

3-1-1993

The Religion Clause: A Double Guarantee of Religious Liberty

Edward McGlynn Gaffney Jr.

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Constitutional Law Commons](#), and the [Religion Law Commons](#)

Recommended Citation

Edward McGlynn Gaffney Jr., *The Religion Clause: A Double Guarantee of Religious Liberty*, 1993 BYU L. Rev. 189 (1993).
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1993/iss1/6>

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Religion Clause: A Double Guarantee of Religious Liberty

*Edward McGlynn Gaffney, Jr.**

INTRODUCTION: THE PROBLEM OF RELIGIOUS WARFARE AND THE RELIGION CLAUSE AS "ARTICLES OF PEACE"

The term "religious warfare" may sound like an oxymoron, for religion is frequently associated with a commitment to nonviolence. For example, Jesus amended the law of the talion¹ with a teaching that many of his disciples in

* Dean and Professor of Law, Valparaiso University School of Law. © 1993 Edward McGlynn Gaffney, Jr.

1. The law of the talion is a provision in the Code of the Covenant, *Exodus* 21-23, requiring that damages be paid in a tort claim arising from an injury to a pregnant woman. *Exodus* 21:23-24; see also *Leviticus* 24:19. The phrase "life for life," *Exodus* 21:23, is often incorrectly interpreted to reflect either an actual practice of death penalty in ancient Israel or a biblical warrant for the death penalty in our times. Similarly, the rest of the law of the talion—"eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe," *Exodus* 21:24—is incorrectly interpreted to mean that ancient Israelite courts actually maimed defendants in tort actions. The context of this passage, however, suggests that this law functioned to mitigate damages in tort claims. For example, the immediately preceding verse clearly refers not to maiming, but to damages that the defendant "shall pay in the presence of the judges." *Exodus* 21:22. And the verses immediately after the law of the talion also suggest that this law refers to damages: "When a man strikes his male or female slave in the eye and destroys the use of the eye, he shall let the slave go free in compensation for the eye. If he knocks out a tooth of his male or female slave, he shall let the slave go free in compensation for the tooth." *Exodus* 21:26-27 (New American Bible). Thus the law of the talion functioned to measure the amount of damages appropriate for a particular sort of injury. As with modern tort claims, loss of an eye was compensated more than the loss of a tooth. Cf. DALE PATRICK, *OLD TESTAMENT LAW* 77 (1985) (stating the principle that a person should suffer to the degree they caused suffering). For extrabiblical literature that confirms this interpretation of the law of the talion, see Articles 195-282 of the Code of Hammurabi (1792-1750 B.C.E.), a series of cases setting forth the monetary damages for tort claims. For example, Article 198 provides: "If he has destroyed the eye of a commoner or broken the bone of a commoner, he shall pay one mina of silver." *The Code of Hammurabi*, in 1 *THE ANCIENT NEAR EAST: AN ANTHOLOGY OF TEXTS AND PICTURES* 138, 161-67 (James B. Pritchard ed., 1958); see also *OLD TESTAMENT PARALLELS: LAWS AND STORIES FROM THE ANCIENT NEAR EAST* 66

subsequent centuries have found hard: "Do not resist an evildoer."² Although Mohandas Gandhi (1869-1948) was a Hindu, he made this teaching the core of his moral practice and with it brought down the mighty British Empire.³ Similarly, the great Baptist preacher, Martin Luther King, Jr., also made creative nonviolence the heart of his preaching and practice,⁴ with which he led an historic struggle to end Jim Crow laws—the segregation codes that might aptly be termed apartheid, American-style.⁵

But for many, the teaching of Jesus on nonviolence is hard to observe. Following this teaching has led some of his disciples to a death like his.⁶ The difficulty of this teaching has also led others—probably most—of his disciples to reject it. For example, at least by the late fourth century when Christianity became the official, established religion of the Roman Empire, the duty to serve the Emperor became a religious duty. By the early fifth century, Augustine, Bishop of Hippo in northern Africa, had elaborated a theory according to which war was justifiable; he could even exhort the Emperor to use violence as a means of coercing dissident Christians or heretics either to conform to the orthodox teaching of the church or to die. By the eleventh century, the Popes were preaching a "Crusade," a war under the sign of the cross which marked the breastplate of the

(Victor H. Matthews & Don C. Benjamin eds., 1991).

2. *Matthew* 5:39 (New Revised Standard Version).

3. See MOHANDAS K. GANDHI, *NON-VIOLENT RESISTANCE* (1961); *THE GANDHI READER* (Homer A. Jack ed., 1956).

4. MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE, CHAOS OR COMMUNITY?* (1968); MARTIN LUTHER KING, JR., *STRENGTH TO LOVE* (1964); MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* (1963); MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* (1958). King, the Pastor of Ebenezer Baptist Church in Atlanta, was the founding President of the Southern Christian Leadership Conference (SCLC). For an account of the role of SCLC in the historic civil rights movement, see TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63* (1988); ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT* (1984); and BAYARD RUSKIN, *STRATEGIES FOR FREEDOM* (1976).

5. For an account of the apartheid system of American law after *Plessy v. Ferguson*, 163 U.S. 537 (1896), see C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974).

6. Many of the early Christian martyrs died as witnesses to their conviction that "Jesus is Lord," 1 *Corinthians* 12:3; *Philippians* 2:11, a religious oath of fidelity they deemed incompatible with the claim of Roman law, "Caesar is Lord," that formed the *sacramentum* or oath of office of a Roman soldier. See ADOLPH HARNACK, *MILITIA CHRISTI: THE CHRISTIAN RELIGION AND THE MILITARY IN THE FIRST THREE CENTURIES* 54, 76 (David M. Gracie trans., 1981) (referring to TERTULLIAN, *ON IDOLATRY*, ch. 19).

Crusaders. Thus was the cross of Christ, a sacred symbol of the redemptive nonviolent suffering on behalf of all the nations, sacrilegiously transformed into the sign of brutal and vicious military conquest and slaughter of the infidel Jews and Muslims in the City of Peace, Jerusalem.⁷

After the Reformation of the western church in the sixteenth century,⁸ Europe was scarred by frequent outbursts of violence, related, in part at least, to religious commitments. For example, the Peace of Augsburg (1555) put an end to the violence that had arisen over the spread of Lutheran belief in the territories of the Holy Roman Empire. Protestant princes, united in a confederation known as the Protestant League, extorted an end to these battles from Emperor Charles V, a Catholic. According to these articles of peace:

Every land that was Lutheran [i.e., governed by a Lutheran prince] before 1552 might remain so legally, and for the future every ruler of a state was given the choice between the old religion [Catholicism] and the Lutheran, and his subjects were to abide by his decision or peaceably leave the

7. Sir Steven Runciman concludes his magisterial treatment of the Crusades as follows:

There was so much courage and so little honour, so much devotion and so little understanding. High ideals were besmirched by cruelty and greed, enterprise and endurance by a blind and narrow self-righteousness; and the Holy War itself was nothing more than a long act of intolerance in the name of God, which is the sin against the Holy Ghost.

3 STEVEN RUNCIMAN, *A HISTORY OF THE CRUSADES* 480 (1954); see also ROLAND H. BAINTON, *CHRISTIAN ATTITUDES TOWARD WAR AND PEACE: A HISTORICAL SURVEY AND CRITICAL RE-EVALUATION* 111-16 (1960); HANS E. MAYER, *THE CRUSADES* (1972).

