Summary and Synthesis: The Crisis in Religious Liberty

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The Essays in this symposium are excellent, but their tendency toward moderation shelters readers from some of the harshest attacks on religious liberty. No one presents the minimalist position on accommodation; Ira Lupu does not come close.¹ No one presents the maximalist position on accountability; Paul Weber did not come close.² No one in this symposium takes seriously the possibility that Employment Division v. Smith³ might be defensible.

Michael McConnell⁴ and William Ball⁵ are more aggressive on the other side, but neither conveys anything like my sense of crisis about the current state of religious liberty. Richard Neuhaus⁶ and Marvin

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Frankel\textsuperscript{7} come closer to maximalist and minimalist positions, but at such a high level of generality that they never really join issue. So I want to talk about some of the things that have been left out, as well as emphasize some of the most important things that have been said.

Religious issues are so intractable because different people have fundamentally different perceptions of reality. Serious secularists and serious religious believers do not understand each other well enough to even talk about the issues. Believers from seriously different traditions sometimes have the same problem, especially if one is highly acculturated and the other highly unacculturated, in Angela Carmella's terms.\textsuperscript{8}

These differences in perception are reflected in both hostility and incomprehension. As between some serious secularists on one side, and some serious religious believers on the other, there is little more equal concern and respect than four hundred years ago, when we were burning each other at stakes. If you read the direct mail fund-raising literature some of these groups send out, it is clear that there are people on all sides of these issues who think that folks on the opposite side are a force for evil in the world, and a serious threat to the things we hold dear. We have reduced the level of violence from four hundred years ago, and that is a great advance. We have expanded the circle of people who are well-enough accepted to be part of the governing coalition, and that is a great advance. But for the many people who remain outside that circle, I am not sure we have advanced beyond grudging and hateful tolerance.

There is also simple incomprehension. Recently I had lunch with the dean of a major law school—a church affiliated law school, although I should say it is a highly acculturated one. He said that nothing in the recent religion cases affected the core of religious exercise, and he was unmoved by examples. He doubted that Native American peyote use was really worship; he doubted that a ban on communion wine would affect core Catholic worship. Finally I said to him, “You can talk in those terms and think in those ways only because you have never spent much time talking with people who are seriously religious.” He thought about it a minute and said, “I've never known anybody who was seriously religious.” From that sort of ignorance, we get fundamental misperceptions of what is at stake.

Let me move on to some of the specific issues addressed in this Symposium, highlighting the differences in perception with respect to each issue.

Access covers a lot of ground, and I want to subdivide it into three distinct areas. First, political access: There is very substantial


agreement among Michael Perry,9 Richard Neuhaus,10 and Marvin Frankel,11 that believers have full access to the political arena. Believers can make their case on any issue they want, argue any position they want, and argue it in any terms they want. Michael Perry reminded us that they would be well advised to make their case in terms that the rest of the polity can understand,12 but that is a political and aspirational constraint, not a legal constraint.

There are folks who would deny even political access, who say that religious arguments are not entitled to be heard in the political process.13 But that extreme position has not a single vote on the Court.

Second, ceremonial access: Can government sponsor worship services, invocations and benedictions, creches, and crosses? Here we have fundamentally different perceptions. Richard Neuhaus tiptoes up to this issue, but does not quite reach it explicitly. I think he sees government sponsored ceremonials as only the individual citizens who make up the polity acting on their several opinions through their agents, the several state and local governments that they created.14 Marvin Frankel sees the same ceremonials as citizens of one faith using the instruments of government to impose exercises of their faith on everyone else.15

With all respect to good friends who think otherwise, I think Marvin Frankel is clearly right. Here there is no conflict between free exercise and disestablishment. You have a right to freely exercise your own religion; you have no right to use the organs of government in that exercise. These government religious ceremonials are simply modest establishments that do not last very long and seem harmless to the mainstream. But they are not harmless to the serious nonbelievers, or to serious particularistic believers—to unacculturated believers. The conflict of rights here does not depend upon the assumption that the Establishment Clause protects a value other than religious liberty. The conflict here is between two claims of

10. See Neuhaus, supra note 6.
11. See Frankel, supra note 7.
12. Perry, supra note 9, at 602.
14. See Neuhaus, supra note 6, at 622-23.
15. See Frankel, supra note 7, at 634-40, 642-43.
religious liberty—between the religious liberty of those who support such ceremonial observances, I ask why it is so important that the city put up the creche instead of the association of churches. Why must there be prayer at graduation, with a captive audience of children, instead of at a privately sponsored baccalaureate with an audience of volunteers? I think it is precisely because some people want a symbolic affirmation that government approves and endorses their religion, and because many of the people who want this affirmation place little or no value on the costs to religious minorities.

