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THE CONSTITUTIONAL RHETORIC OF RELIGION

Marci A. Hamilton*

The message of postmodernism is that we should carefully attend to the language that we use. We should not expect the *meaning* of our words to always accord with our intentions or to remain static.¹ We are likely to be surprised by language's subtle and unintended intonations. This could not be more true for the discourse in the battle over the standard to be applied to free exercises cases. The language of the standard that appears to be good for religion—the Religious Freedom Restoration Act (RFRA)²—sends the message that religion is weak and needy, while the standard that supposedly marks the end of religious liberty—the *Smith* standard³—sketches a more accurate and vital image of religion. I will turn first to a deconstruction of our discourse of religion and then to the practical and doctrinal ramifications to be taken from it.

I. THE DISCOURSE OF RELIGION IN LEGAL TEXTS

The common wisdom is that religion was necessarily better off under the super-strict scrutiny test employed in the now-invalidated RFRA. Under RFRA, if religious conduct was substantially burdened by any law, the government or government actor was forced to prove that its interest was "compelling" and that its means were the "least restrictive."⁴ One could not devise a more exacting constitutional test. The common wisdom says that the compelling interest test and the least restrictive means test are good for religion and good for liberty.

The common wisdom says the *opposite* about the standard announced by the Court in *Smith*.⁵ In that case, the Court stated that the Constitution does not require a government to accommodate incidental burdens on religious conduct resulting from neutral, generally applicable laws.⁶ In other words, a govern-

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1. See STANLEY FISH, *DOING WHAT COMES NATURALLY* (1989); JACQUES DERRIDA, *DISSEMINATION* (Barbara Johnson trans., 1981); JACQUES DERRIDA, *MARGINS OF PHILOSOPHY* (Alan Bass trans., 1982); JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri C. Spivak trans., 1976); JACQUES DERRIDA, *WRITING AND DIFFERENCE* (Alan Bass trans., 1978).

2. Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (1994), *invalidated by* *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

3. See *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990).

4. See 42 U.S.C. § 2000bb-1(b)(1), (b)(2) (1994).

5. See *Smith*, 494 U.S. at 886 ("[W]hat [this standard] would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.").

6. See *id.* at 888-89.

ment must "only" prove that its law is neutral and generally applicable to pass muster. By contrast, when laws target religion or any particular religion for disfavored treatment, traditional strict scrutiny kicks in.⁷ The common wisdom holds this to be a disaster for religious liberty.⁸

The rhetoric of the two tests, however, deserves more careful scrutiny. Underneath the messages about the outcome of cases rests unexamined presuppositions about religion, its power, and its role in society. Before turning to the language itself, it is important to place the discourse in historical context. The following five historical events are of some importance in identifying what we mean when we speak today about religion in the political and legal arenas.

1. The publication of Stephen Carter's *The Culture of Disbelief*.⁹ In that book, Professor Carter makes the argument that religion has been "trivialized" in American society. He points to the secularization of popular and political culture and argues for a revitalization of religion in the public sphere.¹⁰ Undoubtedly, his book hit chords in American society. President Clinton was photographed holding the book aloft and has praised it more than once for the press.¹¹ The book's most apparent impact was that it persuaded politicians around the country that they should be more solicitous of religion. That has resulted in a growing avalanche of religious liberty lawmaking.¹²

2. Roughly and ironically at the same time, the Christian Coalition, the right-leaning evangelicals, came into political power in this country.

7. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993); *Smith*, 494 U.S. at 878-79.

8. See Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1114-16 (1990); see also *Lukumi Babalu Aye*, 508 U.S. at 559-77 (Souter J., concurring). But see William P. Marshall, *In Defense of Smith & Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

9. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993).

10. See *id.* at 55 ("[A]ll of these efforts to limit the conversation to premises held in common would exclude religion from the mix.").

