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Session 6
Unbalanced: A Plan for Protecting the First Amendment and Binding the Chancellor's Left Foot

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Program Description: *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), created a major stir when it ruled that the First Amendment bars labor unions from compelling fees from public employees. Little noticed was a potentially momentous change in First Amendment law concerning the traditional levels of scrutiny applied to state limits on speech. Historically, strict scrutiny has been the highest level of constitutional scrutiny. When a statute is challenged and this test applied, the government carries the burden of proving a compelling state interest satisfied in a way that least restrains the challenger's rights. Prior to Janus, constitutional scholars were hard pressed to explain the difference between "strict" and "exacting" scrutiny, although the Janus Court observed that exacting scrutiny had been used in commercial speech cases. *Janus*, at 2465. The majority opinion in Janus distinguishes between the two and explains that exacting scrutiny is a lesser level of scrutiny. This lesser level is then described by the Court precisely the same way that strict scrutiny has historically been defined. Exacting scrutiny now requires the state to show a compelling interest satisfied by the least restrictive means. *Janus*, at 2465-66.

The revelation in *Janus* that strict scrutiny now requires something more than the traditional compelling interest, least restrictive alternative, opens the door for the Supreme Court to create a no-balance test protecting some types of speech. This presentation explains the historic protections of speech, the current (toothless) no-balance test applied to Free Exercise of religion, and how a new and rigorous no-balance test should be created to protect speech.

Target Audience:

The CLE is directed at lawyers and judges who are interested in recent developments in First Amendment law and how new theories can be applied to protect citizens against compelled speech.

Course Objectives:

1. Understand how *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018) altered the traditional levels of scrutiny for limitations on speech.

2. Understand how this opens the door for a more rigorous protection of speech going forward.
3. Understand how removing from the judiciary the ability to balance certain interests will better protect speech in general, and religious speech in particular.

Brief Outline:

I. Brigadier Raymond G. Cameron – an illustration of a fearless and unbalanced Christian life.
   A. Rigorously held religious beliefs are considered by those who do not share them to be unbalanced. At the same time, the classic approach to resolving constitutional rights is some sort of secular "balance." This is inherently problematic.
II. Two Approaches to Eliminating the Balance
   A. *Employment Div. of Oregon v. Smith*, 494 U.S. 872 (1990).
      1. Balance removed from Free Exercise of Religion.
      2. Two hundred years of precedent upended.
      3. The approach adopted in *Smith* had been specifically rejected by the Court substantially before the *Sherbert* decision.
         a. Deadly neutrality – examples
      4. Religious diversity leading to anarchy is the primary *Smith* reason for seeking an unbalanced solution.
         a. The greater problem is judicial anarchy when it comes to religion. Virtually every Supreme Court decision in the last several terms that touches on religion reversed the decision of the U.S. Court of Appeals.
         b. No balance is a good goal, but the Supreme Court has taken the wrong approach so far.
      5. Originalism denied.
      6. Social and science warriors of the hour defeat timeless religious norms.
   B. The way forward: *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018).
      1. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The concept of placing certain religious practices above any statutory prohibition is not new.
      2. *Hosanna Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012) and the more recent *Our Lady of Guadalupe Sch. v. Morrissey- Burru*, 140 S.Ct. 2049 (2020), establish what is known as the "Ministerial Exception" for churches and church-related institutions. This is a no balance approach.
      3. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 2022 U.S. LEXIS 3055 (2022). The argument for placing certain subjects beyond a balance receives new life!
III. Balance and the Chancellor's Left Foot
   A. *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021), *cert. granted* 142 S. Ct. 1106 (2022).
      1. The *303 Creative* decision of the Tenth Circuit perfectly illustrates why using the Chancellor's left foot to measure a balance conflicts with religious freedom and creates judicial anarchy.
      2. Earlier this year the Supreme Court agreed to review the forced religious speech, but not the *Smith* or Free Exercise claims in *303 Creative.* 142 S. Ct. 1106 (2022).
   B. A Redline for the Left Foot
IV. Questions

Unbalanced: A Plan for protecting the First Amendment and Binding the Chancellor's Left Foot

I. Brigadier Raymond G. Cameron

A. Not a Brigadier General in the Army, but rather a Brigadier in the Salvation Army, a protestant church. In the 1970's he directed the SA's Chicago South-side Men's Center. He was also my uncle.