Finally, financial access: Should religion have access to government funding for social services or education? Richard Neuhaus and Mary Ann Glendon both argue that religious believers should not forfeit their state constitutional right to a free education as a condition of exercising their federal constitutional right to a religious education. They see a classic unconstitutional condition.

Marvin Frankel sees an establishment. He sees his money going to a church to help carry on the core religious function of perpetuating the faith in the next generation. He argues that this use of public funds is an establishment even if the state gets full value in math, reading, and other secular subjects.

These are two fundamentally different ways of perceiving the same reality. Each perception is entirely plausible; each is internally coherent. Each would be compelling if considered without regard to the other. The difficulty is to choose between the two perceptions on a principled basis.

Most of the major denominations have a position picking one perception of reality or the other. In almost every case, their choice is consistent with their own financial self-interest. Churches with many schools pick the Neuhaus-Glendon description of reality, and churches with few or no schools pick the Frankel description of reality.

The Supreme Court has never grappled with the choice between these two views of reality. It has largely adopted the separationist analysis, although with important modifications around the

18. See Frankel, supra note 7, at 643-44.
edges, and the new conservative majority may bring more modifications. The Court has summarily rejected the unconstitutional conditions perception without analysis.

The dominant American legal tradition since the mid-nineteenth century is the separationist position—no money to religious schools. That position is explicit in many state constitutions. We can trace the political origin of that position, and it is not pretty. It traces not to any careful deliberation about constitutional principles or the proper relation of church and state. Rather, it traces to vigorous nineteenth century anti-Catholicism and the nativist reaction to Catholic immigration. The fact is that no one in America worried about religious instruction in schools before Catholic immigration threatened the Protestant hegemony.

Required reading for anyone claiming to have an opinion on financial access is Michael McConnell's recent article in the Harvard Law Review, comparing the controversy over abortion funding to the controversy over parochial school funding. Most people in the country support one and oppose the other, and in so doing nearly all these people are being inconsistent and self-interested. Only after reading McConnell's article and thinking through these controversies together can one express an informed opinion on either.

I want to address accommodation and accountability together. They are not exactly opposite sides of the same coin, but the issues are similar enough that they can be considered together in the interest of space.


22. See, e.g., CAL. CONST. art. IX, § 8; IDAHO CONST. art IX, § 5; MASS. CONST. art. XVIII, § 2; MINN. CONST. art. XIII, § 2; N.H. CONST. pt. 2, art. 83; N.Y. CONST. art. XI, § 3.


Preliminarily, and with apologies to the organizers of this Symposium, "accommodation" is a terrible word. It has nothing whatever to recommend it except that it alliterates with access and accountability. The term implies that government is going out of its way to do religion a favor, but that usage fits only occasionally. If an exam is scheduled on a student's religious holiday, the student needs to be excused from the exam, but he also needs someone to administer a make-up exam. We might reasonably call the make-up exam an accommodation.

But most of the time, we are not talking about special favors. As McConnell said, we are talking about nonmolestation of religion, or in more familiar terms, we are simply talking about liberty. We are talking about the right to be let alone in the exercise of religion. Government does not establish religion by leaving it alone, and talk about accommodation obscures that point.

Accommodation also invites misuse on the other end of the ideological spectrum. Some people who are really seeking endorsement, sponsorship, and support of their religion argue: "No problem; it's just accommodation."

This argument is exemplified by Ira Lupu's story of his friend Patty and released time programs. He described released time programs as an accommodation, and that term has been used to defend these programs. It may have been an accommodation, or simple free exercise, to let Patty out of school to go to church. It was not an accommodation to hold Lupu in school without instruction while Patty went to church. That did not accommodate Patty or anyone else, and it had nothing to do with free exercise. Justice Jackson accurately described this practice in his dissent forty years ago: school authorities converted the school into "a temporary jail for a pupil who will not go to Church." Loose talk of "accommodation" invites the sort of confusion illustrated in this example.

