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CUTTER AND THE PREFERRED POSITION OF THE FREE EXERCISE CLAUSE

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INTRODUCTION

The Free Exercise Clause has been on life support for a number of years. The Supreme Court's 1990 decision in *Employment Division v. Smith* held that the Clause did not prevent enforcement of generally applicable laws that incidentally burdened religious conduct.[1] Legislatures were still prevented from singling out religious beliefs or practices for invidious discrimination, but those results could be reached under either the Free Speech or Equal Protection Clauses.[2] Indeed, the greatest victories for religion in recent years came when the Court included religious speech and activities under the umbrella of free speech protections.[3] Under the circumstances, it is not surprising that leading scholars suggested that the Free Exercise Clause had become "redundant."[4]

For Jay Sekulow, the attorney who engineered the victories for religious groups by using free speech principles, freedom of religion was not just redundant, but was a topic to be avoided. As Sekulow explained, "The first thing you always have to

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[1] 494 U.S. 872 (1990).

[2] *See* Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After* Boerne, 68 GEO. WASH. L. REV. 861, 880–81 (2000).

[3] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001) (holding that the denial of a religious organization's club access to school facilities after-hours constitutes viewpoint discrimination and violates Free Speech Clause); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (concluding that a university program that reimburses printing costs for student organizations but excludes religious organizations violates the Free Speech Clause); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (holding that denying a religious organization access to school premises is viewpoint discrimination and violates Free Speech Clause); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (holding that the exclusion of religious groups from a university's public fora is content-based restriction on free speech).

[4] Daniel O. Conkle, *The Free Exercise Clause: How Redundant, and Why?*, 33 LOY. U. CHI. L.J. 95 (2001); Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71 (2001). Both Tushnet and Conkle anticipated the result in *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005), by suggesting that the Free Exercise Clause might insulate some legislative action from Establishment Clause challenge. *See* Conkle, *supra*, at 112–14; Tushnet, *supra*, at 92–93 & n.89. Neither appears, however, to have anticipated the breadth of the *Cutter* holding. *See infra* note 96.

do is frame the issue, and I took a lot of heat from people on my side, who thought I was abandoning the religion clauses of the First Amendment . . . . But I wanted to win . . . ."[5]

In 2005, this all changed with the Supreme Court's unanimous decision in *Cutter v. Wilkinson*.[6] In *Cutter*, the Court upheld, against an Establishment Clause challenge, a federal law that prevented state prison officials from burdening an inmate's religious expression unless the burden furthered "a compelling governmental interest," and did so by "the least restrictive means."[7] The Court explicitly said that under this law, inmates could gather for religious exercises even though they could not gather for political meetings.[8] The Court reached its conclusion despite opposition to the law by correctional officials,[9] a group to which it typically defers.[10]

Under *Cutter*, religion has achieved a special status it has not enjoyed in years, and this result can be explained only by the Free Exercise Clause. The Court in *Cutter* did not rely on any grant of power to Congress — it resolved only the Establishment Clause issue.[11] Yet the Court did not use any of its numerous approaches to the Establishment Clause. It held simply that, when Congress accommodated the religious practices of inmates, it did not violate the Establishment Clause because Congress was furthering Free Exercise values.[12] This accommodation went far beyond the legislative accommodations previously upheld by the Court. Without the Free Exercise Clause, the result in *Cutter* would have been impossible.

When the Supreme Court explicitly holds that Congress can create a system under which prisoners can "assemble for worship, but not for political rallies,"[13] attention must be paid. Religion, which lost the traditional "preferred position" courts have accorded First Amendment rights in 1990,[14] can now regain that position through legislation notwithstanding the Establishment Clause. Indeed, religion has not only regained parity with free speech, it now receives greater protection than speech in the prison setting.

This victory for religious exercise already has made a practical difference. Within two months of the *Cutter* decision, a federal court of appeals reversed a pre-*Cutter* decision and upheld a prisoner's right to exercise his religion by wearing his hair

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[5] Jeffrey Toobin, *Sex and the Supremes*, NEW YORKER, Aug. 1, 2005, at 32, 36.

[6] 125 S. Ct. 2113 (2005).

[7] *Id.* at 2118, 2121.

[8] *Id.* at 2124.

[9] *Id.* at 2117.

[10] *E.g.*, Lynn S. Branham, *"Go and Sin No More": The Constitutionality of Governmentally Funded Faith-Based Prison Units*, 37 U. MICH. J.L. REFORM 291, 294–95 (2004).

[11] *Cutter*, 125 S. Ct. at 2120 n.7.

[12] *Id.* at 2121.

[13] *Id.* at 2124.

[14] Employment Div. v. Smith, 494 U.S. 872, 895, 901–03 (1990) (O'Connor, J., concurring).

longer than prison regulations specified.[15] In the past, prisoners, as well as students, had often failed to gain constitutional protection for hair style choices, despite free expression and other constitutional claims.[16] And *Cutter*'s impact may soon extend far beyond this case.

I will begin by looking at the origins of the congressional legislation on inmates' religious rights before turning to how the Court's decision in *Cutter*, upholding that legislation, empowers the Free Exercise Clause. Finally, I will offer a few reflections on the jurisprudential future of religion's new "preferred position."

I.