11. See E.J. DIONNE, JR., *THEY ONLY LOOK DEAD: WHY PROGRESSIVES WILL DOMINATE THE NEXT POLITICAL ERA* 164 (1996).

12. See, e.g., *Religious Freedom Restoration Act*, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994); *The Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* (1998) (visited Apr. 13, 1998) <<http://w3.trib.com/FACT/1st.guideline.rel.work.html>>; *Memorandum on Religious Expression in the Public Schools* (1995) (visited Apr. 13, 1998) <<http://w3.trib.com/FACT/1st.pres.rel.html>>; H.R. 3588, 105th Cong. (1998); R.I. Gen. Laws. § 42-80.1 (West 1997); Ass. Bill No. 1617 (Cal. 1997) (amended on Mar. 19, 1998); S. 1591, 90th Gen. Assembly (Ill. 1998); H.S. 167 (La. 1998); H.S. J. Res. 13 (Md. 1998) (withdrawn); Ass. Bill No. 903, 208th Leg. (N.J. 1998); S. 5673, 220 Leg. (N.Y. 1998).

3. Before the *Culture of Disbelief* and continuing to now, the American mainstream Protestant churches have found themselves in an alarming decline at a time when Pentecostal and evangelical churches are booming.¹³ The mainstream churches are losing members at an astonishing rate and Protestant hierarchies are losing credibility with their members. As an example, contributions from Protestant members to their national organizations are down, though giving to the local parish has remained demonstrably stronger. This signals that there is an emerging problem in the hierarchies of the Protestant churches and a concomitant gulf between believers and the hierarchical leadership.

4. At the same time that the mainstream Protestant churches have been experiencing difficulties, Congress raced to support RFRA *as though* the representatives of organized religion who lobbied for RFRA necessarily brought with them thousands if not millions of votes. An impressive array of organized religions banded together and chose a name that is not altogether surprising in light of the Christian Coalition's success. They named themselves the Coalition for the Free Exercise of Religion, and lobbied Congress to pass RFRA for the good of religion.¹⁴ A virtually unanimous Congress passed the law.¹⁵ The law was then struck down in *City of Boerne v. Flores*,¹⁶ and we have been treated ever since to dire warnings for religious liberty from every corner of the religious community. I am told that the Coalition now has all 50 states in its sights to enact mini-RFRA's so that religion will be able to survive.

5. Finally, stretching back in history, the pre-Reformation Catholic Church was castigated by reformers for the abuse of its essentially monopolistic power, for its unresponsiveness to its members and for the profligate actions of its clergy. The foundations of the Protestant churches squarely rest on a belief that the church polity is capable of error and that churches should be both responsible and accountable to their members. The Framers, and particularly, James Madison, were acutely aware that religious sects can act like factions and crafted the Constitution to channel religion's force in a constructive manner and to protect the government from its overwhelming power.¹⁷ This last fact I raised because its essential truth seems to have been forgotten in the coming together of the discourse over the *Culture of Disbelief* and RFRA.

13. See Marci A. Hamilton, *Religion's Reach*, THE CHRISTIAN CENTURY, July 16-23, 1997, at 644.

14. See Brief *Amicus Curiae* of the Coalition for the Free Exercise of Religion in support of Respondents, *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997) (No. 95-2074).

15. See 139 Cong. Rec. S14461, S14471 (daily ed. Oct. 27, 1993) (97-3).

16. 117 S. Ct. 2157 (1997).

17. See Marci A. Hamilton, *The Constitution's Pragmatic Balance of Power Between Church and State*, NEXUS: A JOURNAL OF OPINION, Fall 1997, at 33.

I have juxtaposed these historical events to make the point that in our society religion sometimes looks quite powerful politically, and sometimes it is depicted as less powerful. We are told that it is trivialized but we know that it was a monolith of power as RFRA was drafted, lobbied for, and litigated in the lower courts.¹⁸ The extraordinarily effective political pressure they exerted following the *Smith* decision should make one pause before one accedes to the marginalization or trivialization thesis.

Religion is one of the most authoritative structures of human existence and holds great potential power to effect good and to effect bad.