Let me go to the merits of accommodation and accountability. Angela Carmella was the only person to address Jimmy Swaggart Ministries v. Board of Equalization. That is unfortunate, because the case is a disaster almost equal to Smith. In one way it is more emphatic: Justice O'Connor, who wrote the principal opinion rejecting the Court's attack on free exercise in Smith, wrote Swaggart for a unanimous court.

Swaggart holds that churches are subject to formally neutral taxes, including sales tax, property tax, and income tax. Tax exemption is now wholly a matter of legislative grace. But the reasoning in this

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25. See McConnell, supra note 4, at 688-95.
26. See Lupu, supra note 1, at 743.
28. See Carmella, supra note 8, at 798.
case is more important than the specific holding: the Court reasoned that burdens on religion are "not constitutionally significant" unless they require a believer to violate specific doctrinal tenets of his faith.\textsuperscript{32}

This position implies a wholly negative view of religion. It views God as a great schoolmarm in the sky, who lays down certain binding rules, and it assumes that the exercise of religion consists only of obeying the rules. It is as though all religious experience were reduced to the book of Leviticus.\textsuperscript{33} It is the view of religion held by many secularized adults, who left the church in their youth after hearing too much preaching about sin and failing to experience any benefits.

In this view of religion as obeying the rules, all the affirmative, communal, and spiritual aspects of religion are assumed away—placed outside the protection of the Free Exercise Clause. Practices that merely grow out of religious experience, or out of the traditions and interactions of a religious community, are constitutionally unprotected unless they are mandated by binding doctrine.\textsuperscript{34}

It is the line of cases culminating in \textit{Swaggart} that goes furthest along the lines that concerned Mary Ann Glendon—that savages the rights of churches as social groups or mediating institutions. The Court recognizes little or none of the church's right to manage its own internal affairs. On this religion-as-rules view of free exercise, no free exercise issue would be raised by a People's Bureau for the Management and Supervision of Nonmandatory Aspects of Religious Practice.

The category of mandatory rules does not exhaust even the core of religious exercise, as is illustrated by the examples of prayer and the ministry. People often pray when not required to, and no one is required to be a minister. The Supreme Court of Washington actually held that the ministry is not religious exercise because it is not required.\textsuperscript{35} The United States Supreme Court has held more sensibly that being a minister is religious exercise, but it could not agree

\textsuperscript{32} \textit{Id.} at 391.

\textsuperscript{33} "Being almost wholly concerned with laws and rubrics, the book advances but slightly the pentaterchal narrative." Roland J. Faley, \textit{Leviticus}, in \textit{THE JEROME BIBLICAL COMMENTARY} 67, 67 (Ramond E. Brown et al. eds., 1968).

\textsuperscript{34} For earlier opinions hinting at this new rule, see \textit{Texas Monthly, Inc. v. Bullock}, 489 U.S. 1, 17-18 (1989) (plurality opinion); \textit{Tony & Susan Alamo Foundation v. Secretary of Labor}, 471 U.S. 290, 303-05 (1985). For the argument that earlier case law was protective of a general right to church autonomy, not limited to the right to adhere to specific doctrinal tenets, see Douglas Laycock, \textit{Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy}, 81 COLUM. L. REV. 1373, 1388-1402 (1981).

on why; there was no opinion for the Court.\textsuperscript{36} And I emphasize, all of this damage is wholly independent of \textit{Smith}. \textit{Swaggart} was decided two months before \textit{Smith}; it was unanimous; and it was written by Justice O’Connor.

Finally, I come to \textit{Smith} and the near total loss of any substantive constitutional right to practice religion. \textit{Smith} involved Native American peyote worship. For centuries—for as long as there are written records, and probably long before that—certain Native Americans in the West have experienced God primarily through peyote. Peyote is a naturally occurring hallucinogenic.\textsuperscript{37} It is not a recreational drug; one takes peyote by eating parts of a cactus plant. It is difficult to eat, but if you are sufficiently committed you can get it down.\textsuperscript{38} The Supreme Court said that Oregon could apply its drug laws to punish peyote worship.\textsuperscript{39}

The debate here can be summarized in terms of the two competing conceptions of neutrality that Michael McConnell describes,\textsuperscript{40} or simply in terms of whether religious liberty is an equality right or a liberty right.\textsuperscript{41} Formal neutrality or formal equality teaches that religious liberty consists of no discrimination against religion—that religion should be treated just like every other activity and institution in the society. Substantive neutrality, or liberty, includes the right of religion to be let alone, whether or not other activities and institutions are let alone, save only when government has a compelling reason to interfere.

