-100.

laus Indian Supreme Court decisions on religious freedom. Moving from this general context, we will then focus on the *Stainislaus* case itself.

A. INDIA

1. *Pre-Stainislaus* Indian Supreme Court decisions.

In *Commissioner of Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar*,⁷⁸ the Indian Supreme Court ruled unanimously that several statutes infringed upon the fundamental rights of the local leader of a Hindu theological institution to manage the property over which he exercised stewardship.⁷⁹ The Court stated in passing that "freedom of religion in our Constitution is not confined to religious belief only; it extends to religious practices as well, subject to the restrictions which the Constitution itself has laid down."⁸⁰ Addressing the restrictions that the Constitution delineates, the Court said that "[r]estrictions by the State upon free exercise of religion are permitted both under articles 25 and 26 on grounds of public order, morality and health."⁸¹ Accordingly, the state can "regulate or restrict any economic, financial, political and other secular activities which may be associated with religious practice and . . . [in addition] can legislate for social welfare and reform even though by so doing it might interfere with religious practices."⁸²

However, the Court also stated:

Religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. . . . A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress.

78. 1954 S.C.R. 1005 (India).

79. *Id.* at 1045-46. The Hindu Religious Endowments Board (hereinafter Board) had acted contrary to the wishes of the head of a local religious institution known as a "Math." The Board proposed a scheme whereby the financial affairs of the Math would be managed primarily by the Board. The Board claimed that it had reason to believe that the head of the Math (called a "Mahant") had mismanaged its endowments. *Id.* at 1010. The Mahant sued, requesting that the Court prohibit the Board from implementing its scheme. In the lower courts, the Mahant prevailed. *Id.* at 1011-12.

80. *Id.* at 1028.

81. *Id.* at 1024.

82. *Id.* at 1024-25.

The guarantee under our Constitution not only protects the freedom of religious opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression "practice of religion" in article 25.⁸³

In *R. Modi v. The State of U.P.*,⁸⁴ decided three years later, the Indian Supreme Court upheld the conviction of the editor of a magazine under Section 295A of the Indian Criminal Code.⁸⁵ The Sessions Court of Kanpur convicted the editor of deliberately and maliciously outraging the religious feelings of a particular religious class — the Muslims. The Supreme Court rejected the editor's claim that Section 295A violated his constitutional rights. The Court held that the statute fell within the scope of Article 19, which provided for limitation of free speech "in the interests of public order."⁸⁶ Moreover, the Court contended:

295A does not penalise any and every act of insult to or attempt to insult the religion or the religious beliefs of a class of citizens but it penalises only those acts of insults to or those varieties of attempts to insult the religion or the religious beliefs of a class of citizens, which are perpetrated with the deliberate and malicious intention of outraging the religious feelings of that class. Insults to religion offered unwittingly or carelessly or without any deliberate or malicious intention to outrage the religious feelings of that class do not come within the section.⁸⁷

The editor's efforts to outrage the Muslim community resulted in the Court upholding his conviction and one-year jail sentence plus fine.

Prior to *Stainislaus*, the Indian Supreme Court also had to address the free exercise question in the context of Article 26 of the Indian Constitution which dealt with a religious denomination's freedom to manage its affairs. For example, *Narendra Prasadji v. State of Gujarat*⁸⁸ involved the government of the State of Gujarat adopting land reform legislation that abolished ownership of certain religious lands by local religious groups.

83. *Id.* at 1023-24. Based on this line of reasoning, the Indian Supreme Court chose to affirm the High Court's decision to prohibit the Board from pursuing its financial plan of trying to take over the Math's affairs. *Id.* at 1012.

84. 1957 S.C.R. 860 (India).

85. *Id.* at 862, 868. Section 295A of the Indian Penal Code stated:

Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or both.

See S. KRISHNAMURTI, A HANDBOOK OF CRIMINAL LAW 78 (5th ed. 1951).

86. 1957 S.C.R. at 867.

87. *Id.*

88. 1974 A.I.R. 2098 (India).

The trustee of one of the groups (followers of Lord Krishna) challenged the constitutionality of the land reform statute, arguing that it violated Art. 26(c) of the Constitution. The Supreme Court of India rejected the claim of the trustee and stated that "Article 26 guarantees *inter alia* the right to own and acquire movable and immovable property for managing religious affairs. This right, however, cannot take away the right of the State to compulsorily acquire property in accordance with the provisions of Article 31(2)."⁸⁹

The Supreme Court went on to discuss the nature of the right to religious freedom saying:

No rights in an organized society can be absolute. Enjoyment of one's rights must be consistent with the enjoyment of rights also by others. Where in a free play of social forces it is not possible to bring about a voluntary harmony, the State has to step in to set right the imbalance between competing interests and there the Directive Principles of State Policy, although not enforceable in courts, have a definite and positive role introducing an obligation upon the State under Article 37 in making laws to regulate the conduct of men and their affairs. In doing so a distinction will have to be made between those laws which directly infringe the freedom of religion and others, although indirectly, affecting some secular activities or religious institutions or bodies. For example if a religious institution owns large areas of land far exceeding the ceiling under relevant laws and indulges in activities detrimental to the interests of the agricultural tenants, who are at their mercy, freedom of religion or freedom to manage religious affairs cannot be pleaded as a shield against regulatory remedial measures adopted by the State to put a stop to exploitation and unrest in other quarters in the interest of general social welfare. The core of religion is not interfered with in providing for amenities for sufferers of any kind.⁹⁰

Thus, in some circumstances, the "general social welfare" could outweigh the freedom of religion. The *Narendra Prasadji* Court seemed conscious of the need to protect the "core of religion," but what the Indian Supreme Court meant by this remained undefined.

2. *Stainislaus v. State of Madhya Pradesh*

The leading Indian case law precedent on the freedom to propagate one's religion is *Stainislaus v. State of Madhya Pradesh*.⁹¹ In *Stainislaus*, the Indian Supreme Court consolidated cases from the high courts of two Indian states — Orissa

89. *Id.* at 2103.

90. *Id.* at 2104-05.

91. 2 S.C.R. 611 (1977) (India).

and Madhya Pradesh. The case from Orissa, *Hyde v. State*,⁹² involved separate claims by eight petitioners challenging the validity of the Orissa Freedom of Religion Act 2 of 1968 ("Orissa Act").⁹³ The Orissa Act prohibited forcible conversion, stating that "[n]o person shall convert or attempt to convert, either directly or otherwise, any person from one religious faith to another by the use of force or by inducement or by any fraudulent means nor shall any person abet any such conversion."⁹⁴ Conversion was defined as "renouncing one religion and adopting another" and force constituted "a threat of injury of any kind including threat of divine displeasure or social ex-communication."⁹⁵ In addition, the Orissa Act defined fraud as embracing "misrepresentation or any other fraudulent contrivance,"⁹⁶ and inducement encompassed "the offer of any gift or gratification either in cash or in kind, . . . includ[ing] the grant of any benefit, either pecuniary or otherwise."⁹⁷

Finally, the Orissa Act provided that violation of its provisions could result in a one-year jail sentence plus a steep fine.⁹⁸ This criminal liability was without prejudice to civil liability.⁹⁹ Enhanced penalties were provided if the forcible conversion involved a minor, a woman, or a person who was a member of a "scheduled" caste or tribe.¹⁰⁰

Petitioners claimed that the Orissa state legislature lacked authority to legislate on forced conversions because under the Constitution, the religion field was preempted by the Indian Parliament.¹⁰¹ In addition, Petitioners claimed that in passing this particular act, the state legislature violated their fundamental constitutional rights pursuant to Article 25 of the Indian Constitution.¹⁰²

92. 1973 A.I.R. 116 (Orissa H.C.).

93. *Id.* at 116-17.

94. *Id.* at 120 (§ 3 of the Orissa Freedom of Religion Act of 1968 2).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* (§ 4 of the Orissa Act).

99. *Id.*

100. *Id.* Pursuant to article 341(1), the Indian Constitution authorizes the President, following consultation with the State governor, to designate "castes or races or tribes or parts of or groups within castes, races or tribes which shall for purposes of this Constitution be deemed to be Scheduled Castes in relation to that State." For an excellent discussion of group preferences and group membership in India, see MARC GALANTER, *LAW AND SOCIETY IN MODERN INDIA* 105-40 (Rajeev Dhaven ed., 1989).