The Free Exercise Clause was at the heart of this controversy from the beginning. The Supreme Court's 1990 *Smith* decision changed the judicial approach to free exercise claims in a fundamental way.[17] Before *Smith*, the 1963 *Sherbert v. Verner*[18] decision established that if an individual showed that a law burdened important religious practices, the state could not justify applying that law to the individual unless there was a compelling state interest in doing so and no less restrictive alternative existed.[19] *Smith* rejected the compelling state interest/least restrictive means test and held instead that a free exercise claim could never succeed against a law of general application that incidentally burdened religious conduct.[20]

Congress responded to *Smith* by passing the Religious Freedom Restoration Act of 1993[21] which reinstated the "compelling state interest" and "least restrictive means" test for government action burdening religion.[22] The Act passed by overwhelming majorities — when President Clinton signed it into law, he noted that its broad support could only be explained by "the power of God."[23]

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[15] Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005). The pre-*Cutter* decision that the court distinguished was *Henderson v. Terhune*, 379 F.3d 709 (9th Cir. 2004). *See Warsoldier*, 418 F.3d at 998 n.8.

[16] *See, e.g.*, Alyson Ray, Note, *A Nation of Robots? The Unconstitutionality of Public School Uniform Codes*, 28 J. MARSHALL L. REV. 645, 659–61 (1995); Mara R. Schneider, Note, *Splitting Hairs: Why Courts Uphold Prison Grooming Policies and Why They Should Not*, 9 MICH. J. RACE & L. 503 (2004).

[17] *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1110–11 (1990).

[18] 374 U.S. 398 (1963).

[19] *Id.* at 406–07.

[20] Employment Div. v. Smith, 494 U.S. 872, 878 (1990); *see also* Cutter v. Wilkinson, 125 S. Ct. 2113, 2118 (2005) (discussing the Court's holding in *Smith*).

[21] Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000)).

[22] *Id.* §§ 2000bb(b)(1), 2000bb-1(b).

[23] William J. Clinton, Remarks on Signing the Religious Freedom Restoration Act of 1993, *in* 29 WKLY. COMP. PRES. DOCS. 2377 (Nov. 16, 1993).

The Supreme Court, apparently not affected by this divine endorsement, found the Religious Freedom Restoration Act unconstitutional as applied to the states in its 1997 decision in *City of Boerne v. Flores*.[24] The Act had been passed pursuant to Congress's enforcement power under section 5 of the Fourteenth Amendment, but the Court held that it exceeded that power.[25] Rather than taking remedial steps that were congruent and proportional to deprivations of religious liberty, Congress had attempted to alter the Court's definition of Free Exercise in violation of *Marbury v. Madison*.[26]

Congress responded to *City of Boerne* by passing a more narrowly tailored statute that imposed the compelling state interest and least restrictive means test in just a few areas, including the sole area at issue in *Cutter* — religious exercise by institutionalized persons.[27] In passing the new statute, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[28] Congress relied on its Spending and Commerce Clause powers.[29] A challenge by Ohio correctional officials claimed that those powers were not broad enough to tell states how to run their prisons consistent with federalism, and that, in any event, the statute violated the Establishment Clause.[30] The Sixth Circuit agreed that the Establishment Clause had been violated,[31] but the Supreme Court reversed.[32]

The Sixth Circuit approached the question of whether Congress had violated the Establishment Clause by applying the test set forth by the Supreme Court in *Lemon v. Kurtzman*.[33] This was hardly surprising. While the *Lemon* test has been widely criticized, it has never been overruled.[34] Indeed, as matters developed, it was used by the Supreme Court about a month after *Cutter* when the Court found a display of the Ten Commandments to be unconstitutional.[35] So the Sixth Circuit was hardly off base in applying a precedent that turned out to be important in the Supreme Court both before and after the circuit court's decision. In applying *Lemon*, the Sixth Circuit found that Congress had violated the requirement that a statute not have the

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[24] 521 U.S. 507, 536 (1997); *see also Cutter*, 125 S. Ct. at 2118.

[25] *Boerne*, 521 U.S. at 519–20; *see also Cutter*, 125 S. Ct. at 2118 (discussing the Court's holding in *Boerne*).

[26] *Boerne*, 521 U.S. at 532–36.

[27] *Cutter*, 125 S. Ct. at 2118–19.

[28] 42 U.S.C. §§ 2000cc–2000cc-5.

[29] *Cutter*, 125 S. Ct. at 2118–19.

[30] *Id.* at 2120 n.7.

[31] Cutter v. Wilkinson, 349 F.3d 257, 268–69 (6th Cir. 2003).

[32] *Cutter*, 125 S. Ct. at 2120.

[33] *Id.* at 2120 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)).

[34] *See generally* Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 467 (1994) [hereinafter Gey, *Religious Coercion*] (summarizing criticisms of the *Lemon* test).

[35] McCreary County v. ACLU of Ky., 125 S. Ct. 2722, 2732–33 (2005).

primary effect of advancing religion.[36] In particular, the court found that Congress had "impermissibly advanc[ed] religion by giving greater protection to religious rights than to other constitutionally protected rights," including free speech rights.[37]

II.

