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The End of Free Exercise?

John T. Noonan Jr.

THE END OF FREE EXERCISE?

*John T. Noonan, Jr.**

Beginning with the Bill of Rights, we had an absolutely unique constitutional provision for a nation, stating, "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof . . . ."[1] There had been nothing like it in history. You could, of course, find something like it in several of the colonies and something like it in Virginia after it threw off the British Crown, but the full embrace of both no establishment and free exercise was unique for a nation. Nothing comparable anytime, anywhere, could be found among national states.

Current usage, I am afraid, refers to "the religion clauses" — an unfortunate usage that I think Justice Black was responsible for, at least introducing it into decisions of the Supreme Court.[2] There are no clauses in the constitutional provision. Clauses have a subject and predicate. This provision has a single subject, a single verb, and two prepositional phrases. It is a shabby and inadmissable technique to put the two prepositional phrases dealing with religion into conflict with each other as a statement that with any fidelity to the text should be read as one.

After the reference to religion, the text continues with provisions respecting other objects such as the press or speech as to which Congress shall make no law. It is, I think, essential to see the whole set of prohibitions as going together and supporting each other. They are not independent and isolated admonitions. They are a whole, limiting governmental intrusion into a precious personal zone.

Religion comes first in this enumeration of basic rights in the Bill of Rights. Religion as a discrete, identifiable subject is part of the text. It is embarrassing for people today because religion does not have the same definiteness and clarity that it had in the eighteenth

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* Judge, United States Court of Appeals for the Ninth Circuit. This Article is adapted from the DePaul College of Law's Center for Church/State Studies 1992 Annual Lecture.

1. U.S. CONST. amend. I.

2. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1, 15 (1949).

century. The difficulty is not imported; it is created by the text. We have to have some notion of what religion is if we are going to interpret the key term in the first part of this enumeration of our basic constitutional rights.

The Founding Fathers made the commitment; they enshrined freedom in the text. What happened next? I intend to examine the history of the amendment prior to 1940, then to look at the history from 1940 to 1990, and finally to look at the present situation.

What happened after the First Amendment was enacted was that it had, so far as can be seen, absolutely no impact on the state governments. It did not speak of the state governments or to them. The state governments did not feel bound by any restriction of the Bill of Rights. The Supreme Court did not apply the Bill of Rights to the states. Several of the states had religious establishments that continued to flourish after the Bill of Rights was enacted.

Take my natal state of Massachusetts. The constitution of Massachusetts in its first section, A Declaration of the Rights of the Inhabitants of the Commonwealth, declared that there was free exercise of religion; and at the same time this section of the constitution established the Congregational Church (in fact, not by name) as the state church of Massachusetts and imposed upon the cities and towns of Massachusetts the obligation of raising taxes to pay for the Congregational ministry in the various municipalities.[3] This financial establishment of the church was described approvingly by the Supreme Judicial Court of Massachusetts as a classic establishment of religion.[4] It was supplemented by another portion of the constitution of Massachusetts itself which imposed an antipapist oath. No governor, lieutenant governor, counselor, senator, or representative in Massachusetts could hold office without repudiating both the temporal and spiritual sovereignty of the pope.[5]

The constitution of Massachusetts eventually changed, not because of the Bill of Rights, but because of demographic changes in the commonwealth. Baptists and Catholics moved into Massachusetts. Even more importantly, perhaps, a split occurred between the

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3. MASS. CONST. of 1780, pt. I, arts. II, III. A majority of men in any town could, under this provision, establish another Protestant church in their town, but as John Adams said, no one expected the Congregationalist "establishment" to change. 2 ISAAC BACKUS, A HISTORY OF NEW ENGLAND WITH PARTICULAR REFERENCE TO THE DENOMINATION OF CHRISTIANS CALLED BAPTISTS 201-02 n.2 (Edwin S. Gaustad ed., Arno Press & The New York Times 1969 (1871)).