101. 1973 A.I.R. at 117.

102. *Id.*

The Orissa High Court held that the Act dealt primarily with religion and not with matters of criminal law or public order.¹⁰³ The Court said that matters involving religion fell within the competence of the national Parliament and that the state legislature was incompetent to pass legislation in this area.¹⁰⁴ Further, the Court concluded that the Act was not primarily involved in areas of local legislative competence — specifically criminal law or public order. Accordingly, the Court declared the Act *ultra vires* and directed a writ of mandamus prohibiting the state from effectuating its provisions.¹⁰⁵

Within its consolidated decision, the Indian Supreme Court also considered the companion case *Stainislaus v. State*.¹⁰⁶ A Catholic priest, Father Stainislaus, challenged the Religious Freedom Act of 1968 of the State of Madhya Pradesh.¹⁰⁷ As Petitioner, he asserted that the Madhya Pradesh Religious Freedom Act violated his constitutional rights under Article 25 of the Indian Constitution, that the Madhya Pradesh state legislature was incompetent to pass such legislation, and that other sections of the Act amounted to testimonial compulsion.¹⁰⁸

The Madhya Pradesh Act prohibited forcible conversion through the use of force, fraud, or allurement.¹⁰⁹ Allurement was defined as including an "offer of any temptation in the form of - (i) any gift or gratification either in cash or kind; (ii) grant of any material benefit, either monetary or otherwise."¹¹⁰ The Act stated that force meant "a show of force or a threat of injury of any kind including threat of divine displeasure or social excommunication."¹¹¹ It defined fraud as embracing "misrepresentation or any other fraudulent contrivance."¹¹² As with the Orissa Act, the Madhya Pradesh Act provided for increased punishment if the forcible conversion involved a minor, a woman, or a person who was a member of a scheduled caste or tribe.¹¹³

In addition, the Madhya Pradesh Act required that a person overseeing the religious conversion ceremony of a convert inform the district magistrate by completing a form prescribed in the Act.¹¹⁴ The informant had to specify the name of the person

103. *Id.* at 123.

104. *Id.*

105. *Id.*

106. 1975 A.I.R. 163 (India).

107. *Id.* at 164.

108. *Id.*

109. *Id.* at 165. (§ 3 of the Act).

110. *Id.* at 165 (§ 2 of the Act).

111. *Id.*

112. *Id.*

113. *Id.* at 165 (§ 4 of the Act).

114. *See infra* APPENDIX.

who was changing her religion, the faith from which and to which she was being converted, her father's name, her address, age, occupation, income, and marital status.¹¹⁵ This form also required data regarding whether the convert had dependents, whether she was a member of a scheduled tribe, the date of the conversion, the place of the conversion, and the names of at least two people present at the ceremony. Moreover, the person performing the conversion ceremony had to identify herself.¹¹⁶ If the persuader failed to file the appropriate forms or otherwise comply with the Act's provisions, she could be convicted of a crime.¹¹⁷

Adopting arguments presented in *Hyde v. State*, Father Stainislaus argued that the Madhya Pradesh Freedom of Religion Act was *ultra vires* because only Parliament could legislate in this area, and the state law violated his constitutional rights. The High Court of Madhya Pradesh rejected his arguments.¹¹⁸ After carefully evaluating a number of the same precedents reviewed by the Orissa High Court,¹¹⁹ the Court concluded that the state's Freedom of Religion Act primarily focused on "public order." Since Indian states can pass legislation to promote public order, the Madhya Pradesh High Court held that this state legislation was constitutional.¹²⁰ The Court argued that the term "public order" was broad in scope, and quoted the Indian Supreme Court in stating that:

The test to be adopted in determining whether an act affects law and order or public order . . . is: Does it lead to disturbance of the current life of the community so as to [be] a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed?¹²¹

Recalling the Indian Supreme Court's teaching in this area, the Madhya Pradesh Court decided public order is simply a lesser category of law and order.¹²²

On appeal, to resolve the conflict among state courts, the Indian Supreme Court adopted, in substantial part, the view of the Madhya Pradesh High Court. The Indian Supreme Court

115. 1975 A.I.R. at 165-66.

116. *Id.* at 166.

117. *Id.* at 165.

118. *Id.* at 172-73.

119. *Id.* at 167-73.

120. *Id.* at 173.

121. *Id.* at 171 (quoting *Ghose v. State*, 3 S.C.R. 288 (1970) (India)).

122. *Id.* at 170-72 (M.P.). The Madhya Pradesh court pointed out that the Indian Supreme Court had stated that "[T]he true distinction between the areas of law and order and public order lies not merely in the nature or quality of the act, but in the degree and extent of its reach upon society." *Id.* at 172, quoting *Karmakar v. State*, 1972 A.I.R. 2259, 2260-61 (India).

held that individuals have the right to propagate their religion, meaning to "transmit or spread one's religion by an exposition of its tenets."¹²³ The Court stated that no fundamental constitutional right exists to convert a person from one religion to another.¹²⁴ The Court admonished:

It has to be remembered that Article 25(1) guarantees "freedom of conscience" to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the "freedom of conscience" guaranteed to all the citizens of the country alike.¹²⁵

The Court then considered the argument that the legislatures of the states of Madhya Pradesh and Orissa lacked the authority to pass legislation in the area of religion.¹²⁶ The Court stated that "public order" has a "wide connotation,"¹²⁷ and that the state legislatures could pass laws prohibiting forcible conversion if such conversion would have "created public disorder in the States."¹²⁸ Accordingly, the Court affirmed the judgment of the Madhya Pradesh High Court and reversed the judgment of the Orissa High Court.¹²⁹

The Indian Supreme Court concluded, in effect, that the right to transmit or spread the tenets of one's religion is subordinated where that right conflicts with the public order, defined as the "state of tranquility which prevails among the members of a political society as a result of internal regulations enforced by the government which they have established."¹³⁰

Critics of this opinion suggest that to preserve the stability of the state, the Court glossed over constitutional issues involving civil liberty. One scholar offered the following critique:

We can see how easily the Court converted a tenuous argument into a plausible (even if vague) doctrine by the use of implausible hard examples. Questions relating to the inducement of religious conversion hardly present themselves in the form of physical coercion accompanied by public spectacle. The right to 'propagate' must, perforce, include aspects of 'in-

123. *Stainislaus v. State of Madhya Pradesh & Ors.*, 2 S.C.R. 616 (India).

124. *Id.*

125. *Id.*

126. *Id.* at 617.

127. *Id.*

128. *Id.*

129. *Id.* at 618. The Indian Supreme Court did not take up the issue of testimonial compulsion under Article 20 of the Indian Constitution. *Id.* at 615. That issue had been raised in the Madhya Pradesh state courts. *Id.* at 614.

130. *Id.* at 617 (citations omitted).

ducement', whether in this life or in the life to come. Equally, any activity that some section or group finds disagreeable can, theoretically, give rise to problems of law and order. The Supreme Court's assumptions about social causation (inducement is fraud; fraud may cause public disorder; public order is an over-riding category of constitutional control) obscure many important constitutional questions and leads the Court to conclude that the two statutes before the Court do not "provide for the regulation of religion".¹³¹

Indeed, the Court's assertion that the disputed legislation did not regulate religion is at best problematic. When the state requires a citizen to fill out a form detailing deeply personal information about someone else who has decided to join her faith community, such a requirement smacks of state regulation — perhaps even state interference. The state's control is broadened by the imposition of criminal sanctions if an individual fails to tell the government everything it wants to know about her participation in another person's religious conversion.

Hence, laws such as the Freedom of Religion acts adopted in Orissa and Madhya Pradesh help maintain the religious status quo; they tend to quench the spiritual fervor and temper the theological rhetoric of evangelical religious believers.¹³² Whether the exchange of thoughts and beliefs about religion is in fact adversely affected, and the extent of such effect, is a matter for further empirical study.¹³³

These precedents suggest strongly that Indian courts are predisposed to rule in favor of the state's interest in maintaining public order, not the individual's interest in freely expressing and acting upon her religious beliefs.¹³⁴ This approach seems consis-

131. Dhavan, *supra* note 1, at 229 (footnote omitted).

132. *Id.*

133. Some critics argue that cases like *Stainislaus* and the statutes it upholds have placed a chilling effect on the determination of some to consider conversion. See, e.g., J. Duncan M. Derrett, *Freedom of Religion in India*, KERALA L. TIMES, 91-92 (1979). For a legal scholar's partial defense of the *Stainislaus* case, see V. P. Bhartiya, *Propagation of Religion*, 19 J. INDIAN L. INST. 321-33 (1977).