When the Supreme Court reversed the Sixth Circuit and upheld RLUIPA, it did not say that the lower court had misapplied or misunderstood *Lemon*. After explaining the Sixth Circuit's conclusion under *Lemon*, the Court said, "We resolve this case on other grounds."[38] And there certainly are other approaches to the Establishment Clause that the Court has taken in recent years. Scholars and Justices alike have noted that the Court's Establishment Clause jurisprudence is in disarray.[39] The Court has used the "coercion" test to see if a government action forces individuals into participating in religious exercises.[40] But the "coercion" test was not used in *Cutter*. The Court has used the "endorsement" test to see if a reasonable observer would feel that the government was endorsing religion by taking the action under review.[41] But the "endorsement" test, although mentioned in a parenthetical comment,[42] was not used in *Cutter*. Finally, the Court has, on occasion, asked if a government

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[36] *Cutter*, 349 F.3d at 264.

[37] *Id.*

[38] *Cutter*, 125 S. Ct. at 2120 n.6.

[39] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 804 (2000) (plurality opinion) ("The case's tortuous history over the next 15 years indicates well the degree to which our Establishment Clause jurisprudence has shifted in recent times, while nevertheless retaining anomalies with which the lower courts have had to struggle."); Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) ("Our Religion Clause jurisprudence has become bedeviled . . . by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions."); County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part) ("I am content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area."); *see also* Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990) [hereinafter Gey, *Why Is Religion Special?*] (noting the widespread dissatisfaction with constitutional jurisprudence regarding church and state); Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761 (2005) (noting the various approaches to Establishment Clause adjudication).

[40] *See, e.g.*, *Weisman*, 505 U.S. at 587; *County of Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring in part and dissenting in part); *see also* Gey, *Religious Coercion*, supra note 34, at 482 (describing and criticizing the coercion test).

[41] *See, e.g.*, Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 9 (1989); Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring); *see also* Gey, *Religious Coercion*, *supra* note 34, at 476 (describing and criticizing the endorsement test).

[42] *Cutter*, 125 S. Ct. at 2121.

action violated the principle of "neutrality" under which the state should neither favor nor disadvantage religion.[43] But the "neutrality" test was not used in *Cutter*.

In finding that RLUIPA did not violate the Establishment Clause, the Court proceeded as follows. After noting that the Free Exercise and Establishment Clauses "exert conflicting pressures,"[44] it found that there was "room for play in the joints" between the two Clauses.[45] In other words, some government actions that favor religion, but are not mandated by the Free Exercise Clause, are nonetheless not in violation of the Establishment Clause. RLUIPA's protection of inmate religious practice fit into this space. The statute's compelling state interest test was certainly not mandated by the Free Exercise Clause; indeed, that was precisely the point of *Smith* and *City of Boerne*. But the statute did not constitute an establishment of religion. In short, Congress was not required to adopt RLUIPA, but it was not barred from doing so.[46]

But how did the Court decide that Congress had not violated the Establishment Clause? It said that Congress was accommodating religion, but accommodation claims by legislatures had often failed in the past. The Court had, for example, rejected a Texas statute that exempted religious publications from the sales tax,[47] a Connecticut statute that gave employees a right to avoid work on their Sabbath,[48] and a New York effort to create a school district to meet the needs of a Hasidic Jewish community.[49]

The Court in *Cutter* cited only one case in which it had upheld a legislative accommodation.[50] In its 1987 decision in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, the Court upheld Congress's decision to exempt a religious organization from the statutory prohibition on discrimination in employment.[51] Congress had accommodated religion by saying religious organizations could use the religion of job applicants in hiring decisions.[52]

But this decision hardly compels the result in *Cutter*. The statutory exemption at issue in *Amos* left employers where they were before Congress began to regulate discrimination in the workplace — they were free to hire coreligionists. Congress

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[43] *See, e.g.*, *Mitchell*, 530 U.S. at 809–10; Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993); *see also* Dhananjai Shivakumar, *Neutrality and the Religion Clauses*, 33 HARV. C.R.-C.L. L. REV. 505, 505–06 (1998).

[44] *Cutter*, 125 S. Ct. at 2120.

[45] *Id.* at 2121 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)).

[46] *Id.* at 2121–22. This reading is confirmed by the Court's holding in the term prior to *Cutter* that a state could choose not to fund a student pursuing a degree in theology. *See* Locke v. Davey, 540 U.S. 712, 718 (2004) (noting there is "play in the joints" between the Free Exercise and Establishment Clauses (quoting *Walz*, 397 U.S. at 669)).

[47] Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989).

[48] Estate of Thornton v. Caldor, 472 U.S. 703 (1985).

[49] Bd. of Educ. v. Grumet, 512 U.S. 687 (1994).

[50] *Cutter*, 125 S. Ct. at 2121 (citing Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 349 (1987)).

[51] *Amos*, 483 U.S. at 329–30.

[52] *Id.* at 338.

may have passed the exemption allowing religious groups to hire on the basis of religion because it believed such an exemption was required by the Free Exercise and Establishment Clauses.[53] *Amos*, after all, arose in the days before *Smith* when state action that infringed on religious liberty had to meet the compelling state interest test in court.[54] And the failure to pass the exemption might have forced courts enforcing nondiscrimination in hiring to delve into the internal workings of religious organizations in violation of the Establishment Clause.[55]

In any event, the Supreme Court's 2000 decision in *Boy Scouts of America v. Dale*[56] probably rendered the statutory exemption upheld in *Amos* superfluous. *Dale* upheld a right of expressive association that shielded the Boy Scouts from state antidiscrimination laws that would otherwise have required them to employ gays.[57] Under *Dale*, religious groups can now argue that their expressive goals are undercut if they must hire people who do not share their faith.[58] In short, they can attack the application of equal employment laws to their practices even if they lack the exemption upheld in *Amos*.