In our despair over the loss of protection for religious exercise, it is important not to understate the protection we still have. Do not underestimate formal neutrality. Most of the world’s great religious persecutions violated formal neutrality. Governments throughout history have punished people simply for adhering to a dissenting faith. To be protected against that is a great advance.

But experience shows that formal neutrality does not suffice. Formal neutrality would treat religion just like any other activity or institution. And in the modern regulatory state, most activities and institutions are pervasively regulated. Under a regime of formal neutrality, churches and the religious conduct of believers will be pervasively regulated too. I submit the simple proposition that religious exercise is not free when it is pervasively regulated.

\textit{Smith} says that even at the very core of religious exercise, churches are subject to all formally-neutral, generally-applicable laws. Mary Ann Glendon suggests that \textit{Smith} may turn out to be just another

\textsuperscript{37} ROBERT M. JULIEN, \textsc{A Primer of Drug Action} 149, 152 (4th ed. 1985).
\textsuperscript{40} See McConnell, \textit{supra} note 4, at 688-95.
\textsuperscript{41} For elaboration of this distinction, see Douglas Laycock, \textit{Formal, Substantive, and Disaggregated Neutrality Toward Religion}, 39 DePaul L. Rev. 993 (1990).
drug case.\textsuperscript{42} That is the optimistic reading of Smith's facts. Sometimes the pressure of facts does override the language of the opinion. But if that were all the Justices meant, they could have voted for Justice O'Connor's concurrence.\textsuperscript{43} Let me point out the pessimistic reading: Smith was also a case about a worship service. The Court said that Oregon could criminally punish a worship service, and that this raised no issue under the Free Exercise Clause—that it required no justification—that there was nothing for judicial review beyond the simple determination that the law against peyote applied to all uses and not just religious uses.

I do not say this hyperbolically; I have thought about the choice of words carefully before using them. Smith creates the legal framework for persecution. What prevents Oregon from creating a special task force to hunt down peyote worshipers, break up their services, prosecute all those in attendance, and send them all to prison for long terms? The answer is the lack of stomach for persecution and the likelihood of political backlash from Americans who still believe in religious liberty. These political forces are important; they stand in the way of the sort of full-fledged persecution I have imagined.

The Constitution of the United States does not stand in the way. The Supreme Court does not stand in the way. The federal judiciary does not stand in the way. It is all right with the Supreme Court if Oregon locks up all of the peyote worshipers and throws away the key. Fortunately, it was not all right with most of the Oregon legislature. After the executive branch established the state's power to persecute when it chooses, the legislature exempted most sacramental use of peyote.\textsuperscript{44}

Native Americans are not the only group whose very right to worship has been placed at risk. The Santeria minority in South Florida sacrifices small animals at its worship services, much as Joseph and Mary did,\textsuperscript{45} much as Jews did for thousands of years before the destruction of the Temple. The Santeria practice is some four thousand years old.\textsuperscript{46} It has now been banned by a series of ordinances that are not even formally neutral and certainly are not generally neutral for religious purposes.

\textsuperscript{42} Glendon, supra note 16, at 683.

\textsuperscript{43} Smith, 494 U.S. 872, 891-907 (1990) (O'Connor, J., concurring in judgment) (rejecting the majority's interpretation of the Free Exercise Clause, but finding a compelling interest in suppressing peyote worship).

\textsuperscript{44} OR. REV. STAT. § 475.992(5) (1991). Possession or delivery of peyote for religious purposes remains a crime for persons incarcerated in correctional facilities. Id. § 475.992(6).


The district court upheld the ordinances, and a panel of the Eleventh Circuit affirmed in an unpublished order. If the Santeria do not succeed on certiorari, their worship will be illegal. The level of enforcement is impossible to predict, but, with respect to animal sacrifice, there may be the political will for real persecution.

All the Hare Krishna temples and monasteries in the country are now in the hands of a receiver, or subject to lis pendens filings, to secure one judgment for the emotional distress of one disgruntled former member. If the Hare Krishna lose their remaining appeals, their worship will be suppressed for simple lack of a place to worship. We still recall the Roman destruction of the Temple and Henry VIII's seizure of the monasteries; seizing places of worship is a highly effective means of religious persecution.

