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Article 21

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# HOSTILITY TO RELIGION, AMERICAN STYLE

*Edward McGlynn Gaffney, Jr.\**

## INTRODUCTION

On Christmas day in 1830, Stephen Girard signed a will making various bequests to relatives and friends, to the City of New Orleans, and to various charities.<sup>1</sup> A decade or so later, this will became famous when a greedy relative turned a posthumous family squabble into a Supreme Court controversy. John Girard, one of Stephen's heirs, sought to invalidate a provision in the will that had established a trust to operate a college for poor white orphans to be administered by the city of Philadelphia.<sup>2</sup>

Nowadays, a clever lawyer seeking to enhance his client's portion of the estate might attack the racial discrimination in the provision selecting the beneficiaries.<sup>3</sup> Since the dispute arose before the enactment of the Fourteenth Amendment, however, the attack focused on whether the arrangements of Stephen Girard's will were invalid because they implicated the government in an educational endeavor that was antithetical or hostile to the Christian religion by excluding clerics from the faculty and administration of the college.<sup>4</sup>

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\* Dean and Professor of Law, Valparaiso University School of Law. This Essay is based on remarks given at a conference sponsored by the Center for Church/State Studies, DePaul University College of Law in Chicago on December 6 and 7, 1991, and on a statement that I prepared for interfaith dialogue between Muslims and Roman Catholics in Los Angeles. I am grateful to Kimberlee Colby, Daniel Conkle, Thomas Curry, Laura Gaston Dooley, John Garvey, Frederick Gedicks, Mary Ann Glendon, James Gordon III, David Gregory, Os Guinness, Emily Fowler Hartigan, Dean Kelley, Douglas Laycock, Nathan Lewin, Michael W. McConnell, Richard John Neuhaus, Samuel Ravinove, Rodney Smith, and Marc Stern for comments on an earlier version.

1. *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127, 183 (1844).

2. *Id.* at 129-34.

3. The mere judicial enforcement of a will containing a racially discriminatory devise, without more, would probably not constitute "state action" for purposes of the Fourteenth Amendment. *See Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating a state constitutional amendment that authorized private racial discrimination by recognizing the right of private property holders to dispose of their property to whomever they choose). But the operation of a racially discriminatory school by the government is certainly prohibited by the Fourteenth Amendment. *See Brown v. Board of Educ.*, 347 U.S. 483 (1954).

4. *Vidal*, 43 U.S. (2 How.) at 133. The will provided: "[N]o ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the

Justice Joseph Story acknowledged in his opinion for the Court that "the Christian religion is a part of the common law of Pennsylvania," within the limits provided for in Pennsylvania's Bill of Rights.<sup>5</sup> A decade before the Girard case, Story had written in his influential treatise on the American Constitution: "The real object of the [first] amendment [of the Federal Constitution] was, not to countenance, much less to advance Mahometanism [sic], or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects . . . ."<sup>6</sup> It is thus understandable that Story would have found problematic a hypothetical devise for the establishment of a school or college "for the propagation of Judaism, or Deism, or any other form of infidelity."<sup>7</sup> But he fortunately chose to leave that problem to another day and turned back the actual attack on the will, noting that Stephen Girard had not prohibited the teaching of Christianity in the college he sought to establish, but had merely excluded clerics from doing so.<sup>8</sup> This close reading of the will preserved it from invalidity on the asserted ground that it was "derogatory and hostile to the Christian

premises appropriated to the purposes of said college." *Id.*

5. *Id.* at 198. Story quoted the relevant provision of the state constitution:

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support, any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship.

*Id.*

6. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1871 (1833).

7. *Vidal*, 43 U.S. (2 How.) at 198. Later in his opinion Justice Story wrote:

Suppose the testator had excluded all religious instructors but Catholics, or Quakers, or Swedenborgians; or, to put a stronger case, he had excluded all religious instructors but Jews, would the bequest have been void on that account? . . . The truth is, that in cases of this sort, it is extremely difficult to draw any just and satisfactory line of distinction in a free country as to the qualifications or disqualifications which may be insisted upon by the donor of a charity as to those who shall administer or partake of his bounty.

*Id.* at 199.

8. *Id.* Story quoted from Girard's will:

In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever. But as there is a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce.

*Id.*

religion."<sup>9</sup>

We have come a long way since this fight over an otherwise obscure will in the mid-nineteenth century. In today's jurisprudence, the remotest possibility that any religious instruction would be aided financially by the government suffices for a judicial finding that a provision violates the prohibition of an establishment of religion.<sup>10</sup> For example, in *Aguilar v. Felton*,<sup>11</sup> the fear of potential entanglement between the government and church-operated schools sufficed to invalidate a federal program involving public school employees who provided remedial reading and math training both in the government's schools and in church-operated schools.<sup>12</sup> The Supreme Court reached this result despite a splendid record of effective assistance to students of low-income parents for nearly twenty years without any evidence whatsoever of the "'detailed monitoring and close administrative contact' between secular and religious bodies,"<sup>13</sup> which the Court has sometimes thought necessary to make out a claim of excessive entanglement.

The term "excessive" obviously admits of degrees. In other words, entanglement is in the eyes of the beholder.<sup>14</sup> Thus Chief Justice Burger, who wrote the opinion of the Court in *Lemon v. Kurtzman*,<sup>15</sup> which articulated the entanglement test, was not persuaded in *Aguilar* that "the interaction occasioned by the program at issue presents any threat to the values underlying the Establishment Clause."<sup>16</sup> He wrote in dissent:

I cannot join in striking down a program that, in the words of the Court of Appeals, "has done so much good and little, if any, detectable harm." The notion that denying these services to students in religious schools is a neutral act to protect us from an Established Church has no support in logic, experience, or history. Rather than showing the neutrality the Court boasts of, it exhibits nothing less than hostility toward religion and the children who attend church-sponsored schools.<sup>17</sup>

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9. *Id.* at 197.

10. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

11. 473 U.S. 402 (1985).

12. *Id.* at 414.

13. *Jimmy Swaggart Ministries v. California Bd. of Equalization*, 493 U.S. 378, 395 (1990).

14. See Kenneth F. Ripple, *The Entanglement Test of the Religion Clauses: A Ten Year Assessment*, 27 UCLA L. REV. 1195, 1217-18 (1980).

15. 403 U.S. 602 (1971).

16. 473 U.S. at 420 (Burger, C.J., dissenting).

17. *Id.* (citation omitted).

It must also be observed that entanglement is much harder to prove when a religious body is subjected to a very complicated tax on distribution of religious literature to its own adherents<sup>18</sup> than when children attending a religious school are being given help to improve their reading and 'rithmetic skills on an evenhanded basis with those attending the government's schools.<sup>19</sup>

Chief Justice Burger's dissent in *Aguilar* illustrates that some Justices view considerable parts of the Court's modern interpretations of the First Amendment as hostile to religion.<sup>20</sup> It also provides a link with the Girard case. Both in the earlier case and in the modern Court's official teaching about the First Amendment, the Court has noted that official governmental hostility to religion is not mandated by our Constitution.<sup>21</sup> For example, in the famous Bible read-

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18. See *Jimmy Swaggart Ministries v. California Bd. of Equalization*, 493 U.S. 378 (1990).

19. See *Aguilar*, 473 U.S. 402 (1985).

20. Quoting *Zorach v. Clauson*, 343 U.S. 306 (1952), Chief Justice Burger wrote in his dissent in *Aguilar*: "The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. . . . Otherwise the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly." 473 U.S. at 420 (Burger, C.J., dissenting). See also *Board of Educ. v. Mergens*, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring in part and concurring in judgment) (criticizing the endorsement test as "neutrality in name but hostility in fact"); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part) (noting the Court's "unjustified hostility toward religion"); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 36 (1989) (Scalia, J., dissenting) (maintaining that the government must guard against latent dangers of hostility to religion); *Edwards v. Aguillard*, 482 U.S. 578, 616-17 (1987) (Scalia, J., dissenting) (arguing that the Establishment Clause forbids state action intended to disapprove, inhibit, or evince hostility toward religion); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 554 (1986) (Burger, C.J., dissenting) ("[T]he First Amendment 'requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.'" (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947))); *Wallace v. Jaffree*, 472 U.S. 38, 85 (1985) (Burger, C.J., dissenting) ("[H]ostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion."); *Meek v. Pittenger*, 421 U.S. 349, 395 (1975) (Rehnquist, J., concurring in part and dissenting in part) (stating that the Court should not "throw its weight on the side of those who believe that our society as a whole should be a purely secular one"); *Gillette v. United States*, 401 U.S. 437, 469 (1971) (Douglas, J., dissenting) (arguing that "[g]overnment in our democracy . . . must be neutral in matters of religious theory, doctrine, and practice," not "hostile to any religion or to the advocacy of no-religion" (quoting *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968))); *School Dist. v. Schempp*, 374 U.S. 203, 311-12 (1963) (Stewart, J., dissenting) (stating that governmental hostility to religion or to religious teachings "would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." (quoting *McCollum v. Board of Educ.*, 333 U.S. 203, 211-12 (1948))).

21. See, e.g., *Lee v. Weisman*, 112 S. Ct. 2649, 2661 (1992) ("We express no hostility to [religious] aspiration, nor would our oath permit us to do so."); *Hernandez v. Commissioner*, 490 U.S. 680, 696 (1989) (finding a section of the Internal Revenue Code to have no "animus to religion in general or to Scientology in particular"); *Hobbie v. Unemployment Appeals Comm'n*,

ing case of 1963,<sup>22</sup> the Supreme Court ruled — sensibly in my view<sup>23</sup> — that teachers in schools operated by the government may not read verses of the Bible or lead young schoolchildren in a devo-

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480 U.S. 136, 142 n.7 (1987) (noting that viewing a religiously motivated resignation from employment as “without good cause” would exhibit hostility toward religion (citing *Bowen v. Roy*, 476 U.S. 693 (1986))); *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (same) (citing *Sherbert v. Verner*, 374 U.S. 398, 402 n.4 (1963)); *Goldman v. Weinberger*, 475 U.S. 503, 513 (1986) (Stevens, J., concurring) (upholding an Air Force rule that prohibited personnel from wearing yarmulkes while in uniform because the rule was based on a neutral, objective standard, not motivated by hostility against any religious faith); *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 306 n.32 (1985) (finding no evidence that the government’s actions resulted from hostility to religious beliefs); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (stating that the Constitution forbids hostility toward any religion); *Marsh v. Chambers*, 463 U.S. 783, 810-11 (1983) (Brennan, J., dissenting) (“[G]overnment cannot, without adopting a decidedly *anti*-religious point of view, be forbidden to recognize the religious beliefs and practices of the American people as an aspect of our history and culture.”); *id.* at 812 (“[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion.” (quoting *School Dist. v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring))); *Larson v. Valente*, 456 U.S. 228, 254-55 (1982) (finding evidence of hostility towards “Moonies” behind differential regulation); *McDaniel v. Paty*, 435 U.S. 618, 636 (1978) (Brennan, J., concurring) (stating that preventing those most intensely involved in religion from serving in public office manifests patent hostility toward religion); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 793 (1973) (deciding that, if taxation of religion is viewed as hostility, an exemption represents a reasonable attempt to guard against that danger); *Wisconsin v. Yoder*, 406 U.S. 205, 211 (1972) (deciding that an exemption for Amish students from compulsory schooling was needed to remove them from an environment hostile to their religious beliefs); *Welsh v. United States*, 398 U.S. 333, 372 (1970) (White, J., dissenting) (“[N]either support nor hostility, but neutrality, is the goal of the religion clauses of the First Amendment.”); *Walz v. Tax Comm’n*, 397 U.S. 664, 672 (1970) (holding that the purpose of a tax exemption was neither sponsorship of religion nor hostility toward it); *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) (holding that government may not be hostile to any religion); *School Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (deciding that a state may not establish a “religion of secularism” by showing hostility to religion); *id.* at 232 (Brennan, J., concurring) (stating that eliminating devotional prayer from public schools does “not declare that the First Amendment manifests hostility” to religion); *id.* at 295 (“[T]he First Amendment commands not official hostility toward religion, but only a strict neutrality in matters of religion.”); *id.* at 306 (Goldberg, J., concurring) (stating that the Constitution does not command “brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious”); *Engel v. Vitale*, 370 U.S. 421, 433-34 (1962) (finding no hostility toward religion or prayer indicated in a prohibition of state-composed prayer); *id.* at 443 (Douglas, J., concurring) (“The First Amendment leaves the Government in a position not of hostility to religion . . . .”); *McGowan v. Maryland*, 366 U.S. 420, 445 (1961) (holding that a ban on Sunday rest laws would be hostile to the public welfare); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (stating that the Constitution does not require that the government show “callous indifference” to religious groups); *McCullum v. Board of Educ.*, 333 U.S. 203, 211-12 (1948) (stating that hostility to religion or religious teachings would be “at war” with free exercise of religion); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 654 (1943) (Frankfurter, J., dissenting) (arguing that the essence of religious freedom is that no religion shall incur the state’s hostility).