134. Indeed, Professor Dhavan has argued that:

The nub of the issues in the religious freedom cases has devolved away from religious freedom to a disorganized discussion of the legitimate areas of operation of a modern State. And the courts' answer to the question, "How modern is the modern State?" appears to be, "As modern as it wants to be!" By resolving these questions mechanically, the Court has not really evolved a theory about the permissible limits of social reform. It has left it to other agencies of the State to assume broad powers to regulate religious freedom and has provided supportive constitutional protection so long as some nexus is deemed to exist between the power exercised and the broad undefined categories of control. By enlarging, but not defining, notions of secular management, public order, morality and health, almost any part of religious activity is subject to control.

Dhavan, *supra* note 1, at 230-31 (footnote omitted).

tent with the constitutional mandate placing public order as a higher priority than the free exercise of religion.¹³⁵ We now turn to United States Supreme Court case law dealing with evangelistic activities.

135. These perceptions seem to be confirmed in some post *Stainislaus* Indian Supreme Court decisions involving freedom of religion, though not specifically focusing on propagation. For instance, *Abbas v. State of U.P.*, 1983 A.I.R. 1268 (India), involved a Supreme Court order implementing the recommendation of a Court-appointed committee concerning a disputed parcel of religious property used by the Sunni and Shia Islamic sects. *Id.* at 1269-70. The committee recommended that two graves of the Sunnis be moved to another place so that the Sunnis would not have to interact as much with the Shias. To the objection that the fundamental right of religious freedom of the Sunnis had been violated, the Indian Supreme Court responded, "the exercise of these fundamental rights is not absolute but must yield or give way to public order . . ." *Id.* at 1270. This was especially the case since the two Sunni graves in question mysteriously appeared *after* the initial lawsuit commenced. Thus the Supreme Court reaffirmed the primacy of the state's interests in public order over individuals' free exercise rights.

More recently, in *Emmanuel v. State of Kerala*, 748 A.I.R. (1987) (India) the Indian Supreme Court affirmed that some limits exist upon the governmental authorities' ability to restrict the exercise of religious beliefs. *Emmanuel* involved the expulsion of three Jehovah's Witnesses' children from a public school. When the Indian National Anthem was sung, the three children stood respectfully but remained silent. Under pressure from an Indian Legislative Assembly member who noticed this behavior, the Headmistress of the school expelled the children, in part because it was felt that their failure to sing was "unpatriotic." *Id.* at 749.

The lower courts rejected the children's petition requesting readmission to school. On appeal to the Indian Supreme Court, the state authorities defended their behavior by relying upon two governmental circulars providing, among other things, for school children to sing the national anthem. *Id.* at 752-53.

The Supreme Court reversed the lower court judgments. The Court ruled that the circulars did not have the force of law. The circulars were "mere departmental instructions." *Id.* at 753. Such departmental instructions could not deprive citizens of their constitutional rights under either Article 25 protecting the right to freely profess, practice and propagate religion, or under Article 19, shielding freedom of speech and expression.

Furthermore, the Indian Supreme Court held that the state had not passed any legislation relevant to singing the national anthem. *Id.* at 752. The Supreme Court panel was nevertheless careful to point out that the Court under the Constitution could regulate religious expression. The Court said:

[W]hile on the one hand, Art. 25(1) itself expressly subjects the right guaranteed by it to public order, morality and health and to the other provisions of Part III, on the other hand, the State is also given the liberty to make a law to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practice and to provide for social welfare and reform, even if such regulation, restriction or provision affects the right guaranteed by Art. 25(1).

Id. at 754.

Thus the *Emmanuel* court, while protecting free exercise of religious belief from state intrusion via mere executive or departmental instructions, at the same time affirmed that the state has very broad authority to regulate religious activities.

B. UNITED STATES

In deciding whether certain conduct is constitutionally permissible, the Supreme Court of the United States also weighs the interests of the state, affected third parties, and religious believers. The judicial decisions in America, however, have tended to reach different results than those in India.

In that regard, during the past fifty years, the United States Supreme Court has periodically confronted cases involving the scope of an individual's freedom to communicate deeply held religious beliefs. It has not always been clear whether the primary motive of such communication has been persuasion to join one's faith community or a desire for financial support. Often the motives have been mixed.¹³⁶ The crux of the issue, addressed in the following Supreme Court cases, is what the Constitution allows individuals to do to "get the word out."

In *Cantwell v. Connecticut*¹³⁷ the Court invalidated a Connecticut statute requiring all persons who sought to solicit money or any thing of value for a "religious, charitable or philanthropic cause" to first obtain a certificate from a Connecticut public welfare official.¹³⁸ The public official had the statutory duty of determining "whether such cause is a religious one . . . and conforms to reasonable standards of efficiency and integrity . . ."¹³⁹ Three ministers of the Jehovah's Witnesses faith failed to obtain such a certificate. All three went from house to house proselytizing and soliciting in a predominantly Roman Catholic neighborhood. One of them stopped two men on the street, asked and received permission to play a gramophone record regarding Jehovah's Witnesses doctrine, and proceeded to play the record.¹⁴⁰ The two hearers responded with great hostility to the anti-Catholic message of the record and threatened the minister, Jesse Cantwell, with physical violence. Cantwell retreated but was later arrested.¹⁴¹

136. This observation seems validated by the (recent embarrassing) scandals involving so-called televangelists. However, motive is not necessarily irrelevant to judicial evaluation of religious activity as suggested in the differing outcomes of *Lee v. ISKCON*, 112 S. Ct. 2701 (1992) (financial solicitation) and *ISKCON v. Lee*, 112 S. Ct. 2709 (1992) (religious literature distribution), *see infra* text accompanying notes 162-180.

137. 310 U.S. 296 (1940).

138. *Id.* at 301-02.

139. *Id.* at 302.

140. *Id.* at 302-03.

141. *Id.* All three ministers were charged and convicted of violating the anti-solicitation statute. They were also convicted of a common law breach of the peace. On appeal, the Connecticut Supreme Court affirmed the convictions under the anti-solicitation statutes, and Cantwell's breach of the peace. *Id.* at 300. The Connecticut

Following their criminal convictions in the Connecticut state courts, the ministers appealed to the U.S. Supreme Court, which unanimously reversed the convictions. The Supreme Court held that the First Amendment provisions governing freedom of religion applied not only to congressional but also to state legislative action.¹⁴² Under the Connecticut statute, the state officials were required to decide whether the faith that the ministers professed was a religion. If an individual's beliefs were not what the officials considered a religion, the individual's solicitation and proselytizing became a crime. The Court found this to be repugnant to the First Amendment, constituting "censorship of religion."¹⁴³

To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.¹⁴⁴

The Court nevertheless recognized the right of a state to enact "general and non-discriminatory legislation" regulating the time, place, and manner of soliciting on the public streets so as to ensure peace and good order.¹⁴⁵

Three years later the Court decided *Jamison v. Texas*,¹⁴⁶ which involved the criminal conviction of a Jehovah's Witness for distributing religious leaflets on a Dallas public street. The Supreme Court held unconstitutional a Dallas ordinance that the state courts had construed as prohibiting distribution of religious handbills. The Supreme Court held that Texas could not constitutionally prohibit a person from expressing her ideas on a public street in an orderly manner, and that it was precluded from enforcing legislation which disallowed distribution of religious handbills "at all times, at all places, and under all circumstances."¹⁴⁷ The individual's right to express her religious beliefs extended to requesting, through the handbills, financial contributions for religious purposes and the purchase of religious literature.¹⁴⁸

Supreme Court granted Cantwell's cohorts a new trial on their breach of the peace charges. *Id.*

142. *Id.* at 303.

143. *Id.* at 305.

144. *Id.* at 310.

145. *Id.* at 304.

146. 318 U.S. 413 (1943).

147. *Id.* at 416.

148. *Id.* at 416-17.