So *Amos* did not compel the result in *Cutter*. Nonetheless, *Amos* was a relevant precedent, so it is unsurprising that the Court followed a fairly conventional route in *Cutter*. The Court used *Amos* along with its cases that had rejected accommodation and set forth a set of three considerations for deciding whether an accommodation was lawful under the Establishment Clause: Did the accommodation alleviate "exceptional government-created burdens on private religious exercise?" Did it avoid unduly burdening nonbeneficiaries? Was it neutral among different faiths?[59] The Court found that RLUIPA met these tests.

The constitutional question is from where do these tests come. And the answer can only be that it is the Free Exercise Clause. In other words, if the Constitution did not have a Free Exercise Clause, RLUIPA would violate the Establishment Clause. We know this is so because of the unusual posture of the case. The Court expressly declined to decide whether Congress had the substantive power to enact RLUIPA or whether that statute was inconsistent with federalism.[60] Thus Congress was not able to argue that the Court should defer to its judgment that RLUIPA was necessary and proper to regulate interstate commerce or to pursue the general welfare under the Spending Power.

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[53] *See* Stacey M. Brandenburg, *Alternatives to Employment Discrimination at Private Religious Schools*, 1999 ANN. SURV. AM. L. 335, 339.

[54] In *Amos*, the Court did not consider whether the statutory exemption was required by the Free Exercise Clause. *Amos*, 483 U.S. at 339 n.17.

[55] *Id.* at 343–44 (Brennan, J., concurring in the judgment).

[56] 530 U.S. 640 (2000).

[57] *Id.* at 656.

[58] *See* Tushnet, *supra* note 4, at 85–86.

[59] Cutter v. Wilkinson, 125 S. Ct. 2113, 2121 (2005).

[60] *Id.* at 2120 n.7.

Similarly, Congress could not have maintained that it was enforcing the Fourteenth Amendment. In theory, Congress could have tried to distinguish *City of Boerne* by arguing that, in the special setting of prisons, securing the free exercise rights guaranteed in *Smith* requires special measures. Without a compelling state interest test, wardens would be able to effectively and secretly stamp out religious practices in a discriminatory manner. Thus RLUIPA used that test in prisons as a congruent and proportional measure to enforce the free exercise rights guaranteed in *Smith*. But here again the structure of the Court's opinion rules out this approach. There is no analysis of *City of Boerne*'s approach to congressional power under section 5 of the Fourteenth Amendment for the same reason that there is no discussion of commerce or spending: the Court is leaving for another day to determine whether Congress had the power under any theory to enact RLUIPA. The only question in *Cutter* is, assuming Congress has the power, does its action violate the Establishment Clause?

The holding of *Cutter* is not that the Free Exercise Clause is an affirmative grant of power to Congress. If that were the case, *City of Boerne* would have to be reexamined. The holding is, rather, that the Free Exercise Clause shapes the meaning of the Establishment Clause. It makes constitutional statutes that otherwise would be unconstitutional.

The Court uses two metaphors to capture this idea. It sometimes says there is "room for play in the joints" between the Clauses where a legislature has discretion to act.[61] At other times it says that the space between the Clauses "is not so narrow a channel that the slightest deviation . . . leads to condemnation" of legislation that accommodates religion.[62] Whether the Free Exercise Clause is seen as a joint in a structure or the bank of a river, it is not passive. It pulls some legislation into a zone of safety that otherwise would be crushed by the Establishment Clause.

So the Free Exercise Clause is not redundant after all. In explicitly finding space between the two Religion Clauses, the Court resolved a question that had divided scholars for some years.[63]

But the most important implication of *Cutter* is not that the Free Exercise Clause empowers Congress to accommodate religion in certain settings. The big news is that *Cutter* empowers Congress to give religious expression a preferred position in relation to political expression. It is one thing to suggest, as the Court did in dicta in *Smith*, that a legislature could accommodate a religion's need to use an otherwise banned drug

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[61] *See, e.g., id.* at 2121 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)).

[62] *Id.* (quoting Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting)).

[63] *Compare, e.g.*, Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000) (arguing in favor of religious accommodations), *with* Gey, *Why Is Religion Special?*, *supra* note 39 (arguing there is no constitutional basis for accommodating religion).

such as peyote.[64] It is far more controversial to hold, as the Court did unanimously in *Cutter*, that a legislature can favor religious gatherings over political assembly.

The Court did not shy away from this implication; it embraced it. The issue was squarely before the Court because the Sixth Circuit decision it was reviewing had struck down RLUIPA in part because the circuit court saw that statute as "impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights," such as free speech and assembly.[65] The Court saw no problem in preferring religion in this fashion.

The Court made its point in dramatic fashion by focusing on government provision of chaplains. First, the Court noted with favor that the federal government accommodates religious practices by members of the military by providing military chaplains.[66] This practice dates back to the earliest days of the Republic, but the Supreme Court had never before passed on its constitutionality. Prior to *Cutter*, the constitutional question was not trivial: no less a figure than James Madison opposed military chaplains as aiding religion unduly,[67] and the leading court of appeals precedent — the Second Circuit's 1985 *Katcoff v. Marsh* decision — questioned some aspects of the program on Establishment Clause grounds.[68] *Cutter* finally put the Supreme Court on record as allowing the chaplaincy program.