22. *School Dist. v. Schempp*, 374 U.S. 203 (1963).

23. For a detailed account of the strong opposition to this decision, see KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, *THE PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE* (1971).

tional recitation of the Lord's Prayer without violating the Establishment Clause of the First Amendment.<sup>24</sup> In a separate concurring opinion, Justice Arthur Goldberg wrote of "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious," which he said is "not only not compelled by the Constitution, but . . . [is] prohibited by it."<sup>25</sup> The subtitle of this article could be: "Where is Justice Goldberg when we need him?"

It should not be very difficult to embrace the concept that the Constitution prohibits hostility to religion. As I demonstrate below, this concept is fundamental both to the elimination of religious tests for federal office in the original Constitution,<sup>26</sup> and to any sensible interpretation of the Religion Clause of the First Amendment, which was enacted to promote religious liberty by removing from the federal government the power to establish any religion and the power to impose excessive burdens on religious beliefs and practices.<sup>27</sup>

As obvious as this conclusion might be to some, it seems to me that many remain to be persuaded on the matter. I do not assume, for example, that my own convictions about the central meaning of the First Amendment Religion Clause are widely shared among legal educators. I cannot prove this empirically, but I assume that by and large we completely ignore the ban on religious tests in our curriculum, and that many of us teach the Establishment Clause as though it were the part of the Constitution designed to keep religion in its place, that is, out of the public discourse to the greatest extent possible. One of the predicates for these negative attitudes about religious liberty among academics seems to be an uncritical sociological assumption that America is a firmly secular nation.<sup>28</sup> The

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24. *Schempp*, 374 U.S. at 223.

25. *Id.* at 306 (Goldberg, J., concurring).

26. "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI, cl. 3.

27. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990) (tracing the history of the enactment of the Free Exercise Clause).

28. For comment on the tendency of academics to misperceive and trivialize religion, see Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, and Jacob Neusner, *The Campus Conspiracy on the Religious Order*, NAT'L REV., Mar. 14, 1986, at 37. On the attitudes of legal academics toward religion, see KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 5-6 (1988) and MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL ESSAY 10 (1988). In these volumes, Greenawalt and Perry have helped to open the discussion of the appropriate role of religion in public discourse. For a critical appreciation of Greenawalt's argument, see Franklin I. Gamwell, Book Note, 8 J.L. &

empirical data on this question support an opposite conclusion: religion, in fact, is thriving in America.<sup>29</sup> This in turn is explained in part by the firm commitment to religious freedom that has come to characterize the American experiment at its best, but that has regrettably been absent from our common experience when we behave at our worst.

Perhaps for the very reason that religion seems to be thriving here, Americans tend to take religious freedom for granted, and we seldom explore the phenomenon of hostility to religion that has marred our history from the outset and that continues to cause trouble in our own times. We should be grateful, then, that this symposium affords us an opportunity to explore this forgotten dimension of our history.

Hostility to religion in America has assumed different forms in the roughly four centuries from the colonial period through the early federal period down to the present stage of the Republic. Sometimes this ideological hostility resides within individuals. Thus, Justice Black noted in *Board of Education v. Allen*<sup>30</sup> that some of our citizens are "bitterly hostile to and completely intolerant of the [religious faith of] others."<sup>31</sup> Sometimes hostility to religion is struc-

RELIGION 461 (1990) (reviewing GREENAWALT, *supra*). Greenawalt replied to Gamwell in *Religious Convictions and Political Choice: Some Further Thoughts*, 39 DEPAUL L. REV. 1019 (1990). For a very different view of religion, see BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980). For my reply to Perry and for commentary on the secularist thrust of Bruce Ackerman's social project, see Edward McGlynn Gaffney, Jr., *Politics without Brackets on Religious Convictions: Michael Perry and Bruce Ackerman on Neutrality*, 64 TULANE L. REV. 1143 (1989). For the view that explicitly religious arguments must be avoided in public discourse so as to avoid the repetition of the holy wars of the sixteenth century, see William P. Marshall, *The Public Square and the Other Side of Religion* (forthcoming 44 HASTINGS L.J. (1993)) and Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1096-97 (1990). The fears of Professors Marshall and Solum 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. See Gaffney, *supra*, at 1188-94; see also FREDERICK MARK GEDICKS & ROGER HENDRIX, *CHOOSING THE DREAM: THE FUTURE OF RELIGION IN AMERICAN PUBLIC LIFE* (1991); Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992).

29. See, e.g., GEORGE GALLUP & JAMES CASTELLI, *THE PEOPLE'S RELIGION: AMERICAN FAITH IN THE 90'S* (1989); RICHARD JOHN NEUHAUS, *UNSECLAR AMERICA* 12 (1986); ROBERT WUTHNOW, *THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II* (1988); *THE PERSISTENCE OF RELIGION* (Andrew M. Greeley & Gregory Baum eds., 1973).

30. 392 U.S. 236 (1968).

31. *Id.* at 251 (Black, J., dissenting); see also *Employment Div. v. Smith*, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring) (stating that many religious beliefs and practices of minorities are "not shared" and are "viewed with hostility" by the majority); *United States v. Ballard*, 322 U.S. 78, 87 (1944) (stating that there is little left of religious freedom if a jury in a hostile



tural in the sense that general cultural patterns are reflected within the institutions of government, including the courts. Thus, in the view of some commentators, some of Justice Black's own opinions manifest the very hostility and intolerance of which he wrote.<sup>32</sup> As any therapist knows, hostile people are usually the last ones to acknowledge their hostility.

*The Williamsburg Charter*, a bicentennial document celebrating religious freedom, has identified several forms of confusion about the relation between religion and politics that culminate in official governmental hostility toward religion.<sup>33</sup> Two are particularly noteworthy. "Politics has recently been inflamed by a number of confusions: the confusion of personal religious affiliation with qualification or disqualification for public office . . . and the confusion of government neutrality among faiths with government . . . hostility to religion."<sup>34</sup>

In this Essay, I comment on these two confusions, and then I suggest a connection between the history of hostility to religion in America and the confused state of constitutional jurisprudence about religious freedom that continues to plague us in the present. I do not attempt here a grand theory that explains why a move away from hostility for religion is not coterminous with special preference for religion or that argues why the absence of hostility would not entail large gobs of public funds for religious institutions. My purpose in this Essay is more humble: to state simply that Americans have been hostile to two religious communities — Muslims and Roman Catholics<sup>35</sup> — throughout our history, and that we continue to reap the ill effects of this hostility.

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environment could send a person to jail for false teachings).

32. See Michael W. McConnell, *Exchange: Religious Participation in Public Programs; Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 121-22 (1992); see also *infra* text accompanying notes 91-95 (discussing *Allen*).

33. THE WILLIAMSBURG CHARTER (1988), reprinted in 8 J.L. & RELIGION 5 (1990). The document was signed in Williamsburg, Virginia, on June 25, 1988, the 200th anniversary of the call by Virginia for a Bill of Rights in the Federal Constitution.

34. *Id.* at 21.

35. The history of hostility toward other religious groups in America (e.g., Jews, Mormons, Jehovah's Witnesses, Fundamentalists, Hare Krishna devotees, and adherents of the Unification Church) is part of an ongoing project of which this is a first installment.

## I. THE EXCLUSION OF RELIGIOUS CONVICTIONS FROM PUBLIC LIFE

The first illustration of hostility to religion that I treat in this Essay has both a specific focus — religious tests for public office, in the period of established religion — and a more general focus — the drift toward secularism, in our own time. I will comment on both the specific historic problem and the more general contemporary problem.

One of the vices of the regime of an established religion was that some citizens were given prominence in the community by virtue of their religious convictions, while others were effectively excluded from participation in public life because of their religious convictions and practices.<sup>36</sup> Thus, it is no accident that the emergence of “the Church of England, by law established”<sup>37</sup> in the period of the Tudor and Stuart monarchs entailed severe civil and criminal penalties for Roman Catholics and dissenting Protestants.<sup>38</sup> A similar pattern of penalties imposed on nonmembers of the established order held sway in the American colonies. Far from being the idyllic “freedom-loving” folk that Justice Black imagined the colonists to be,<sup>39</sup> the colonists imposed the harshest restraints and the cruelest sanctions for nonconformity to the various orthodoxies and orthopraxies that they established along the Atlantic seaboard.<sup>40</sup> Among these penalties was the exclusion of nonmembers of the established church from political life. They were denied both the franchise and the ability to serve in public office. This historical problem was solved at the federal level by the ban on religious tests in Article VI of the Federal Constitution. At the state level, how-

36. See CHESTER JAMES ANTIEAU, *FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES* 92-110 (1964); ALBERT J. MENENDEZ, *NO RELIGIOUS TEST: THE STORY OF OUR CONSTITUTION'S FORGOTTEN ARTICLE* (1987); Leo J. Pfeffer, *Religious Test for Public Office*, 12 *NEW CATHOLIC ENCYCLOPEDIA* 677 (1967).

37. The phrase is taken from the Canons of 1604, which were intended to inaugurate the reign of James I (1603-1625) with a definitive codification of the church-state relationship that had been developed under Elizabeth I (1558-1603). For a thoughtful discussion of these arrangements, see ROBERT E. RODES, JR., *LAY AUTHORITY AND REFORMATION IN THE ENGLISH CHURCH: EDWARD I TO THE CIVIL WAR* 114-92 (1982).

38. See, e.g., Toleration Act, 1 W. & M., ch. 18 (1689); Second Test Act, 30 Car. 2, ch. 1 (1678); First Test Act, 25 Car. 2, ch. 2 (1673); Act of Uniformity, 14 Car. 2, ch. 4 (1662); Corporation Act, 13 Car. 2, ch. 1 (1661); Oaths Act, 7 & 8 Jam., ch. 6 (1610); Act of Uniformity, 1 Eliz., ch. 1 (1559); Act Abolishing Diversity of Opinions, 31 Hen. 8, ch. 14 (1539).

39. See *Everson v. Board of Educ.*, 330 U.S. 1, 11 (1947).

40. See ANTIEAU, *supra* note 36; THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986).

ever, this problem was resolved very slowly.<sup>41</sup> The last remaining vestige of inhibitions on public service relating to the religious convictions of a potential office holder — banning clergy from serving in the state legislature and at state constitutional conventions — was invalidated in 1978 in *McDaniel v. Paty*.<sup>42</sup>

I turn now to the more general contemporary problem, but I will occasionally illustrate it by reference to the particular historical problem. The exclusion of people from the political process goes to the very heart of our self-understanding as a national community. As the Warren Court knew well, a large political community such as the United States tells those who live here who counts and who does not by telling them whether or not they may vote or hold office or otherwise participate in public life. After Chief Justice Warren retired from the bench in 1969, he used to entertain law students in his chambers. It became an expected ritual that one of the students would ask the Chief Justice what was the best thing he had done for the Republic. Warren would then reply that his decision in *Reynolds v. Sims*,<sup>43</sup> enshrining the “one person, one vote” rule, was his most important contribution to the Republic, because it placed equality of participation on a firm footing. Without that, he thought, the very possibility of democracy was deeply eroded.<sup>44</sup>

Recently, Justice O'Connor has suggested a similar theme in Es-

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41. For a moving description of the efforts to remove the political stigmas attached to Jews in the early Republic, see MORTON BORDEN, *JEWS, TURKS AND INFIDELS* (1984).

42. 435 U.S. 618 (1978).

43. 377 U.S. 533 (1964).

44. I had heard several of my classmates recount this story. So when I got my chance to visit the Chief Justice, I decided to ask him to identify the worst mistake he had made in public life, which included service as District Attorney for Alameda County, Attorney General, and Governor of California, before he was appointed Chief Justice in 1953. He noted my impertinence, said that law students usually asked about the best thing he had done for the Republic, and then played the *Reynolds v. Sims* cassette. Then he acknowledged that he had not answered my question because he had been overcome with a rush of memories of mistakes. In an act of extraordinary humility, he identified his silence as Attorney General of California in the face of the incarceration of Japanese-Americans at the outset of World War II, his service on the Warren Commission on the Kennedy Assassination, and his vote in *Naim v. Naim*, 350 U.S. 891 (1955) (dismissing a case challenging the constitutionality of Virginia's miscegenation statute), as among his worst mistakes. Chief Justice Warren wrote the unanimous opinion for the Court in *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967), invalidating Virginia's miscegenation statute. Warren's third self-perceived mistake sheds light on the debate between Alex Bickel and Gerald Gunther over the “activism” of the Warren Court. Compare Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 79 (1961) (praising the use of threshold barriers to avoid decisions) with Gerald Gunther, *The Subtle Vices of the “Passive Virtues” — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 5 (1964) (criticizing such use as unprincipled).

tablishment Clause litigation. The Establishment Clause is offended, she wrote in the first crèche case, *Lynch v. Donnelly*,<sup>45</sup> if the government sends a message of approval to those in a preferred religious community and of disapproval to those who are not members of this preferred group.<sup>46</sup> Although some commentators do not give much hope that the endorsement theory will provide any greater coherence to the interpretation of the Establishment Clause than earlier formulations by the Court,<sup>47</sup> it does at least encapsulate an important theme from the history of established religions.