In *Follett v. Town of McCormick*¹⁴⁹ another significant case involving religious evangelism, the U.S. Supreme Court invalidated a local ordinance imposing a tax on each person who sold books in the town. When applied to a Jehovah's Witnesses minister who made his livelihood selling books from door to door, the statute was held unconstitutional because it effectively imposed a tax upon the expression of his religious beliefs. The Court ruled that the state may not tax a person's preaching ministry — whether from the pulpit or door-to-door.¹⁵⁰

Several justices dissented on the basis that the minister was allowed to obtain benefits from local government services without contributing via payment of taxes for those services. The dissenters contended that the Court had effectively granted a subsidy to door-to-door ministers.¹⁵¹

Nearly forty years later the Supreme Court decided *Heffron v. International Society for Krishna Consciousness, Inc.*,¹⁵² another free exercise case embracing state regulation of activities which arguably include evangelism. *Heffron* involved a Minnesota regulation requiring all persons at the state fair who wished to sell or distribute merchandise to do so from fixed booths on the fairgrounds.¹⁵³ The state regulation applied to the sale or distribution of "written material" including religious literature. The International Society for Krishna Consciousness ("ISKCON") sought a court order invalidating the regulation on the grounds that, among other things, it violated the right to engage in selling

149. 321 U.S. 573 (1944).

150. *Id.* at 577-78.

151. *Id.* at 581. The American courts are nevertheless willing to concede an important role for the State in cases of free exercise of religion by minors. Thus in the case of *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court upheld the criminal conviction of a woman for violating a Massachusetts statute prohibiting child labor. At her nine-year-old niece's request, the woman, Mrs. Prince, took her niece with her to sell religious literature and obtain adherents to their faith. *Id.* at 162. The Supreme Court said:

Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves. Massachusetts has determined that an absolute prohibition, though one limited to streets and public places and to the incidental uses proscribed, is necessary to accomplish its legitimate objectives We think that with reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the case of other freedoms, and the rightful boundary of its power has not been crossed in this case.

Id. at 170.

152. 452 U.S. 640 (1981).

153. *Id.* at 643.

literature to and soliciting donations from the public as their religion requires.¹⁵⁴

The Minnesota Supreme Court reversed a lower court judgment upholding the constitutionality of the regulation.¹⁵⁵ On appeal, a sharply divided Supreme Court overruled the Minnesota Supreme Court's decision. The U.S. Supreme Court stated that local governments may adopt reasonable regulations governing the time, place, and manner of sale and distribution of religious matter, the solicitation of funds, and the proselytization of prospective members.¹⁵⁶ The Court held that the state had a substantial interest in maintaining public order, which was furthered through requiring Krishna followers to conduct their sales, distributions, and solicitations from booths.¹⁵⁷ The Court viewed the requirement of booth sales, distributions, and solicitations as a crowd control measure.¹⁵⁸ For the majority, the state interest in preventing disorder and chaos outweighed the individual right to freely practice a tenet of her religion requiring sale and distribution of religious literature to the public.

Four justices concurred in the judgment to uphold the ban on financial solicitation;¹⁵⁹ however, these same four dissented regarding whether the state regulations could constitutionally require individuals to distribute religious literature from booths.¹⁶⁰ All four dissenters argued that the state had no substantial interest in regulating the distribution of religious literature. The Krishna followers were already allowed to walk around and talk with people, and no substantial state interest justified preventing them from attempting to hand members of the public a brochure or flyer during the course of the conversations.¹⁶¹

The *Heffron* case seemed to portend a movement of the U.S. Supreme Court toward facilitating state regulation of the free ex-

154. *Id.* at 644-45.

155. *Id.* at 646.

156. *Id.* at 647-50.

157. *Id.* at 654.

158. *Id.* at 649-53.

159. *Id.* at 657 (Brennan, Marshall and Stevens, JJ., dissenting); *Id.* at 663-64 (Blackmun, J., dissenting).

160. Three of the four dissenters distinguished the state's interest in regulating sales and solicitation of funds to prevent fraud from the state's interest in controlling distribution of literature. These dissenters argued that a substantial state interest existed in regulating sales and solicitation to prevent fraud; for such activities, a booth requirement was justified. *Id.* at 657 (Brennan, Marshall, and Stevens, JJ., dissenting). The fourth dissenting justice, Justice Blackmun, agreed with the majority that the state concern with crowd control justified confining financial solicitation to booths. Blackmun disagreed with his dissenting colleagues' anti-fraud rationale. *Id.* at 664-65 (Blackmun, J., dissenting).

161. *Id.* at 660-61 (Brennan, Marshall, and Stevens, JJ.) *Id.* at 663 (Blackmun, J.).

ercise of religion on grounds like those which the Indian courts and constitution recognize — namely, restrictions to maintain public order. This perception was validated in several recent cases, the most factually pertinent of which are two cases involving members of ISKCON. In *ISKCON v. Lee*¹⁶² (“*Lee I*”) and *Lee v. ISKCON*¹⁶³ (“*Lee II*”) the Supreme Court addressed the issue of government regulation of First Amendment rights in public airport terminals. In *Lee I* and *Lee II*, ISKCON sued the Port Authority of New York and New Jersey seeking an injunction and declaration to prohibit the Port Authority from preventing the petitioners from performing *Sankirtan*, which involves the distribution of religious material and solicitation of funds by Krishna followers. The trial court granted summary judgment in favor of ISKCON, finding that the public airports were quintessential traditional public fora, which required the government to show a “compelling state interest” to justify its regulations.¹⁶⁴

On appeal, the Second Circuit Court of Appeals affirmed only part of the trial court’s decision. First it held that the public airport terminals were not public fora. Therefore, the government only had to show that restrictions on the solicitation and distribution of the ISKCON’s materials were “reasonable.”¹⁶⁵ Accordingly, the appellate court reversed the district court’s judgment regarding the solicitation of monies to pay for the religious materials. The Second Circuit found the governmental limitations on solicitation “reasonable.”¹⁶⁶ However, the appellate court affirmed the district court’s ruling that the ban on distribution of religious material was unconstitutional.¹⁶⁷

Both sides appealed to the U.S. Supreme Court and a closely divided Court affirmed the decision of the Second Circuit. The Supreme Court announced a “forum based” approach for evaluating governmental regulation of speech on government property.¹⁶⁸ The Supreme Court said that it would give highest scrutiny to governmental regulation of speech on public property where the government had traditionally made such property available for public expression.¹⁶⁹ The Court applied the same standard where the government had specifically designated pub-

162. 112 S. Ct. 2701 (1992) (majority opinion only); 112 S. Ct. 2711 (1992) (concurring and dissenting opinions).

163. 112 S. Ct. 2709 (1992) (majority and dissenting opinions); 112 S. Ct. 2711 (1992) (concurring and dissenting opinions).

164. 112 S. Ct. 2701, at 2704.

165. *Id.* at 2704.

166. *Id.*

167. *Id.*

168. *Id.* at 2705.

169. *Id.*

lic property as a public forum.¹⁷⁰ The majority concluded, however, that all remaining public property was governed by a reasonableness standard. In essence, this meant that on such property the Court would uphold governmental regulations of speech provided the Court believed that such regulations were reasonable.¹⁷¹

Curiously, the *Lee I* solicitation majority failed to discuss in any significant detail the free exercise rights of the ISKCON members. For example, solicitation was a part of ISKCON adherents' religious practices, yet the majority failed to evaluate whether the state's regulation of those practices satisfied free exercise constitutional norms. Although the Court acknowledged that ISKCON members could not perform religious based solicitation, it treated this as a free speech case.

Justices O'Connor and Kennedy, who voted with the *Lee I* majority to uphold the solicitation ban, switched their votes in *Lee II*. With the three *Lee I* dissenters¹⁷² they formed a majority in *Lee II*.¹⁷³ In an unsigned opinion, the *Lee II* Court affirmed the Second Circuit's ruling that the state had unreasonably banned distribution of religious literature. The *per curiam* opinion in *Lee II* merely cites the opinions of Justices O'Connor, Kennedy, and Souter in *Lee I* as the basis for the Court's decision to allow distribution of religious literature.