8. The attitude of Martin Luther toward war was ambivalent. On the one hand, he invoked *Acts* 5:29 ("We must obey God rather than men") for the conclusion that "we should neither follow nor help a prince who desired to go to war [if] his cause was clearly unrighteous." 44 MARTIN LUTHER, *Treatise on Good Works*, in *LUTHER'S WORKS* 15, 100 (Helmut T. Lehmann ed., 1966) (1520); see also 46 MARTIN LUTHER, *Open Letter on the Harsh Book Against the Peasants*, in *LUTHER'S WORKS*, *supra*, at 63, 77 (1525); 46 MARTIN LUTHER, *Whether Soldiers, Too, Can Be Saved?*, in *LUTHER'S WORKS*, *supra*, at 87, 130 (1526). On the other hand, Luther clearly contemplates in the same texts that there may be some instances in which a prince waging war justly should be obeyed. For example, Article 16 of the Augsburg Confession (1530) provides that a Christian may wage war justly (*jure bellare*). For a commentary on this article of the Confession, see GEORGE W. FORELL & JAMES F. MCCUE, *CONFESSING ONE FAITH: A JOINT COMMENTARY ON THE AUGSBURG CONFESSION BY LUTHERAN AND CATHOLIC THEOLOGIANS* 322-33 (1982).

state—the famous principle of *cujus regio ejus religio* [whose region, his religion], though the actual phrase is later.⁹

Similarly, prompted by the territorial wars which ensued even after the Peace of Augsburg, the Formula of Concord (1577) established not only a rigorous peace but also contained “an uncompromising [Lutheran] exclusion of the Reformed [Calvinist] doctrine of the Eucharist and . . . of predestination.”¹⁰ At least in its early phase, the Thirty Years War was a war of Calvinists against Catholics, with Lutherans remaining aloof.¹¹ The provoking incident occurred on April 11, 1606, when Protestants attacked a Catholic ceremonial procession in the heavily Protestant city of Donauworth in southern Germany. A year later Maximilian of Bavaria occupied the city, annexed it to Bavaria, installed Jesuits in the church, and made it “forcibly Catholic.”¹² “In 1608 the Protestant states formed the Evangelical Union to defend Protestant states attacked in contravention of the Peace of Augsburg.”¹³ Led by Maximilian of Bavaria, Catholics formed a rival alliance known as the Catholic League in the same year. The war came to an end with the Peace of Westphalia in 1645. Although the war was fought over political rivalry as much as religious commitments,¹⁴ it is recalled as a classic instance of “religious warfare.”

In England, the struggle to establish Parliamentary hegemony was likewise marked by deep religious commitments. The Royalist banners unfurled on the battlefields of the Civil War read, “For God, For King, For Country.” The banners of the Cromwellians read, “Pray Fervently, Fight Boldly.”¹⁵ Across the sea in what George Bernard Shaw called “John Bull’s Other Island,” the Irish experienced not only eight centuries of foreign rule, but also cruel denial of their religious liberty.¹⁶ The dissolution of the monasteries by Henry VIII

9. OWEN CHADWICK, *THE REFORMATION* 143 (1972).

10. *Id.* at 144.

11. *Id.* at 317.

12. *Id.* at 316.

13. *Id.*

14. “After 1635 the war was no longer in any real sense a religious war, but a modern European war dependent on rivalry between revived France and imperial Germany.” *Id.* at 317.

15. For a brief discussion of the Puritan Revolution from the perspective of a history of war, see BAINTON, *supra* note 7, at 147-51. See also DEREK HIRST, *AUTHORITY AND CONFLICT: ENGLAND, 1603-1658*, at 221-363 (1986).

16. See 3 *A NEW HISTORY OF IRELAND: EARLY MODERN IRELAND* (Theodore W.

devastated the Catholic community in Ireland as well as in England,¹⁷ and the Penal Laws enacted under Elizabeth I criminally punished Roman Catholics for exercising their religious commitments.¹⁸ The armies, first of Cromwell and later of William of Orange, slaughtered innocent Irish civilians by the thousands.¹⁹ The Protestant rulers illegally confiscated the lands and homes of the natives and gave them to the Presbyterians "planted" there by "Good King Billy."²⁰

More recently, the continuous violence in the northern part of Ireland has been characterized by uninformed media reports as a "religious war." I have no brief to write for this violence, but I do not view it primarily in religious terms. It strikes me as a struggle primarily over the legitimacy of imperial domination and the continuous denial of political and civil rights to people because of their religious commitments. It is, moreover, about as probable to believe that the occupying British Army is an effective peace-keeping force in Ireland as it is to think that the U.S. Marines could keep the peace in Lebanon.²¹

However one characterizes the protracted conflict in the northern part of Ireland, we do not lack recent evidence of religiously grounded violence. Bosnia is torn apart by violent conflict between Serbs and Muslims. In Lebanon and Israel, bloody strife continues between Jew and Arab and between

Moody et al. eds., 1976).

17. The two statutes ordering the dissolution of the monasteries were 27 Hen. 8, ch. 28 (1536), 31 Hen. 8, ch. 13 (1539); see BRENDON BRADSHAW, *THE DISSOLUTION OF THE RELIGIOUS ORDERS IN IRELAND UNDER HENRY VIII* (1974).

18. See S.T. BONDOFF, *TUDOR ENGLAND* 212-46 (1950); GEOFFREY R. ELTON, *REFORM AND REFORMATION: ENGLAND, 1509-1558* (1977); GEOFFREY R. ELTON, *ENGLAND UNDER THE TUDORS* (1955).

19. See T.C. BARNARD, *CROMWELLIAN IRELAND* (1975).

20. The Irish who remember the invasion of William of Orange from the underside usually stomp their feet twice when they say "God bless King Billy." It is like the custom of observant Jews who make a lot of noise when the name of Haman, prototypical enemy of the Jews, is mentioned in the reading of the Book of Esther at the feast of Purim. For a dispassionate analysis of the British attitude toward the native Irish and the native Americans in the seventeenth century, see William Bassett, *The Myth of the Nomad in Property Law*, 4 J.L. & RELIGION 133 (1986).

21. The most obvious difference in this comparison is that Northern Ireland is part of the United Kingdom, whereas Lebanon is not part of the United States. The point of the comparison, however, is that many of the contending natives in both places resent the presence of foreigners who are obviously committed to one side of an ongoing conflict.

Arab and Arab. In Iran and Iraq a *jihad* has been waged ferociously over the past decade.

These images of religiously grounded violence throughout the world lend a note of urgency to the conversation reflected in this symposium. It is important that we grasp correctly the meaning of the First Amendment Religion Clause. The importance of doing so is crucial not only to our republic, but also to many parts of the world that do not live with the blessing of the First Amendment.

Some scholars, notably William Marshall, Lawrence Solum, and Jeffrey Stout, have suggested that the story of violence sometimes associated with religion leads in the direction of placing strong societal limits on religion.²² Dean Mark Schwehn summarizes the arguments of Professor Stout as follows:

Stout opposes efforts to strengthen the public influence of religion in part because he remains even today traumatized by the religious wars of the seventeenth century, events that constitute the crucial episode in the formation of the academic conscience of the West. Thus, for example, Stout characterizes our society's recognition that the good life must allow for our inability to agree upon any one model of the good life as *phronesis* "forged in the religious strife of early modern Europe." He argues that theology has lost credibility among intellectuals largely because it "was unable to provide a vocabulary for debating and deciding matters without resort to violence." And he often thinks of contemporary religion in terms of Belfast and Beirut, Teheran and Lynchburg, places that give him "ample reasons for concern."²³

Schwehn acknowledges that passionate religious commitments have led to destructive tribalism and violence. But he notes with equal force the evil of wholly secular totalitarian regimes of the left and right that have left behind human carnage by the millions in our own century. Thus, he concludes sensibly that Stout's "highly selective recognition of the past" should not serve as a warrant for the repression or privatization of

22. See WILLIAM P. MARSHALL, *THE PUBLIC SQUARE AND THE OTHER SIDE OF RELIGION* (forthcoming 1993); JEFFREY STOUT, *ETHICS AFTER BABEL: THE LANGUAGE OF MORALS AND THEIR DISCONTENTS* 222-23, 238 (1988); Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1096-97 (1990).

23. MARK R. SCHWEHN, *EXILES FROM EDEN: RELIGION AND THE ACADEMIC VOCATION IN AMERICA* 54 (1993) (quoting STOUT, *supra* note 22, at 223, 238).

religion, any more than a mention of Hitler, Stalin, Mao, and Pol Pot should serve as an argument against secularism *per se*.²⁴

In short, Professors Marshall, Solum, and Stout prove too much when they suggest that explicitly religious arguments must be avoided in public discourse so as to avoid the repetition of the "holy wars" of the sixteenth and seventeenth centuries. Their fears, however, might be allayed if the virtues of "technical competence, civil intelligibility, and political courtesy" were viewed as imperatives for both religious and nonreligious participants in public policy debate.²⁵ But I would not place upon religious discourse any stricter regulation than that which is permissible for secular speech.²⁶

Although I am frightened by images of religiously grounded violence elsewhere, I note that they are *abroad*, and that we have found a different way of dealing with our deepest differences in the American experience. For that very reason, I think that we should tone down some of the excessive rhetoric about a "culture war" now raging in America.²⁷ When measured against the real shedding of real blood involved in the real wars abroad, our struggles over cultural influence and control are quite tame. That is not to say that we can afford to go about our business with reckless disregard for courtesy. On the contrary, as the Williamsburg Charter—a bicentennial document celebrating religious liberty—puts it, "The issue is not only what we debate, but how."²⁸ The Charter states:

24. *Id.*

25. J. Bryan Hehir, *Responsibilities and Temptations of Power: A Catholic View*, 8 J.L. & RELIGION 71, 82 (1988); see also FREDERICK M. GEDICKS & ROGER HENDRIX, CHOOSING THE DREAM: THE FUTURE OF RELIGION IN AMERICAN PUBLIC LIFE (1991); RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE (1984); Edward M. Gaffney, *Politics Without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality*, 64 TUL. L. REV. 1143, 1188-94 (1989); Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992).

26. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

27. See JAMES D. HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991). Professor Hunter maintains that his title is simply a translation of the German term, *Kulturkampf*. Since the German word for "war" is not *Kampf*, but *Krieg*, it might be more accurate to speak of a cultural struggle, of great magnitude and moment, than to speak of culture wars. For all the modish appropriation of militaristic metaphors by groups like the National Organization for Women, which describes their strategy planning office as the "war room," it might help elevate the tone of political discourse if all of us would tone down our excessive rhetoric.

28. *The Williamsburg Charter*, 8 J.L. & RELIGION 5, 11 (1990). The Charter committed its signatories to the propositions that "those who claim the right to

The Religious Liberty provisions are not "articles of faith" concerned with the substance of particular doctrines or of policy issues. They are "articles of peace" concerned with the constitutional constraints and the shared prior understanding within which the American people can engage their differences in a civil manner and thus provide for both religious liberty and stable public government.²⁹

Against this preliminary discussion of the Religion Clause as "articles of peace," I wish to explore three points about "new directions in religious liberty." First, the two provisions of the First Amendment Religious Liberty Clause—one prohibiting the establishment of religion and the other guaranteeing the free exercise of religion—are not contradictory in any sense, but are "mutually reinforcing provisions [that] act as a double guarantee of religious liberty."³⁰ Second, although religious freedom as a significant constitutional value began to erode long before William H. Rehnquist became the Chief Justice in 1986, it has come to a low point in the past few years. Third, I explore the impact of *Employment Division v. Smith*³¹ on the lower courts and other government agencies and conclude that remedial legislation is sorely needed to restore the first of civil liberties to the position of honor it deserves in our republic.

I. THE RELATIONSHIP BETWEEN THE PROHIBITION AGAINST AN ESTABLISHMENT OF RELIGION AND THE GUARANTEE OF FREE EXERCISE OF RELIGION

First, I will attempt to reconcile free exercise concerns and the prohibition against a governmental establishment of religion. This point is fundamental to any interpretation of the First Amendment. Functionally, it makes sense for litigators to proceed as though there were two separate provisions dealing with religion, but I concede this point only because the case law of the modern period has done so. Able historians like Thomas Curry have noted that the two ways of speaking of

influence should accept the responsibility not to inflame," *id.* at 20, and "those who claim the right to participate should accept the responsibility to persuade." *Id.* at 21.

29. *Id.* at 12. The conception of the Religious Liberty Clause as "articles of peace" was articulated in JOHN C. MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 45-79 (1960).

30. *The Williamsburg Charter*, *supra* note 28, at 6.

31. 494 U.S. 872 (1990).

religion in the First Amendment were almost interchangeable and virtually indistinguishable in the eighteenth century.³²

The bifurcation of the Religion Clause in the modern period has led to serious problems in theory, in the metaphors used to describe the theory, and in practice. An example of this *theoretical confusion* is the conflict the Court built into the standards announced in *Lemon v. Kurtzman*³³ for determining a violation of the Establishment Clause. *Lemon* teaches that the Establishment Clause criteria prohibited any government practice that did not have a secular purpose.³⁴ A year later the Court held that the Free Exercise Clause may only be invoked by adherents to a religious faith, not to a general secular view.³⁵ It makes little sense as a matter of logic that the Establishment Clause must *prohibit* what the Free Exercise Clause *requires*. And if that result did not make for coherent constitutional theory, the theory became worse in *Smith*, when the so-called tension between the clauses was removed by eliminating the vigor and force of the Free Exercise Clause. That is like fixing a headache by lopping off the head. In his characteristically humorous manner, Jim Gordon put it this way: "[According to the *Smith* case,] the free exercise clause . . . generously permits you to have whatever religious beliefs you want. You just can't 'exercise' them. It is comforting to know that the protection of religious liberty in America is now just as broad as it is in NORTH KOREA."³⁶ I realize that this is a gross exaggeration to which the North Koreans might take exception.

The "metaphors" the Court has chosen to describe the relationship between the two parts of the Religion Clause are not very helpful either. Chief Justice Burger suggested the image of a ship captain struggling to find a "neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."³⁷ Taking this metaphor further, Chief Justice Rehnquist has described the

32. THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 216-17 (1986).

33. 403 U.S. 602 (1971).

34. *Id.* at 612.

35. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

36. James D. Gordon III, *An Unofficial Guide to the Bill of Rights*, 1992 B.Y.U. L. REV. 371, 371.

37. *Walz v. Tax Comm'n*, 397 U.S. 664, 668-89 (1970).

relationship between the two Clauses as a narrow channel bordered by a Scylla and a Charybdis through which the Court must steer.³⁸ This surely qualifies for the *New Yorker's* "Block that Metaphor" column. It is especially inappropriate because it implies a negative connotation for both parts of the Religion Clause, imagined to be twin perils or dangers, neither of which could be evaded without risking the other.³⁹ The metaphors the Court uses make it appear as if James Madison and his colleagues had planned a big tug-of-war between disharmonious and brutal rivals by crafting the first two provisions of the First Amendment in a way that made little sense without the valiant efforts of the Court in the late twentieth century to "reconcile" the seeming "conflict" between them.⁴⁰

An example of the *practical confusion* in this area is that the Court has created two different standards for who may bring an Establishment Clause complaint and who may allege a free exercise violation. The point is not a fine academic one, but one with important practical consequences. Without a clearer understanding of the relationship between the two parts of the Religion Clause, the outcome of religious liberty cases will depend on the cleverness of lawyers characterizing a case as one arising under the establishment provision or the free exercise provision. In my view, that is no blessing to the republic.

The Williamsburg Charter notes that the two parts of the Religion Clause are "mutually reinforcing provisions [that] act as a double guarantee of religious liberty Together the clauses form a strong bulwark against suppression of religious liberty."⁴¹ One of the drafters of the Charter, Richard John Neuhaus, has written:

The conventional wisdom is that there are two religion clauses that must somehow be "balanced," one against the

38. *Thomas v. Review Bd.*, 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting); see also *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 28 (1989) (Blackmun, J., concurring); *id.* at 42 (Scalia, J., dissenting).

39. Scylla was a dangerous rock on the Italian side of the Straits of Messina; Charybdis was a nearby whirlpool; these perils were represented as female monsters in ancient mythology.

40. See Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986).

41. *The Williamsburg Charter*, *supra* note 28, at 6, 16.

other. But these provisions of the First Amendment are not against each other. Each is in the service of the other. More precisely, there is one religion clause, not two. The meaning of a "clause," apart from the narrowly grammatical, is that it is an article or stipulation. The two-part religion clause of the First Amendment stipulates that there must be no law respecting an establishment of religion. The reason for this is to avoid any infringement of the free exercise of religion. Non-establishment is not a good in itself, it does not stand on its own feet. The positive good is free exercise, to which non-establishment is instrumental.⁴²

I do not read Neuhaus to be downplaying either the historical or the contemporary significance of the prohibition against an established religion. I read him simply to be reminding us that the reason for the prohibition of an established religion—both at the time of the framing and now—is to promote religious liberty. Non-establishment of religion is "instrumental" in this sense. As philosophers know, however, the term "instrumental" is not a term of derision; it is language borrowed from an Aristotelian understanding of causation that indicates the channel through which the goal of religious liberty is attained in our society.⁴³

Professor Franklin Gamwell of the University of Chicago Divinity School has proposed that we think of the free exercise guarantee as the establishment of the religious question in America, and that we think of the no-establishment provision as the prohibition of a governmental answer to that question. This is a dramatically different approach to Professor Marshall's suggestion that we should not really try to get out of the Religion Clause anything more than we could get out of the rest of the First Amendment.⁴⁴ To quote again from the Williamsburg Charter:

Far from being a sub-category of free speech or a constitutional redundancy, religious liberty is distinct and

42. Richard J. Neuhaus, *Contending for the Future: Overcoming the Pfefferian Inversion*, 8 J.L. & RELIGION 115, 115-16 (1990); see also Richard J. Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620, 626-31 (1992).