In his reply to Professor Hauerwas<sup>48</sup> in this symposium, Professor Gedicks has illustrated the theme of hostility to his own religious community, the Mormons.<sup>49</sup> As I mentioned above, this Essay illustrates the theme with reference to Muslims, a community often ignored in American history, and with reference to my own community, the Roman Catholics. If the stories I recount here were simply a thing of the past, we might be justified in paying less attention to these sad realities at a time in our national history when we are called to celebrate the bicentennial of the Bill of Rights. But the duty to tell the stories of communities that have experienced denial of their religious freedom in America strikes me as necessary at this

45. 465 U.S. 668 (1984).

46. *Id.* at 688 (O'Connor, J., concurring). A year later, a majority of the Court cited Justice O'Connor's endorsement test favorably in *Grand Rapids School District v. Ball*, 473 U.S. 373, 389 (1985). A majority also used the test in the second crèche case, *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 592-94 (1989). Professor Tribe takes the endorsement notion much further than the Court has gone, arguing that government invalidly endorses a religion whenever it uses religious means where nonreligious ones would suffice. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1287-97 (2d ed. 1988). In my way of thinking, Tribe epitomizes the "pervasive devotion to the secular" of which Justice Goldberg warned in his concurring opinion in *School Board v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., dissenting).

47. For a critical view of the endorsement standard, see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987); see also McConnell, *supra* note 27, at 147-57 (criticizing the endorsement test).

48. Stanley Hauerwas & Michael Baxter, C.S.C., *The Kingship of Christ: Why Freedom of "Belief" Is Not Enough*, 42 DEPAUL L. REV. 107 (1992).

49. Frederick Mark Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 DEPAUL L. REV. 167 (1992); see *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890) (upholding the seizure of assets of a church until it changed its religious convictions); *Davis v. Beason*, 133 U.S. 333 (1890) (sustaining a test oath prohibiting orthodox Mormons from voting in federal territory because of their beliefs on plural marriages); *Reynolds v. United States*, 98 U.S. 145 (1879) (upholding the imposition of criminal sanctions on orthodox Mormons because of conduct relating to plural marriages); see also GUSTAVUS MYERS, *HISTORY OF BIGOTRY IN THE UNITED STATES* 158-62 (1943); TRIBE, *supra* note 46, at 1271-72; Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 416-17 (1986).

moment because Muslims and Roman Catholics continue to experience misunderstanding and hostility from their fellow citizens.

### A. *Hostility to Muslims in America*

"Religious persecution" is not too strong a term to describe the experience of the first Muslims in America. These persons were brought to these shores involuntarily from West Africa as slaves. The story of the African slave trade is a complicated one, involving, for example, the complicity of some West African leaders in the exploitation of their own people. The exportation of West Africans in the slave trade, moreover, is not entirely one of white oppression of blacks; some of the most notorious slave traders were themselves Africans selling their fellow Africans into captivity. Many of the West Africans were animists rather than Muslims. These complications, however, do not gainsay the brutality of the white slave traders both in the dangerous crossing of the Atlantic<sup>50</sup> and in the legal structure they erected to define and control the slaves who survived the passage "out of darkness."<sup>51</sup> Both before and after the enactment of the Religion Clause of the First Amendment, one of the many cruelties inflicted upon the black slaves by their white "masters" was the lack of respect for the Muslim heritage often reflected in forced "conversions" to Christianity.<sup>52</sup>

The major contours of the "execrable commerce" — to use the phrase Thomas Jefferson penned for a draft of the Declaration of Independence<sup>53</sup> — are well known. The primary responsibility for

50. For a graphic account of the perils of the slave ships, see ALEX HALEY, *ROOTS: THE SAGA OF AN AMERICAN FAMILY 159-92* (1976).

51. See, e.g., A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD* (1978); see also JOHN T. NOONAN, *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 29-64* (1976).

52. See ALLAN D. AUSTIN, *AFRICAN MUSLIMS IN ANTEBELLUM AMERICA: A SOURCEBOOK* (1984).

53. Jefferson put before Congress a form of the declaration that originally contained the following paragraph about the slave trade:

[George III] has waged cruel war against human nature itself, violating it's [sic] most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere or to incur miserable death in their transportation thither. [T]his piratical warfare, the opprobrium of *infidel* powers, is the warfare of the *Christian* king of Great Britain. [D]etermined to keep open a market where *Men* should be bought & sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or to restrain this execrable commerce. [A]nd that this assemblage of horrors might want no fact of distinguished die, he is now exciting those very people to rise in arms among us, and to

the brutality of this traffic in human flesh belongs to the Europeans, primarily the Dutch and the English. Although the imposition of religious faith was brought about primarily through the agency of private slave-holders, our government may not avoid responsibility for this massive denial of religious liberty, if only because of its clear complicity in and official support for the "peculiar institution" of slavery until its abolition through the Thirteenth Amendment.<sup>54</sup>

If African Muslims experienced religious persecution in the form of forced conversion when they got to America, they were also the victims of religious bigotry as a religious minority in the early period of the history of the Republic. Even after the movement for disestablishment of a single religious community, accomplished at the federal level through the adoption of the First Amendment and at the state level through the passage of Bills of Rights in the state constitutions from 1776 to 1833, Muslims were not regarded as the subjects of the religious freedom that was secured by those charters of liberty. Both the franchise and office-holding were limited to Christians in all of the first state constitutions. In the overwhelming majority of the states, these rights of political participation were limited more particularly to Protestants, a point that I will return to later. "Jews, Turks, and Infidels (or any other exotic group) . . . could worship as they pleased but had no right to participate in . . . government."<sup>55</sup> As noted above, Justice Joseph Story suggested in his commentary on the American Constitution that the purpose of the First Amendment was not to prostrate Christianity "but to exclude all rivalry among Christian sects."<sup>56</sup> It bears repetition that Story expressly noted that the purpose of the First Amendment was not to "countenance, much less advance Mahometanism [sic], or Ju-

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purchase that liberty of which he has deprived them, by murdering the people on whom he also obtruded them: thus paying off former crimes committed against the *Liberties* of one people, with crimes which he urges them to commit against the *lives* of another.

1 THE PAPERS OF THOMAS JEFFERSON 317-18 (Julian P. Boyd et al. eds., 1950). The passage was struck out at the insistence of the delegates from South Carolina and Georgia, who, in Jefferson's words, "had never attempted to restrain the importation of slaves, and who on the contrary still wished to continue it." 1 *Id.* at 314. See GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 65-75 (1978).

54. See KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* (1964).

55. BORDEN, *supra* note 41, at ix. Borden offers a rich study of the Jewish struggle for religious equality in America, but does not include an exploration of the story of the Turks or other Infidels (including Muslims and Roman Catholics) in this volume.

56. 3 STORY, *supra* note 6, § 1871.

daism, or infidelity."<sup>57</sup>

Nearly 160 years after Story's commentary, Muslims are not subjected to formal, de jure disqualification from the franchise or from holding public office. But there is strong evidence of widespread hostility towards Muslims in our society that may lead to a reasonable perception on their part that they are widely regarded as outsiders or second-class citizens. For example, a national opinion survey in 1987 indicated that 13% of the American public think "there is no place in America for the Moslem religion."<sup>58</sup>

One way in which a culture may manifest its passive aggression against a minority group is by ignoring the beliefs and achievements of the members of that group. For example, despite the fact that there are more Muslims in the United States than, say, Episcopalians, there is a massive silence about Muslims in the major texts purporting to examine the history of religion in the United States.<sup>59</sup> Muslims are even omitted from general reference sources on American history which contain extensive materials on other religious groups.<sup>60</sup> Accurate information about the Islamic faith by Muslim scholars is insufficiently found even in the libraries of major research universities, let alone in public libraries to which the majority of Americans have easy access.

Still worse is active hostility toward a minority group perpetuated through negative images or false stereotypes. Muslims are subject to this form of aggression not only through unfair or biased reporting in the mass media of communication,<sup>61</sup> but also in the educational message inculcated in American youth through history texts adopted for use in public elementary and secondary schools.<sup>62</sup> Against this background of insensitivity to Islam in American culture generally and against the most recent perception of at least

57. *Id.*

58. CENTER FOR COMMUNICATIONS DYNAMICS, WILLIAMSBURG CHARTER SURVEY ON RELIGION AND PUBLIC LIFE 18 (1988) [hereinafter WILLIAMSBURG CHARTER SURVEY]. See James Davison Hunter, *The Williamsburg Charter Survey: Methodology and Findings*, 8 J.L. & RELIGION 257, 264 (1990).

59. See, e.g., SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* (1975); ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* (1950).

60. See, e.g., *HARVARD GUIDE TO AMERICAN HISTORY* (Frank B. Friedel & Richard K. Showman eds., 2d ed. 1974).

61. See, e.g., EDWARD W. SAID, *COVERING ISLAM: HOW THE MEDIA AND THE EXPERTS DETERMINE HOW WE SEE THE REST OF THE WORLD* (1981); JACK G. SHAHEEN, *THE TV ARAB* (1984).

62. See, e.g., Testimony of Audrey Shabbas on behalf of the American-Arab Anti-Discrimination Committee, California State Board of Education, June 10, 1987.

some Muslims (e.g., Shiites in Iran) as analogous in some respects to Fundamentalists, it causes small wonder that there is still widespread animosity among Americans today towards Muslims in our society.<sup>63</sup>

In addition, Muslims continue to experience lack of accommodation to their religious beliefs and practices similar to that afforded to the members of other religious communities. Professor McConnell has argued convincingly that accommodation of religion should not be confined to instances compelled by the Free Exercise Clause because "the government is in a better position than the courts to evaluate the strength of its own interest in governing without religious exemptions."<sup>64</sup> Yet the duty of accommodation of religious beliefs and practices, whether mandated under the Free Exercise Clause or extended to religious communities by legislative enactments more generous than the demands of the First Amendment, is not absolute. Thus the government need not accommodate a religious conviction if the state interest behind a particular public policy is truly "compelling," "paramount," or "of the highest order."<sup>65</sup> An example of an interest of this nature is the requirement of reasonable security in penal institutions.

Even when the government asserts interests that compel it to restrict religious freedom, however, it may not do so in a way that singles out a particular religion for unfavorable treatment. Thus, when members of the majority religious traditions in America (Protestants, Catholics, and Jews) are in fact accommodated within penal institutions both with respect to dietary requirements and with respect to times of communal prayer without any noticeable diminution of the government's interest in prison security,<sup>66</sup> it is insensitive

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63. See ISLAMIC CENTER OF SOUTHERN CALIFORNIA, VIOLENCE AGAINST MUSLIMS: THE NEW TREND (1988).

64. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 31.

65. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (holding that the state interest in universal compulsory education is not sufficiently important to outweigh the parental interest in religious upbringing of children). But see *United States v. Lee*, 455 U.S. 252, 260 (1982) (holding that a broad public interest in maintaining a sound tax system is of such a high order that it outweighs religious belief in conflict with payment of Social Security tax).

66. See, e.g., *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (requiring that a Buddhist prisoner be afforded "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts"); *Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975) (requiring a federal prison to provide an Orthodox Jewish prisoner with a diet that would keep the prisoner in good health without violating kosher laws); *Barnett v. Rodgers*, 410 F.2d 995 (D.C. Cir. 1969) (requiring a prison to accommodate dietary requirements of Muslim prisoners).



— to say the very least — for prison officials not to extend similar accommodation to Muslims within their jurisdiction. In *O'Lone v. Estate of Shabazz*,<sup>67</sup> however, the Supreme Court upheld prison regulations regarding work by prisoners outside the prison that precluded Muslim prisoners from attending religious services on Friday afternoons.<sup>68</sup> More recently, in *Hunafa v. Murphy*,<sup>69</sup> the Seventh Circuit remanded a suit by a Muslim state prisoner who had objected to service of meals containing pork.<sup>70</sup> The court noted that the Supreme Court's ruling in the 1990 peyote case, *Employment Division v. Smith*,<sup>71</sup> had "cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences."<sup>72</sup> Nearly a year later in *Al-Alamin v. Gramley*,<sup>73</sup> another panel in the same court curiously ignored *Smith* even though the case also involved a religious claim by a Muslim prisoner. The *Al-Alamin* court relied instead on *Turner v. Safley*<sup>74</sup> to turn back a request by Muslim prisoners for access to an imam to lead them in the traditional Friday prayer service of Muslims, known as Jumah, or to join together for Friday prayer without an imam, but with appropriate supervision by the prison staff.<sup>75</sup> Both *Hunafa* and *Al-Alamin* have a ring of technical correctness to them, but they manifest indifference, if not overt hostility, towards Muslims. It is doubtful that the cases would have come out the same way if the plaintiffs had been Roman Catholics complaining about denial of access to the Mass, or Orthodox Jews complaining about violations of their dietary laws.