These opinions are in some tension with one another, and suggest that the *Lee II* majority could not agree on a common rationale. For example, Justice O'Connor disagreed with the other four members of the *Lee II* majority on whether the termi-

170. *Id.*

171. *Id.* On these bases, five of the six members of the *Lee I* majority voted to uphold the state regulation banning solicitations. *Id.* (Rehnquist, C.J., and White, O'Connor, Scalia, and Thomas, JJ.) These five justices argued that the ban was reasonable because solicitations could have an element of duress, especially where they were done face to face. Solicitations could also result in impediments to the normal flow of airport traffic, since travelers might miss their flights. *Id.* at 2708. However, Justice Kennedy voted to sustain the prohibition on financial solicitation because he perceived the regulations as involving a narrow and valid restriction "of the time, place, and manner of protected speech in this forum, or else a valid regulation of the nonspeech element of expressive conduct." *Id.* at 2715. Kennedy disagreed with the majority regarding whether the airport was a public forum. *Id.* Justices Souter, Blackmun and Stevens joined that portion of Kennedy's opinion arguing that airport terminals should be classified as public fora. *Id.*

172. Justices Blackmun, Stevens, and Souter.

173. The majority issued a brief *per curiam* opinion stating:

For the reasons expressed in the opinion of Justice O'Connor, Justice Kennedy, and Justice Souter in [*International Society for Krishna Consciousness, Inc. v. Lee*] . . . the judgment of the Court of Appeals holding that the ban on distribution of literature in the Port Authority Airport Terminals is invalid under the First Amendment is *Affirmed*

Id. at 2701.

nal was a public forum.¹⁷⁴ Her disagreement flowed from a perception that publicly-owned terminals did not have as one of their purposes the free exchange of ideas¹⁷⁵ and that such terminals have not traditionally been places "devoted to assembly and debate."¹⁷⁶

On the other hand, Justice O'Connor recognized that the New York and New Jersey terminals were multi-purpose public creatures (complete with large department stores, cafeterias, food and drug stores, dental offices, and nurseries),¹⁷⁷ and found the terminals' "special attributes" and their "surrounding circumstances" to be dispositive.¹⁷⁸ Specifically, since the state had in essence invited large numbers of the public to use the terminals for a number of purposes, Justice O'Connor did not find it reasonable for the government to impose a complete ban on sale or distribution of religious literature.¹⁷⁹

While Justices Kennedy, Souter, Blackmun, and Stevens were in the minority in *Lee II* on the issue of whether the airport terminal was a public forum, they picked up Justice O'Connor's decisive fifth vote regarding the unreasonableness of the distribution ban. These four justices agreed with Justice O'Connor that the anti-leafletting ban was too broad and would need to be narrowly tailored regarding "time and place of expressive activity."¹⁸⁰

The *Heffron* and *Lee* cases suggest that the Supreme Court continues to take an active role in upholding state regulation of religious activities involving financial solicitation from members of the public. *Heffron* and *Lee I* affirmed local government regulation of religious financial solicitations. However, unlike *Heffron*, which upheld a state regulation limiting distribution of religious materials to booths at a local fair, *Lee II* allowed religious adherents to distribute their literature in a public place.

Doctrinally, the *Heffron* and *Lee II* results are not easily reconcilable. In each case the Court confronted issues involving ISKCON believers' distribution of religious literature in public places. With the advantage of hindsight, one might argue that

174. *Id.* at 2711.

175. *Id.*

176. *Id.*

177. *Id.* at 2712.

178. *Id.*

179. *Id.* Justice O'Connor would have been favorably inclined to uphold a narrowly drawn regulation of the time, place and manner of leafletting provided it was "content-neutral" and left open adequate alternative opportunities for First Amendment communicative liberties. *Id.*

180. *Id.* at 2720.

Heffron and *Lee II* involved the scope of First Amendment liberties in nonpublic fora.

However, we are left with such questions as the following: Is it reasonable to restrict a faith community's distribution of religious materials to licensed booths on fairgrounds while allowing the same individuals to distribute the same pamphlets throughout the nation's airports? What is the functional difference between a fair and an airport?

One might attempt to distinguish fair and airport regulation on the basis that the governmental operator and private patrons desire rapid transportation at airports, but with fairs, inefficient movement of people is not necessarily contrary to the state's interests in commerce and cultural activity. Interestingly, that distinction would support an argument that *Heffron* and *Lee II* were both wrongly decided. To the extent that inefficient flow of people is part of a fair's nature, one must evaluate with skepticism the *Heffron* Court's concern about fair attendees' freedom of movement.¹⁸¹ Similarly, insofar as airport terminals are constructed to facilitate the hectic schedules of travellers, one must critically view the *Lee II* majority's decision to allow distribution of religious literature.¹⁸²

These distinctions seem insufficiently compelling to justify the Court's different decisions in *Heffron* and *Lee II*. In both contexts there is substantial public movement from place to place—distribution of religious literature may impede such movement. Moreover, if the Constitution allows distribution of religious literature one may presume that individuals could also distribute nonreligious literature. More literature distribution could result in more crowd flow impediments. Values involving freedom of expression and worship versus freedom of movement are implicated in these cases. In particular, the *Heffron* and *Lee I* Court decisions suggest that the Court values the rights of movement of members of the public who do not care to be solicited more than the rights of the evangelists.

In two other recent free exercise decisions not involving evangelism, the Court has expounded a doctrine with potentially significant implications for evangelistic activities. In *Employment Division v. Smith*,¹⁸³ two private individuals were fired from their jobs after ingesting peyote during a Native American

181. 452 U.S., 640-55 (1981).

182. The *Lee I* majority used the hectic traveller argument as part of its rationale for upholding the governmental ban on financial solicitation. See 112 S. Ct. 2701, 2708 (1992).

183. 494 U.S. 872 (1990).

church ceremony.¹⁸⁴ The Oregon Supreme Court upheld the Oregon Court of Appeals' ruling that the former employees were entitled to unemployment benefit payments.¹⁸⁵ On appeal, the United States Supreme Court reversed the Oregon Supreme Court's decision, and stated that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"¹⁸⁶ By a closely divided vote (5 to 4), the Court asserted that its free exercise decisions had applied the compelling state interest test to invalidate governmental actions only in unemployment compensation cases.¹⁸⁷ The majority argued that it had never applied the compelling state interest test to invalidate a general criminal law prohibition and declined to apply that test in *Smith*:

If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says . . . many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.¹⁸⁸

In essence the majority argued that adopting the compelling state interest test would place the onus on the state to protect religious diversity; this might allow individuals to be exempted from a wide range of civic obligations on religious grounds.¹⁸⁹

184. *Id.* at 874. The Oregon Employment Division rejected the former employees' requests for unemployment compensation. However, the Oregon Court of Appeals reversed the Employment Division's determination. *Id.* The Employment Division appealed.

185. *Id.* at 875. On the initial appeal to the United States Supreme Court, the Court vacated the Oregon Supreme Court's decision and remanded to allow the Supreme Court of Oregon to determine the "legality of the religious use of peyote in Oregon." *Employment Div. v. Smith*, 485 U.S. 660, 673 (1988). On remand, the Oregon Supreme Court found that the religious use of peyote fell within the ambit of the relevant Oregon criminal law statute and that since the statute made no exception for the sacramental use of peyote, the statute was invalid to the extent that it conflicted with the Free Exercise Clause. *Smith*, 494 U.S. at 876. The state appealed again.

186. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (Stevens, J., concurring)).

187. *Id.* at 883. The majority acknowledged that it had sometimes applied the compelling state interest test to "across the board criminal prohibition on a particular form of conduct." *Id.* at 884.

188. *Id.* at 888.

189. For example, exemptions might include avoiding compulsory military service, payment of taxes and compliance with health and safety regulations. *Id.* at 889 (citations omitted). The *Smith* majority concluded that:

In dissent, Justice O'Connor joined by Justices Brennan, Blackmun and Marshall, argued that contrary to the majority's views, the Court had "interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct."¹⁹⁰ Justice O'Connor contended that criminalizing an individual's religiously inspired conduct would burden that individual's free exercise of her religion "in the severest manner possible for it 'results in the choice to the individual of either abandoning [her] religious principle or facing criminal prosecution.'"¹⁹¹ The dissenters saw no convincing reason for the Court to abandon its compelling state interest test in the context of the *Smith* case.¹⁹²

In a separate opinion, Justices Blackmun, Brennan and Marshall dissented arguing, among other things, that the courts could consider the impact of a law on the ability of religious adherents to practice their faith. The dissenters said the courts need not "turn a blind eye to the severe impact of a state's restrictions on the adherents of a minority religion."¹⁹³

leaving the accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Id. at 890.