The Court then turned to the prison setting. The Court noted with approval that Ohio, even prior to the enactment of the RLUIPA, had provided prisoners with chaplains.[69] Then, the Court stated that "[t]he State provides inmates with chaplains 'but not with publicists or political consultants.'"[70]

Perhaps the chaplaincy program can be distinguished since it requires funding, and the government might be especially leery of funding "political consultants." But the Court went further. Ohio did not want to allow the range of observances RLUIPA would make lawful,[71] but it did sometimes allow prisoners to gather for religious services.[72] The Court noted the latter practice with favor and went on to point out that

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[64] Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

[65] *Cutter*, 125 S. Ct. at 2123 (quoting Cutter v. Wilkinson, 349 F.3d 257, 264 (6th Cir. 2003)).

[66] *Id.* at 2122.

[67] *See* Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 511 (1991).

[68] 755 F.2d 223, 237–38 (2d Cir. 1985) (concluding that a military chaplaincy program is generally constitutional, but remanding to consider the constitutionality of chaplaincy programs for particular military personnel, such as retirees and personnel in urban areas, whose military service obligations do not inhibit attendance at civilian religious services).

[69] *Cutter*, 125 S. Ct. at 2122 n.10.

[70] *Id.* at 2124 (quoting Reply Brief for the United States as Respondent Supporting Petitioner at 5, *Cutter*, 125 S. Ct. (2005) (No. 03-9877) [hereinafter Reply Brief]).

[71] Brief for Respondents at 1, *Cutter*, 125 S. Ct. 2113 (2005) (No. 03-9877) [hereinafter Brief for Respondents].

[72] *Cutter*, 125 S. Ct. at 2122 n.10.

"[t]he State allows 'prisoners to assemble for worship, but not for political rallies.'"[73] In other words, preferring religious assembly to political assembly is an acceptable accommodation. RLUIPA simply applies this principle to a wider range of practices than the Ohio officials desired.[74]

This result is dramatic for two reasons. First, it arises in the prison setting, where the Court typically defers to correctional officials.[75] While the Court consistently has said that prisoners are not shorn of their constitutional rights, it just as consistently has said that those rights are defined and limited by the prison setting.[76] In 1977, the Court, in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, upheld a Department of Correction regulation that prevented prisoners from soliciting support for a prisoners' union and prohibited union meetings, even though organizational rights had been extended to other groups, including the Jaycees.[77] The Court deferred to what it found to be a "not unreasonable" distinction by the Department of Correction.[78]

The *Jones* decision was generalized by two 1987 cases — *Turner v. Safley*[79] and *O'Lone v. Estate of Shabazz*.[80] In *Turner*, the Court held that the question of whether a prison regulation unlawfully impinged on a prisoner's fundamental constitutional rights, including free speech rights, depends on whether "the regulation is . . . reasonably related to legitimate penological interests," rather than the higher level of scrutiny used outside prison walls.[81] In *O'Lone*, the Court applied this rule to the religion setting, holding that prison officials had acted reasonably in preventing Muslim inmates from attending weekly congregational services held in the prison.[82] The prison officials had relied on practical considerations, such as the fact that "returns from outside work details generated congestion and delays at the main gate."[83] The Court squarely rejected the notion that a higher level of scrutiny for free exercise claims was warranted[84] even though the *Sherbert* decision, which applied at the time of this pre-*Smith* case, had mandated such scrutiny in non-prison settings.[85]

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[73] *Id.* (quoting Reply Brief, *supra* note 70, at 5).

[74] Brief for Respondents, *supra* note 71, at 6–7.

[75] *See generally* James E. Robertson, *The Majority Opinion as the Social Construction of Reality: The Supreme Court and Prison Rules*, 53 OKLA. L. REV. 161, 171–82 (2000) (detailing the history of prisoners' rights cases).

[76] *E.g.*, Hudson v. Palmer, 468 U.S. 517, 523 (1984); Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

[77] 433 U.S. 119, 121–23 (1977).

[78] *Id.* at 134–36 & n.11.

[79] 482 U.S. 78 (1987).

[80] 482 U.S. 342 (1987).

[81] *Turner*, 486 U.S. at 89.

[82] *O'Lone*, 482 U.S. at 344–45, 350.

[83] *Id.* at 351.

[84] *Id.* at 349.

[85] Sherbert v. Verner, 374 U.S. 398, 406–07 (1963).

Ohio officials relied on these cases when *Cutter* was argued.[86] They said that the Court had been wise to reject a compelling state interest test for prisons in *Jones*, *Turner*, and *O'Lone*, and that RLUIPA's effort to mandate that standard would be unworkable.[87] They noted that the religions bringing the lawsuit in *Cutter* were non-mainstream groups, including white supremacists, and they maintained that, under the guise of religious activities, violent endeavors could be planned.[88]

But in *Cutter*, as we have seen, the Court squarely held that Congress could impose the strict scrutiny in the religion area that the Court itself had rejected both in previous prison cases and, in *Smith*, for free exercise claims generally.[89] Of course, in practice, wardens retain substantial authority.[90] The Court pointed out in *Cutter* that "prison security is a compelling state interest," and it may well be that, even under RLUIPA, wardens will often succeed in court when they restrict certain activities.[91] But it is undeniable that RLUIPA provides accommodation for religion beyond that available under earlier law.[92] Congress has succeeded in replacing the *Turner* reasonableness test with strict scrutiny.[93]

The second reason *Cutter* is dramatic is that, whether one is inside or outside a prison, it is remarkable to see the Court give religious exercise greater freedom than political speech and assembly.[94] Until *Cutter*, the Court had stressed that religious viewpoints could not be excluded when the government extended benefits to political expression.[95] The underlying message was that religion was not a poor stepchild, but there never was a suggestion that religion could be favored over political speech.[96]

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[86] Brief for Respondents, *supra* note 71, at 13–15.