4. Barnes v. First Parish, 6 Mass. 334, 338 (1810).

5. MASS. CONST. of 1780, pt. II, art. I.

Congregationalists and Unitarians, leading to the Unitarians taking over a large number of the Congregational churches and making the Congregationalists realize that establishment was not very pleasant, if you were no longer the established church.[6] So in 1833 the constitution was changed. Religious freedom did come to Massachusetts two generations after the Revolution, but it was not due to the Bill of Rights.

The Bill of Rights also had no apparent impact on Congress and the president. The same Congress that enacted the First Amendment established a chaplaincy for Congress so that chaplains would be paid by, and pray for, the Congress.[7] The same Congress established an army chaplain so that the military would have religious services paid for by the federal government.[8] The same Congress created a fund for the promotion of religious education in the vast Northwest Territory.[9] The same Congress asked George Washington to establish a day of prayer.[10]

Subsequent presidents went right on praying in public, establishing days of prayer for the country, asking God in the name of the country to forgive the sins of the country or thanking God in the name of the country. There continued to be a very public profession of religion by the nation's chief magistrate.[11] Even Madison, who may have felt the scruples he later, out of office, expressed, as president beseeched God for his blessing and bewailed the country's sins.[12]

Congress, which from the start had appropriated money for religious purposes, went right on appropriating it. In the 1820s, it funded the American Board of Foreign Missionaries, a Congrega-

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6. JOHN T. NOONAN, THE BELIEVER AND THE POWERS THAT ARE 159-60 (1987).

7. 1 Stat. 71 (1789); *see* 2 ANNALS OF CONG. 2180 (1834).

8. 1 Stat. 222 (1789) (giving the president the power to employ chaplains for the Army).

9. 1 Stat. 50, 51-53 (1789). It has been argued that "in 1791 the establishment clause prevented the United States from doing what half the fourteen states then permitted — giving government aid to religions on a non-preferential basis." LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 193-94 (1988). This statement appears to assume that the members of the First Congress acted contrary to the amendment they proposed.

10. 1 ANNALS OF CONG. 914-15 (Joseph Gales ed., 1834) (petitioning for a day of prayer and thanksgiving).

11. *E.g.*, Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 304 (James D. Richardson ed., 1897).

12. 27 ANNALS OF CONG. 2673-74 (1813) (proclamation of James Madison, July 23, 1813). *Cf.* James Madison, *Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments, reprinted in* 128 HARPER'S 489 (1914) (arguing that all laws should be based on the premise of separation of church and state).

tionalist enterprise evangelizing the Indians.[13] Most of the schools developed during the nineteenth century for the Indians were either Catholic or Protestant schools paid for by Congress.[14] Congress appropriated money for a Baptist institution — Columbia College, which later became George Washington University.[15] Congress funded a small Jesuit school — Georgetown — then as now operated by the Society of Jesus.[16] None of these aids to the establishment of religion appeared to bother Congress. The Bill of Rights was there; it was no barrier to what actually was done.

Yet despite the absence of any intervention by a court, despite all the activity promoting religion, there was a sense that America was the land of religious freedom. It was our ideology even if it was not our legal practice. On that subject, I refer to the person who in many ways was and still remains the most eloquent articulator of the American ideal, Alexis de Tocqueville.

Tocqueville came over here as a young French lawyer on a kind of boondoggle: he had government authorization to do research on American prisons. Once he got here he spent his time observing our society. He took a particular interest in religion. His analysis of the place of religion in America is one of the great moments in his *Democracy In America.* He wrote:

> Upon my arrival in the United States it was the religious aspect of the country that first struck my attention. The more I stayed the more I saw the great political consequences flowing from facts new to me. I had seen among us the spirit of religion and the spirit of liberty working almost always in opposite directions. Here I found them intimately united to each other; together they ruled the same ground. Each day I felt my desire increase to know the cause of this phenomenon.
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> In order to learn, I questioned the faithful of all communions; I sought especially the society of the clergy, who are depositories of the different beliefs and have a personal interest in their duration. The religion that I profess brought me in particular relationship to the Catholic clergy, and I did not delay in forming a kind of intimacy with several of its members. To each of them I expressed my astonishment and set out my doubt. I found that all these men differed with one another only as to details. All principally attributed the peaceful empire that religion exercises in their country to the complete separation of the Church and the State. I am not afraid to affirm that

13. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 529 (1832).