43. Aristotle's discussion of four kinds of causes or explanatory principles—efficient, final, material, and formal—is found in his *METAPHYSICS* I.3 (W.D. Ross ed., 1988). See also Ruliard Taylor, *Causation*, in 2 *THE ENCYCLOPEDIA OF PHILOSOPHY* 56 (Paul Edwards ed., 1967).

44. William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 575-93 (1983).

foundational. Far from being simply an individual right, religious liberty is a positive social good. Far from denigrating religion as a social or political "problem," the separation of Church and State is both the saving of religion from the temptation of political power and an achievement inspired in large part by religion itself. Far from weakening religion, disestablishment has, as an historical fact, enabled it to flourish.⁴⁵

In the interests of religious liberty, both provisions are crucial; as double guarantees, they provide a framework from which we, as a people, are able to pursue happiness. Because they have been viewed as polar, however, the resulting tension has tended to erode the understanding that both provisions of the Religion Clause are meant to foster and protect religious freedom.

II. THE EROSION OF RELIGIOUS FREEDOM BEFORE THE REHNQUIST COURT

With notable exceptions,⁴⁶ there is broad consensus among scholars and religious leaders that the Court erred grievously in *Employment Division v. Smith*.⁴⁷ I regard *Smith* as the nadir of judicial contempt for the first of our civil liberties. To defend this conclusion, it is necessary to trace the broad contours of the development of free exercise doctrine. Because they are familiar, I do so briefly.

In the first period of the republic, the Bill of Rights had no application to the several states, but governed the regulatory reach only of the national government.⁴⁸ And in its first application to congressional legislation, the Free Exercise Clause proved but a parchment barrier to statutes that codified massive hostility against the Mormons. In a series of three

45. *The Williamsburg Charter*, *supra* note 28, at 17.

46. Professors William Marshall, Mark Tushnet, and Ellis West have argued that the Free Exercise Clause should not be relied upon for exemptions from generally applicable laws. See Marshall, *supra* note 22; William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989); Mark V. Tushnet, "Of Church and State and the Supreme Court": *Kurland Revisited*, 1989 SUP. CT. REV. 373; Mark V. Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990).

47. 494 U.S. 872 (1990).

48. *Barron v. Mayor & City Council*, 32 U.S. (7 Pet.) 243 (1833).

cases in the late nineteenth century, the Supreme Court reinforced with judicial authority the hostility toward the Mormons manifested in the congressional legislation that singled them out in an invidious manner.⁴⁹ In the first case, *Reynolds v. United States*,⁵⁰ the Court ruled that Congress could impose criminal sanctions against the Mormon practice of plural marriage; the Court noted, however, that religious beliefs were beyond the regulatory reach of the government.⁵¹ In the second case, *Davis v. Beason*,⁵² the belief-conduct distinction the Court had touted in *Reynolds* was exposed as a sham, for Mormons were deprived of the franchise because of their *belief* in plural marriage. In the third case, aptly styled *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*,⁵³ the Court went still further, divesting the Mormon church of its property until it changed its view on plural marriage. This is the sort of dictatorial rule that one associates with Henry VIII's dissolution of the monasteries in sixteenth century England and Ireland,⁵⁴ not with the spirit of the First Amendment. It is important to note that the *Smith* Court expressly relied on the *Reynolds* case, and implicitly on its progeny, which had ruled that the Free Exercise Clause imposed no serious obstacle to congressional legislation targeted at a vulnerable and unpopular religious minority.⁵⁵

In 1925, the Supreme Court began the process of incorporating various guarantees of the Bill of Rights against the several states through the Due Process Clause of the Fourteenth Amendment.⁵⁶ By 1940 the Court thought it desirable to extend the reach of the Free Exercise Clause to the states as well and did so in *Cantwell v. Connecticut*.⁵⁷ *Cantwell* marked a breakthrough made possible by the

49. See GUSTAVUS MYERS, HISTORY OF BIGOTRY IN THE UNITED STATES 158-62 (1940); Frederick M. Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 DEPAUL L. REV. 167 (1992).

50. 98 U.S. 145 (1878).

51. *Id.* at 164, 166.

52. 133 U.S. 333 (1890).

53. 136 U.S. 1 (1890).

54. See *supra* notes 16-19 and accompanying text.

55. *Employment Div. v. Smith*, 494 U.S. 872, 879-85 (1990).

56. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925) (Free Speech Clause applicable to the states); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (Free Press Clause applicable to the states).

57. 310 U.S. 296 (1940).

persistence of the Jehovah's Witnesses, who brought to the Court's attention a series of cases illustrating the brutality of political power intolerant of a small, unpopular minority group.⁵⁸ In this respect, the cases involving the Jehovah's Witnesses were a harbinger of the stance that the Court was later to take against racial discrimination in *Brown v. Board of Education*.⁵⁹ Not only religious minorities, but also racial minorities could take comfort from Justice Jackson's assurance in the second flag-salute case that "freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."⁶⁰ This was a solid commitment of an independent judiciary that it would enforce the limits placed on our government by the founders in the Bill of Rights.

The beginning of the modern period of free exercise doctrine was *Sherbert v. Verner*,⁶¹ which marked an important departure from a series of cases involving Sunday closing laws that had been decided adversely to Jews only two years before *Sherbert*.⁶² In *Sherbert*, Justice Brennan tried to give religious freedom more effective protection than it had previously enjoyed. To achieve this end, he imported from equal protection analysis in cases involving racial discrimination the standard requiring the government to show that its interest in a racial classification was truly "compelling." After the breakthrough decision in *Brown v. Board of Education*,⁶³ in case after case in the race area, the Court repeatedly told the government that *no* interest that it might articulate on behalf of Jim Crow laws (or American apartheid)⁶⁴ could match this strict standard of review.⁶⁵

In addition, Justice Brennan reached out to Commerce Clause cases such as *Dean Milk Co. v. City of Madison*,⁶⁶ to require further that the government must use the "least restrictive alternative" to achieve its "compelling interest." In

58. See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

59. 347 U.S. 483 (1954).

60. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

61. 374 U.S. 398 (1963).

62. See, e.g., *Braunfeld v. Brown*, 366 U.S. 599 (1961).

63. 347 U.S. 483 (1954).

64. See WOODWARD, *supra* note 5.

65. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating state prohibition of interracial marriage).

66. 340 U.S. 349 (1951).

Dean Milk the Court ruled that the City of Madison had a powerful interest in the purity of milk sold to its inhabitants. But the Court held that this goal could be achieved by requiring pasteurization of milk in Illinois as easily as it could by requiring that the milk be transported in its raw form up to Wisconsin for pasteurization and inspection, then be transported back down to Illinois for packaging, and then be transported up to Wisconsin again for sale. The Court correctly reasoned that the imposition of additional transportation costs on the out-of-state farmers was a none-too-subtle way of discriminating against them in favor of local merchants.

By combining these two standards—compelling state interest and least restrictive alternative—into one new test for the adjudication of claims arising under the Free Exercise Clause, the *Sherbert* court sent a signal to lower courts that religious freedom was to be given the same favored status accorded to the national commitment to racial equality (*Brown v. Board of Education*) and to the elimination of tariff barriers in a national common market (*Dean Milk*). This new standard may not have been perfect. (What test that involves balancing is perfect?) But the test proved to be fairly effective in the lower courts as a way of safeguarding religious freedom in an environment that had become pervasively regulated.

The new test, moreover, was not limited to the facts of the unemployment compensation claim sought by Ms. Sherbert but was invoked by the Court as a general principle in virtually all the free exercise cases it decided in the past two decades.⁶⁷ Of all these cases involving facts other than an unemployment compensation claim, one of the few actually won by a religious adherent was *Wisconsin v. Yoder*.⁶⁸ *Yoder* involved the religious claim of Amish parents that their religious practices and communal life would be injured by the application of a facially neutral, generally applicable norm requiring

67. See, e.g., *Hernandez v. Commissioner*, 490 U.S. 680 (1989); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *United States v. Lee*, 455 U.S. 252 (1982); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Gillette v. United States*, 401 U.S. 437 (1971).