Even under *Smith* it is clear that the benefits of the Free Exercise Clause must extend equally to all.<sup>76</sup> And governmental preference of

67. 482 U.S. 342 (1987).

68. *Id.* at 345.

69. 907 F.2d 46 (7th Cir. 1990).

70. *Id.* at 48.

71. 494 U.S. 872 (1990). See *infra* text accompanying notes 139-44 (discussing *Smith*).

72. 907 F.2d at 48.

73. 926 F.2d 680 (7th Cir. 1991).

74. 482 U.S. 78, 89 (1987) (holding that prison regulations impinging on religious rights of prisoners are valid if they are "reasonably related to legitimate penological interests").

75. 926 F.2d at 683, 686.

76. 494 U.S. 873, 888 (1990). The Court has granted review in a case involving a religious gerrymander. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court has agreed to review whether city ordinances specifically directed at the sacrifice of animals in a religious ritual, while permitting the killing of animals for such other purposes as food, science, convenience, or sport, violate the Free Exercise Clause. 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 1472 (1992).

one religious group over another is the very thing prohibited by the Establishment Clause.<sup>77</sup> For these reasons, when the courts approve manifest disparity in treatment of Muslims by the government, the lack of constitutional protection for this religious minority is deplorable.

### B. *Hostility to Roman Catholics in America*

Like Muslims, Roman Catholic colonists in America also experienced religious persecution during the colonial period and into the early years of the Republic. Indeed, one of the great ironies of American history is that, like other Christians who came to America in part to escape religious persecution in Tudor England, Roman Catholics soon became victims of official persecution in this land. For example, colonial Maryland was first envisaged as a haven for Roman Catholics and Protestants living in harmony.<sup>78</sup> According to this ideal, both groups would be free to practice their respective religions, and neither would enjoy any special favor from the state.<sup>79</sup> Even this limited experiment in religious toleration proved impossible to survive in the polemical atmosphere of sectarian hostility in the seventeenth century. The conflict between Catholics and Protestants in Maryland was further complicated by economic, legal, and political issues. In 1689, Protestants in Maryland who opposed the proprietary rule of the Calverts seized the government. Shortly thereafter, the revolutionaries put an end to the experiment in religious toleration of Catholics, in part because of the nearly universal stereotype of Catholics as disloyal.<sup>80</sup> In 1692, Roman Catholics were expressly excluded from holding public office by means of oaths incompatible with their religious beliefs. In 1702, the Church of England was officially established in Maryland. Soon thereafter penal legislation sought both to stem the growth of Catholicism and to remove its influence from every aspect of public life.<sup>81</sup>

I mentioned above that political penalties were visited upon

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77. See, e.g., *Larson v. Valente*, 456 U.S. 228 (1982).

78. EDWIN S. GAUSTAD, *AMERICAN RELIGIOUS HISTORY* 72-79 (1968).

79. Although the early Maryland experiment provided for the free exercise of religion for Christians, it imposed the severest penalties, including confiscation of goods and capital punishment, on those who exceeded the limits of Christian orthodoxy. See CURRY, *supra* note 40, at 39.

80. For example, Catholics were widely supposed to be plotting with the French and the Indians to suppress the Protestant population. *Id.* at 45-47. See also MYERS, *supra* note 49, at 35-43.

81. CURRY, *supra* note 40, at 48-51.

“Jews, Turks, and Infidels” in the early Republic. I return now to this point to highlight the fact that Roman Catholics were “infidels” for purposes of these civil penalties. Even after the movement for disestablishment of a single religious community not only at the federal level but also in the overwhelming majority of the new state constitutions, Roman Catholics were still not deemed worthy of full participation in the early Republic. Although the Federal Constitution removed religious tests for serving in federal offices, several state constitutions in the period of the early Republic continued either to disenfranchise Roman Catholics and other non-Protestants or to prohibit them from serving in public office.<sup>82</sup> This unequal treatment under the law was rationalized in part because the loyalty of Roman Catholics was suspect, due to false stereotypes of the transnational allegiance that arose from the catholic character of this faith community.

In addition, Roman Catholics were subjected to overt hostility and bigotry throughout the nineteenth century and into the early twentieth century. There were three waves of this anti-Catholic hysteria in the nineteenth century. The first and longest lasting of these movements was Nativism, according to which repulsion for foreigners was virtually synonymous with hostility to Catholics.<sup>83</sup> Nativist sentiment may be found early in the federal period. As an organized movement, Nativism lasted roughly from 1830 — the year in which some Protestant clergy in New York launched an overtly anti-Catholic weekly newspaper, *The Protestant* — to the mid-1920s, when immigration had changed the face, if not the heart, of America irrevocably. In its heyday, Nativism was responsible not simply for the ignorant mobs who literally burned down convents and churches in the 1830s,<sup>84</sup> but also for the virulent anti-Catholic attitudes of

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82. CHESTER J. ANTIEAU ET AL., RELIGION UNDER THE STATE CONSTITUTIONS 100-04, 115-16 (1965); SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 8, 35-36, 299, 337, 356, 358, 445, 447-49, 452, 503, 515, 519 (1902); 1 STOKES, *supra* note 59, at 859.

83. See JOHN TRACY ELLIS, AMERICAN CATHOLICISM 61-69 (2d ed. 1969); JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (1963); MARK J. HURLEY, THE UNHOLY GHOST: ANTI-CATHOLICISM IN THE AMERICAN EXPERIENCE (1992); MYERS, *supra* note 49, at 110-28. The main burden of Hurley's book is to describe the efforts of the Catholic Church to renew and reform itself, primarily in the events of the Second Vatican Council (1962-1965) in which Hurley was himself a key participant. His narrative helps to transcend many of the difficulties that Protestants and others had with Catholics in the nineteenth and early twentieth centuries. It contains, however, frequent references to historical manifestations of anti-Catholicism in that earlier period.

84. ELLIS, *supra* note 83, at 64.

intellectuals like Horace Mann, whose "common schools" masked only slightly the common contempt for Catholicism.<sup>85</sup>

The second wave of opposition to Catholicism was aptly styled the Know-Nothing movement.<sup>86</sup> Like the Nativists before them, the Know-Nothings targeted the immigrant Catholics for special opprobrium. They peaked as a movement in the 1850s and began to wane in the early 1860s, when the need for Catholics in the Union Army counted for more than the earlier anti-Catholic bias.

The third wave of anti-Catholicism hit after the Civil War. Two venomous groups, the American Protective Association (APA)<sup>87</sup> and the Ku Klux Klan,<sup>88</sup> poisoned the atmosphere with virulent attacks on Jews, Catholics, and African-Americans. The Klan faded with the enactment of new civil rights legislation in the 1870s, only to rise again in the 1920s. The APA remained potent as a social force until the turn of the century.

As in the Muslim experience, so also the Catholic experience of hostility in the past was but a prologue to an ongoing phenomenon. Conditions have ameliorated dramatically for Catholics in the late twentieth century, on any measure of comparison with the conditions of their immigrant ancestors in the nineteenth century.<sup>89</sup> Although Catholics have achieved greater acceptance in American society than in the past,<sup>90</sup> they continue to be victimized by unfair stereotypical characterizations in several important ways. Hostile attitudes towards Catholics are reflected not only in subtle forms of employment discrimination,<sup>91</sup> but even in misrepresentations of the

85. See CHARLES LESLIE GLENN, JR., *THE MYTH OF THE COMMON SCHOOL* (1988); ROCKNE M. MCCARTHY ET AL., *DISESTABLISHMENT A SECOND TIME: GENUINE PLURALISM FOR AMERICAN SCHOOLS* (1982); DIANE RAVITCH, *THE GREAT SCHOOL WARS, NEW YORK CITY, 1805-1973: A HISTORY OF THE PUBLIC SCHOOLS AS A BATTLE FIELD OF SOCIAL CHANGE* (1974).

86. See ELLIS, *supra* note 83, at 85-86; HIGHAM, *supra* note 83, at 4-7, 12-13, 28; HURLEY, *supra* note 83, at 128, 137, 160; MYERS, *supra* note 49, at 129-39, 149-62.

87. See ELLIS, *supra* note 83; HIGHAM, *supra* note 83, at 62-63, 80-87, 108; MYERS, *supra* note 49, at 163-92.

88. HIGHAM, *supra* note 83, at 287-88; MYERS, *supra* note 49, at 211-57.

89. See ANDREW M. GREELEY, *THE AMERICAN CATHOLIC: A SOCIAL PORTRAIT* (1977); ANDREW M. GREELEY, *THE EDUCATION OF CATHOLIC AMERICANS* (1966).

90. The *Williamsburg Charter Survey on Religion and Public Life* reported that in 1987 only 8% of Americans indicated that they would not vote for a Catholic for president even if that person were a member of the respondent's political party and the respondent liked his ideas. WILIAMSBURG CHARTER SURVEY, *supra* note 58, at 9. This response compares favorably with the indication in a 1959 Gallup poll that 25% of Americans would exclude a Catholic from the presidency solely on the ground of the candidate's religion. *Id.* See Hunter, *supra* note 58, at 266.

91. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, *RELIGIOUS DISCRIMINATION: A NEGLECTED ISSUE* (1979).

educational efforts of Roman Catholics at the highest level of governmental decisionmaking. For example, in the New York textbook loan case, *Board of Education v. Allen*,<sup>92</sup> Justice Black was not above exaggerating the Catholic drive for power. Having written the opinion of the Court espousing the "no aid" view in *Everson v. Board of Education*,<sup>93</sup> Justice Black found himself on the losing side in *Allen*. In dissent, he characterized the Catholic school advocates as "powerful religious propagandists" striving for "complete domination and supremacy of their particular brand of religion."<sup>94</sup> Reviewing the reasons why Catholics and Jews created their own schools in the nineteenth century, Professor McConnell charges that the "bigotry of Justice Black's language is particularly striking in light of its historical context. . . . [It] turn[s] reality on its head."<sup>95</sup>

Throughout the decade of the 1970s, the principal targets for anti-Catholic hostility were their parochial schools. Three years after *Allen*, it was Justice Douglas's turn to engage in ignorant commentary on Catholicism from the bench of the nation's highest court. In *Lemon v. Kurtzman*,<sup>96</sup> which set the criteria for all the parochial aid cases to follow, the Court ruled that public financial assistance to teachers of secular subjects in parochial schools violated the Establishment Clause.<sup>97</sup> Douglas bolstered his view that this form of aid was impermissible by citing one of the most notorious anti-Catholic polemical tracts of recent times.<sup>98</sup>

Toward the end of the decade, Senator Daniel Patrick Moynihan

92. 392 U.S. 236 (1968) (authorizing the loans of secular textbooks to children attending parochial schools).

93. 330 U.S. 1 (1947).

94. 394 U.S. at 251 (Black, J., dissenting). For an astonishingly unflattering acknowledgement of the hostile feelings that Justice Black had towards Roman Catholics generally, see his son's folksy biography, HUGO BLACK, JR., MY FATHER: A REMEMBRANCE (1973).

95. McConnell, *supra* note 32, at 121-22.

96. 403 U.S. 602 (1971).

97. *Id.* at 606-07.

98. *Id.* at 635 n.20 (1971) (Douglas, J., concurring). The book that Justice Douglas cited with approval was LORAINÉ BOETTNER, ROMAN CATHOLICISM (1962). For comment on this tract, see Douglas Laycock, *Civil Rights and Civil Liberties*, 54 CHI.-KENT L. REV. 390, 418-21 (1977). Perhaps the best way to grasp the vicious character of this tract is to compare some of its rhetoric to well known hate tracts circulated by the Ku Klux Klan. As Laycock phrases it, Boettner suggested that "an undue proportion of the gangsters, racketeers, thieves, and juvenile delinquents who roam our big city streets come from the parochial schools." *Id.* at 420. A campaign pamphlet against Al Smith circulated in 1928 suggested that voters repudiate Smith because he was associated with "the vice trust, the gamblers, the red-light and dope-ring vote. . . . [and] the Jew-Jesuit movie gang who want sex films and Sunday shows to coin millions through the corruption of youth." MYERS, *supra* note 49, at 324.

proposed the use of tax credits to provide some relief for parents who incur significant costs in sending their children to church-operated schools. His proposal was met with the charge that Roman Catholic schools are "bastions of white privilege and exclusivity."<sup>99</sup> The description is wildly erroneous. Roman Catholic parochial schools in the inner cities typically serve minority children, often not of the Catholic faith.<sup>100</sup> For example, already by the early 1980s a slightly higher percentage of children attending Catholic schools in California were members of minority groups than were children attending the government's schools in that state.<sup>101</sup>

One may surely reach a conclusion that no public aid should be given to church-operated schools without being anti-Catholic. Catholics themselves are divided over the wisdom of accepting various forms of financial assistance that might, for example, entail an unacceptable risk of governmental interference in the educational mission of the church. But that does not justify misleading and false characterizations of that mission by those who attack it from outside this religious community. In a moment of candor, the Presbyterian Church (U.S.A.) recently acknowledged: "We must take care that our theological and ecclesiastical history of hostility to Roman Catholicism does not unconsciously continue to affect our constitutional and public policy views [about funding for education in church-operated schools]."<sup>102</sup>

99. Daniel Patrick Moynihan, *What the Congress Can Do When the Court Is Wrong*, in PRIVATE SCHOOLS AND THE PUBLIC GOOD: POLICY ALTERNATIVES FOR THE EIGHTIES 79, 81 (Edward McGlynn Gaffney, Jr. ed., 1981).