[87] *Id.*

[88] *Id.* at 5–6.

[89] *Compare* Cutter v. Wilkinson, 125 S. Ct. 2113, 2123 (2005), *with* Employment Div. v. Smith, 494 U.S. 872, 884–86, (1990), *O'Lone*, 482 U.S. at 349–50 & n.2, Turner v. Safley, 482 U.S. 78, 89 (1987), *and* Jones v. N.C. Prisoner's Labor Union, Inc., 433 U.S. 119, 127–28 (1977).

[90] *Cf. Cutter*, 125 S. Ct. at 2123.

[91] *Id.* at 2124 & n.13. But the mere invocation of security concerns does not guarantee that wardens will be successful in RLUIPA litigation post-*Cutter*. *See* Warsoldier v. Woodford, 418 F.3d 989, 998–1001 (2005) (striking down a prison hair length regulation even though prison security is a compelling interest because the regulation was not the least restrictive alternative).

[92] *See Warsoldier*, 418 F.3d at 997–98.

[93] *Id.* at 998.

[94] *See Cutter*, 125 S. Ct. at 2123–24.

[95] *See supra* note 3.

[96] Writing before *Cutter*, Professor Daniel Conkle suggested that the Court may confer a preferred status on religion because it was more likely to view exclusions of political — as opposed to religious — speech as content- rather than viewpoint-based. *See* Conkle, *supra* note 4, at 112–14. Also writing before *Cutter*, Professor Mark Tushnet suggested that accommodations of religious speech might evade some equality objections based on free speech doctrine, although he was "uncomfortable" with the idea. *See* Tushnet, *supra* note 4, at 93 n.89. Neither seems to have anticipated the stark preference for religious over political speech embraced in *Cutter*. *See Cutter*, 125 S. Ct. at 2123–24.

Consider the Supreme Court's 1995 decision in *Rosenberger v. Rector and Visitors of University of Virginia*,[97] which concerned a state university program of paying outside contractors to print student publications. The school in question would not authorize participation by a religious student group on the ground that to do so would violate the Establishment Clause.[98] The Court ruled that barring the religious group from this limited public forum constituted unconstitutional viewpoint discrimination in violation of the Free Speech Clause that could not be justified by invoking the Establishment Clause.[99] This hard-fought 5–4 decision gave religion an equal status with other free speech rights, but certainly no more.[100] The necessity of treating viewpoints equally was the theme of the majority opinion.

Rosenberger was followed by the Court's 2001 decision in *Good News Club v. Milford Central School*,[101] which involved a New York school board's decision to open the public schools for certain after-school activities. Because the schools were available for groups discussing "character and morals," the Court ruled that the school board had acted unconstitutionally in not allowing school usage by a religious group that taught youngsters "moral lessons from a Christian perspective through live storytelling and prayer."[102] The Court again was divided, with the dissenters finding Establishment Clause problems[103] and the majority emphasizing that the state had to allow the religious activities in order to be "neutral" toward religious perspectives.[104]

The doctrines involved in *Cutter* and these cases are distinct. A prison is not typically viewed as a limited public forum,[105] but the asymmetry in the results in the two cases is striking. While Congress cannot exclude religious viewpoints from a limited public forum, Congress, notwithstanding the Establishment Clause, can protect religious activity in a prison without protecting comparable secular activity.[106] On the facts of *Cutter* itself, Congress can require that a meeting time and place be made available for The Church of Jesus Christ Christian, a white supremacist religion, while not requiring that any provision be made for the Aryan Nation, a white supremacist political group.[107] The Free Exercise Clause has not only avoided redundancy,[108] it has become muscular indeed. Neutrality toward religion is not the touchstone in *Cutter*.

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[97] 515 U.S. 819 (1995).

[98] *Id.* at 822–23.

[99] *Id.* at 845–46.

[100] *Id.* at 822, 839.

[101] 533 U.S. 98 (2001).

[102] *Id.* at 108, 110.

[103] *Id.* at 141 (Souter, J., dissenting).

[104] *Id.* at 114 (majority opinion).

[105] *E.g.*, Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119, 134 (1977).

[106] *Compare Good News Club*, 533 U.S. at 108, 110, *with* Cutter v. Wilkinson, 125 S. Ct. 2113, 2124 (2005).

[107] Of course, the government could always attempt to show that the restriction of the religious group served a compelling state interest. *See Cutter*, 125 S. Ct. at 2123 n.11.

[108] *See* Conkle, *supra* note 4, at 112; Tushnet, *supra* note 4, at 92–93.

To put the matter in stark terms, imagine that Congress, instead of passing RLUIPA, had passed a statute saying that the compelling state interest and least restrictive means test should be used whenever wardens attempted to restrict the free expression rights of inmates. Suppose that this imaginary statute made clear that wardens would, on the other hand, still be subject to the more deferential reasonableness standard of *Turner* and *O'Lone* if they attempted to restrict the religious activities of inmates. Now imagine a lawsuit by religious groups challenging the law.