Presumably, the Court meant that the ability to engage in religious practices has political implications and that the legislatures should decide such political questions. If this is what the Court meant, the issue then becomes the definition of political interests and, assuming they are different than constitutionally protected interests, what are constitutionally protected interests? A systematic examination of that and related issues must await another time and place.

190. *Id.* at 895 (citations omitted).

191. *Id.* at 898 (citations omitted).

192. *Id.* at 901-03. As a matter of fact with regard to the question of majority rule in a democracy, the dissent quoted Justice Jackson's familiar words in *West Virginia Bd. of Educ. v. Barnett*, 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 life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Smith, 494 U.S. at 903.

Justice O'Connor ultimately agreed with the majority in the result. However, her reasoning was different because she purported to apply a compelling state interest analysis to the *Smith* case.

193. *Id.* at 919 (citations omitted). In an interesting footnote, Justice Blackmun argued that during Prohibition it would not have been possible for the federal government to have precluded practicing Roman Catholics from using wine during their communion services even though the use of alcohol was prohibited. *Id.* at 913 n.6. Justice Blackmun also contended that the Oregon prohibition of peyote use was

More recently, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* ("Church of Lukumi"),¹⁹⁴ the Supreme Court addressed the scope of the Free Exercise Clause's scope in the context of a local Florida ordinance prohibiting animal sacrifice for religious purposes. While not dealing directly with proselytization, this case builds on the neutrality and general applicability rubric of *Smith*, and serves as an important indicator of the continuing trend of the Supreme Court concerning the right to practice religious beliefs.

In *Church of Lukumi*, the city of Hialeah in Florida adopted several ordinances prohibiting religious animal sacrifice in response to the announced intention of members of the Santeria religious faith to open a place of worship in the city.¹⁹⁵ Responding to the Santeria's decision to worship in Hialeah, the City Council called an emergency meeting¹⁹⁶ and, following the Florida Attorney General's advice, determined that animal sacrifice violated Florida state law. Council adopted several ordinances prohibiting such sacrifice.¹⁹⁷

The Santeria followers sought declaratory, injunctive, and monetary relief.¹⁹⁸ After a bench trial, the District Court upheld the ordinances.¹⁹⁹ The Court held that the impact of the ordi-

derived from a federal statute outlawing such use; but the federal government itself had granted an exemption for the use of peyote by Native Americans. *Id.* at 917. Moreover, the dissent pointed out that Oregon rarely if ever enforced the anti-peyote statute. *Id.* at 911.

Smith has generated intense scrutiny and debate. In fact, in large part because of the *Smith* case, Congress recently passed the Religious Freedom Restoration Act of 1993, Pub. L. 103-141, 107 Stat. 488. For systematic, illuminating critiques of the *Smith* case, see Angella C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 B.Y.U. L. REV. 275; Ira C. Lupa, *Employment Division v. Smith and the Decline of Supreme Court Centrism*, 1993 B.Y.U. L. REV. 259; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). For a further discussion of *Smith's* general applicability and neutrality standards and The Religious Freedom Restoration Act, see *infra* notes 217-19 and accompanying text.

194. 113 S. Ct. 2217 (1993).

195. Santeria worshipers practice an African Christian religion that draws upon Christian concepts involving Catholic saints and African notions that spiritual beings play an important role in human life. *Id.* at 2222. At certain times, as part of their worship liturgy, the Santeria worshipers sacrifice animals by severing the carotid artery. *Id.*

196. *Id.* at 2223.

197. *Id.* at 2223-24. Among other things, the ordinances prohibited citizens from possessing or owning animals with the intention of using them for food purposes. *Id.* at 2224. The ordinance also proscribed sacrificing any animal within the corporate limits, and killing animals for food outside of areas zoned for slaughterhouse use. *Id.* An exception was provided for "the slaughter or processing for sale of 'small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.'" *Id.*

198. *Id.* at 2224.

199. *Id.*

nances upon the religious practices of the Santeria followers was "incidental to [their] secular purpose and effect."²⁰⁰ In a *per curiam* opinion, the Eleventh Circuit affirmed.²⁰¹

On appeal to the United States Supreme Court, the Court unanimously reversed the lower court judgments. The Court revisited the question of the appropriate scope of the Free Exercise Clause and noted that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."²⁰² The Court said that under the Free Exercise Clause "a law that is neutral and of general applicability need not be justified by . . . compelling governmental interest[s] even if the law has the incidental effect of burdening a particular religious practice."²⁰³

The Supreme Court pointed out that the Hialeah ordinances were neither neutral nor of general applicability. Concerning neutrality, the Court concluded that the Hialeah statutes accomplished a "religious gerrymander" because the Council had drawn the ordinances so that they applied to the Santeria religion while exempting other activities involving the killing of animals.²⁰⁴ In addition, regarding general applicability, the Court stated that the city failed to narrowly tailor its laws to address the

200. *Id.* (quoting the District Court's opinion, 723 F. Supp. 1467, 1484 (1989)).

201. *Id.* at 2225.

202. *Id.* (quoting *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 714 (1981)).

203. *Id.* at 2226. The Court asserted that neutrality and general applicability were interrelated concepts, and that if one of those prerequisites is unfulfilled, it is likely that the "other has not been satisfied." *Id.* Thus, if the law is neither generally applicable nor neutral, the government must show a compelling state interest for burdening the free exercise of religion. The Court also stated that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* (citations omitted).

204. *Id.* at 2227 (quoting *Walz v. Tax Commission of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). The Court discussed the numerous exemptions in the law allowing the killing of animals by nonmembers of the Santeria religion. The Court pointed out that "[t]he city, on what seems to be a *per se* basis, deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. . . . There is no indication in the record that respondent has concluded that hunting or fishing for sport is unnecessary." *Id.* at 2229. Thus, while the city seemed to allow hunting and fishing for sport as necessary activities, and such activities would result in the deaths of animals, the killing of animals in worship of God was outlawed in the case of Santeria worship. *Id.* As the Court pointed out, "[r]espondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is singled out for discriminatory treatment." *Id.* (citations omitted).

public policy concerns that the city claimed needed vindication.²⁰⁵

Finally, turning to the issue of whether the local ordinances served a compelling state interest, the Supreme Court held that they did not. Rather the ordinances were underinclusive because they were drawn too narrowly to protect the public health and prevent animal cruelty; and were overbroad because they regulated religious conduct too restrictively.²⁰⁶ For these reasons, the Court reversed the Federal Court of Appeals decision.

In a concurring opinion, Justice Scalia, speaking for himself and Chief Justice Rehnquist agreed that free exercise analysis involved a determination of whether the challenged ordinances were both neutral and of general applicability.²⁰⁷ For Scalia, it mattered little whether one analyzed the law's invalidity under the neutrality or general applicability rubric. Both analyses grew substantially from the same conceptual ground, and the statutes were invalid under either analysis.²⁰⁸

Justice Souter's opinion concurred in part and concurred in the Court's judgment. He argued that the majority opinion reached the right results for the right reasons in so far as the Court applied compelling state interest analysis to the Hialeah ordinances.²⁰⁹

205. Those policies included "protecting the public health and preventing cruelty to animals." *Id.* at 2232. The local statutes did not burden secular activities involving animal killing to the same extent as Santeria religious sacrifice. In that sense the ordinances were underinclusive. Moreover, the City made no substantial effort to enact general ordinances to protect public health through proper disposal of animal remains. Only the Santerias bore the brunt of these regulations. Accordingly, the Court concluded that the ordinances were primarily directed toward "conduct motivated by religious belief." In that respect they were overbroad.

206. *Id.*

207. *Id.* at 2239. Justice Scalia acknowledged that the terms "neutrality" and "general applicability" are more than "interrelated;" according to him, they "substantially overlap." *Id.* He further acknowledged that neither neutrality nor general applicability is found in the text of the First Amendment itself. In essence they are judicial glosses on that text and attempt to explain the meaning of the Free Exercise Clause in practice. Justice Scalia argued that laws that are not neutral "impose disabilities on the basis of religion." *Id.* On the other hand, laws that lack general applicability may be neutral in their terms but "through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment." *Id.* (citations omitted).