100. For an empirical description of Catholic schools in several major cities, see JAMES SAMUEL COLEMAN ET AL., *HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED* (1982); see also JAMES G. CIBULKA ET AL., *INNER-CITY PRIVATE ELEMENTARY SCHOOLS: A STUDY* (1982).

101. Dr. Joseph McElligot, a member of the National Advisory Council on the Education of Disadvantaged Children stated that the minority population in Catholic elementary and secondary schools in California is 44%, compared to 41% minority population in public schools. PRIVATE SCHOOLS AND THE PUBLIC GOOD, *supra* note 99, at 65. See also ANDREW M. GREELEY, *CATHOLIC HIGH SCHOOLS AND MINORITY STUDENTS* (1982).

102. The Presbyterian Church (U.S.A.), "*God Alone Is Lord of the Conscience*": *Policy Statement and Recommendations Regarding Religious Liberty Adopted by the 200th General Assembly* (1988), reprinted in 8 J.L. & RELIGION 331, 383 (1990). The Presbyterian and Reformed Publishing Company, which is not an organ of the Presbyterian Church (U.S.A.), published the hate tract by Loraine Boettner. BOETTNER, *supra* note 98. For an example of nineteenth-century polemics between a Presbyterian minister and a Roman Catholic priest, see JOHN HUGHES & JOHN BRECKINRIDGE, *A DISCUSSION OF THE QUESTION, IS THE ROMAN CATHOLIC RELIGION, IN ANY OR ALL ITS PRINCIPLES, INIMICAL TO CIVIL OR RELIGIOUS LIBERTY?. AND OF THE QUESTION, IS THE PRESBYTERIAN RELIGION, IN ANY OR ALL ITS PRINCIPLES, INIMICAL TO CIVIL OR RELIGIOUS LIBERTY?* (1836).

Throughout the decade of the 1980s, the most prominent instance of hostility towards Roman Catholics was the targeting of the leadership of this community in litigation by private parties seeking to use the courts to remove the tax-exempt status of the church because it allegedly violated the restrictions on political speech found in the tax code when it made known its views on abortion.<sup>103</sup> After years of costly litigation, the Supreme Court ruled that the church was at least entitled to challenge the imposition of coercive fines imposed on the church for its refusal to hand over massive amounts of sensitive internal documents to outsiders.<sup>104</sup> On remand, a divided panel of the Second Circuit ruled that the plaintiffs lacked standing and dismissed the suit.<sup>105</sup> The Supreme Court declined to review this judgment,<sup>106</sup> leaving the issue raised by the plaintiffs to be decided later by another court, and perhaps, against a weaker church.

The good news from this protracted attack on the Catholic Church was that the Golden Rule was observed by other religious organizations, including groups that disagreed with the Catholic Church on the merits of the abortion question. Religious organizations that joined an amicus brief in support of the United States Catholic Conference included the American Jewish Congress, James E. Andrews as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.), the Baptist Joint Committee on Public Affairs, the Catholic League for Religious and Civil Rights, the Church of Jesus Christ of Latter-Day Saints, the Lutheran Church-Missouri Synod, The National Association of Evangelicals, the National Council of Churches of Christ in the United States, the Synagogue Council of America, and the Worldwide Church of God. All of these groups joined forces to state that the autonomy and integ-

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103. *In re* United States Catholic Conference, 824 F. 2d 156 (2d Cir. 1987); *Abortion Rights Mobilization, Inc. v. Baker*, 110 F.R.D. 337 (S.D.N.Y. 1986); *Abortion Rights Mobilization, Inc. v. Regan*, 603 F. Supp. 970 (S.D.N.Y. 1985); *Abortion Rights Mobilization, Inc. v. Regan*, 552 F. Supp. 364 (S.D.N.Y. 1982); *Abortion Rights Mobilization, Inc. v. Regan*, 544 F. Supp. 471 (S.D.N.Y. 1982). The United States Catholic Conference is the civil entity for the Roman Catholic Bishops in the United States; the canonical entity is known as the National Conference of Catholic Bishops. Both entities were sued at the outset of the litigation, but were dismissed as defendants. *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 75 (1988). That ruling actually diminished the ability of the church to pursue its remedies until the Supreme Court clarified that a witness has standing to bring an appeal challenging the imposition of punitive sanctions for contempt of court. *Id.* at 76.

104. *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988).

105. 885 F.2d 1020 (2d Cir. 1989).

106. 495 U.S. 918 (1990).

rity of all religious bodies are threatened by allowing private parties hostile to the moral teaching of a target church to seek a court order revoking the exempt status of that religious body.<sup>107</sup>

All religious groups must retain the freedom to engage in public discourse. This freedom has included the historical willingness of religious bodies in this country to exercise a critical voice in the public order on a wide variety of issues, including the abolition of slavery and the struggle for the protection of the civil and political rights of racial minorities and of women.<sup>108</sup> This freedom must continue to enable religious bodies to act as agents for transmitting the operative values of society by formulating and articulating the moral aspects of political questions.<sup>109</sup> Attempts to restrict this freedom to speak and act in the public sphere are not well grounded in the Constitution.<sup>110</sup>

Anti-Catholic bigotry has been described as America's "invisible prejudice" which occasionally becomes visible. It became highly visible on October 3, 1992, when the Irish singer, Sinead O'Connor, sang a Bob Marley song on NBC's *Saturday Night Live*, after which she identified Pope John Paul II as "the real enemy" (of whom or what we were left to guess),<sup>111</sup> and tore a large photo of

107. For a discussion of the ecumenical and interreligious character of the response of religious communities to the *Abortion Rights Mobilization* case, see Edward McGlynn Gaffney, Jr., *The Abortion Rights Mobilization Case: Political Advocacy and Tax Exemption of Churches*, in *THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY* 127 (James E. Wood ed., 1991).

108. See Gaffney, *supra* note 28, at 1166-75.

109. See RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984). As I noted above, the history of religious wars in the past has troubled scholars like William Marshall and Lawrence Solum. See *supra* note 28. Neuhaus is not unmindful of the fact that these wars "once destroyed the basis of civil life" and he states that "nobody who cares about authentic politics should want to take that risk again," but he proposes better speech — not less speech — as the cure to this ill. NEUHAUS, *supra*, at 260; see also MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991) (arguing that the quality of religious discourse relating to political matters improves with broader ecumenical consensus among religious voices); *Review Essays and Book Reviews*, 8 *J.L. & RELIGION* 397 (1990) (providing a comprehensive review of literature exploring the relation between religion and politics in America in the past decade).

110. See Edward McGlynn Gaffney, Jr., *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, 40 *DEPAUL L. REV.* 1 (1990); see also The Presbyterian Church (U.S.A.), *supra* note 102, at 383 (opposing "attempts by government to limit or deny religious participation in public life by statute or regulation, including Internal Revenue Service regulations on the amount or percentage of money used to influence legislation, and prohibition of church intervention in political campaigns").

111. *Saturday Night Live* (NBC television broadcast, Oct. 3, 1992). Ms. O'Connor has subsequently disclosed that she is the victim of child abuse. One can empathize with her plight as a victim of that sort of violence without agreeing that the spiritual leader of the church in which her family members were raised is worthy of the public contempt she manifested.



the Pope to bits before a nationwide television audience.<sup>112</sup>

I offer here only a few less startling examples of the hostility to Roman Catholics in American culture.<sup>113</sup> In 1989, Reverend Timothy Healy, S.J., the former President of Georgetown University, was appointed President of the New York Public Library. Two of the luminaries of American high culture, Gay Talese and Joseph Heller, attacked Father Healy for having insufficient credentials as an intellectual, a secularist, and a civil libertarian.<sup>114</sup> In a rare protest against anti-Catholicism by the liberal media,<sup>115</sup> the *New Republic* editorialized that:

[These attacks] have little to do with Healy's own record, with the position of the Jesuit order, or with the present-day historic transformation of the Catholic Church itself. Rather, they seem to be one of those recurrent instances of Know-Nothing anti-Catholicism, once known, and justifiably so, as the anti-Semitism of the liberals.<sup>116</sup>

112. *Id.* See also Lynette Holloway, *Chronicle*, N.Y. TIMES, Oct. 5, 1992, at B2. NBC immediately issued a statement denying any previous knowledge that O'Connor was going to do what she did, and apologizing to anyone who found O'Connor's act reprehensible. Statement of Curt Block, Vice-President of NBC, to author. A week later, the show's host was actor Joe Pesci, who began the program with the statement, "Sinead O'Connor tore up a picture of the Pope and I thought that was wrong." *Saturday Night Live* (NBC television broadcast, Oct. 10, 1992). He then held up the patched-up photo, to the audience's applause. *Id.* See also Nadine Brozan, *Chronicle*, N.Y. TIMES, Oct. 12, 1992, at B4.

113. For a recent account of new manifestations of an "old bigotry," anti-Catholicism, "befouling American public life," see George Weigel, *The New Anti-Catholicism*, COMMENTARY, June 1992, at 25. Among the episodes mentioned by Weigel is the controversy over NEA funding of an exhibition of paintings about AIDS in which the catalogue of the show described Cardinal O'Connor as a "fat cannibal" and a "creep in black skirts" and referred to St. Patrick's Cathedral as "that house of walking swastikas." *Id.* at 25. The *New York Times* referred to these characterizations as matters of "critical opinion." *Id.*

114. Joseph Heller, *Letters: Questions on Father Healy and Library Persist*, N.Y. TIMES, Mar. 31, 1989, at A34; Gay Talese, *Free Speech Views of New Library Chief Needed*, N.Y. TIMES, Mar. 1, 1989, at A24; Garry Wills, *Letters: Library Will Be Safe With Father Healy*, N.Y. TIMES, Mar. 16, 1989, at A30.

115. For a carefully nuanced study of this phenomenon by renowned scholars using content analysis of four major media outlets (the *New York Times*, the *Washington Post*, *Time*, and *CBS Evening News*) during three five-year periods (1964-1968, 1974-1978, and 1984-1988), see S. ROBERT LICHTER ET AL., *MEDIA COVERAGE OF THE CATHOLIC CHURCH* (1991).

116. *Why Do the Heathen Rage?*, NEW REPUBLIC, May 8, 1989, at 7 (editorial). Peter Viereck, a historian and poet at Mount Holyoke College, coined the catchy aphorism alluded to by *The New Republic*. Like any good aphorism, this one is reported in several versions: (1) "Catholic-baiting is the anti-Semitism of the liberals." Peter Viereck, *Plea by a Protestant: Stop Baiting Catholics* 177 CATHOLIC WORLD 22, 22-24 (1953). (2) "Anti-Catholicism is the anti-Semitism of the intellectuals." Michael Lind, *Archer in the Marrow: the Applewood Cycles*, NAT'L REV., Feb. 5, 1988, at 55 (reviewing PETER VIERECK, *ARCHER IN THE MARROW: THE APPLEWOOD CYCLES OF 1967-1987* (1987)); see also James L. Buckley, *The Catholic Public Servant*, FIRST THINGS, Feb. 1992, at 18, 21. (3) "Anti-Catholicism is the anti-Semitism of the liberals." *Why Do the Heathen Rage?*, *supra*, at 7. See also PETER VIERECK, *CONSERVATISM REVISITED AND THE NEW*

Another recent example of hostility to Roman Catholicism is the recurrent sniping in the media about the position of this church on abortion. Whatever one thinks about abortion, it is one of the most vexing problems of our day. Hence one might expect that the media would accordingly foster intelligent discussion of a variety of perspectives about this matter of urgent public concern.<sup>117</sup> Instead, there are repeated instances of editorials that mischaracterize the debate itself as though it were simply a sectarian issue or that treat with a condescending attitude those Roman Catholics leaders who have raised their voices on this matter. For example, since becoming the Archbishop of New York in 1984, Cardinal John O'Connor has been a vocal critic of the country's complacency with a policy of abortion on demand, a policy that places virtually no significant restrictions on the choice to terminate a pregnancy.<sup>118</sup> For his troubles O'Connor has encountered the stiff opposition of one of the nation's

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CONSERVATISM: WHAT WENT WRONG? 173 (rev. ed. 1962) (noting the pairing of anti-Semitism and anti-Christianity in both brands of totalitarianism, Hitlerism and Stalinism).

117. As *The Williamsburg Charter* states:

The role of religion in American public life is too often devalued or dismissed in public debate, as though the American people's historically vital religious traditions were at best a purely private matter and at worst essentially sectarian and divisive. Such a position betrays a failure of civil respect for the convictions of others. It also underestimates the degree to which the Framers relied on the American people's religious convictions to be what Tocqueville described as "the first of their political institutions." In America, this crucial public role has been played by diverse beliefs, not so much despite disestablishment as because of disestablishment.