In the debate regarding the Free Exercise Clause, there is an unacknowledged split between two disparate ways of viewing religion. One side (the side purportedly on religion's and liberty's side) treats religion as weak, while the other (the one purportedly on government's side) treats religion as strong. RFRA was supposed to be the better standard for religion, and *Smith* the worse. The subtext was that the former was good for liberty and the latter was not. The rhetoric of the competing standards, however, sends a different message. The rhetoric of RFRA is not in religion's interest because it depicts religion as a weak servant. Nor is it in society's interest because it paints religion as a necessarily weak child in the political system, which is not true. The RFRA standard itself marginalizes religion.

In contemporary discussions regarding religious liberty, it is too often said that religion needs "space." If government simply would not regulate when religion enters the picture, so the story goes, if it would just leave room for religion, everything would be okay.¹⁹ RFRA, we are told, did not really affect the state. Rather, it simply directed government to engage in an *absence* of regulation whenever religion was affected, as though absence of regulation is a vacuum and not an affirmative decision not to regulate.²⁰

The language of RFRA reflected this ideology. The Act stated that government cannot enforce its generally applicable, neutral law if that law is not the "least restrictive means" as applied to this particular believer.²¹ The rhetorical message of the space metaphor and of the least restrictive means test

18. See *City of Boerne v. Flores*, 877 F. Supp. 355 (W.D. Tex. 1995); see also Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994).

19. See Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997); Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 884-85 (1994).

20. See Brief for Respondent at 46-47, *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (No. 95-2074); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996); Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 229-31 (1993).

21. See 42 U.S.C. § 2000bb-1(b).

is that religion is anemic. It cannot withstand society's presence, and the only way for it to survive is if the society turns away and pretends that it does not exist or at least endeavors to make as much room as it possibly can so that religion will not be hurt.

The message of RFRA was that society must structure *itself* so that religion can thrive. Religion, on this reading, has no resources to protect its interests and therefore needs the right to exile the state from its geographical, political, and spiritual domains. The Act was supposedly necessary because *Smith* left claims for religious conduct in conflict with generally applicable laws to the political process.²² On this reading, religious believers are politically ineffectual and lack fundamental people skills. They are uncooperative, selfish, and incapable of negotiating or understanding the demands made upon them by communities living with them cheek to jowl. They must hide so that they will not be bruised.

Comparatively, under the RFRA scenario, the state is an authoritarian monolith whose policies are rooted in bad motives and frivolous policy concerns. It is a collection of unaccountable bureaucrats who are incapable of acknowledging or understanding the force of a religion's request for exemption. The overbearing monster of the state stands over and above weak, cowering religion. RFRA was to be religion's shield in this morality play reminiscent of Jack and the Beanstalk.

If there were ever a rhetorical strategy that is guaranteed to feed the perception of religion's marginalization, RFRA was it. The compelled exemption theory, which Michael McConnell has articulated, suffers even more from this defect—its operation is supposed to be automatic, rendering religion not only weak but also mute in the political sphere.²³

The rhetoric of religious weakness is repeated in the outcry over the *Smith* decision. In *Smith*, two drug counselors were fired for smoking peyote in a Native American ceremony because the state had a law prohibiting drug counselors from using illegal drugs.²⁴ This decision was considered an outrage. Yet, why does society have to guarantee a drug counseling job to individuals who use peyote for any reason? The context of the debate seems to assume that these religious believers were not sturdy enough to find a different job, say in the private sector. Rather, they needed the law to make the system fit to

22. See Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); Rod M. Fliegel, *Free Exercise Fidelity and the Religious Freedom Restoration Act of 1993: Where We Are, Where We Have Been, and Where We Are Going*, 5 SETON HALL CONST. L.J. 39 (1994).

23. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990).

24. See *Smith*, 494 U.S. at 874.

them. The concept of sacrifice for religion is emptied of all content by this discourse. Forget martyrdom; these religious believers are saying that they cannot be asked to make *any* adjustment for religion. Moreover, they did not have the political wherewithal to ask for an exemption from the law until they were told that the Constitution would not automatically protect them.²⁵

Following *Smith* and the accompanying outcry, the mask of weakness was lifted and the force of religion's claim on society was witnessed as the federal government, Oregon, and other states passed laws exempting the use of peyote for religious purposes from general narcotics laws.²⁶ Aided by other religious groups, the Native American Church exercised its political muscle and obtained exemptions at the state and federal levels.