68. 406 U.S. 205 (1972). See also *McDaniel v. Paty*, 435 U.S. 618 (1978) (invalidating state statute prohibiting clergy from seeking office because it conditioned the right to free exercise of religion on the surrender of the right to seek office).

compulsory school attendance by their children after the eighth grade. Professor McConnell characterizes the cases lost by religious claimants as follows:

Orthodox Jews have been expelled from the military for wearing yarmulkes; a religious community in which all members worked for the church and believed that acceptance of wages would be an affront to God has been forced to yield to the minimum wage; religious colleges have been denied tax exemptions for enforcing what they regard to be religiously compelled moral regulations; Amish farmers who refuse Social Security benefits have been forced to pay Social Security taxes; and Muslim prisoners have been denied the right to challenge prison regulations that conflict with their worship schedule.⁶⁹

Although purporting to surround free exercise of religion with a lot of protection, the Court either trivialized the burden on religion imposed by the demands of the modern regulatory state or rejected the validity of an exemption based on religious grounds.

In his article on *Smith*, Professor McConnell described free exercise doctrine before *Smith* as a sort of Potemkin village,⁷⁰ in which visitors could see with their own eyes Soviets who were grateful to Josef Stalin for an abundance of ice cream and for other delights of their collectivized lives. Only the most gullible tourist could have believed the rosy picture created by the Potemkin village, and only a naive observer of religious liberty in this country would say that everything has been well in order either before or after *Smith*. At least on paper, however, the compelling state interest and least restrictive alternative standard appeared to be operative in a unanimous decision as recently as a few months before *Smith*.⁷¹

Whatever may have been true for other cases, the Supreme Court has laid down an unbroken line of unemployment compensation cases that are directly relevant to the unemployment compensation claim presented in *Smith*. In this line of cases, the Court repeatedly adhered to the doctrine that

69. Michael W. McConnell, *Why "Separation" Is Not the Key to Church-State Relations*, 107 CHRISTIAN CENTURY 43, 46 (Jan. 19, 1989).

70. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1118 (1990).

71. Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378, 384 (1990).

the Free Exercise Clause did not allow the government to enforce a law or policy that burdens the exercise of a sincere religious belief unless it is the least restrictive means of attaining a particularly important secular objective.⁷²

III. THE EROSION OF FREE EXERCISE BY THE REHNQUIST COURT

A. *Pre-Smith Cases: Hobbie, O'Lone, Lyng, Frazee, and Swaggart*

*Hobbie v. Unemployment Appeals Commission*⁷³ was in some senses an unremarkable case that simply extended the *Sherbert* principle to the situation of a woman whose religious conflict with her secular duty arose during the course of her employment rather than before it. Paula Hobbie had been employed by a Florida jeweler for some two and one-half years until her discharge. When Hobbie began her employment, she was not a member of the Seventh-day Adventist Church. She later became a baptized member of that church, which forbids its members from secular activities during the period between sundown Friday and sundown Saturday. Although the situation of Ms. Hobbie was virtually identical to that of Ms. Sherbert, the Florida authorities denied Hobbie's request for unemployment compensation benefits on the ground that she had adopted new religious beliefs that conflicted with the requirements of her job. The Supreme Court reversed, clarifying that the free exercise of religion includes the right to adopt new beliefs or to convert from one faith to another. Justice Rehnquist filed a dissent in *Hobbie* stating that he continued to adhere to his dissent in *Thomas v. Review Board*.⁷⁴

Perhaps the most significant aspect of *Hobbie* was the Court's rejection of the view of free exercise urged by Solicitor General Charles Fried. In an amicus brief for the United States, he argued:

[F]ree exercise claims should generally not be entertained when the state's actions, rather than prohibiting or directly seeking to discourage a religious practice, have an indirect

72. See *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

73. 480 U.S. 136 (1987).

74. *Thomas*, 450 U.S. at 720-27 (Rehnquist, J., dissenting).

and unintended disadvantaging impact on an individual's choice to engage in a particular religious practice. Even in such cases of indirect disadvantaging, a free exercise claim may be made out, however, if (a) the state's action is not neutral between religious practices, or between religious and other analogous personal choices, or (b) the action bears so heavily on an individual's choice as to have virtually the preclusive effect of a direct prohibition.⁷⁵

The Court did not follow Fried's suggestion on that occasion but came to adopt it in an even more extreme form in *Smith*.

In that same Term, the Court ruled in *O'Lone v. Estate of Shabazz*⁷⁶ that prisons do not have to do much to accommodate the prayer life of Muslim prisoners. Fifteen years earlier, in *Cruz v. Beto*, the Court had required the Texas correctional system to afford a Buddhist prisoner "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts."⁷⁷ This has the flavor of the rule announced by the Court in *Larson v. Valente*, where Justice Brennan wrote: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."⁷⁸ Despite the fact that *Cruz* expressly referred to the accommodation of the worship practices of Protestants, Catholics, and Jews within the state prisons, and despite the court-ordered accommodation of the dietary requirements of observant Jewish prisoners,⁷⁹ the *Shabazz* Court failed even to acknowledge either *Cruz* or *Sherbert* as relevant precedents affording protection to the free exercise rights of Muslim state prisoners. It should come as no surprise that the lower courts since *Smith* have given short shrift to the free exercise claims brought by such prisoners.⁸⁰

75. Brief for the United States as Amicus Curiae Supporting Appellees at 5, *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1986) (No. 85-993).

76. 482 U.S. 342 (1987).

77. *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam); see also *Cooper v. Pate*, 378 U.S. 546 (1964).

78. *Larson v. Valente*, 456 U.S. 228, 244 (1982).

79. *Cruz*, 405 U.S. at 319-20; see also *Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975) (requiring federal prison to provide Orthodox Jewish prisoner with a diet that would keep the prisoner in good health without violating kosher laws).

80. See *Al-Alamin v. Gramley*, 926 F.2d 680, 685-89 (7th Cir. 1991); *Hunafa v. Murphy*, 907 F.2d 46, 47-49 (7th Cir. 1990).

In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,⁸¹ the Court ruled that the Free Exercise Clause interposed no barrier to the Government's logging and road construction activities on lands used for religious purposes by several Native American tribes. At the heart of Justice O'Connor's proposal of an endorsement test for Establishment Clause cases is the concern that the government must never convey a disparaging view of the beliefs and practices of religious communities lest the members of these groups have cause to perceive themselves as outsiders or as second-class citizens.⁸² Despite the fact that there is no group in our history whose religious beliefs and practices have been subjected to greater abuse or more systematic violation, there is no trace of O'Connor's concern about the second-class character of the Native Americans before the Court in *Lyng*. Indeed, O'Connor even conceded in *Lyng* that it was undisputed that the building of the proposed forest road through land held sacred by the Native Americans "could have devastating effects on traditional Indian religious practices."⁸³ Thus O'Connor appears to have proposed a test in the establishment context that she ignores in a free-exercise context, despite its clear relevance to that concern.

As if we had not heard enough from the Court on unemployment compensation cases (*Sherbert, Thomas, and Hobbie*), the Court accepted another one in the 1988 Term. In *Frazee v. Illinois Department of Employment Security*,⁸⁴ the Court was able to clarify for the fourth time that unemployment benefits may not be withheld from a worker whose religious convictions about refraining from work on her Sabbath conflicted with her job assignment. Two minor differences from *Sherbert* were present in *Frazee*. First, the day on which the petitioner refused to work was Sunday, not Saturday. Second, the basis for this refusal arose from individual conscience rather than from the official teaching of a religious body. The Court readily disposed of those differences and ruled for the religious claimant.

81. 485 U.S. 439 (1988).

82. See *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring); see also *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 389 (1985) ("[A] core purpose of the Establishment Clause is violated" where government action "conveys a message of government endorsement or disapproval of religion.") (citation omitted).

83. *Lyng*, 485 U.S. at 451.

84. 489 U.S. 829 (1989).