14. *See* FRANCIS P. PRUCHA, THE CHURCHES AND THE INDIAN SCHOOLS 1888-1912, at 3-31 (1979).

15. 4 Stat. 603 (1832).

16. 6 Stat. 538 (1833).

> during my stay in America I did not meet a single man, cleric or lay, who was not in agreement on this point.[17]

A rosy-eyed view of the actual situation affected Tocqueville. But he faithfully reflects our ideology.

Reflecting on his American experience and meaning to offer a lesson to his French compatriots, Tocqueville added:

> As long as a religion rests only on the sentiments which are the consolation of every misery, it can draw to itself the hearts of the human race. Mixed in the bitter passions of this world, it is compelled sometimes to defend allies given to it by interest, rather than love; and it is necessary for it to repulse as opponents men who often still love it while they fight those to whom it has become united. Religion, therefore, cannot share the material power of a government without burdening itself with a portion of the hate that power generates.[18]

From this conclusion, it followed for Tocqueville that "religion should found its empire only upon the desire of immortality, which lives in every human heart" and should not concern itself with political affairs.[19]

I plan to return to this last quotation. Let me say now that Tocqueville faithfully reflects a popular point of view. It is a seductive point of view. I believe it is a profoundly wrong point of view. But one feels the attraction.

Here then was the situation as it stood from 1791 to 1940: a Bill of Rights that was unique, an ideology that favored liberty, and a practice which ignored the text. Governmentally, there was, as the Supreme Court once put it, a mass of benevolent utterances in favor of religion.[20] No Supreme Court precedent upheld the freedom of religion. If you picked up a constitutional law book in 1900 or 1910 or 1920 or 1930, the only reference you would have seen to freedom of religion would have been the Mormon cases. In the Mormon cases, the attempts of the Church of Jesus Christ of Latter-Day Saints to invoke that religious freedom had been rejected by the United States Supreme Court.[21]

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17. ALEXIS DE TOCQUEVILLE, DE LA DEMOCRATIE EN AMERIQUE (1835) (translated by author).

18. *Id.*

19. *Id.*

20. Holy Trinity Church v. United States, 143 U.S. 457, 471 (1892).

21. *See, e.g.*, Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).

Then the change came. The first and possibly most interesting question perhaps is, Why? What happened in 1940 that made change conceivable, desirable, actual? We may speculate. I have not seen any definitive study. I offer some suggestions.

First of all, there were precedents going back to the 1920s when this or that portion of the Bill of Rights began to be incorporated into Due Process and so applied through the Fourteenth Amendment to the states. A process was going on that made the legal culture different from the pre-Fourteenth Amendment world, where nothing in the Bill of Rights applied to the states. Precedent existed for moving some of the First Amendment into the Constitution and so channelling state action.[22]

More important to my mind was what was going on in Europe. I am a fairly strong believer in atrocities generating significant reactions. What was going on in Europe were terrible suppressions in Nazi Germany above all, but also, of course, in the Soviet Union and Fascist Italy. The events made people who were aware of them think about the value of religious liberty. A sense developed that we had to do more to protect our religious liberty at a time when it was being so terribly abused in Europe.

Then there was the almost accidental. There had to be some agent of change. The agents were somewhat accidental, but they deserve credit nonetheless. The agents of change were the Jehovah's Witnesses, a small fundamentalist sect, which throughout the 1930s kept raising the banner of free exercise in the face of hostile government action. A biblically oriented group, the Witnesses really took seriously the gospel parable that even an unjust judge will yield if you keep knocking at his door.[23] Time and again the United States Supreme Court denied the Witnesses' petitions for certiorari from state decisions denying them religious liberty. Then finally, in 1940 the Supreme Court granted certiorari and decided *Cantwell v. Connecticut*[24] and declared that states were bound by the First Amendment obligation to permit religion to be freely exercised.[25] The Supreme Court did so on behalf of a Jehovah's Witness who had been peddling Witness literature on the streets of New Haven stating

22. *See* Twining v. New Jersey, 211 U.S. 78, 99 (1908) ("It is possible that some of the personal rights safeguarded by the first eight amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law.").