Contrast the rhetoric of RFRA with that of *Smith* wherein religion has the strength to enter the political battlefield and to secure the accommodations most important to it. The vision of religion underlying *Smith* is a vision of a vital, politically active, and capable social force.²⁷ Religion is not a separate, isolated entity, far removed from the rest of society. It is not a hothouse flower that must be carefully cultivated and shielded from every draft, but rather a hardy plant that can thrive even when planted in rocky soil.

The religion portrayed in *Smith* is also a constitutive element of the society that inevitably interacts with communities and honors their desires when appropriate. It is a responsible and accountable member of the political community.

While the state in *Smith* is not the monolithic monster portrayed by RFRA,²⁸ it is no weakling. The decision in *Smith* provides some bright-line rules that are not to be breached. First, belief will not be imposed, coerced, or dictated by the state. It is absolutely protected.²⁹ The reality informing the

25. See 21 C.F.R. § 1307.31 (1994) (exempting members of the Native American Church from the federal drug laws for their religious use of peyote); ARIZ. REV. STAT. ANN. § 13-3402 (1989); COLO. REV. STAT. ANN. § 12-22-317 (3) (West Supp. 1995); N.M. STAT. ANN. § 30-31-6(D) (Michie 1989) (exempting "the use of peyote in bona fide religious ceremonies by a bona fide religious organization."); TEX. HEALTH & SAFETY CODE ANN. §§ 481.111 (Vernon 1991).

26. See OR. REV. STAT. § 475.992(5), (6) (Supp. 1992); TEX. HEALTH & SAFETY CODE ANN. § 481.111 (Vernon 1991); ARIZ. REV. STAT. ANN. § 13-3402 (West 1984); COLO. REV. STAT. ANN. § 12-22-317(3) (West Supp. 1995); N.M. STAT. ANN. § 30-31-6(D) (Michie 1989) (exempting "the use of peyote in bona fide religious ceremonies by a bona fide religious organization.").

27. See *Smith*, 494 U.S. at 890.

28. The recurrent theme in the defense of RFRA is that all government actors are thoughtless "bureaucrats." I have heard this defense in many of the debates in which I have participated regarding RFRA. See, e.g., Roger Pilon, *Is the RFRA Constitutional?*, Cato Policy Report, May/June 1997 (debate between myself and Kevin J. Hasson of Becket Fund for Religious Liberty on February 18, 1997).

29. This has always been part of the Supreme Court's free exercise jurisprudence. See *Smith*, 494 U.S. at 879 ("Laws[] . . . cannot interfere with mere religious belief and opinions

absolute protection of belief is that if the state can succeed in dictating belief, then religion *will* become the weakling depicted in the RFRA rhetoric. Categorical protection for belief is an absolute prerequisite if there is to be a level playing field between religion and the state.³⁰

Second, the state cannot persecute religions or religion *per se*.³¹ If it is found as an empirical matter that a government is targeting a particular religion for disfavored treatment or even religion in general for disfavored treatment, the government's action will be subjected to the most searching scrutiny and in all likelihood declared invalid.³² The reality here is that religious persecution is an undeniable component of history and the power of the state must be curtailed from this historically documented temptation.³³

Third, when the state makes individualized determinations under a law, and therefore holds the potential to engage in unfettered discretion, the determination reached is subject to searching scrutiny.³⁴ Fourth, when the state regulates combined, or hybrid, constitutional rights, its actions will be closely monitored.³⁵

Thus, the state is subject to significant restraints in circumstances where its temptation and potential to do harm to constitutional interests are at their height.