I believe this statute would not survive Supreme Court review. Whether the Court used a public forum analysis or an equal protection approach, it is simply implausible that the Court that decided *Rosenberger* and *Good News Club* would allow Congress to make this distinction. If Virginia cannot allow discrimination against religious groups in its funding policy for student organizations,[109] and New York cannot allow such discrimination in its access policy for after-hours use of public schools,[110] it is hard to see how Congress could lawfully discriminate against religion in the prisons.

But *Cutter* explicitly upholds discrimination in the other direction.[111] Congress passed a statute that prescribed compelling state interest and least restrictive alternative analysis for religion claims while maintaining the deferential reasonableness standard for all other constitutional rights, including free speech.[112] The Court, explicitly noting the distinction, upheld the statute.[113]

The idea that Congress wanted to favor religion qua religion in RLUIPA is not an idea that first arose in litigation. It is the point of the statute.[114] In the hearings on RLUIPA, Congress heard testimony that inmates who participate in religious exercises are less disruptive when in prison and less likely to be recidivists after release.[115] No such claims were made about secular political activity undertaken by prisoners. Congress believed, in short, that religion is good for you. Thus, Congress wanted an asymmetry between religion and politics,[116] and *Cutter* upheld that asymmetry.[117]

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[109] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845–46 (1995).

[110] *Good News Club*, 533 U.S. at 108, 110.

[111] *See Cutter*, 125 S. Ct. at 2124.

[112] *See, e.g., id.* at 2123 n.11.

[113] *Id.*. at 2124.

[114] The stated purpose of the law, 42 U.S.C. § 2000cc (2005), is "[t]o protect religious liberty." Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (2000).

[115] Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 511 & n.43 (2005).

[116] *See id.* at 519, 521.

[117] *See, e.g., Cutter*, at 2123 n.11.

III.

In this light, it is worth taking a look at the idea that First Amendment freedoms enjoy a "preferred position" in our constitutional order.[118] While "preferred position" rhetoric seems to have run its course in the Supreme Court, it enjoyed an important status at one time, and it may prove illuminating in thinking about *Cutter*.

The usual academic defense of the "preferred position" idea focuses on free speech.[119] The notion is that the courts should review legislative decisions that impinge on free speech more carefully than economic regulation because free speech is essential to the development of a working democracy.[120] To quote a recent account, the preferred position approach means that "freedom of speech appears to be treated as special, both 'constitutionally and culturally.'"[121]

The scholarly genesis of this idea is often traced to Zechariah Chafee and his 1920 treatise, *Freedom of Speech*.[122] G. Edward White ably summarized Chafee's contribution:

> Chafee restated the philosophical rationale for protecting free speech in America — resting protection for speech on a "social interest" in enhanced public participation and informed public debate in a democracy rather than on an individual interest in self-expression. His reformulation supplied First Amendment jurisprudence with the first of its twentieth-century bases for a speech-protective perspective: that protection for speech facilitated a search for truth in the marketplace of ideas.[123]

In judicial decisions, the "preferred position" idea typically included the protection of religion as well as speech.[124] But there never was a suggestion that religion was

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[118] *See, e.g.*, Peter Linzer, *The* Carolene Products *Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277, 299 (1995); Elizabeth J. Wallmeyer, *Filled Milk, Footnote Four & the First Amendment: An Analysis of the Preferred Position of Speech After the* Carolene Products *Decision*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1019, 1050 (2003).

[119] G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 329 (1996).

[120] *Id.* at 329–30.

[121] Wallmeyer, *supra* note 118, at 1021 (quoting White, *supra* note 119, at 300).

[122] ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 34 (1920) ("The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion . . . .").

[123] White, *supra* note 119, at 316.

[124] *E.g.*, Kovacs v. Cooper, 336 U.S. 77, 88 (1949); Murdock v. Pennsylvania, 318 U.S. 105, 115 (1943).

entitled to a higher status than speech. Justice Stone inaugurated judicial support of stricter scrutiny for infringements of political as opposed to economic rights with his famous footnote four in the Court's 1938 *Carolene Products* decision.[125] Stone's footnote singled out for protection the "specific prohibition[s] of the Constitution, such as those of the first ten Amendments," and suggested that strict scrutiny might be needed in the "review of statutes directed at particular religious, . . . or national, . . . or racial minorities."[126]

The first time the phrase "preferred position" was used in an opinion, it appeared in a dissent in which free speech and religion were again linked. In 1942, the Court upheld the application of a general sales tax to the printed materials sold by Jehovah's Witnesses.[127] Stone, by then Chief Justice, dissented:

> The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack.[128]

The dissent in *Jones I* ultimately became the law,[129] and "preferred position" language was, for a few decades, used by the Supreme Court, often in cases involving religion.[130] The phrase "preferred position" was gradually abandoned, although the principle remained, as other doctrinal approaches provided heightened protection for free speech.[131] The *Sherbert* decision then adopted language from a free speech case to protect free exercise against statutory burdens unless these burdens could be justified by a compelling state interest.[132] Thus, under *Sherbert*, free exercise received protection at the same level as free speech.[133]

As we have seen, this all changed when the 1990 *Smith* decision departed from *Sherbert* as well as Stone's *Jones I* formulation by rejecting free exercise claims against neutral statutes of general application.[134] Justice O'Connor, departing from

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[125] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[126] *Id.* (citations omitted).