1. Black Panther snipers were active in Chicago to kill police officers at that time.

2. SA officers were easily mistaken for the police. They drove plain, full-size cars. Their uniforms (and hats) looked like those of the police.

3. Begged my uncle to remove his uniform jacket and hat as he drove daily to the Chicago south side.

4. He refused, saying that his life was in God's hands and he would not worry.

B. The Brigadier and hitchhikers

1. The Brigadier had another dangerous practice. He picked up hitchhikers who crossed his path for the purpose of sharing the gospel with them.

2. Some were more in need of hearing the gospel than others, because the Brigadier was robbed more than once by a hitchhiker. One stole his car and his officer's uniform and left him on the side of the road in his underwear. Seeking help in your underwear presents certain challenges.

C. Asbury Park night-time missions

1. In his old age the Brigadier retired with his wife to a SA Officers' retirement home in Asbury Park, N.J. When I visited, I was impressed that it was a very dangerous place to live. Outside his building was a large, free-standing, iron USPS postbox bolted to the sidewalk. On the iron postbox was a USPS note that it would soon be removed because it had been vandalized so many times.

2. At some point in their retirement, the Brigadier's wife was moved to another nearby building because of her declining health. Every night the Brigadier would walk to see his wife and then he would return later in the evening. He was fearless, an elderly man unafraid to walk outside at night in an area in which iron postboxes could not survive.

D. Brigadier Raymond G. Cameron died in his 80's.

E. The average person would, in a word, consider the Brigadier "unbalanced." He was not making the decisions that most people would make. Some of his decisions were unthinkable to the vast majority. But, they all stemmed from his unwavering trust in God.

F. Brigadier Cameron's story reflects the greater problem that exists in the legal approach to resolving constitutional rights. Rigorously held religious beliefs are considered by those who do not share them to be unbalanced. At the same time, the classic approach to resolving constitutional rights is some sort of secular "balance." This is inherently problematic. How can "unbalanced" religious beliefs be adequately protected by a system that depends on reaching a "balanced" result?

II. Two Approaches to Eliminating the Balance

A. *Employment Div. of Oregon v. Smith*, 494 U.S. 872 (1990).

1. Balance removed from Free Exercise of Religion. Justice Scalia, writing for the Court, recognized the difficulty in resolving clashes between religious practice and the law. He wrote that it would be "courting anarchy" to protect "society's diversity of religious belief" through the traditional balance used to protect the diversity of speech. *Id.* at 888.

a. In response the Court eliminated any balance when it came to protecting the free exercise of religious belief from government incursion. Instead, the Court determined that any statute that was "neutral and generally applicable" would withstand a First Amendment attack. *Id.* at 879, 881.

2. Two hundred years of precedent upended. The Court considered the practice of subjecting statutes that inhibit religious practice to heightened scrutiny only dated back to *Sherbert v. Verner*, 374 U.S. 398 (1963). In fact, heightened scrutiny dated back two hundred years. Virginia, for example, adopted its Statute for Establishing Religious Freedom in 1786. It provided protection for religious practices until they interfered with "peace and good order." Leo Pfeffer, *Church State and Freedom* 113 (1967). Justice Rutledge in his dissent in *Everson v. Bd. of Educ.*, 330 U.S. 1, 32 n.9 (1947) opined that the Virginia Statute was "[p]ossibly the first official declaration of the 'clear and present' danger doctrine."

3. The approach adopted in *Smith* had been specifically rejected by the Court substantially before the *Sherbert* decision. In *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), Justice Frankfurter argued *in dissent* what would become the *Smith* standard. *Id.* at 651.

a. Deadly neutrality – examples

i. The current problem with gas prices could be cured by increased production or decreased consumption. Consider a neutral and generally applicable federal law that barred all driving on the weekend. Although it would do great damage to the religious practice of most Christians and Jews who cannot walk to their place of worship, it would be constitutional.

ii. The concern over terrorists is spurring facial recognition technology. Consider a neutral and generally applicable federal law which banned head coverings at all transportation hubs and on city streets. Although this statute would do great damage to those who believe that a head covering is required in public, the statute would not violate the Free Exercise clause.

4. Religious diversity leading to anarchy is the primary *Smith* reason for seeking an unbalanced solution. The problem with that rationale is that in 1990 religious diversity had never created anarchy in the United States.