Under the *Smith* scenario, when the government is not persecuting, when it is not engaging in an attempt at mind-control or soul-control, when its individualized discretion is at a minimum, and when hybrid rights are not at stake, then religion is forced into the political process to justify itself and to attempt to find solutions that can benefit both the church and the community. If a church wants to build an addition in a historical preservation district, under

. . . .") (quoting *Reynolds v. United States*, 98 U.S. 145, 166 (1879)). See also *McDaniel v. Paty*, 435 U.S. 618 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) ("The freedom to hold religious beliefs and opinions is absolute."); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

30. Thus, the debate over the standard to be applied in free exercise cases is only a debate about religious *conduct*. Like *Smith*, RFRA is limited to conduct.

31. See *Smith*, 494 U.S. at 876.

32. See *Lukumi Babalu Aye*, 508 U.S. at 546.

33. See Leonard W. Levy, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (2d. ed 1994); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religion Conduct*, 61 U. CHI. L. REV. 1245, 1271 (1994) (arguing that susceptibility of religion to persecution provides grounds for constitutional protection but not privileging religion); Steven G. Gay, *Why Is Religion Special?, Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 148 (1990).

34. See *Employment Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. at 872 (1990).

35. See *id.* at 881 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

the *Smith* regime, the church must articulate its needs. It must persuade the community that it is not being shortchanged for no good reason. It is simply not enough for religion to say, "I want it." Nor should it be. Church and state, under *Smith*, stand as equal entities, each with valid and important claims that require public airing and *mutual* accommodation. Each challenges the other to justify itself. In Professor Milner Ball's imagery, they are engaging in an isometric exercise that mutually strengthens both.³⁶ *Smith* hopes for win-win solutions, rather than adversarial court contests, unlike RFRA which gives religion such a leg up that churches are understandably tempted to refuse constructive dialogue and to embrace stubbornly their initial, potentially unreflective position.

The most salutary message to be taken from *Smith's* imagery of religion is that religion is, in Niklas Luhmann's terms, autopoietic.³⁷ Religion is "a social system [that] can be differentiated as constituting [itself] self-referentially through the development of [its] own separate symbolically generalized media of communication."³⁸ Yet, it is not solely self-referential, i.e., it is not Habermasian.³⁹ Luhmann points out that autopoietic systems can be simultaneously open and closed to the contextual environment. Thus, religion is inevitably constructed on an infrastructure that includes meaningful communication with other elements of the society. At the same time, it is also self-defining such that it can be distinguished from other autopoietic systems within the society.⁴⁰ Religion is not the atomistic, self-referential structure envisioned by RFRA or the compelled exemption theory but rather a constitutive element of the society that is in part defined by society and that in turn defines aspects of society. In other words, there can be meaningful communication between religion and society.⁴¹

Surely, *Smith's* vision of religion as a constitutive element of society is closer to the Framers' vision than the radically atomistic vision presupposed and engendered by RFRA. The colonial generation believed that religion is an important and vital civilizing force.⁴² They viewed Christianity as a necessary

36. See MILNER S. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* 73 (1985).

37. See NIKLAS LUHMANN, *ECOLOGICAL COMMUNICATION* 13-14, 23, 64, 65 (John Bednarz, Jr. trans., 1989).

38. See *id.* at xi.

39. See JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1995).

40. See LUHMANN, *supra* note 37, at xi. Systems are recursively closed but also exhibit environmentally open irritability. See *id.*

41. Of course, many religions are *premised* on the concept of service to society. For example, *Christianity*. For those religions, the RFRA imagery of religion as weak and as timid in upon itself operates as a barrier to the fulfillment of theological goals.

42. See Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71

cement that would make the United States cohere. Justice Scalia's opinion in *Smith* captures the flavor of that vision and provides a vivid juxtaposition with the cowering image of religion evoked by RFRA and compelled exemption theories.

In sum, RFRA's standard runs the risk of either marginalizing religion or masking its true power to the detriment of society. The *Smith* rhetoric is more realistic and safer for society because it forces religion to justify itself when its conduct impinges on generally applicable law.

II. THE DOCTRINAL AND PRACTICAL RAMIFICATIONS OF THE DISCOURSE OF RELIGION IN LEGAL TEXTS

As one who truly cares about religious liberty (but obviously not for RFRA), I think it is now time to take a no-nonsense look at *Smith* in practice. For the following three reasons, both the states and the federal government should put off legislative action until we know more, more about *Smith* in practice and more about the state of religious liberty in the United States and the several states.