THE WILLIAMSBURG CHARTER, *supra* note 33, at 12.

118. In *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), the Supreme Court recently clarified that abortion policy is still governed by *Roe v. Wade*, 410 U.S. 113 (1972). *Roe* appears to allow the government to regulate abortion after viability, presumably because of the legitimate interest in protecting life that can survive outside of a mother's womb. What is often overlooked in the analysis of our current abortion policy, however, is that in *Doe v. Bolton*, 410 U.S. 179 (1972), the companion case to *Roe*, the Court allowed all abortions thought necessary for the "health [of the mother]," a term the Court construed to mean "all factors — physical, emotional, psychological, familial, and the woman's age." *Doe*, 410 U.S. at 192; see also *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 467 (1983); *H.L. v. Matheson*, 450 U.S. 398, 404 (1981); *Colautti v. Franklin*, 439 U.S. 379, 387 (1979); *Beal v. Doe*, 432 U.S. 438, 442 (1977). As Justice White noted in his dissent in *Roe* twenty years ago, the effect of *Roe* and *Doe* taken together is judicial support for a policy of abortion on demand at all stages of a pregnancy, with no regard for the protection of fetal life even after viability. *Roe*, 410 U.S. at 221 (White, J., dissenting). Although the *Casey* opinion could be read as sustaining *Roe*, it has engendered powerful opposition among the most vocal supporters of abortion on demand precisely because the three Justices (O'Connor, Kennedy, and Souter) who issued a separate opinion in *Casey* are not convinced that the government may never impose any reasonable regulation on the termination of a pregnancy. Time will tell whether the "undue burden" formula which they proposed in *Webster v. Reproductive Health Services*, 492 U.S. 490, 530 (O'Connor, J., concurring), will prove workable.

leading newspapers, the *New York Times*.<sup>119</sup> That is, of course, to be expected in a republic where freedom of expression is cherished, and where clerics are emphatically not immune from criticism any more than their secular counterparts. In my view, though, the tone of several editorials and op-ed pieces in the *Times* comes awfully close to the attitude of hostility that I have been trying to illustrate in this Essay. It is illuminating, moreover, that one of the leading editors of the *Times* took the occasion to inform O'Connor shortly after he came to New York that when John F. Kennedy was elected president, "we thought that Catholics understood how things are done, but frankly, Archbishop, since you came to town, we're not sure that you understand how we do things here."<sup>120</sup>

Several editorials in the *Times* have since illustrated the crass "we-they" allocation of who knows what. For example, the *Times* editorialized that if Roman Catholic bishops took pastoral steps to enforce their teaching on abortion, it would tear apart the "truce of toleration" and the "climate of comity between state and church" that the *Times* thinks has existed for two centuries in this country. Although acknowledging that "churches are free to practice their faith and to express themselves on politics" and that a "church's right to discipline its flock is part of American liberty," the *Times* suggested that voters would no longer be able to believe the promise that John Kennedy made to the Protestant clergy in Houston in 1960: "I do not speak for the church and the church does not speak for me."<sup>121</sup> On the contrary, wrote the *Times*:

[M]any non-Catholic Americans may once again be moved to withhold their trust from Catholic candidates who could no longer credibly promise to follow the Kennedy and Cuomo examples. Forced obedience to a religious political agenda could thus prove costly to all: to Catholics who wish to bring their moral outlook to bear on many more subjects than abortion, and to non-Catholics, who benefit when politics is enriched by many viewpoints.

Above all, to force religious discipline on public officials risks destroying the fragile accommodations that Americans of all faiths and no faith have

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119. See, e.g., Arthur Schlesinger, Jr., *O'Connor, Vaughan, Cuomo, Al Smith, J.F.K.*, N.Y. TIMES, Feb. 2, 1990, at A31; *Letters to the Editor*, Feb. 17, 1990, at A26. For a description of O'Connor by one of the reporters at the *New York Times* who has covered him, see ARI L. GOLDMAN, *THE SEARCH FOR GOD AT HARVARD* 119-27 (1990).

120. Conversation with Cardinal John O'Connor, October, 1984.

121. *The Bishop and the Truce of Tolerance*, N.Y. TIMES, Nov. 26, 1989, at D12 (editorial) (quoting Kennedy's speech, which was reprinted in its entirety, along with a transcript of the questions and answers that followed, in N.Y. TIMES, Sept. 13, 1960, at A22). The speech is also reprinted in *CHURCH AND STATE IN AMERICAN HISTORY: THE BURDEN OF RELIGIOUS PLURALISM* 190-92 (John Frederick Wilson & Donald L. Drakemen eds., 1987).

built with the bricks of the Constitution and the mortar of tolerance.<sup>122</sup>

In 1990, Cardinal O'Connor and one of his Auxiliary Bishops, Reverend Austin Vaughan, were openly critical of the public record of Governor Mario Cuomo on the abortion issue. Were these leaders exercising the normal attributes of citizens in a free and open democracy? Not according to the distinguished historian, Arthur Schlesinger, Jr., who wrote in the op-ed page of the *New York Times* that:

[O'Connor and Vaughan were] doing their best to verify the fears long cherished by the No-Nothings [sic] in the 1850s, the Ku Klux Klan in the 1920s, and a succession of anti-Catholic demagogues that the Roman Catholic Church would try to overrule the American democratic process.

They seem to be doing their best to prove the case that Catholic politicians will not be free to act for what a majority regards as the general good.<sup>123</sup>

Perhaps this comment does not qualify Professor Schlesinger for membership in the club of anti-Catholic demagogues of which he speaks, but it is evident that Jr. was oblivious to the observation of his father, Arthur Schlesinger, Sr., to Monsignor John Tracy Ellis, the dean of American Catholic Church historians: "I regard the prejudice against your Church as the deepest bias in the history of the American people."<sup>124</sup>

My effort here is not to indulge in media-bashing. To underscore that point, let me offer two examples where major newspapers defended the Catholic Church against its critics when they have gone beyond the bounds of decency and civility. My first example is the treatment of the brutal intrusion into the sacred rites of the Church that occurred when Act Up, a gay rights organization, passed out condoms at St. Patrick's Cathedral while Cardinal O'Connor was distributing the bread of the Eucharist to communicants at a Sunday Mass on December 10, 1989. The *New York Times* not only reported the episode,<sup>125</sup> it also editorialized against the form of this protest:

There is plenty of room for controversy over church positions on homosexu-

122. *The Bishop and the Truce of Tolerance*, *supra* note 121, at D12. For a discussion of the attitude at the *Times* about liberation theology, see Richard John Neuhaus, *A Question of Simple Honesty*, NAT'L REV., May 23, 1986, at 37.

123. Schlesinger, *supra* note 119, at A31.

124. ELLIS, *supra* note 83, at 151.

125. See Jason DeParle, *111 Held in St. Patrick's AIDS Protest*, N.Y. TIMES, Dec. 11, 1989, at B3.

ality, AIDS and abortion. No one can quarrel with a peaceful demonstration outside St. Patrick's, and John Cardinal O'Connor did not do so. . . . But some of the demonstrators turned honorable dissent into dishonorable disruption. . . . Far from inspiring sympathy, such a violation mainly offers another reason to reject both the offensive protesters and their ideas.<sup>126</sup>

The *Times* did well to editorialize against the Act Up tantrum. Like most angry messages, the message of this group was polyvalent. At one level it bespoke rage at the pain of exclusion suffered by gays and lesbians because of their sexual orientation. It was also intended to be an urgent statement that condoms should be part of a public health policy to combat the spread of the dread disease of AIDS. Whatever the message, however, it could have been communicated less intrusively through leafletting on the public sidewalk outside the cathedral. In fact, that form of communication may have enhanced the probability of greater respect for the message by the listeners. But to enter the sacred space of a church in order to desecrate it by a parody of Holy Communion does not just go beyond the limits of protected free speech activity and invite considerations of trespass. It goes far beyond the bounds of decency, and it tears apart the common fabric of respect for religious liberty that should cover the relationships even among people who contend with one another on public policy matters, whether on religious or secular grounds.

Hardly anyone holds the absolutist view that freedom of speech has no limits whatever. For example, reasonable restrictions on the time, place, and manner of communication are generally thought acceptable.<sup>127</sup> Thus, protesters can be arrested for invading the "sacred" precincts of a court.<sup>128</sup> For that matter, the sacrosanct editorial offices of a newspaper cannot be breached to require the paper

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126. *The Storming of St. Pat's*, N.Y. TIMES, Dec. 12, 1989, at A24 (editorial). Nearly two years later the same group tried to bring its message to a national television audience through a documentary entitled *Stop the Church*. PBS declined to support national distribution of the film because of what it called a "pervasive tone of ridicule." Peter Steinfeld, *Channel 13 to Show Film on AIDS Protest*, N.Y. TIMES, Sept. 13, 1991, at A24. Walter Goodman, the TV critic for the *New York Times*, wrote that the film was a "nonstop diatribe against the Roman Catholic Church and John Cardinal O'Connor." Walter Goodman, *Prime Time Vs. Art of Ridicule*, N.Y. TIMES, Sept. 1, 1991, § 2, at 21.

127. See, e.g., *TRIBE*, *supra* note 46, at 789-94.

128. *United States v. Grace*, 461 U.S. 171, 180 (1983) (allowing a peaceful demonstration on the sidewalk adjacent to the Supreme Court, but not allowing demonstration inside the building). Not even the First Amendment absolutist, Justice Hugo Black, thought much of the rights of civil rights demonstrators who took their protest too close for his Southern comfort to a courthouse. See *Cox v. Louisiana*, 379 U.S. 559, 581-84 (1965).

to offer space to a political enemy, even though that would expand the viewpoints expressed on matters of public concern.<sup>129</sup>

And more than a trespass against property rights was implicated in the Act Up episode at St. Patrick's Cathedral. No one would miss this something extra if neo-Nazis had desecrated a Jewish cemetery by painting swastikas or other contemptuous symbols on the stones marking the last resting place of Holocaust survivors. By the same token, the ability of all people to worship free from disruption is one worthy of protection as a free exercise principle.

Another example of media opposition to anti-Catholic bias occurred a year later. In 1991, shortly after President Bush announced his controversial nomination of Clarence Thomas to serve as an Associate Justice of the Supreme Court, Governor Douglas Wilder of Virginia told reporters that since Thomas had been schooled by nuns, the confirmation process should focus on the question, "How much allegiance is there to the Pope?"<sup>130</sup> The Governor apologized later "if anyone was offended" — and plenty were — by his remark about the Catholic background of Judge Thomas.<sup>131</sup> For the record, it might be noted that Justice Thomas is now an Episcopalian.

If Bush had nominated a prominent Jew to be our ambassador to the United Nations and if Wilder had publicly questioned the fitness of this nominee to serve, on the view that Jews owe allegiance to Israel,<sup>132</sup> newspapers from coast to coast would have rightly demanded Wilder's immediate withdrawal from the presidential race, if not his resignation from public office, for making a disgraceful anti-Semitic remark. Not many papers objected to Wilder's comment about Thomas, but the *Washington Post* editorialized against the Governor's ignorance of the No Religious Test provision of the

129. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (invalidating under the Free Press Clause a statute that granted a political candidate a right to equal space in a newspaper to reply to criticism and attacks on his record).

130. David S. Broder, *Wilder Urges Scrutiny Of Thomas on Abortion; Religion Impels Questioning*, *Governor Says*, WASH. POST, July 3, 1991, at A14; Richard L. Berke, *Judge Thomas Faces Bruising Battle With Liberals Over Stand on Rights*, N.Y. TIMES, July 4, 1991, at A12.

131. Donald P. Baker & David S. Broder, *Wilder in Hot Water; Prelates, Politicians Angered by Words On High Court Nominee's Catholicism*, WASH. POST, July 4, 1991, at C1; B. Drummond Ayres, *Virginia Leader Apologizes for Remark on Inquiry*, N.Y. TIMES, July 8, 1991, at A6. For a thoughtful reflection both on the limits of federal judicial power and on the ways in which religious convictions might properly influence the process of judging, see Buckley, *supra* note 116, at 18.

132. I note in passing that Arthur Goldberg served with great distinction as our Ambassador to the United Nations during the troubled times of the hostilities of 1967.

Constitution.<sup>133</sup> According to Al Smith, who was himself a target of religious bigotry when he ran for president as a Democrat in 1928, this provision "represents the most vital principle that was ever given to a people."<sup>134</sup>

133. Specifically, the *Washington Post* stated:

[I]t is important to understand exactly what was wrong about [Governor Wilder's] remarks. It is the implication that American Catholics, unlike religious people of other persuasions, are some kind of public-policy robots marching in lock-step to the commands of a foreign leader. Setting aside the records of some of the more illustrious Catholics who have held high office in this country — men and women such as John F. Kennedy, William Brennan and assorted members of Congress as dissimilar as Barbara Mikulski and Henry Hyde — the governor raises the old bugaboo that Rome controls them all.