23. *Luke* 18:1-6.

24. 310 U.S. 296 (1940).

25. *Id.* at 303.

that religion was a racket and playing a phonograph record attacking the Catholic Church. Cantwell was charged with breach of the peace for his behavior and with soliciting funds without the requisite license from the secretary of state of Connecticut.[26] His actions violated two general laws — the ordinary municipal ordinance of the city of New Haven as to breach of peace and the solicitation law of the state. Both of them were held to be unconstitutional in restricting this Jehovah's Witness's activity in promoting his religion.[27]

Cantwell was followed quite shortly by *Murdock v. Pennsylvania,*[28] where, again, a group of Jehovah's Witnesses asserted a claim to religious freedom. This time the Witnesses had had the practice of descending on small towns in the middle of Pennsylvania on Sundays, going door-to-door distributing their literature or peddling it.[29] The towns were largely Catholic. The townsfolk did not like being disturbed on Sundays. They passed ordinances regulating all door-to-door solicitation.[30] The ordinances were declared unconstitutional. They were restrictions of what, Justice Douglas wrote, was the same as preaching.[31] The practice regulated was a well-known way of spreading the Gospel; it went back to the Apostles. The Jehovah's Witnesses should be allowed to practice their religion and preach it without restriction. Even though the ordinances applied across the board to all persons selling or pushing periodicals, they were unconstitutional because they restrained a familiar way of presenting the Gospel.[32]

The climactic decision for the Jehovah's Witnesses came when they won the flag salute case. The flag salute was to the Witnesses a form of idolatry forbidden by the verse in Exodus against idolatry.[33] Witnesses told their children not to give the flag salute at school. They would risk having the children expelled as truants; they would risk going to jail themselves as parents contributing to the delinquency of minors. They were willing to be martyrs in a number of states throughout the Union where the flag salute was required.

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26. *Id.* at 301-03.
27. *Id.* at 303, 307.
28. 319 U.S. 105 (1943).
29. *Id.* at 106.
30. *Id.*
31. *Id.*
32. *Id.* at 109.
33. *Exodus* 20:3-5.

When in *Minersville School District v. Gobitis*[34] the issue was first presented to the United States Supreme Court, Justice Frankfurter for the Court wrote an opinion upholding the salute. In the Court's view, the requirement was meant to insure national security by insuring national unity, establishing a national symbol.[35] The claims of the Jehovah's Witnesses to free exercise of conscience and to free exercise of behavior could not stand against this important national interest which the states had embodied in their law.[36]

Very few decisions of the United States Supreme Court have been subjected to such widespread and almost unanimous criticism ranging from religious periodicals to liberal periodicals and law reviews.[37] Within two years the majority had shifted. In *West Virginia State Board of Education v. Barnette,*[38] the Supreme Court took a different position and, in the name of freedom of speech, held that the state could not compel the expression of belief by requiring schoolchildren to salute the flag.[39] Read very narrowly, *Barnette* did not overrule *Gobitis,* but in every practical way it did. Justice Frankfurter found himself writing a very bitter dissent,[40] while Justice Jackson in clarion terms declared, "If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe" what is our belief.[41] Jackson's majority opinion was in effect a ringing endorsement of religious freedom although it went further to endorse freedom of thought of any kind, religious or nonreligious.[42]

The Witnesses had won the field. After that a number of decisions came down upholding free exercise. Probably the most significant was *Wisconsin v. Yoder,*[43] holding that the Amish could claim free exercise as a reason for not sending their children to high school.[44] The Amish position was that the Amish religion was such that it would be irretrievably damaged by exposing adolescent

34. 310 U.S. 586 (1940), *overruled by* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
35. *Id.* at 595.
36. *Id.*
37. *See* NOONAN, *supra* note 6, at 250-51.
38. 319 U.S. 624 (1943).
39. *Id.* at 642.
40. *Id.* at 646 (Frankfurter, J., dissenting).
41. *Barnette,* 319 U.S. at 642.
42. *Id.*
43. 406 U.S. 205 (1972).
44. *Id.* at 207.