208. *Id.* Justice Scalia also disagreed with Justice Kennedy's opinion involving the applicability of legislative motivation as a reason for invalidating the statute. *Id.* Justice Scalia's perception on this point was that First Amendment analysis focuses primarily on the impact of the law rather than the motive of the legislators. *Id.* at 2240.

209. However, Justice Souter disagreed with the majority to the extent that it applied the rule announced in *Smith*, holding in effect that a law neutral on its face could withstand constitutional scrutiny even if it had a prohibitive effect on religious exercise. *Church of Lukumi*, 113 S. Ct. at 2240. Justice Souter expressed grave

Justices Blackmun and O'Connor also concurred in the judgment, arguing that the *Smith* case was wrongly decided.²¹⁰ Justice Blackmun asserted that a "statute that burdens the free exercise of religion 'may stand only if the law in general, and the state's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.'"²¹¹ Blackmun contended that the *Church of Lukumi* case was a relatively easy one to decide, in that the statutes involved were directed specifically toward suppressing religious activity of a particular group. Such ordinances would fail under either strict scrutiny/compelling state interest analysis or the analysis adopted in *Smith* giving deference to the statute.²¹²

Church of Lukumi reaffirms the Supreme Court's willingness to protect religious exercise; however, the Court's multiple opinions in that case and in *Smith* indicate that it is deeply divided. In the wake of *Church of Lukumi*, the current Court seems to be *selectively* preserving and developing existing free exercise precedent through a two-step approach: First, the Court ascertains whether it should defer to the legislature because the statute is neutral and generally applicable. If the statute fulfills these criteria, the statute is upheld. Second, if the statute is neither neutral nor generally applicable, the Court then attempts to ascertain whether an identifiable compelling state interest exists. Again, if such an interest exists, the Court will uphold the statute and subordinate the individual's liberty to the state's policy.²¹³

doubts about the *Smith* test, saying that "whatever *Smith's* virtues, they do not include a comfortable fit with settled law." *Id.* at 2247. He argued that the *Smith* case ought to be reconsidered in a proper factual context. *Id.* at 2247-50. In essence, Souter argued for a return to a rule which emphasized that a law's neutrality not only must be a formal one in the sense of applying on its face to all cases, but also must be neutral in effect.

210. *Id.* at 2250.

211. *Id.* (quoting *Smith*, 494 U.S. at 907 (dissenting opinion)).

212. *Id.* at 2251.

213. Such an approach suggests that *Smith* must be read relatively narrowly rather than read to mean that the Court has totally abandoned the compelling state interest test in Free Exercise cases. Thus for example, Professor Lupa argues that in *Church of Lukumi*:

By holding that the Constitution prohibits religious gerrymanders structured to the detriment of a particular faith, the Court has . . . constructed an outer boundary beyond which the deterioration of free exercise protection will not pass. Although the Court's opinion is entirely true to the equal protection character of *Smith*, the right of religious minorities to be free from state discrimination, both overt and covert, is of both theoretical and practical significance. Furthermore, any constitutional victory for an unusual, numerically small religion constitutes a significant sign that the Free Exercise Clause still carries some punch.

Lupa, *supra* note 193, at 265.

In the evangelism context, the Supreme Court has not applied the neutrality and general applicability analytical framework as articulated in *Smith* and *Church of Lukumi*. At least theoretically, the Court could do so. *Church of Lukumi* offers some insights into how the Court might view religious freedom associated with evangelism.²¹⁴ In *Church of Lukumi*, the Court was careful to point out that its opinion was directed toward a city ordinance that would primarily result in a religious gerrymander. Accordingly, it is conceivable that legislation directed towards evangelistic activity on a broader, more neutral basis, might well pass First Amendment constitutional muster. For example, one wonders whether *Lee II* would have been decided the same way using *Church of Lukumi*'s two-step analytical approach. The airport regulations on distribution of religious literature seemed generally applicable and neutral. However, were the regulations reasonable? If the regulations were general, neutral and reasonable, that suggests the Court, following *Church of Lukumi* rationale, would have upheld the state regulations. The Court's flexible interpretive approach leaves us with some troubling jurisprudential questions. For example, in a system of limited government, should not the presumption be in favor of individual liberty? Should not the Court begin from a critical stance vigilantly protective of such liberty?

However, the Court's approach expands the state's ability to regulate religious exercise. The Court's analysis begins from a perspective of defending the government's regulation (whatever the regulation may be). The current Court's approach is inherently formalistic; if the statute "looks" constitutional, the Court seems predisposed to affirm it. While in most cases such an approach may be appropriate, in some cases individual liberty may be circumscribed more than the Constitution permits. In borderline cases, the Court's interpretive approach becomes critical. Simply put, the state gets the benefit of the doubt. Affirming the state's interest over individual liberty is a profound justice issue.

Additionally, in evaluating the rights of religious believers engaged in evangelistic activities, the courts must also consider the rights of third parties who may not want to be bothered. Choosing between the rights of these groups involves a value judgment regarding whose interests are more important — and why.

The *Church of Lukumi* Court asserted that it would analyze the facial and substantive neutrality of ordinances regulating free

214. Evangelism tends to be an intensely personal kind of activity, and as noted in *Cantwell*, such emotions can run very high.

exercise.²¹⁵ However, the Court's starting point — favoring the state and in effect, placing the onus on the individual practicing her faith — is understandable but nevertheless unsettling. It is understandable because we live in a representative democracy in which laws are frequently created by the legislature through majority vote. The Court's decision to defer to the legislative process is defensible on procedural grounds: one branch of the government has made a public policy decision, presumably with the support of a majority of the people's representatives. Nevertheless, ours is a society in which not infrequently the rights of unpopular minorities have been sacrificed on the altar of public passion and prejudice. Arguably the decisions of the state officials and lower courts in *Cantwell* and *Church of Lukumi* reflect this recurring systemic problem. In both cases the local governmental officials and lower courts significantly (and unconstitutionally!) curtailed the free exercise activities of minority faith communities.²¹⁶

Smith and *Church of Lukumi* also suggest that the U.S. Supreme Court is moving via its general applicability and neutrality standard toward a position more consonant with the Indian Supreme Court's norms. The Indian Supreme Court sanctions significant regulation of religious activity. While the U.S. Supreme Court has not yet embraced such regulation, the line of march is perceptible. Moreover, in *Heffron* and *Lee I*, the U.S. Supreme Court has allowed the government to establish a standard for regulating speech based on reasonableness. In those cases, it has at least implicitly applied the same standard to religious exercise. Thus, two crucial human rights, free exercise and free speech, seem predisposed to significant limitation by whatever a particular governmental body deems reasonable.

In response to the Court's adoption of the general applicability and neutrality standards, Congress has recently passed and President Clinton signed the Religious Freedom Restoration Act of 1993 (The Religious Freedom Act).²¹⁷ This Act prohibits gov-

215. *Church of Lukumi*, 113 S. Ct. at 2227.

216. Whether the Court should adopt a posture that would, in effect, side with the politically dominant interests which have prevailed on a given issue raises value concerns. Those concerns revolve around respect to both majority and minority rights. While it is beyond the ambit of this article to attempt a definitive treatment of these issues, see LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 1-20 (1994), for an illuminating discussion of the meaning of democracy and see TRIBE, *supra* note 1, at 61-66 (discussing the "Antimajoritarian Difficulty").

217. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (to be codified at 42 U.S.C. § 2000bb). In adopting the Religious Freedom Act, Congress made the following findings:

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

ernment from substantially burdening an individual's exercise of religion except where the following two conditions are met. First, government must demonstrate that the substantial burden furthers a compelling state interest. Second, government must show that it has used the least restrictive means of furthering its compelling interest.²¹⁸ In essence, the Act requires the courts to apply the "compelling state interest test" to Free Exercise cases.²¹⁹ Accordingly, Congress has made a public policy choice

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Div. v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion;

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) PURPOSES. — The purposes of this Act are —

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

218. Religious Freedom Restoration Act of 1993 § 3 107 Stat. at 1489. The Act's language reflects the rationale of Justice Blackmun's dissenting opinion in *Church of Lukumi* regarding the compelling state interest/least restrictive alternative jurisprudential framework. See *Church of Lukumi*, 113 S. Ct. at 2250.

Section three of the Act states:

(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;

(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.

Religious Freedom Restoration Act § 3 107 Stat. at 1488-89.