Senators need not concern themselves about matters of theology, dogma or papal pronouncements. Their responsibility is to assess the nominee's own views concerning legal, not religious, matters. Discuss, if they will, his thoughts on the right to privacy, the constitutional argument over prayer at public ceremonies and the authority of Congress to authorize chaplains in the military. So long as senators are not seeking a pledge about cases that may come before the court, such general questions touching on law and religion can be asked of any nominee.

*In the Pocket of the Pope?*, WASH. POST, July 6, 1991, at A18 (editorial).

134. This quotation is from a letter from Al Smith to the author's grandfather, John Peter Gaffney, dated July 2, 1928. In the previous year, a New York lawyer openly questioned whether Al Smith or any other Roman Catholic was fit to serve as president on the ground that the loyalty of American Catholics as well as their devotion to the Constitution are suspect. Charles C. Smith, *An Open Letter to the Honorable Alfred E. Smith: A Question That Needs an Answer*, 139 THE ATLANTIC MONTHLY 540 (1927). Smith, who had served four terms as Governor of New York, published a spirited reply in the next issue of the journal. Alfred E. Smith, *Catholic and Patriot: Governor Smith Replies*, 139 THE ATLANTIC MONTHLY 721 (1927). Smith concluded his reply with a summary of his creed as an American Catholic:

I believe in absolute freedom of conscience for all men and in equality of all churches, all sects, and all beliefs before the law as a matter of right and not as a matter of favor . . . . And I believe in the common brotherhood of men under the common fatherhood of God. In this spirit I join with fellow Americans of all creeds in a fervent prayer that never again in this land will any public servant be challenged because of the faith in which he has tried to walk humbly with his God.

*Id.* at 728. This essay is reprinted in ALFRED E. SMITH, PROGRESSIVE DEMOCRACY (1928) and in 14 THE ANNALS OF AMERICA 536 (1968). The attack on Smith's religion in the campaign of 1928 by the Ku Klux Klan and other bigots is discussed in MYERS, *supra* note 49, at 258. Smith lost the election of 1928, of course, and he did not get his wish that public servants would never again be challenged because of their religious faith. For example, after World War II, one of the leading figures in the organization, known as Protestants and Other Americans United for Separation of Church and State, wrote a frequently cited attack on the growing influence of American Catholics in public life. PAUL BLANSHARD, AMERICAN FREEDOM AND CATHOLIC POWER (1949). For a reply to Blanshard's volume, see JAMES M. O'NEILL, CATHOLICISM AND AMERICAN FREEDOM (1952).

In 1960, a leading Episcopal Bishop who had been a law professor before his ordination acknowledged that the constitutional prohibition on religious tests meant that "No voter should vote against any candidate simply on the ground of his religion." JAMES A. PIKE, A ROMAN CATHOLIC IN THE WHITE HOUSE 130 (1960). Bishop Pike, however, added that the tradition of equality for all faiths is so "well established" among Protestants, Jews, and secularists that no question need be raised of them, but that this issue becomes "complicated only in the case of a Roman Catholic candidate." *Id.* at 131. Pike also raised "the question of assessing to what degree a Roman Catho-

The sad examples of coercion in matters of religious commitment and hostility to members of religious minorities that I have recounted here strike at the very core of religious freedom. Because these attitudes persist, even in subtle manifestations, they merit firm censure, not collective amnesia.<sup>135</sup> The seamy side of American history — our violent outbursts of hatred toward religious minorities — turns out to be important in understanding the official hostility towards religion that Justice Goldberg warned of in *School District v. Schempp*.<sup>136</sup>

## II. OFFICIAL HOSTILITY TO RELIGION

The second confusion of which *The Williamsburg Charter* spoke was official governmental hostility toward religion. Though less dramatic than overt hostility, complete indifference to religion on the part of government is just as lethal to religious freedom, especially in the affirmative welfare state. To state it more precisely, mere formal neutrality toward religion turns out to be another form of hostility.<sup>137</sup> To quote *The Williamsburg Charter* again: “[T]he chief menace to religious liberty today is the expanding power of government control over personal behavior and the institutions of society, when the government acts not so much in deliberate hostility to, but in reckless disregard of, communal belief and personal conscience.”<sup>138</sup>

A watershed in official hostility or indifference to religion was reached when the Supreme Court dramatically reduced the protec-

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lic President would be subject to various types of informal ecclesiastical pressures, and the degree to which a Roman Catholic President would really be able to enter into the occasions reflecting our pluralistic society . . . .” *Id.* at 132. With friends like Pike, John Fitzgerald Kennedy could have used a few enemies. He addressed the “religious issue” both in the West Virginia primary, and in a famous statement to Baptist clergy in Dallas, where he promised to resign the presidency “if the time should ever come . . . when my office would require me to either violate my conscience, or violate the national interest . . . . [I]f this election is decided on the basis that 40,000,000 Americans lost their chance of being President on the day they were baptized, then it is the whole nation that will be the losers in the eyes of the Catholics and non-Catholics throughout the world, in the eyes of history, and in the eyes of our own people.” Kennedy’s statement, along with the questions and answers that followed, were published in N.Y. TIMES, Sept. 13, 1960, at A22.

135. See KEVIN R. LONG, *ANTI-CATHOLICISM IN THE 1980’s* (1988); MICHAEL SCHWARTZ, *THE PERSISTENT PREJUDICE: ANTI-CATHOLICISM IN AMERICA* (1984).

136. 374 U.S. 203 (1963).

137. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

138. THE WILLIAMSBURG CHARTER, *supra* note 33, at 9.



tion of the Free Exercise Clause in *Employment Division v. Smith*.<sup>139</sup> Several commentators have noted egregious flaws in the Court's opinion.<sup>140</sup> I will not repeat their criticisms here but will confine my comment to the way in which *Smith* acted "not so much in deliberate hostility to, but in reckless disregard of, communal belief and personal conscience."<sup>141</sup> Justice Scalia, the author of *Smith*, is well aware of the danger to liberty posed by omnipresent regulation in the modern welfare state. Indeed, he was the darling of deregulation when he was a scholar in residence at the American Enterprise Institute. He knows from the inside the intricacies of modern administrative law, which he taught as a professor of law at the University of Chicago. For this very reason it is astonishing that he would be so impervious to the danger to religious liberty posed by the demands of the modern nation-state. Government at all levels is now far more intrusive than it was at the time of the founding. As Donald Giannella noted with considerable understatement, "The style and scope of twentieth century government has led to its involvement with ends and values of varying importance."<sup>142</sup> In the days of the watchman state, there was little need for religious exemption; in the days of the regulatory state, there is every need. To regulate religion on the same basis as other activities is to brook deep and constant intermeddling by the state in matters of religion.

Under the doctrine that held sway before *Smith*, the Free Exercise Clause required that the government not enforce a law or policy that burdened the exercise of a sincere religious belief unless it was the least restrictive means of attaining a particularly important secular objective.<sup>143</sup> Even under the "compelling interest" test, however, government lawyers were not having a very hard time persuad-

139. 494 U.S. 872 (1990).

140. See, e.g., James D. Gordon, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990). For a defense of the *Smith* decision, see William P. Marshall, *Correspondence: Exchange on the First Amendment*, 57 U. CHI. L. REV. 118, 122 (1990) and Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990).

141. THE WILLIAMSBURG CHARTER, *supra* note 33, at 9.

142. Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1388 (1967); see also McConnell, *supra* note 64, at 23 (arguing for greater vigilance against encroachment of liberty when government programs are more encompassing).

143. *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).

ing courts that their little slice of the bureaucracy was vital to the survival of the Republic. Michael McConnell has deftly summarized the holdings of the major free exercise decisions of the 1970s and 1980s:

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.<sup>144</sup>

After *Smith*, government lawyers do not even have to bother showing up in court with any kind of a serious reason for overriding a religious claim pressed against a facially neutral governmental demand. Lower court cases since *Smith* demonstrate that local governments often have little or no respect for sincere religious convictions at odds with the sensibilities or preferences of the majority, and that an antidiscrimination principle is not sufficient to shield the exercise of religion from the intolerance of majorities and the inflexibility of bureaucrats. Let me offer a few examples of cases that should not have passed the straight face test, let alone any kind of rigorous test that required a showing of a serious governmental interest overriding a claim of exemption from a generally applicable norm.

In *St. Agnes Hospital v. Riddick*,<sup>145</sup> a district court found a compelling interest in requiring a religious hospital to teach all residents how to perform abortions, irrespective of whether this governmental mandate would create a crisis of conscience either for the hospital or for at least some of its personnel.<sup>146</sup> The lower court was apparently unaware of the Supreme Court's diminution of the compelling interest requirement in *Smith*. What is most striking about the case is that even on 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.<sup>147</sup>

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

145. 748 F. Supp. 319 (D. Md. 1990).

146. *Id.* at 329.

147. See *Doe v. Bolton*, 410 U.S. 179, 184-205 (1973) (upholding a conscience clause protect-

In a little publicized case, the city of New York recently invoked handicap access regulations to close down a shelter for the homeless operated by Mother Teresa's religious order, the Missionaries of Charity.<sup>148</sup> The shelter was on the second floor of a walk-up. The nuns offered to carry any handicapped they encountered upstairs, but the City would brook no exception to its neutral, generally enforceable rules requiring an elevator in a homeless shelter.<sup>149</sup> 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 *Smith* analysis, the State did not need any reason; even a frivolous "generally applicable" rule was enough to shut down a religious mission. The bureaucracy won, while the nuns and the homeless lost.

In *Montgomery v. County of Clinton*,<sup>150</sup> a generally applicable, facially neutral law requiring autopsies was applied to a Conservative Jew who had died in an auto accident.<sup>151</sup> Under Jewish law, the defilement of the body is a sacrilege, and burial must take place at least before sundown on the day after the death.<sup>152</sup> Since the man had died in an auto accident, that should have satisfied whatever interest the government might have in ascertaining the cause of death of its citizens. Similarly, in *You Vang Yang v. Sturner*,<sup>153</sup> a district court, "with great regret" dismissed on the basis of *Smith* its earlier determination that the government was required to accommodate the religious objection of Vietnamese Hmong to autopsies on the ground that the body of the deceased must be revered without mutilation.<sup>154</sup> The governmental interest in an autopsy in this case was slight; Mr. Yang had died in his sleep without any suggestion of foul play, consumption of unlawful drugs, or any evidence relating to a matter of public health.<sup>155</sup> In both cases, a mechanical approach to "generally applicable" norms was allowed to trump a sincerely held religious tenet, in a manner that was man-

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ing doctors and nurses who refuse to participate in abortions).

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

149. *Id.*

150. 743 F. Supp. 1253 (W.D. Mich. 1990).

151. *Id.* at 1257-58.

152. *Id.* at 1258.

153. 750 F. Supp. 558 (D.R.I. 1990).

154. *Id.*

155. 728 F. Supp. 845, 846, *opinion withdrawn by* 750 F. Supp. 558 (D.R.I. 1990).

ifestly not the least restrictive alternative means of effectuating the government's interests.

After becoming aware that they no longer have a constitutional obligation to accommodate minority religious convictions, governmental agencies have typically pursued the bureaucratic imperative without regard to contrary religious interests, belying the promise in *Smith* that the political branches of government can safely be trusted to respect the value of protecting the first of our civil liberties.<sup>156</sup> Even a well-intentioned legislature may frequently be unaware of the impact of its laws on unfamiliar faiths, and the press of business in the legislatures makes particularized legislative remedies at best an uncertain source of protection.

At the local level, zoning laws have been invoked both to prohibit a church from beginning its ministry at all and even to regulate the number of persons to whom a church may minister.<sup>157</sup> Zero-population growth may be desirable in a particular local community, but the application of this policy to a church's spread of the gospel is a clear example of governmental overreaching.

At the federal level, one agency even construed *Smith* to allow — or worse yet, to require — the revocation of a religious exemption from the requirement of wearing hard hats on construction sites.<sup>158</sup> This administrative decision — temporarily lifted under congressional pressure — exemplifies the bureaucratic impulse to enforce all laws to the limit of their logic, without regard for their impact on religious minorities.

This bureaucratic tendency has even led officials in the Justice Department to extend the reach of *Smith* to “generally applicable” norms of oppressive foreign regimes. In its training manual dealing with asylum for refugees claiming a well-founded fear of persecution, the Immigration and Naturalization Service characterizes *Smith* as supporting an “[a]lien’s obligation to obey general law, notwithstanding religious objection.”<sup>159</sup> The “tempest-tossed yearning to breathe free” may evidently be denied asylum if a government attorney couches potential emigres’ experiences of religious

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156. See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

157. See *Bethel Evangelical Lutheran Church v. Village of Morton*, 559 N.E.2d 533, (Ill. App. Ct. 1990); see also R. Gustav Niebuhr, *Here Is The Church*, WALL ST. J., Nov. 20, 1991, at A1.

158. OSHA Instruction STD 1-6.3 (Feb 4, 1975), *revoked by*, OSHA Notice CPL 2 (Nov. 5, 1990), revocation suspended pending administrative review (1991).