[127] Jones v. Opelika, 316 U.S. 584 (1942) (Jones I), *vacated*, 319 U.S. 103 (1943).

[128] *Id.* at 608 (Stone, C.J., dissenting).

[129] *See* Jones v. City of Opelika, 319 U.S. 103 (1943) (per curiam) (rehearing and reversing *Jones I* for the reasons given in the dissent in *Jones I* as well as the majority in *Murdock*, 319 U.S. 105).

[130] *See* White, *supra* note 119, at 327, 335–36.

[131] *Id.* at 331; *see also* Linzer, *supra* note 118, at 299.

[132] Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[133] *See* Philip Hamburger, Essay, *More is Less*, 90 VA. L. REV. 835, 865 (2004).

[134] Employment Div. v. Smith, 494 U.S. 872, 878–79, 884–85 (1990).

this approach, went all the way back to Stone's approach, when she wrote that "[t]he compelling [state] interest test effectuates the First Amendment's command that religious liberty . . . occupies a preferred position."[135]

So, the Court no longer assures that religion occupies a "preferred position." On the contrary, religious claims against neutral statutes succeed only when religion can present itself as a species of political speech and then argue against viewpoint discrimination.[136] But the Court in *Cutter* authorized Congress to give religion the preferred position accorded by strict scrutiny review even when such status is not given to political speech.[137] This is an important role indeed for the Free Exercise Clause.

What is the future of this newly invigorated Clause? There are three possibilities. First, *Cutter* may turn out to be an anomaly, a case that is limited to its facts. The unequaled state control over an inmate's life may have made the Court more sympathetic to the need for Free Exercise protection in prisons than in other settings.[138] This may explain why Justice Stevens, who found that the Religious Freedom Restoration Act violated the Establishment Clause because its compelling state interest test "provided the Church with a legal weapon that no atheist or agnostic can obtain,"[139] joined the Court's opinion in *Cutter*.

Following this view, the Court likely will limit Congress's ability to expand free exercise protection strictly to prisons, thus finding that the remaining portion of RLUIPA — the extension of the compelling state interest test to land use decisions that affect religion — is an unconstitutional establishment of religion.[140] The Court will also likely strike down any further Congressional efforts to expand free exercise.

This possibility cannot be ruled out. Any suggestion that a constitutional provision is more cherished than free speech faces an uncertain future. In a very different context, the Court previously backed down from such a notion. In its 1972 decision in *California v. LaRue*,[141] a five-member majority of the Court upheld a legislative restriction on nude entertainment in establishments where liquor is sold, finding that the Twenty-first Amendment mandated giving such legislation a strengthened presumption of validity.[142] This approach was widely criticized[143] — one law review piece referred

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[135] *Id.* at 895 (1990) (O'Connor, J., concurring in the judgment).

[136] *See supra* note 3.

[137] Cutter. v. Wilkinson, 125 S. Ct. 2113, 2119, 2124 (2005).

[138] *See id.* at 2121-22.

[139] City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Stevens, J., concurring).

[140] *Cutter* did not consider the validity of the land-use provisions of RLUIPA. *Cutter*, 125 S. Ct. at 2118, n. 3.

[141] 409 U.S. 109 (1972).

[142] *Id.* at 118–19; *see also* N.Y. State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981) (per curiam) (holding that the Twenty-first Amendment supports ban on topless dancing).

[143] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 478 n.15 (2d ed. 1988).

sardonically to "The Preferred Position of the Twenty-First Amendment"[144] — and the Court subsequently rejected the reasoning in *Larue*.[145]

The second possibility is that the Court will move dramatically in the other direction: *Cutter* could begin a process that results in a fundamental rethinking of both religion clauses. The disarray in the Court's Establishment Clause jurisprudence was obviously one reason the Court decided *Cutter* — an Establishment Clause challenge to a federal statute — without citing any of its various Establishment Clause tests.[146] Perhaps the Court's use of free exercise values to decide an Establishment Clause case points toward the goal, long sought by some scholars, of treating the two religion clauses as one, and to construe that Clause's meaning with more sympathy to religious expression.[147]

But neither of these possibilities is very likely. The "play in the joints" idea pulls against any notion that the Court itself is going to firmly map out a broad or a narrow role for the legislature.[148] The most likely future is that *Cutter* will inaugurate a series of case-by-case decisions in which the Court grapples with which accommodations of religion to allow. Some legislatures will be attracted to the idea of furthering religious expression without fostering secular political expression in a variety of settings. As these cases come to the Court, the Free Exercise doctrine of the future may come to be as complicated and fragmented as the Establishment Clause doctrine of today. Nonetheless, *Cutter* will be understood to have established one proposition: the Free Exercise Clause is not redundant; it does real work in giving meaning to the United States Constitution.

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[144] Daniel E. Ramczyk, Note, *Constitutional Law — Regulating Nude Dancing in Liquor Establishments — The Preferred Position of the Twenty-First Amendment* — Nall v. Baca, 12 N.M. L. REV. 611 (1982).

[145] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996).

[146] *See, e.g.*, Cutter v. Wilkinson, 125 S. Ct. 2113, 2120 n.6 (declining to apply the three-part test established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

[147] *See, e.g.*, Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 311–12 (2002).

[148] *See supra* text accompanying note 61.