The 1989 Term proved to be a disaster for free exercise of religion. *Smith* is the precedent that everyone recalls from that Term, but religious freedom was also dealt a powerful blow in *Jimmy Swaggart Ministries v. California Board of Equalization*.⁸⁵ Pressed for cash to pay its bills after the taxpayer revolt enacted caps on property taxes in Proposition 13, the State of California has relied increasingly on other forms of taxation, such as sales and use taxes, to raise revenue. The State Board of Equalization⁸⁶ singled out an unpopular evangelist as the target of its efforts to establish a precedent that it had the power to tax the distribution of religious literature. In the previous Term, the Court in *Texas Monthly, Inc. v. Bullock* had invalidated under the Establishment Clause a Texas statute that provided an exemption for religious literature from sales and use taxes, but the Court left open the question of whether the Free Exercise Clause required the states to refrain from imposing a tax on such literature.⁸⁷ The Court answered that question resoundingly in the negative in *Swaggart Ministries*.

Justice O'Connor wrote for a unanimous Court in *Swaggart Ministries* that "the collection and payment of the generally applicable tax in this case imposes no constitutionally significant burden on appellant's religious practices or beliefs."⁸⁸ O'Connor acknowledged that a "more onerous tax rate, even if generally applicable, might effectively choke off an adherent's religious practices,"⁸⁹ but she did not think that the tax before the Court constituted a choke-hold strangling religious exercise. In the wake of the beating of Rodney King, it is no comfort that the Court took such a casual attitude toward the notorious and lethal "choke-hold" technique employed by the Los Angeles Police Department.⁹⁰ It is equally disastrous for religious freedom that the transmission of religious literature to the adherents of one's own faith may be subjected to one of the most complicated forms of taxation ever devised, with relief from taxation postponed until a religious organization is being choked to death. As if setting the stage for the major reversal

85. 493 U.S. 378 (1990).

86. I love the way California describes its taxing authority.

87. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). Justice Brennan, writing for three Justices, held that a state sales tax exemption for religious publications violated the Establishment Clause. *Id.* at 25.

88. 493 U.S. at 392.

89. *Id.*

90. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

to follow in *Smith*, the Court all but overruled earlier resounding victories for religious freedom, distinguishing *Murdock v. Pennsylvania*⁹¹ and *Follett v. Town of McCormick*⁹² on the ground that they were limited to a flat occupational tax. And Justice O'Connor brushed aside in a single sentence the fear that Justice Scalia had voiced in the previous Term in *Texas Monthly* about discriminatory enforcement of the tax: "There is no danger that appellant's religious activity is being singled out for special and burdensome treatment."⁹³

The Court also rejected the contention that the "on-site inspections of appellant's evangelistic crusades, lengthy on-site audits, examinations of appellant's books and records, threats of criminal prosecution, and layers of administrative and judicial proceedings"⁹⁴ represented an excessive entanglement of the government with religion.⁹⁵ If the government interferes with a religious body, one would normally view such an interference as a free exercise violation. But the Court has developed this standard as though it were only an aspect of establishment.⁹⁶ For example, it used the entanglement test to invalidate a federal program providing remedial reading and math instruction to the children of poor parents,⁹⁷ even though there was no evidence whatsoever in the record of the "detailed monitoring and close administrative contact" between secular and religious bodies⁹⁸ that the *Swaggart Ministries* Court held necessary to make out a claim of excessive entanglement. Evidently, entanglement is in the eyes of the beholder. At least it looks very different when a religious body is being taxed (no entanglement) than when children attending a religious school are being given aid on an evenhanded basis (entanglement).

91. 319 U.S. 105 (1943) (invalidating application of occupational license tax to sale of religious literature by Jehovah's Witnesses).

92. 321 U.S. 573 (1944).

93. *Swaggart Ministries*, 493 U.S. at 390.

94. *Id.* at 392.

95. *Id.* at 392-97.

96. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970).

97. *Aguilar v. Felton*, 473 U.S. 402 (1985); see also *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985).

98. 493 U.S. at 395 (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 696-97 (1989)).

B. *The Smith Case*

Whatever one makes of the stingy application of free exercise doctrine to cases that have come before the Rehnquist Court, *Smith* clearly marked a major shift in free exercise doctrine itself. *Smith* represents a complete abandonment of the compelling state interest and least restrictive alternative test that had, at least in theory, obtained since *Sherbert v. Verner*. In doing so, the *Smith* Court completely undercut its own precedents. And it did so without any notice or warning that it was considering a significant shift in doctrine. No one, not even the parties, had an opportunity to brief the Court in *Smith* on the importance of a constitutional standard that would afford appropriate protection to religious exercise. Given the question presented for review and the nature of the arguments presented in the case, no one in the religious communities thought that the pre-*Smith* standard was at risk in *Smith*.

The test articulated in *Sherbert* for free exercise claims had been thought secure because of the series of unemployment compensation cases to which I made reference above.⁹⁹ These cases ruled that the government could not burden religious freedom unless the burden was justified—because it reflected a supreme public necessity—and no less restrictive alternative to the burden existed. Under these cases, however, no one made the claim that religious faith and conduct were absolutely protected, but it was at least clear that the government could not penalize a person for exercising religious faith.

The *Smith* case involved the sacramental use of peyote in a ceremony of the Native American Church. The reverence that Native Americans have for the buds of this cactus plant is tied to the centuries-old belief that it contains the presence of deity and has healing power. Recognizing these convictions, Congress and nearly half of the state legislatures expressly exclude the sacramental use of peyote from their prohibition of illicit drugs. Even though Oregon did not have an exemption of this sort on the books at the time,¹⁰⁰ the Oregon Supreme Court ruled that the First Amendment prohibited the State from denying unemployment benefits to the two Native Americans who were

99. See *supra* text accompanying notes 67-93.

100. Oregon has recently given statutory protection to the religious use of peyote. See OR. REV. STAT. § 475.992 (1991).

fired when they acknowledged having participated in the rituals of their church. The United States Supreme Court reversed the state court, abandoning the solid line of unemployment compensation cases I mentioned above, including *Frazer*, a unanimous decision the year before.

If viewed as another drug case, the result in *Smith* was unsurprising. In today's climate of drug wars, the mere presence of a non-scheduled drug in a case can turn some pretty fine minds to mush. If one is prepared to launch a full scale military invasion of Panama in order to apprehend a former CIA operative turned drug dealer, I suppose that some will be prepared to relax or even bend the requirements of the Fourth Amendment in order to apprehend drug dealers in our inner cities. And I imagine that the same folks who think that Fourth Amendment rights must yield when the "D" word is invoked will be casual about the First Amendment as well.

At another level of analysis, however, the *Smith* case was a sweeping disaster for religious liberty because it was not just another drug case, but a case about punishing people for their religious worship. Thus one might be less angered by the formal, narrow holding of the case—that unemployment compensation benefits are unavailable to a person who is fired for sacramental use of peyote—than by the Court's abandonment of the requirement that the government demonstrate a compelling secular justification for overriding claims of religious conscience. I do not agree with Justice O'Connor's reading of the case, but I can understand that reasonable persons—including Dean Jesse Choper, an eminent First Amendment scholar who was of counsel to the Attorney General of Oregon in *Smith*—could agree that Justice O'Connor correctly found that the government has a compelling interest in the regulation of the use of illegal drugs. Although she reached this result, she refused to sign the opinion of Justice Scalia, who left the protection of religious conscience to the tender mercies of the legislatures. Justice O'Connor found this policy "incompatible with our Nation's fundamental commitment to individual religious liberty."¹⁰¹ For her, "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility."¹⁰²

101. *Smith*, 494 U.S. at 891 (O'Connor, J., concurring in the judgment).

102. *Id.* at 902.

In the spirit of Justice O'Connor's concurring opinion in *Smith*, I would like to offer two historical reasons for rejecting the Court's decision in *Smith*. First, the compelling governmental interest standard conforms more closely to the historical situation at the time of the framing of the First Amendment. Before *Smith* there was little scholarly exploration of the historical justification for religious exemptions. Shortly after *Smith* was decided, however, an article by a leading commentator gathered extensive evidence that the original meaning of the Free Exercise Clause allowed judges to craft exemptions from laws of general applicability.¹⁰³ For example, under nine of the original state constitutions—Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and South Carolina—free exercise of religion expressly prevailed, to use the phrase of James Madison, “where it [did] not trespass on private rights or the public peace.”¹⁰⁴ These provisions regarding free exercise of religion appear to be an early equivalent of the compelling state interest requirement. For example, Article 61 of the Georgia State Constitution of 1777 provides: “All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State.”¹⁰⁵ If free exercise guarantees may not be read to exempt believers from “otherwise valid” laws, what would be the purpose of the “peace and safety” proviso? According to Professor McConnell, “[t]hese provisions were the likely model for the federal free exercise guarantee, and their evident acknowledgement of free exercise exemptions is the strongest evidence that the framers expected the First Amendment to enjoy a similarly broad interpretation.”¹⁰⁶

The majority in *Smith* is composed of judges who often complain that judges should not exceed their limited task of construing the constitutional text in line with the intentions of the framers. But these same judges ignored the historical evidence about the intent of the framers of the Free Exercise Clause. Professor McConnell offered several examples of ex-

103. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

104. Letter from James Madison to Edward Livingston (July 10, 1822), in 9 THE WRITINGS OF JAMES MADISON 98, 100 (G. Hunt ed., 1901).