Amish to high school.[45] The Amish did not offer to establish an Amish high school. They simply said high school was incompatible with their way of life.[46] The Supreme Court accepted this religious stance as trumping the general education laws of the state of Wisconsin.[47]

These were notable victories for the small religious bodies concerned — for the Amish, for the Jehovah's Witnesses, for the Seventh-day Adventists, all tiny groups with scarcely detectable impact on mainstream America. The organs of the state that were overcome were school boards, motor vehicle departments, municipal police. The victories upheld the freedom to be a minister and run for political office;[48] the freedom to solicit contributions for one's faith by attacking another faith;[49] the freedom to distribute door-to-door religious literature;[50] the freedom not to be photographed for a driver's license;[51] the freedom of an atheist not to take an oath calling on God;[52] the freedom of a Seventh-Day Adventist not to work on Saturdays;[53] and, of course, the freedom not to pledge allegiance to the flag.[54] It is not a notable list of freedoms. Very few of them relate to any substantial community activity; the majority are negative.

None of the liberties championed by the United States Supreme Court were championed against Congress. The First Amendment said, "Congress shall make no law . . . ."[55] The United States Supreme Court never found a law made by Congress to infringe religious liberty. The blandness of the academic acolytes of the Court conceals that dismaying fact. The Court has been portrayed as the champion of religious liberty. It has not been the champion against the co-equal federal branch of government, whose power the Amendment had been written to curb. If you were a legal realist you would say that Congress can do what it wants and will not be stopped by any citizen invoking free exercise of religion.

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45. *Id.* at 211-12.
46. *Id.*
47. *Id.* at 234.
48. McDaniel v. Paty, 435 U.S. 618 (1978).
49. Cantwell v. Connecticut, 310 U.S. 296 (1940).
50. Murdock v. Pennsylvania, 319 U.S. 105 (1943).
51. Quaring v. Peterson, 472 U.S. 478 (1975) (per curiam).
52. Torcaso v. Watkins, 367 U.S. 488 (1961).
53. Sherbert v. Verner, 374 U.S. 398 (1963).
54. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
55. U.S. CONST. amend. I.

As to things important to the national interest, religion has not been tolerated as a reason for objection. As to the draft, draft exemptions came only by the grace of Congress. Congress gave preference to the so-called historic peace churches such as the Quakers, total pacifists. Other religions might not apply. That kind of discrimination in favor of one religious approach over another, that kind of nonrecognition of the consciences of religious believers, was upheld by the United States Supreme Court.[56] Similarly, where any objections were made on religious grounds to the taxing power of Congress, the taxing power trumped the religious claim.[57]

Where your treasure is there will be your heart, as the Gospel has it.[58] For the national government, the ability to raise troops and the ability to tax was where its heart was. The national court was not going to intrude upon those sacred national powers. If you take Emile Durkheim's view of what religion is, nothing else could have been expected. In that secular sociological view, religion is the expression of the collectivity.[59] The collectivity is not going to turn against itself. Free exercise is an illusion. The decisions of the Supreme Court show that it is an illusion.

The illusion was not commented on by the constitutional law scholars in general. Only in recent times has a leading constitutional law scholar, Michael McConnell of the University of Chicago, asked, What do we have? and suggested that we have a Potemkin village.[60] A Potemkin village in its modern form was a pretty little village put up by the Soviet Union to deceive well-meaning foreigners into believing that things were going very well in the Soviet Union because here was a prosperous little village. McConnell's point is that we have something similar to show to foreigners; we have cases defending religious liberty in ringing terms in basically small ways for socially marginal groups of people. Yet we have had the ideology; we had the penumbra, if you like, of religious freedom.