From a structural standpoint, we need to be most concerned when religion wraps itself in the garb of trivialization and marginalization as it flexes its considerable political muscle in legislative backrooms. That is when representatives are most sorely tempted to abandon their role as independent trustees of the people's interest.⁴³ In those circumstances, the legislature's superior factfinding capacities and investigative facilities need to be exercised to their hilt.

A. The Religious Freedom Restoration Act, Whether Federal or State, Is an Inappropriate Legislative Enactment

A religious freedom restoration act, federal or state, is a parcel of legal problems, from separation of powers to the Establishment Clause.⁴⁴ Given the

B.U. L. REV. 455 (1991).

43. See Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477 (1994) [hereinafter Hamilton, *Discussion and Decisions*].

44. See *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) ("RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."); *id.* at 2172 (Stevens, J., concurring) (stating that RFRA violates the Establishment Clause because "the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment."). See also Marci A. Hamilton, *Boerne v. Flores: A Landmark for Structural Analysis*, WM. & MARY L. REV. (forthcoming 1998); Marci A. Hamilton, *RFRA is Unconstitutional, Period*, 1 U. PA. CONST. L.J. (forthcoming 1998); Marci A. Hamilton, *The*

unequivocal message sent by the Court in *Boerne*,⁴⁵ the insistence of the Coalition for the Free Exercise of Religion in pressing forward on state laws that mimic RFRA is bewildering.

The federal act, like the state proposals, attacked the perceived problems posed by *Smith* with a one-size-fits-all solution.⁴⁶ Religious liberty is too important to be adjusted in this slap-dash fashion, in the absence of evidence of its necessity (which might justify constitutional amendment), and in the absence of a sustained public debate. The end of the federal Constitution is a pragmatic balance of power between church and state.⁴⁷ That balance should not be effected through ignorance.

Although religion's representatives drafted RFRA, citizens never understood the legalese of RFRA.⁴⁸ No government should be able to adjust the balance of power between church and state across the board in one fell sweep. Such adjustments require ratification by the people. A RFRA-like statute offends the core constitutional value of popular sovereignty and invites constitutional invalidation. If unjustified and substantial burdens on religious conduct truly exist, there are other means available to alleviate such burdens, for example, meaningful negotiation between government and religion when conduct and law collide, the individualized exemptions for particular problems adverted to in *Smith* and constitutional amendment.⁴⁹ The anecdotes of religious persecution in the 1992 and 1993 federal hearings could have been redressed by a handful of particularized legislation, rather than the sweeping readjustment of church-state power dictated by the judicial standard codified in RFRA.⁵⁰

Constitution's Pragmatic Balance of Power Between Church and State, NEXUS: A JOURNAL OF OPINION, Fall 1997, at 33.

45. See *Boerne*, 117 S. Ct. at 2171 ("[RFRA] imposes in every case a least restrictive means requirement . . . which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations.").

46. See *Boerne*, 117 S. Ct. at 2170 ("Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.").

47. See Marci A. Hamilton, *The Constitution's Pragmatic Balance of Power Between Church and State*, NEXUS, A JOURNAL OF OPINION, Fall 1997, at 33.

48. See Marci A. Hamilton, *Boerne v. Flores: A Landmark for Structural Analysis*, WM. & MARY L. REV. (forthcoming 1998).

49. See *Smith*, 494 U.S. at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.").

50. See *Boerne*, 117 S. Ct. at 2169 (referring to "anecdotes" in legislative history of RFRA); see also *Religious Freedom Restoration Act of 1991, Hearings on H.R. 2797 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 102d Cong. 81 (1993) (statement of Nadine Strossen); *id.* at 107-110 (statement of William Yang); *id.* at 118 (statement of Rep. Stephen J. Solarz); *id.*, at 336 (statement of Douglas Laycock); *The Religious Freedom Restoration Act, Hearing on S. 2969 before the Senate*