105. 1 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 383 (Ben Poore ed., 1878).

106. McConnell, *supra* note 70, at 1118.

emptions of religion from generally applicable laws that date from the beginning of the republic, implying that the framers of the Free Exercise Clause intended to assert the primacy of religious conscience over secular laws by protecting the right to actively fulfill religious duties without state interference. Rather than account for this sort of evidence, the majority in *Smith* invented their own judge-made policy restricting the protection of the Religion Clause to overt intentional discrimination against religion.

The *Smith* Court did not show the slightest regard for serious legal history. Instead, it asserted that laws of general applicability are now to be presumed valid even if they seriously interfere with someone's religious beliefs or practices. According to Justice Scalia, the only laws that the Free Exercise Clause prohibits are those "specifically directed at . . . religious practice,"¹⁰⁷ i.e., those *intended* to stifle a particular religion. Anyone having a glancing acquaintance with politics knows that no legislature will be crude enough to admit that the purpose of its legislation is to harm a vulnerable religious organization. Since, in Scalia's view, the nation cannot "afford the luxury"¹⁰⁸ of striking down laws because they violate religious belief, individuals must rely on the political process for legislative protection of their beliefs and practices. Justice Blackmun wrote in a sharp dissent: "I do not believe the Founders thought their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty."¹⁰⁹

Second, requiring a government attorney to demonstrate the relative significance of the government's interest before it may prevail over a sincere religious claim may be more necessary in our period of the republic than in the founding period precisely because government at all levels is now far more intrusive than it was at the time of the founding. As one commentator has noted, "The style and scope of twentieth century government has led to its involvement with ends and values of varying importance."¹¹⁰ As Professor McConnell has argued, religious exemptions are more necessary after the New Deal

107. *Smith*, 494 U.S. at 878.

108. *Id.* at 889.

109. *Id.* at 909 (Blackmun, J., dissenting).

110. Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1388 (1967).

than in the founding period since "[t]he growth of the modern welfare-regulatory state has vastly increased the occasions for conflict between government and religion."¹¹¹

C. *Post-Smith Developments*

The consequences for religious liberty that have ensued since *Smith* have been disastrous. The cases discussed in this section illustrate graphically why the judiciary must not abandon its responsibility to enforce the limits placed on our government by the Bill of Rights. The *Smith* Court suggested that any exemption for religious conduct from generally applicable laws must come from the legislatures, not from the courts. The Court acknowledged that "leaving accommodation [of religion] to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."¹¹² This drastically understates the problem. The real consequence of *Smith* is that sincere religiously based conduct is not to be afforded significant protection from majoritarian control. Sending unpopular religious minorities to city councils and State legislatures for relief is like sending the Jehovah's Witnesses to the very legislative bodies in the 1930s that were doing their level best to get rid of them.¹¹³

After *Smith*, governmental agencies have recklessly disregarded the protections that the Constitution affords to religious conscience, belying the promise in *Smith* that the political branches of government can safely be entrusted with the exclusive duty of protecting the first of our civil liberties. For example, at the level of local government, zoning laws have been invoked both to prohibit a church from beginning its ministry and even to regulate the number of persons to whom a church may minister.¹¹⁴ Zero-population growth may be desirable in

111. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 23.

112. *Smith*, 494 U.S. at 890.

113. See, e.g., DAVID R. MANWARING, *RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY* (1962); JOHN T. NOONAN, *THE BELIEVER AND THE POWERS THAT ARE* 233-55 (1987); Richard Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion*, 1977 SUP. CT. REV. 257.

114. See, e.g., *Bethel Evangelical Lutheran Church v. Village of Morton*, 559 N.E.2d 533 (Ill. Ct. App.), *appeal denied*, 564 N.E.2d 835 (Ill. 1990) (post-*Smith* cap on enrollment of students in parochial school); see also R. Gustav Niebuhr, *Here Is The Church; As for the People, They're Picketing It*, WALL ST. J., Nov. 20, 1991, at A1.

a particular local community, but the application of this policy to a church's membership is the clearest example imaginable of an instance of governmental overreaching. At the federal level, we have even had regulations purporting to tell the Amish what to wear when they raise a barn.¹¹⁵

In a little-publicized case, the City of New York recently invoked handicap access regulations to close down a shelter operated by Catholic nuns for the homeless on the second floor of a walk-up because the facility did not have an elevator. The nuns—members of Mother Teresa's religious order—offered to carry upstairs any handicapped persons they encountered, but the City would brook no exception to its neutral, generally enforceable rules. The City should have taken the prize for the most frivolous governmental interest ever asserted against a religious body engaged in charitable activity—the view that it is better for the homeless to sleep in the street than in a building without an elevator. Under the *Smith* analysis, however, a “generally applicable,” if not very serious, rule was enough to shut down a religious mission. The bureaucracy won, and the nuns and the homeless lost.¹¹⁶

The result of *Smith* is not just that the political branches will find it hard to comprehend the need for properly drafted religious exemptions from generally applicable rules. An even more scandalous consequence of *Smith* is that federal judges have shown signs of callous disregard for the first of our civil liberties. The judicial record after *Smith* betrays a remarkable insensitivity to religious liberty that requires remedial legislation by Congress. For example, in *St. Agnes Hospital v. Riddick*,¹¹⁷ the district court found a compelling interest in requiring a religious hospital to teach all residents how to perform abortions. The lower court was apparently unaware of the Court's diminution of the compelling interest requirement in *Smith*. What is most striking about the case is that even on

115. See, e.g., OSHA Notice CPL 2 (Nov. 5, 1990) (post-*Smith* revocation of exemption for Amish and Sikhs from requirement of wearing hard hats on construction sites). OSHA has withdrawn this regulation in part because of the intervention of the principal co-sponsor of the Religious Freedom Restoration Act, Congressman Stephen Solarz. The important thing to heed is that *Smith* sent to administrative agencies the message that they could—or, worse yet, they should—write regulations with no care whatever for their impact on religious freedom.

116. Sam Roberts, *Fight City Hall? Nope, Not Even Mother Teresa*, N.Y. TIMES, Sept. 17, 1990, at B1.

117. 748 F. Supp. 319 (D. Md. 1990).

a belief so deeply and widely held as conscientious objection to performing abortions, state officials ignored the Court's suggestions that "it is desirable" for the political branches to provide free exercise exemptions.¹¹⁸

In *Salvation Army v. Department of Community Affairs*,¹¹⁹ the court decided that *Smith* required it to reject the church's free exercise claim to an exemption from disclosure requirements in the state's Room and Boarding Act. On remand, the government may yet be required by the court to demonstrate a serious need to know the identity of the down-and-outers aided by the Salvation Army. Under *Smith*, however, the church must now claim its exemption from the state's reporting requirements—which the court acknowledged would dissuade people in need of help from participating in the church's rehabilitation program—by pressing a free speech right or a right deriving from associational freedom, not one grounded in the religious character of the church's ministry.

In *Montgomery v. County of Clinton*,¹²⁰ a generally applicable, facially neutral law requiring autopsies was applied to an Orthodox Jew, for whom the mutilation of the body is a sacrilege, and for whom burial must take place before sundown on the day of death. Since the man had died in an auto accident, whatever interest the government might have in ascertaining the cause of death of its citizens should have been satisfied. Yet once again, a mechanical approach to "generally applicable" norms was allowed to trump a sincerely held religious tenet—in a manner that was manifestly not the least restrictive alternative means of effectuating the government's interests. In *Yang v. Sturmer*,¹²¹ another district court "regretfully" dismissed, on the basis of *Smith*, its earlier determination that the government was required to accommodate the religious objection of Vietnamese Hmong to autopsies.