219. Religious Freedom Restoration Act §§ 2(b), 3(c), 107 Stat. at 1489. The Act raises a number of issues which fall outside the scope of this article. For example, the Act fails to define what Section 3(a) means by the term "substantially burden." Similarly, the Act requires the government to *demonstrate* a compelling state interest and that it has used the least restrictive alternative. The Act says that "demonstrates means meets the burden of going forward with the evidence and of persuasion . . ." Religious Freedom Restoration Act § 5(3), 107 Stat. at 1489. However, the Act does not say what the state's burden *is*; for example, a preponderance of the evidence or clear and convincing evidence. Further, the definition of exercise of religion is circular: "the term 'exercise of religion' means the exercise of religion

to give greater protection to the rights of religious believers to express themselves. It is unclear where the rights of such individuals must yield to those of others who wish to be free from evangelistic encouragement.

IV. CRITICAL REFLECTIONS

India's history extending over 4500 years has been marked by periods of religious tolerance and periods of great religious conflict. Within memory, thousands of people were killed during the partition of the nation, and more recently many hundreds died during the aftermath of the assassinations of Indira and Rajiv Gandhi. At the end of 1992, a national tragedy of huge proportions unfolded in the aftermath of the demolition of a Muslim mosque in Ayodhya.²²⁰

In these circumstances, the restrictive approach of the Indian Constitution and courts toward the practice of religious beliefs is understandable and perhaps a prudent policy to follow, at least for the near future. Nonetheless, there are palpable costs incurred when restricting individual freedom of worship. For example, society as a whole suffers from the curtailment of individual liberty when the state limits freedom to act fully in accord with one's most deeply held beliefs. For some missionary religions like Christianity, sharing the good news is a part of living out one's faith — whether through one-to-one personal testimony, literature distribution, attempting to live an exemplary life, or other modes of communication. The costs of state restriction on religious practices, the rights of members of society to be left alone, and the benefits of promoting national order must be balanced.

In light of recent history one wonders whether India's legal approach can possibly promote religious tolerance. The state can regulate religious expression almost at will. Accordingly, one wonders whether the constitutional preference for public order over individual religious expression is in the best interests of the Indian state from a long-term public policy perspective.²²¹

America's history in comparison is quite brief and fortunately not as burdened and bludgeoned by physically violent religious warfare. Until recently the courts seemed intent on upholding the individual's claim to freely exercise her religion

under the First Amendment to the Constitution." To say that free exercise means free exercise under the First Amendment is most unilluminating. In short, the courts will have to give these debatable phrases meaning. Hopefully, individual liberty will be protected.

220. See *supra* notes 2-3.

221. Dhavan, *supra* note 1, *passim*.

against all but the most compelling state interests.²²² However, the U.S. Supreme Court has adopted flexible standards for determining a law's general applicability, neutrality, and reasonableness. Such standards implicitly require judicial consideration of whether the government's regulation is for the public's health, safety, or welfare. If the laws seek to promote such public policies, courts must decide whether the government has reasonably regulated the individual's religious activity. Or to state the query in Indian jurisprudential terms, the judicial outcome tends to turn on maintaining public order.

This hermeneutical approach places secondary importance upon protecting individual liberty against governmental intrusion. The presumption is in favor of upholding the governmental regulation against private autonomy. Some constitutional theorists have argued that the U.S. Constitution creates a government of limited powers while preserving a broad scope of individual autonomy.²²³ The Supreme Court, by presuming that the gov-

222. This is in accord with the First and Fourteenth Amendments' proscriptions that Congress and the States "shall make no law . . . prohibiting the free exercise of religion."

223. Professor Tribe calls this vision of limited government "Model I" of constitutional law. TRIBE, *supra* note 1, at 2. Tribe described this model as follows:

In this first model, the centralized accumulation of power in any man or single group of men meant tyranny; the division and separation of powers, both vertically (along the axis of federal, state and local authority) and horizontally (along the axis of legislative, executive, and judicial authority) meant liberty. It was thus essential that no department, branch, or level of government be empowered to achieve dominance on its own. If the legislature would punish, it must enlist the cooperation of the other branches—the executive to prosecute, the judicial to try and convict. So too with each other center of governmental power: exercising the mix of functions delegated to it by the people in the social compact that was the Constitution, each power center would remain dependent upon the others for the final efficacy of its social designs.

Id. at 2-3.

This view of limited government is reflected in writings of theorists like Alexander Hamilton who went so far as to contend that it was not a good idea to include a bill of rights in the Constitution because:

[t]hey would contain various exceptions to powers which are not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it . . . would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge . . . that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government.

ernment has not abridged individual freedom, risks turning the limited government notion of American constitutional law upside down. For example, a broad reading of *Church of Lukumi* would suggest that governmental regulation of religion may pass constitutional scrutiny simply by appearing to be neutral and generally applicable. However, because the Court interpreted its neutrality and general applicability tenets to embrace both facial and substantive fairness, such a result is less likely.

A flexible standard of judicial review broadens the scope of judicial power. Concepts like reasonableness, general applicability, and neutrality widen the sphere for judicial resolution between citizen and government. If the courts are predisposed to side with government, however, increased judicial oversight from the standpoint of protecting individual freedom is not necessarily reassuring.

Finally, the reasoning of the *Heffron* and *Lee I* majorities supports state statutes designed to nip public disorder mischief in the bud. However, the judiciary's view that public discussion of religion inevitably leads to social chaos is problematic at best.²²⁴ Social tensions are inevitable within a large and increasingly diverse democracy. Whether the present tenuous U.S. Supreme Court majority has appropriately drawn the line in the constitutional sand is debatable. The rough and tumble environment of large metropolitan airport terminals seems like rocky soil for the growth of such intrusiveness on the part of the government. In light of the recent Court's decisions, Congress has stepped in and placed a greater burden upon government to justify its regulation of individual believers' religious activities.

In sum, the previously discussed cases indicate that American courts are somewhat more protective of the individual's right to express her religious beliefs to others than is the case in India. The concern with possible violence due to divergent religious beliefs is less pressing for American than for Indian courts because physical conflicts flowing from differing religious perceptions have been less intense. In both the United States and India, one must ask whether in the long run either society can survive as robust, vibrant democracies if individuals are legally discouraged

THE FEDERALIST NO. 84, at 513-14 (Alexander Hamilton) (Clinton Rossitor ed., 1961).

224. Other opinions of the current U. S. Supreme Court affecting civil liberties may leave one with a "gut reaction" that because of real or imagined dangers to the state, the Court believes that the behavior of citizens ought to be tightly controlled by the state. Such controls manifest themselves even in the exercise of the most personal activities including worship and expression of sexual intimacy. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186 (1986). Such "state action" might make political philosophers like John Locke most restless in their "long sleep."

from talking with one another about personal beliefs that, to many of them, matter most.

APPENDIX

"Form A"
(See Rule 3 (2))

Intimation regarding conversion from one religious faith to another.

To

The District Magistrate,
District _____
Madhya Pradesh.

Sir,

I having performed the necessary ceremony for conversion as a religious priest/having taken part in the conversion ceremony of Shri _____ s/o _____ r/o _____ from _____ religious faith, do hereby, give intimation of the conversion as required by sub-section (1) of Section 5 of the Madhya Pradesh Dharma Swatantrya Adhiniyam, 1968 (No. 27 of 1968) as follows: -

1. Name of the person converted _____
2. Name of the father of the person converted _____
3. Address of the person converted in
House No. _____ Ward No. _____
Mohalla _____ Village _____
Tah _____ District _____
4. Age _____
5. Sex _____
6. Occupation and monthly income of the persons converted _____
7. Whether married or unmarried _____
8. Name of persons, if any, dependent upon the person converted _____
9. If a minor, name and full address of the guardian, if any _____
10. Whether belongs to Scheduled Caste or Scheduled Tribe and if so, particulars of such Caste or Tribe _____
11. Name of the place where the conversion ceremony has taken place with full details
House No. _____ Ward No. _____
Mohalla _____ Village _____
Tah _____ District _____
12. Date of conversion _____

13. Name of person who has performed the conversion ceremony and his address _____
14. Names of at least two persons other than priest/the person giving intimation present at the conversion ceremony _____

Signature of the religious
Priest/the person taking part in
the conversion ceremony.

VERIFICATION.

I, the undersigned do hereby declare that what is stated above is true to the best of my knowledge and belief.

Place _____

Signature

Date _____