Governments need to determine the true state of religious liberty in American society before they adjust church-state relations. This requires examination of the law's impact on religion in particularized settings. Yet, this prerequisite simply cannot be met under the RFRA-type law, which applies to every law, every government actor, whether the government action was taken before or after RFRA was enacted. For example, had Congress thought carefully about RFRA, it would have inquired into the vast variety of instances in which churches bump into federal law. A balanced approach to RFRA as applied to federal law would have considered religion vs. environmental law,⁵¹ religion vs. tax law,⁵² religion vs. copyright law,⁵³ religion vs. national parks law,⁵⁴ religion vs. government provision of services,⁵⁵ religion vs. federal drug laws, etc., etc.⁵⁶ To the rejoinder that such an inquiry would have been impossible, the correct, constitutional answer, is that the impossibility of the inquiry proves the infeasibility of the law. The longer the rfra concept survives, the more aware the various affected interests are becoming. The proposed Maryland rfra was withdrawn in the wake of concerns expressed by perhaps the widest group of dissenters to date.⁵⁷

RFRA's scope made it an amendment to the Constitution without the involvement of the people, a stealth amendment, if you will. Congress did not engage its constitutional obligation to engage in independent decisionmaking in the best interests of the people when it focused its attention almost exclusively on religion and not on the other important government interests it is charged by the Constitution with furthering, e.g., commerce, the environment, intellectual property, tax law, and so on.⁵⁸ The path to RFRA's invalidation was laid by Congress's irresponsible and hasty conduct. If the states, and Congress, seek to avoid further invalidations, they must temper their eagerness to please religion with their obligation to serve the people's interests. Once they acknowledge that obligation, the wheels of the state and federal

Committee on the Judiciary, 102d Cong. 5-6, 14-26 (1993) (statement of William Yang); *id.*, at 27-28 (statement of Hmong-Lao Unity Assn., Inc.); *id.* at 50 (statement of Baptist Joint Committee); 117 S. Ct. at 2169 (referring to "anecdotes" in legislative history of RFRA).

51. *Cf. Lukumi Babalu Aye*, 508 U.S. at 544 (addressing the State's interest of sanitation law and the public health).

52. *See Walz v. Tax Comm'n of New York*, 397 U.S. 664 (1970).

53. *See Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1353, 1355-57 (E.D. Va. 1995); *Religious Tech. Ctr. v. F.A.C.T.N.E.T., Inc.*, 907 F. Supp. 1468, 1472 (D. Colo. 1995).

54. *Cf. Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

55. *See Bowen v. Roy*, 476 U.S. 693 (1986).

56. *Cf. Smith*, 494 U.S. at 874; *United States v. Meyers*, 95 F.3d 1475, 1480-84 (10th Cir. 1996).

57. *See Hearings on H.S. J. Res. 13, Mar. 6, 1998* (testimony by American Academy of Pediatricians, Child Advocacy, Prisons, Prisons Guards, Schools, and Counties).

58. *See Hamilton, Discussions and Decisions, supra* note 43.

legislators should slow to a more reasonable speed and the inquiries should become more careful and more measured.⁵⁹

B. Religious Persecution is Not Sufficiently Likely to Justify Federal or State Legislative Action at This Time

In light of existing constitutional doctrine and the proven political power of religion, the concerns expressed about religious persecution in this country seem overblown.⁶⁰ The Court's decision in *Smith* is not quite the bright-line rule disabling religion that is depicted by the supporters of the federal and state RFRAs.⁶¹ For one thing, the Court's pre-*Smith* doctrine was not the haven for religious conduct portrayed by the RFRA supporters.⁶² In *Smith* itself, neutral, generally applicable laws are to be subjected to strict scrutiny if they are a mere pretext for persecution and targeting, or if a claim involves a hybrid of constitutional values, or if the scheme requires particularized official decisionmaking that lends itself to an abuse of discretion.⁶³ Thus, *Smith's* standard, especially when molded by creative lawyering, is likely to lose its straight-edge image to become a more expansive and flexible tool for the adjustment of power between church and state.