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56. Gillette v. United States, 401 U.S. 437 (1971). For an alternative view, see Justice Douglas's dissent in Negre v. Larsen, 401 U.S. 437, 463 (1971), a decision that was subsumed under the *Gillette* decision.

57. United States v. Lee, 455 U.S. 252 (1982). Congress although provided an exemption on religious grounds for self-employed Amish and others. *Id.* at 260.

58. *Luke* 12:34.

59. EMILE DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE 63 (Joseph Ward Smith trans., Free Press 1963) (1947).

60. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1110 (1990). As McConnell has put it more recently, we have "a mess." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 120 (1992).

All of that has been challenged, perhaps taken away in the third phase.

The third phase was ushered in abruptly by *Employment Division v. Smith*[61] in 1990. In that case, in an opinion by Justice Scalia that garnered four votes besides his own, two persons who were believers in the Native Indian religion that uses peyote as a sacrament took the sacrament in apparent violation of Oregon criminal law, which did not make an exception for the sacramental use of peyote. The two believers were fired from their jobs because of their action.[62] They appealed to free exercise, and the Supreme Court rejected their claim, rejected it because, as Justice Scalia wrote, the general law of the state must prevail.[63] Unless the law was specifically devoted to persecuting a religion, the general law would trump the claim of religion.[64]

Although there was a cosmetic attempt to save some of the previous decisions, the fundamental proposition of Justice Scalia's opinion undid the previous fifty years. On a fair reading of *Smith,* nothing remained of the major decisions of the past to the extent that they upheld the free exercise of religion against state action. To drive that point home, Justice Scalia took the extraordinary step of quoting Justice Frankfurter's opinion in the flag salute case.[65] An opinion that had been heatedly condemned on all sides, and repudiated two years later by the Supreme Court, was now quoted by Justice Scalia as though it were good law, as though the new standards were the Frankfurter standards restored. He made no acknowledgment that *Barnette* had been the law since 1943.

The impact of *Smith* has not yet been fully felt. It may seem strange to say that before *Smith,* although there was only a Potemkin village to be blown away, nonetheless there were at least cases to be appealed to, ideals to be invoked. But now you have a whole series of areas were you can feel the heavy hand of *Smith.* Take one instance from Massachusetts. The Jesuits at the Immaculate Conception Church in Boston, an old church, finally in 1990 got around to turning their altar around to conform with the directives of Vatican II; they made a change in the interior of the church. The

61. 494 U.S. 872 (1990).
62. *Id.* at 874.
63. *Id.* at 879.
64. *Id.* at 877.
65. *Id.* at 879 (citing Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594-95 (1940)).

Boston Landmark Commission invoked *Smith*.[66] No doubt there was a general law, you cannot change historical landmarks.[67] The Jesuits had to litigate and go as far as the Supreme Judicial Court of Massachusetts to maintain their freedom to rearrange their church to conform to their doctrine. Instead of using, as it might have in the past, the Federal Constitution, this court invoked the Massachusetts Constitution to conclude that the Jesuits had a free exercise right to change the position of their altar.[68]

Take a second case, which is a bit hypothetical: *NLRB v. Catholic Bishop of Chicago*[69] held a few years ago that because of the special status of a church school, the National Labor Relations Board could not order collective bargaining in a parochial school. The guts of the decision were that such an order would intrude on a religious interest. Now under *Smith* there is a general labor law and there is not any reason for abstention on religious grounds. The rationale of *Catholic Bishop of Chicago* is so undermined that one can well expect the intrusion of the Board into the parochial school.

Another area is that of the laws that have been enacted by a number of states on the reporting of child abuse. Those statutes typically make no exception for sacramental confession.[70] If child abuse is reported in sacramental confession, there is a general law ordering the abuse to be reported. Under *Smith*, there would be no defense if, because of the religious seal of the sacrament, a priest declined to report what had been confessed to him in the sacrament of penance.