159. DEPARTMENT OF JUSTICE IMMIGRATION & NATURALIZATION SERV., BASIC LAW MANUAL ASYLUM: A TRAINING MANUAL FOR IMMIGRATION AND NATURALIZATION OFFICERS 37 (1991).

persecution abroad in facially neutral terms. The Supreme Court surely did not have in mind complicated asylum claims when it decided *Smith*, but that case is now being invoked to assert the tautological, statist claim that a foreign government may "seek to punish conduct it may lawfully forbid."<sup>160</sup>

The problem of official hostility or indifference to religion obviously antedates *Smith*. According to Michael McConnell, for example, the real problem with the Religion Clause jurisprudence of the Warren and the Burger Courts was not the inconsistencies that many have noted,<sup>161</sup> but "the Court's tendency to press relentlessly in the direction of a more secular society."<sup>162</sup> For McConnell, to make the Religion Clause an engine of increased secularization is the most dangerous form of hostility toward religion in the recent case law:

The Court's opinions seemed to view religion as an unreasoned, aggressive, exclusionary, and divisive force that must be confined to the private sphere. When religions stuck to the private functions of "spiritual comfort, guidance, and inspiration," the Court extended the protection of the Constitution. But the Court was ever conscious that religion "can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions." The Court's more important mission was to protect democratic society from religion.<sup>163</sup>

With his customary acuity, McConnell has located the shift in Religion Clause jurisprudence in the Rehnquist Court as "part of a general jurisprudential shift in favor of greater judicial restraint."<sup>164</sup> Though generally in sympathy with this view, McConnell notes:

[J]udicial restraint, for its own sake, is not a faithful mode of interpreting the Religion Clauses. There is a crucial difference between the discovery of "rights" not expressly or implicitly protected by the Constitution, where the dangers of judicial legislation and the need for judicial restraint are the

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160. *Id.*; see also Frederick Mark Gedicks, *Religious Conservatives Misjudged the Court*, CHRISTIAN SCI. MONITOR, July 18, 1991, at 19 (characterizing the Court as statist rather than as conservative).

161. See McConnell, *supra* note 32, at 117-20; see also LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 121-64 (1986); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Antonin Scalia, *On Making It Look Easy by Doing It Wrong: A Critical View of the Justice Department, in PRIVATE SCHOOLS AND THE PUBLIC GOOD*, *supra* note 99, at 173.

162. McConnell, *supra* note 32, at 120.

163. *Id.* (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 382 (1985)); see Laycock, *supra* note 137, at 1007-10; see also Richard Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19 (1992) (arguing that the Court is not influenced by the privatization hypothesis).

164. McConnell, *supra* note 32, at 136.

greatest, and the enforcement of rights firmly based on the text and tradition of the Constitution.<sup>165</sup>

It is entirely possible, then, that we may get from the Rehnquist Court a more coherent, but far less protective interpretation of the Religion Clause of the First Amendment, one, in short, that will be increasingly hostile or indifferent toward religion.

### III. HOSTILITY TO RELIGION IN THE TUG-OF-WAR THEORY OF THE RELIGION CLAUSE

I have suggested in Part I that American history is replete with examples of subtle as well as overt hostility to religion. I have illustrated this theme with respect to two religious communities in America, Muslims and Roman Catholics, though the illustration could as easily have been taken from the history of Jews, Mormons, Jehovah's Witnesses, Fundamentalists, or other religious minorities in America. In Part II, I have suggested that this culture or history of hostility or indifference to religion has influenced the course of the law relating to religious freedom, with the result that in *Employment Division v. Smith*<sup>166</sup> and its progeny in the lower courts, the protection of religious freedom has been significantly diminished. I now wish to suggest that hostility toward religion is at least implicit in the general misunderstanding about the relationship between the two provisions of the Religion Clause of the First Amendment.

*The Williamsburg Charter* speaks of "the First Amendment Religious Liberty clauses, whose mutually reinforcing provisions act as a double guarantee of religious liberty."<sup>167</sup> Together the two parts of the Religion Clause form a strong bulwark against suppression of religious liberty. The prevailing view, however, is that the two provisions are in deep tension with one another, and if carried to a logical extreme, would tend to clash.<sup>168</sup>

This bifurcation of the two parts of the Religion Clause has led to problems both in theory and practice. An example of the theoretical confusion is the conflict the Court built into the standards it laid

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165. *Id.*; see also McConnell, *supra* note 140, at 1149 ("[T]he Free Exercise Clause, properly understood, does not pose the problem of subjective judicial restraint so feared by the majority in *Smith*.").

166. 494 U.S. 872 (1990).

167. THE WILLIAMSBURG CHARTER, *supra* note 33, at 6.

168. See *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

down in the *Lemon* case for determining a violation of the No-Establishment Clause.<sup>169</sup> If taken seriously, these criteria *prohibited* what the Free Exercise Clause was thought to *require*, at least before the *Smith* case. And if that result made little sense as a matter of logic or coherent constitutional theory, the theory became worse in *Smith*, where 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.

If my metaphor seems excessive, 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."<sup>170</sup> Taking this metaphor to the limit, Chief Justice Rehnquist has described a narrow channel that the Court must steer between a Scylla and a Charybdis.<sup>171</sup> 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.<sup>172</sup> It is almost 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.

Fine minds have attempted to find a rational solution to the purported conflict between the two clauses.<sup>173</sup> Others, however, have insisted that the very attempt to pit one clause against the other is itself a subtle manifestation, however unintentional, of hostility toward religion. Michael Paulsen, for example, has powerfully opposed a dichotomous view of the two provisions of the Religion

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169. See *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

170. *Walz*, 397 U.S. at 668-69.

171. *Thomas v. Review Bd.*, 450 U.S. 707, 721 (1985) (Rehnquist, J., dissenting); see also *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 28 (Scalia, J., dissenting) (referring to Justice Rehnquist's Scylla and Charybdis analogy).

172. 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.

173. See, e.g., Choper, *supra* note 161.

Clause implicated in the "grand tug-of-war" metaphor.<sup>174</sup> This view, which posits a schizophrenia within the Religion Clause, is about as plausible as believing that the Free Press Clause was both intended to foster greater dissemination of opinions and to repress any thought the government finds offensive.

Richard John Neuhaus has taken the argument a step further, suggesting that the current incoherence of Religion Clause jurisprudence is a necessary corollary of the commonplace construction of the Religion Clause of the First Amendment as containing two provisions that are mutually opposed:

The conventional wisdom is that there are two religion clauses that must somehow be "balanced," one against the 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.<sup>175</sup>

Neuhaus is not downplaying either the historical or the contemporary significance of the prohibition against an established religion. I read him simply to be reminding us, as *The Williamsburg Charter* did, that the reason for the prohibition of an established religion — both at the time of the framing and now — is to promote religious liberty. Nonestablishment of religion is "instrumental" in this sense, but the term "instrumental" is not a term of derision; it is language borrowed from Aristotle to indicate the channel through which the goal of religious liberty is attained in our society. Perhaps the best way to correct Neuhaus is not to deny the truth of his point about instrumentality, but to emphasize in addition that both parts of the

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174. Michael A. Paulsen, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 324 n.66 (1986).

175. Richard John Neuhaus, *Contending for the Future: Overcoming the Pfefferian Inversion*, 8 J.L. & RELIGION 115, 115-116 (1990) [hereinafter Neuhaus, *Contending for the Future*]; see also Mary Ann Glendon & Paul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991) (treating both provisions of the Religion Clause holistically as ways of serving religious liberty and arguing that this approach would eliminate artificial distinctions between establishment and free exercise); Richard John Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620, 627 (1992) ("[T]here is no conflict, no tension, no required 'balancing' between free exercise and establishment. There are not two religion clauses. There is but one Religion Clause.").



Religion Clause are interrelated terminal values.

Thus, Neuhaus is correct when he argues against the treatment of the no-establishment value in isolation. The consequence of this isolation, he suggests, is that:

In decision after decision, non-establishment has been given practical priority, with the topsy-turvy result that the end (free exercise of religion) has been subordinated to the means (non-establishment of religion). In legal thinking this has gone so far that Laurence Tribe can write in his much respected treatise on constitutional law that there is a "zone which the free exercise clause carves out of the establishment clause for permissible accommodation of religious interests. This carved-out area might be characterized as the zone of permissible accommodation." There we have the inversion perfectly and succinctly stated. Professor Tribe allows that, within carefully prescribed limits, the means (non-establishment) might permissibly accommodate the end (free exercise). This way of thinking is hardly original with Professor Tribe. Indeed it is entrenched in the conventional wisdom and in court decisions of the last several decades. Nonetheless, had we not been habituated to it, such an inverted construction of the religion clause would be greeted with astonished incredulity.<sup>176</sup>

It is not my view that Neuhaus's nemesis, Leo Pfeffer, the most prominent advocate of an absolute separationist perspective on the Establishment Clause, is in any real sense hostile to religion. On the contrary, Pfeffer is a devout Jew who is convinced that religion will thrive — even that it can only thrive — when it does not enjoy the benefit of governmental subsidies.<sup>177</sup> In fairness to Pfeffer, moreover, it should be noted that he welcomed the Supreme Court's decision in *Wisconsin v. Yoder*<sup>178</sup> in an article entitled *The Supremacy of Free Exercise*.<sup>179</sup> And Leo Pfeffer joined his old adversary on Establishment Clause matters, William Bentley Ball, in roundly excoriating the Court for its decision in the *Smith* case.<sup>180</sup> Perhaps all that can be said, then, is that the Supreme Court's continued focus on the Establishment Clause, successfully led by Pfeffer,<sup>181</sup> had

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176. Neuhaus, *Contending for the Future*, *supra* note 175, at 116-17 (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 823 (1978)). In the second edition of his treatise, Professor Tribe expressly states that "different results are arguably mandated by the two religion clauses" and purports to offer help to "identify the zone in which the free exercise clause dominates the intersection, permitting the accommodation of religious interests." TRIBE, *supra* note 46, at 1169.

177. See Leo Pfeffer, *An Autobiographical Sketch*, in *RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER* 487-533 (James E. Wood ed., 1985).

178. 406 U.S. 205 (1972).

179. Leo Pfeffer, *The Supremacy of Free Exercise*, 61 *GEO. L.J.* 1115 (1973).

180. See *Petition for Rehearing, Employment Div. v. Smith*, 496 U.S. 913 (1990).

181. Samuel Krislov, *Alternatives to Separation of Church and State in Countries Outside the*

brought us to a state of the law in which the free exercise of religion has — to say the very least of *Smith* and its progeny — become undervalued and underprotected by the judiciary. Long before Neuhaus and others began writing about the First Amendment in this vein, moreover, Professor Paul Kauper had argued that “[a]ny interpretation of [the Establishment Clause] and the constitutional values it serves must also take into account the free exercise clause and the values it serves.”<sup>182</sup>

#### CONCLUSION: ON SAYING NO TO CAESAR

I conclude not with a grand theory, but with an autobiographical note. Many of my fellow religious believers and I take our spiritual nurture from peacemakers like Francis of Assisi, Teresa of Calcutta, and Dorothy Day of the Bowery. In this respect, we are like the Mennonites, who took a radical stand in opposition to violence at the time of the Reformation, and who believe that being in trouble with the State is one of the marks or sure signs of the church’s authenticity.<sup>183</sup>

Although I take my stand generally against the necessity of violence to resolve disputes, this conviction does not make me an easy mark for confusing the two orders or realms of church and state, or for collapsing the one into the other. In fact, it is precisely because I prize the freedom of the church to announce the Gospel that I must of necessity place some limits on the power of the government to lay its general commands upon all.

For these reasons, I come in the end to a conclusion that some might find paradoxical. As a religious believer knowing well the difference between the commands of God and those of human powers, I expect all governments — ours included — to be hostile at some point to the demands of biblical religion. Yet as a civil libertarian in the Madisonian tradition, I am deeply opposed to the government’s indifference and hostility to religion and to religious freedom, for this hostility to the first and most fragile of our civil liberties is dangerous to the whole structure of all of our civil liberties.

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*United States, in RELIGION AND THE STATE, supra note 177, at 421.*

182. PAUL G. KAUPER, *RELIGION AND THE CONSTITUTION* 79 (1964).

183. *See, e.g., SPIRITUAL AND ANABAPTIST WRITERS: DOCUMENTS ILLUSTRATIVE OF THE RADICAL REFORMATION* (George Huntston Williams & Juan de Valdes eds., 1977); JAMES M. STAYER, *ANABAPTISTS AND THE SWORD* (1964); JOHN HOWARD YODER, *THE POLITICS OF JESUS: VICIT AGNUS NOSTER* (1972).

To conclude in the words of *The Williamsburg Charter*:

The right to freedom of conscience . . . is the foundation of, and is integrally related to, all other rights and freedoms secured by the Constitution. 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.<sup>184</sup>

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184. THE WILLIAMSBURG CHARTER. *supra* note 33, at 8.