Justice Scalia, speaking for the Court, was on to something in *Smith* when he said that we need not worry too much about religious conduct when it bumps up against generally applicable laws because, in general, this society is

59. This can already be seen in California and Maryland, where the proposed legislation has alerted a diverse array of interests.

60. There is no question that religious persecution remains a problem around the world, even in westernized countries like Germany. See *Germany to Put Scientology Under Scrutiny*, WASH. POST, June 7, 1997, at A20; Ray Moseley, *In Germany, Scientology Distrusted and Very Unwelcome*, CHI. TRIB., Feb. 16, 1997, at 1; see also Michael R. Gordon, *Russians Pass Bill Sharply Favoring Orthodox Church: Other Christians Hurt*, N.Y. TIMES, Sept., 20, 1997, at A1; Daniel Williams, *Faith-Curbing Bill Becomes Law in Russia: Restrictions on Religion Enacted in Face of Global Criticism*, WASH. POST, Sept. 27, 1997, at A16.

61. See Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 9-10, 54.

62. See Marci A. Hamilton, *The Beliefs/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct*, 54 OHIO ST. L.J. 713, 746-49 (1993).

63. See *Lukumi Babalu Aye*, 508 U.S. at 540-42. This latter point is reminiscent of the Court's approach in its First Amendment zoning cases. See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) (discussing procedural safeguards of local discretion impacting First Amendment protected liberties); *Freedman v. Maryland*, 380 U.S. 51 (1965).

solicitous of religious claims.⁶⁴ The *Smith* fallout, including RFRA and the state and federal peyote exemptions, bear witness to this.⁶⁵

The *Smith* decision and its discordant reception sent me back to James Madison's notes on the Constitutional Convention to divine whether the *Smith* perspective on religion would have been alien to the Framers. As I stated earlier, they believed religion would and could have significant political leverage.⁶⁶ At this point, there is reason to be more concerned about the abuse of political power by religion than about religion's suppression.

C. Minority Religions Are Not at Risk as a Result of the *Smith* Decision

Minority religions also do not appear to be in the position of peril claimed by those attempting to enact mini-RFRAs at the state level.⁶⁷ Political scientist Mancur Olson made a persuasive case that small, organized groups do better in the legislative process than disorganized majorities.⁶⁸ When one adds the Supreme Court's decision in *Lukumi Babalu Aye* to this reality⁶⁹ and to the existence of the Coalition, which ought to turn its attention to riding herd for small as well as mainstream religions, the fear of minority religion suppression dims considerably.

In sum, as Professor Lupu also has urged, it would be worthwhile to wait to see how the *Smith* doctrine actually plays itself out in the courts.⁷⁰ Legislative action is premature at many levels.

III. CONCLUSION

What we say is not always what we mean. But our words shape our worldviews nonetheless. In the debate over the free exercise standard, there is

64. See *Smith*, 494 U.S. at 890 ("[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.").

65. See 42 U.S.C. § 2000bb-4 ("Granting . . . exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter."); ARIZ. REV. STAT. ANN. § 13-3402 (West 1989); COLO. REV. STAT. ANN. § 12-22-317(3) (West 1991 & Supp. 1995); N.M. STAT. ANN. § 30-31-6(D) (Michie 1989) (providing exemption for "the use of peyote in bona fide religious ceremonies by a bona fide religious organization").

66. See *supra* note 17 and accompanying text.

67. See Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 230 (1993); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 15, 55.

68. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 144 (2d ed. 1971).

69. See *Lukumi Babalu Aye*, 508 U.S. at 547.

70. See Ira Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, pt. IV, at 602-03 (1998).

significant ambiguity about the sociological and political status of religion. When it comes to characterizing religion, the vision painted by *Smith* of religion as a vital social force is more accurate than RFRA's anemic portrait.⁷¹ Thus, *Boerne* signals not a requiem for religious liberty, but rather a structural constitutional landmark saving us from our own best intentions.⁷²

71. See *Smith*, 494 U.S. at 888 ("Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference; . . . and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid* . . . every regulation of conduct that does not protect an interest of the highest order.") (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)).

72. See *New York v. United States*, 505 U.S. 144 (1992).