Another example is close to my concerns as a law professor. Catholic law schools now, by grace of the American Bar Association (ABA), the accrediting agency, are able to maintain themselves as religious law schools. The same is true of course of a Jewish law school like Cardozo, or a Mormon law school like Brigham Young, or an Evangelical law school like Oral Roberts. These schools can maintain their religious identity only to the extent permitted by the United States Constitution. That is the way the ABA has chosen to phrase the permitted deviation from the secular norm.[71] Under

66. *See* Society of Jesus v Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990).

67. *Id.* at 572.

68. *Id.* at 573.

69. 440 U.S. 490 (1979).

70. *See generally* William N. Ivers, Note, *When Must a Priest Report Under a Child Abuse Reporting Statute? — Resolution to the Priests' Conflicting Duties*, 21 VAL. U. L. REV. 431 (1987).

71. AMERICAN BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETA-

Smith, I do not see how there is any latitude given. The general rule, the ABA rule, is you may not discriminate as to race, or as to sex, or as to religion. Religion is treated as one of the invidious discriminations. If that is the general law, it would seem that under *Smith,* it would be the law applicable to the religiously oriented law schools; religious preferences would be unacceptable.

I am sure that those with experience in other fields could go on finding areas where the reverberation of *Smith* will have a serious impact on the corporate expression of religion. We do have, of course, from the past a body of cases saying that not only does an individual have a free exercise right, but the church does. *Kedroff v. St. Nicholas Cathedral,*[72] upholding the right of the Soviet-dominated patriarchate to have religious freedom, leads off that list. Not so long ago, *Corporation of Presiding Bishop v. Amos*[73] upheld that principle in the Mormon context. But these cases are also called in doubt by *Smith.*

We seem to be back almost with Toqueville's view of what religion is about. Religion, in the *Smith* perspective, seems to be innocuous belief — belief that you keep to yourself. Toqueville's vision was similar. It was strangely close to that of the anticlericals of his day. Religion should stay in the cloister, the priest should stay in the sacristy, the church should not meddle in politics. Justice Scalia's view in *Smith* seems to be if it is action it can be ruled by the state. There is no protection for the free exercise of religion as to acts that are commanded or prohibited by the state.

Now, if *Smith* were the last word, then my title "The End of Free Exercise?" would mean that we had reached the end, at least, for the time being. But the title does contain not only a question but a pun. The true end of religious freedom, the end for which it has been instituted, the purpose of religious freedom, is action. We do not live in an America in which the priest is condemned to the sacristy, in which the church is driven out of politics. The great overwhelming social phenomenon is that since 1830 there have been five movements that have had enormous impact on American society, each of which has been a religious crusade.

When I say these movements have been crusades, I mean they have had these badges of crusades: They have had leaders who were

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TION, S.211 (1990).

72. 344 U.S. 94 (1952).

73. 483 U.S. 327 (1987).

churchmen. They have used religious signs and symbols. They have used Scripture as their text. They have made prayer integral to their action. And they have spoken in God's name in what they demanded.

Those five crusades have occurred in cycles of roughly forty years. The first was the crusade to abolish slavery that began in 1830 and substantially finished in 1870. That was a crusade led largely by Congregationalists and Methodists. Then the second crusade began in 1850 and ended in 1890, the crusade to abolish polygamy — a crusade again of Congregationalists and Methodists, joined by Presbyterians. It was a crusade that ended in the abolition of polygamy as the first had ended in the abolition of slavery. The third crusade got underway in the 1870s or 1880s and reached its climax in 1920. That was to abolish the use of alcohol. There the Methodists took the lead, supported by one branch of the Lutherans. That crusade, of course, did not attain its end except for a brief period. The fourth crusade had its very dim beginnings in the 1930s and reached its glorious climax in the 1960s; you can round it off at 1970 — the crusade to abolish discrimination based on race. Just as the crusade for prohibition has been described as the Protestant Church in action so this crusade has been described as the Black Church in action.[74] The entire Southern Christian Leadership was composed of Baptist ministers. The organizations of the church were used to raise money and recruit movement members. The symbols of the church were used to motivate the Blacks of the South. Finally, in recent time, and still in progress, is the crusade to abolish abortion — something you may date as beginning in 1970, and if it is on a forty-year cycle will end in approximately 2010. Here the Catholics and the Fundamentalists and the Evangelicals have been in the forefront. In those five movements, you do see the end of religious freedom, the free exercise of belief to influence society and produce political results.