Nothing in *Smith* pointed to anything that would soon develop into anarchy.

a. The greater problem, as discussed below, is judicial anarchy when it comes to religion. Virtually every Supreme Court decision in the last several terms that touches on religion reversed the decision of the U.S. Court of Appeals. The Court of Appeals is generally the final stop for almost all litigation. This suggests that something is seriously wrong in applying the current rule of law in religion cases.

b. Good goal, wrong approach. This presentation applauds Justice Scalia's goal of eliminating the balancing in religious practice cases. The problem is his approach to eliminating the balance takes the most miserly view of religious freedom – a view that cannot be squared with his views on originalism.

5. Originalism denied. Originalism, as promoted by Justice Scalia, asks "What was intended by the original authors?" James Madison is generally credited with being the primary author of the First Amendment. An originalist should be very interested in understanding Madison's view of the Free Exercise clause of the First Amendment.

a. Madison explored. Fortunately, we don't have to look far. In James Madison's "Memorial and Remonstrance against Religious Assessments," he wrote:

> This right [freedom of religion] is in its nature an unalienable right. It is unalienable . . . because what is here

> a right towards men, is a duty towards the Creator. . . . This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. . . . We maintain therefore that . . . Religion is wholly exempt from [the] cognizance [of civil society].

i. Madison intended that the duty of members of society to protect the citizens' freedom of religion is "precedent … in degree of obligation to the claims of Civil Society." This can only mean in any balance, religious freedom must always win.

6. Social and science warriors of the hour defeat timeless religious norms. Religious practice has been taking a beating in the lower courts when weighed against the rights of homosexuals. The Catholic Church ultimately won in *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021). But Jack the baker won at best a technical victory in *Masterpiece Cake Shop v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719 (2018). Even the most fundamental religious practice, the right to worship freely according to individual conscience, could muster at best a partial victory at the injunction stage before the Supreme Court when pitted against the social scientists mandating COVID lockdowns. *Tandon v. Newsom*, 141 S.Ct. 1294 (2021) (*per curiam*); *accord*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66-67 (2020) (*per curiam*).

B. The way forward: *Janus v. AFSCME Council 31*, 138 S.Ct. 2448 (2018).

1. *Janus* contains a little noticed bombshell. That might be because the explosion that captured the attention of all was the end of compulsory union payments for

public employees. The unnoticed blast had to do with the traditional levels of scrutiny applied to speech: exacting scrutiny v. strict scrutiny.

a. What we always knew about strict scrutiny. Strict scrutiny was the highest level of statutory scrutiny. When a statute was challenged and this test applied, the government carried the burden of proving a "compelling" state interest satisfied in a way that least restrained the challenger's rights.

b. The unexpected promotion of strict scrutiny. Prior to *Janus*, constitutional scholars were hard pressed to explain the difference between "strict" and "exacting" scrutiny, although the *Janus* Court noted that exacting scrutiny had previously been used in commercial speech cases. *Janus*, at 2465. The majority opinion in *Janus* distinguished between the two, explained that exacting scrutiny was a lesser level of scrutiny than strict, but then defined exacting scrutiny precisely the same way that strict scrutiny had historically been defined. Exacting scrutiny now required both a compelling state interest (which the Court assumed), satisfied in the least restrictive way ("through means significantly less restrictive of associational freedoms"). *Janus*, at 2465-66.

2. A new path to unbalanced. The *Janus* Court never defined what the newly elevated strict scrutiny standard required. That opened the door to an unbalanced scrutiny, a standard so high that if a statute infringes on certain kinds of religious rights it is simply unconstitutional – or at least not subject to a balancing involving the chancellor's foot. No balancing should be permitted.

3. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The concept of placing certain religious practices above any statutory prohibition is not new. As mentioned above, James Madison explicitly said that should be the way freedom of religion is protected. *Barnette* explained that the purpose of the Bill of Rights was to withdraw religious practices "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." *Barnette* at 638.

4. *Hosanna Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012) and the more recent *Our Lady of Guadalupe Sch. v. Morrissey- Burru*, 140 S.Ct. 2049 (2020), established what is known as the "Ministerial Exception" for churches and church-related institutions. Both cases involved church schoolteachers who were discharged in what would typically be determined to be a violation of the federal civil rights statutes. Instead of applying the neutral and generally applicable *Smith* test, the Court adopted a no balance test. If the employee's work is to share the message of the faith group (what could loosely be termed a minister) that automatically defeats any statutory civil rights claim.

a. *Hosanna Tabor* contained an extensive historical discussion of the right of religion to be free from government control. 565 U.S. at 182-85.

b. Is there any reason why individual religious belief should be less protected than institutional religion?

5. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 2022 U.S. LEXIS 3055 (2022). The argument for placing certain subjects beyond a balance receives new life! Just at the university deadline for submitting this outline for CLE approval, the Supreme

Court decided *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 2022 U.S. LEXIS 3055 (2022).

a. The lower courts and the balance. Lower courts, when adjudicating gun rights applied a "two step" analysis. The first step applied a no balance outcome much like the *Smith* approach. If the regulated gun activity fell outside the original scope of the Second Amendment, then it was "categorically unprotected." *Id.* at 21.

i. However, if the regulated activity might have come within the original scope (meaning possessing a gun in your home), then the state could still defeat that right by applying the balancing test normally associated with the First Amendment: a compelling state interest and narrow tailoring. *Id.* at 22.

ii. In other circumstances, where the application of the original scope of the Second Amendment was uncertain, the lower intermediate scrutiny test applied. *Id.* at 22.

b. The balance rejected. The Supreme Court specifically rejected the application of any "judge-empowering 'interest-balancing inquiry.'" It tossed into the garbage pile of history any test "that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Id.* at 27.

i. Instead, the Court impose an originalist test – "assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id.* at 32.

c. The Court added two important points.

i. First, it commented that Second Amendment rights were not "unlimited." *Id.* at 25. They should be tied to an originalist understanding of the right.

ii. Second, the Court opined that this was also an appropriate way to handle First Amendment rights, specifically naming the right of free speech and the Establishment Clause. *Id.* at 29-30.

iii. This suggests the Court is open to a no balance approach to protecting religious practice.

d. Why no balance for the Second Amendment? The "balance," according to the Court, already took place when the people adopted the Second amendment. For that reason, the Second Amendment elevated above *all other interests* the right of citizens to use arms for self-defense. *Id.* at 31.

i. This "all other interests" sounds like the Madison approach to religious practice.

C. Balance and the Chancellor's Left Foot

1. *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021), *cert. granted* 142 S.Ct. 1106 (2022).

a. The *303 Creative* decision of the Tenth Circuit perfectly illustrates why using the Chancellor's left foot to measure a

balance conflicts with religious freedom and creates judicial anarchy.

b. In *303 Creative* the state sought, in the name of homosexual rights, to bar the owner of 303 Creative from designing web sites only for heterosexual couples. The owner's religious belief was that homosexual marriage conflicted with the will of God. 6 F.4th at 1170. The business also wanted to explain to the public the nature of the owner's religious beliefs. Among important distinctions, the business was willing to aid customers, without regard to sexual orientation, in any service that it provided except creating custom websites celebrating same sex marriages. *Id.*

c. 303 Creative challenged the application of the statute on both the Free Speech and Free Exercise Clauses of the First Amendment.

d. The Tenth Circuit ruled against the Free Exercise claim based on *Smith* – thus applying a no balance standard to defeat the religious practice claim.

e. However, the Court agreed that the free speech claims required strict scrutiny because the statute not only compelled speech, but it was a content-based restriction on speech. *Id.* at 1178.

i. The state faced a difficult challenge in proving a least restrictive alternative because the record showed that homosexuals had many commercial outlets which would

create a wedding web site for same-sex couples. *Id.* at 1180.

ii. The decision shows that any balancing scheme, even the most rigorous, cannot thwart a chancellor who is willing to contort his left foot beyond recognition. Tenth Circuit determined that the creative services of the religious owner of 303 Creative were unique. No one else was exactly like the owner. That made her services unique, and not available from other vendors. *Id.* The fact that the owner had her own personality, talents, and beliefs made it impossible for her to avoid voicing the state's view on same-sex marriage. If her Free Exercise rights were subject to a similar balance, creative, progressive jurists would find a way to defeat them.

f. Earlier this year the Supreme Court agreed to review the forced religious speech, but not the *Smith* or Free Exercise claims in *303 Creative.* 142 S.Ct. 1106 (2022).

D. A Redline for the Left Foot

1. The new unbalanced, *Janus* opens a door.

a. Redline on Ministerial Exception parallels.

i. Worship inside home or church

ii. Religious speech

iii. Other religious compulsion

b. Redline on statutory rights with no historic roots trumping constitutional rights. Religion precedent over civil society.

c. Redline on liberty interests overriding enumerated rights.

III. Questions