In *Hunafa v. Murphy*,¹²² the Seventh Circuit remanded a suit by a Muslim state prisoner who had objected to service of meals containing pork. The court noted, however, that *Smith* had "cut back, possibly to minute dimensions, the doctrine that

118. See *Doe v. Bolton*, 410 U.S. 179, 184, 197-98 (1973) (upholding conscience clause protecting doctors and nurses who refuse to participate in abortions).

119. 919 F.2d 183 (3d Cir. 1990).

120. 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd*, 940 F.2d 661 (6th Cir. 1991).

121. 728 F. Supp. 845 (D.R.I.), *withdrawn*, 750 F. Supp. 558 (D.R.I. 1990).

122. 907 F.2d 46 (7th Cir. 1990).

requires government to accommodate, at some cost, minority religious preferences."¹²³

This political and judicial overkill in reaction to *Smith* is akin to the reaction against the Jehovah's Witnesses in the wake of the Court's first flag-salute case, *Minersville School District v. Gobitis*,¹²⁴ including licensing of the Witnesses and waves of violent attacks on the Witnesses both by the police and by vigilante mobs in order to drive them out of a state.¹²⁵ The majority opinion in *Smith* betrays massive insensitivity not only to the history surrounding the adoption of the Free Exercise Clause by the First Congress, but also to the history surrounding its own precedents in this century. The Court cited *Gobitis* approvingly three times in *Smith* without even mentioning that it had been overruled in *West Virginia State Board of Education v. Barnette*.¹²⁶

The circumstances of *Barnette* are themselves instructive for our times. The second flag-salute case came to the Court in the middle of the Second World War. By then, the Justices were fully aware of the brutal oppression of minorities by totalitarian governments in Germany and Italy. It was against the background of the Nürnberg rallies with their massed flags and swastikas that the Court reexamined the view that the national interest required the Jehovah's Witnesses to face criminal sanctions rather than saluting an object they sincerely regard as a "graven image" which the second commandment forbids them from worshipping.¹²⁷ In this setting, the Court clearly adopted a standard that protected religious freedom and freedom of speech far more broadly than the suggestion in *Smith* that these freedoms are adequately secured merely by commanding the government to refrain from discrimination. Justice Roberts proclaimed a far broader vision of freedom in these ringing terms: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, *religion*, or other matters of opinion or force citizens to confess by word or act their faith therein."¹²⁸

123. *Id.* at 48.

124. 310 U.S. 586 (1940).

125. *See, e.g.*, PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 22-23 (1988).

126. 319 U.S. 624, 642 (1943).

127. *See Exodus* 20:4; *Deuteronomy* 5:8.

128. 319 U.S. at 642 (emphasis added).

It would be unfair to suggest that the Court intended all of the far-reaching and outrageous results discussed above, whether against the Jehovah's Witnesses in the 1940s or against religion generally in the 1990s. But the damage to religious freedom since *Smith* has been real, whether intended or not, just as the damage to religious freedom after *Gobitis* was palpable and real, whether or not Justice Frankfurter and his colleagues could fairly be said to have intended those harmful results.

Rightly understood, the Free Exercise Clause should breathe life into the rest of the provisions of the Bill of Rights. Religious liberty is the foundation of, and is integrally related to, all other rights and freedoms secured by the Constitution. If the power of government to coerce in matters of conscience is denied, government is limited indeed. It follows, for example, that it may not disturb religious belief and conduct any more than it may curb free expression of political ideas. In the words of the Williamsburg Charter, religious freedom is a "basic civil liberty . . . ineradicable from the long tradition of rights and liberties from which the [American] Revolution sprang."¹²⁹

IV. CONCLUSION: THE NEED FOR REMEDIAL LEGISLATION

For these reasons I recommend that Congress enact legislation that would restore the requirement that when a law burdens a sincerely held religious belief or practice, the government may prevail over the religious adherent only if it demonstrates both that its interest in the law is truly compelling or of paramount significance and that the means chosen to effectuate the governmental interest are the least restrictive alternative.

Congress has acted in the past to protect rights more generously than the judiciary has chosen to do. For example, in 1986 the Court ruled that Jews were subject to dishonorable discharge from the military for wearing yarmulkes.¹³⁰ Congress responded promptly with legislation that reversed this oppressive result.¹³¹ No one has seriously suggested that Congress lacked the power to enact this provision. Indeed, Justice Rehnquist's opinion fairly invited legislation by referring to the

129. *The Williamsburg Charter*, *supra* note 28, at 8.

130. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

131. 10 U.S.C. § 774 (1988).

federal power to regulate the armed forces, a provision expressly given to Congress in Article I, Section 8 of the Constitution. And I know of no commentator who has suggested that this legislation is invalid under the Establishment Clause. For example, the Court unanimously sustained a provision in Title VII exempting religious bodies from the general ban on employment discrimination on the basis of religion.¹³²

The *Smith* Court did not reflect judicial restraint appropriate in a democracy, but rather abdicated the proper judicial function of assuring that unpopular minorities will also have the benefit of First Amendment protections when legislatures turn a deaf ear to these minorities. To return to the parties most directly affected by the *Smith* case, we need to walk with the Native Americans down the long trail of broken promises that they have travelled in this country. In order to apply the Golden Rule to this case, we have but to ask whether Jews would be willing to have the government ban the Seder because a new prohibition law failed to provide an exception for liturgical use of wine, or whether Christians would be willing to let the state exclude teenagers from participating in the celebration of Mass or the Lord's Supper because it cannot be proven in court that a law of general applicability (the legal age for drinking) was, in Scalia's words, "specifically directed at . . . religious practice,"¹³³ or intended to stifle a particular religion.

The sacramental use of peyote, based on the view that deity is present within the cactus plant from which peyote is derived, may strike most of us as bizarre. That fact, which used to be constitutionally irrelevant, has now become politically relevant. To return to the Golden Rule, we need to think about some aspect of our faith and practice that we would not want the government to suppress because a majority of outsiders find it strange. Then we need to think back to the point in the history of our own religious organization when it was small and vulnerable (all of us were in that position at one time or another). Would we want our religious convictions to be governed by the will of a hostile majority at that moment?

The Williamsburg Charter eloquently answers this question:

132. Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987).

133. Employment Div. v. Smith, 494 U.S. 872, 878 (1990).

Religious liberty finally depends on neither the favors of the state and its officials nor the vagaries of tyrants or majorities. Religious liberty in a democracy is a right that may not be submitted to vote and depends on the outcome of no election. A society is only as just and free as it is respectful of this right, especially toward the beliefs of its smallest minorities and least popular communities.¹³⁴

James Madison was right when he wrote in his famous *Memorial and Remonstrance* that the time to take alarm is at "first experiment with our liberties."¹³⁵ Because I am truly alarmed at the disastrous consequences for religious liberty that have already flowed from the *Smith* case, I hope that Congress will act promptly to repudiate the tragic experiment with religious liberty that the *Smith* case represents. I support the Religious Freedom Restoration Act as appropriate remedial legislation designed to accomplish that end.¹³⁶

When the judiciary gives a minimalist interpretation of the importance of religious liberty, it is time for the political branches of government to extend greater protection through legislation grounded in the values secured by the Bill of Rights. And when we, the People, encourage our representatives to safeguard the first of our civil liberties, religious freedom, we are doing the very thing that this bicentennial season demands of us: securing "the Blessings of Liberty for ourselves and our Posterity" and promoting that "more perfect Union" that our Constitution was ordained to establish.¹³⁷

134. *The Williamsburg Charter*, *supra* note 28, at 8.

135. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENT, in 2 THE WRITINGS OF JAMES MADISON, *supra* note 104, at 185.

136. Religious Freedom Restoration Act of 1990, H.R. 5377, 101st Cong., 2d Sess. (1990). The legislation has also been introduced in the 103rd Congress. H.R. 1308, 103d Cong., 1st Sess. (1993); S. 578, 103d Cong., 1st Sess. (1993). The bill passed the House on May 11, 1993, 139 CONG. REC. H2356-63 (daily ed. May 11, 1993), and it was approved by the Senate Judiciary Committee on May 6, 1993 by a vote of 15 to 1, 139 CONG. REC. D472 (daily ed. May 6, 1993); Adam Clymer, *Congress Moves to Ease Curb on Religious Acts*, N.Y. TIMES, May 10, 1993, at A9.

137. U.S. CONST. pmbl.