I want to go over in somewhat more detail the prototype of all of these campaigns, the campaign to abolish slavery. It began in 1829, in the Park Street Church in Boston, with a speech on the Fourth of July by the Reverend William Lloyd Garrison calling for the end of slavery in the United States.[75] Garrison's solitary cry was then picked up by 124 Congregational ministers, who issued a declara-

74. *See* BAYARD RUSTIN, STRATEGIES FOR FREEDOM 38-43 (1976).

75. NOONAN, *supra* note 6, at 169.

tion in 1834 calling on their fellow ministers to spread the word to their parishioners that slavery was unacceptable, that it was against the law of God, that there could be no compromise with slavery.[76] A significant book of the movement was entitled *The Bible Against Slavery*.[77] A network of clergy spread the word throughout the Northern states and developed a small, dissident, unpleasant movement that was cordially disliked by the people who preferred the status quo but which spoke to the consciences of some. The issue — unusual for American politics — was not economic; but the appeal to conscience spoke to some. In the 1840s came the war against Mexico. A dissident group refused to endorse the war because it was a war to expand slavery. The Conscience Whigs, as they were called, set their consciences against the expansion.[78] Then you had the Compromise of 1850, passed by the Congress and denounced by the religionists because it *was* a compromise.[79] The senior senator from Massachusetts, Daniel Webster, was condemned by Boston's leading Unitarian minister, Theodore Parker, because he had compromised his conscience. Parker, denouncing Webster, quoted the terrible words, "They enslave their children's children, who compromise with sin."[80]

The religious campaign went on as a drumbeat through the 1850s. Finally the Supreme Court decided in a made-up case to solve it all, to provide a final solution in the *Dred Scott* decision.[81] The Court decided that a person born of black slaves could never become a citizen of the United States and that Congress had no power to restrict the spread of slavery into the territories.[82] That decision, far from ending the controversy with a tidy legal solution, drew denunciation not only from the Congregationalists and the Unitarians but from the Methodists and the Presbyterians. Antislavery was now a major religious cause.[83]

Then the war came. When the war came, it was entirely congruent with the war's religious roots that *The Battle Hymn of the Re-*

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76. *Id.* at 168.

77. THEODORE DWIGHT WELD, THE BIBLE AGAINST SLAVERY (New York, American Anti-Slavery Society 1838); *see* NOONAN, *supra* note 6, at 169.

78. NOONAN, *supra* note 6, at 170.

79. *Id.* at 170-71.

80. Theodore Parker, *Mr. Webster's Speech, in* 11 PARKER T.: WORKS 247 (James K. Hosmer ed., 1907).

81. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

82. *Id.* at 426-27, 452.

83. NOONAN, *supra* note 6, at 177.

public should proclaim that God was marching on.[84] God, the abolitionists were sure, was on the Union's side. When Abraham Lincoln finally issued the Emancipation Proclamation he told his cabinet in so many words that he had made a covenant with God to issue the proclamation.[85] At every turn, action in this prototypical crusade was dictated by conscience, and religion was turned from belief into action.

You need not agree with the ends of any of these crusades, but no one, I think, can deny that ours is a country that has been shaped by them. This shaping has been the end of free exercise.

84. FLORENCE HOWE HALL, THE STORY OF THE BATTLE HYMN OF THE REPUBLIC 1-2 (1916).

85. Gideon Welles, Entry of September 22, 1962, *in* DIARY OF GIDEON WELLES 143 (Howard K. Beale ed., 1969).