When three ancient faiths are brought to the brink of having their worship suppressed in a single year, I think that "crisis" is the right word. Religious liberty in this country is in very serious crisis.

The association between persecution and formal neutrality interpretations of the Free Exercise Clause is not just a matter of a worst-case reading of recent cases. Nor is just a matter of law professor theorizing. It is also a matter of history. Smith relies heavily on two earlier cases that read the Free Exercise Clause as requiring only formal neutrality: Gobitis v. Minersville School District and Reynolds v. United States. Both of these cases were associated with real persecutions.

Gobitis was the first Jehovah's Witness flag salute case, the one they lost. Its result was overruled three years later, but while it

47. The essence of the offense is killing an animal for "sacrifice" in a "ritual or ceremony." See Hialeah City Code § 6-8.2; Hialeah City Ordinance 87-71 § 1. There are few if any limits on nonsacrificial killings of animals. Hialeah and the State of Florida permit animals to be killed for food or for sport, because they are sick or injured, or merely because they are "stray," "unwanted," "undesirable," or "of no commercial value." See, e.g., Fla. Stat. Ann. §§ 828.05, 828.055, 828.058, 828.073(4)(c)(2) (1976 & West Supp. 1991). The right to hunt on private land is a constitutionally protected property right in Florida, Alford v. Finch, 155 So. 2d 790, 793 (Fla. 1963), and it is unlawful to help animals escape from hunters, Fla. Stat. Ann. § 372.705 (West Supp. 1991).


49. George v. International Soc'y of Krishna Consciousness, 262 Cal. Rptr. 217, review denied and ordered not published 1989 Cal. Lexis 5077 (Cal. Nov. 30, 1989), vacated, 111 S. Ct. 1299 (1991). The state judgment was remanded for consideration in light of Pacific Mutual Life Insurance Co. v. Haslip, 111 S. Ct. 1032 (1991), a case about awards of punitive damages against insurance companies. In the logic of formal neutrality, the church's free exercise rights are compared to the due process rights of insurance companies. The church is arguing in part that the relevant comparison is the free speech rights of the commercial press.

50. 310 U.S. 586 (1940).

51. 98 U.S. 145 (1878).

52. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Barnette was decided on free speech grounds, and although some justices concurred on free exercise grounds, it is technically true that Barnette did not overrule the free exercise holding in Gobitis. But "relying on Gobitis without mentioning Barnette is like relying on Plessy v. Ferguson without mentioning Brown v. Board of Education." Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. CHI. L. REV. 1109, 1124 (1990) (footnote
lasted, it said that Jehovah's Witnesses were required to salute the flag like everyone else. It triggered a nationwide outbreak of physical violence against the Witnesses—of children being beaten on school lots.53

Reynolds upheld prosecution of Mormon polygamists. The case was part of a full-scale governmental persecution. The government prosecuted hundreds of Mormon leaders for polygamy; it imposed a test oath to keep Mormons from voting;54 and finally it dissolved the church and seized its property.55 The Supreme Court upheld all of this. At that point the Mormons received a new revelation and abandoned polygamy, and the government returned the church property.56 The history of these cases illustrates the reality that formal neutrality interpretations of free exercise can end in persecution.

Other horror stories abound; the threat is not limited to highly unacculturated faiths. Regulation in this polity is driven by interest group demands. Every church offends some interest group, and many churches offend lots of interest groups. No church is big enough or tough enough to fight them all off, over and over, at every level of government. Let me give you some recent examples, some decided under Smith, some decided under the expansive notions of compelling government interest and the impoverished understanding of religious exercise that led up to Smith. Since this paper was presented orally, there has been good news in a few of these cases; some courts have found other ways to provide modest protection in the most politically appealing cases. The overall picture remains bleak, however.

A Catholic hospital in Baltimore had a residency program in obstetrics and gynecology. That program lost its accreditation because it refused to perform abortions or teach doctors how to perform them.57

The Catholic student center at the University of Minnesota was ordered to provide subsidized office and meeting space to Dignity, the Catholic gay rights group. And it was held liable in punitive damages for not providing the space voluntarily, before it was

omitted). That is, it is equally true that Brown, 347 U.S. 483 (1954), did not overrule Plessy, 163 U.S. 537 (1896). Brown held only that "in the field of public education the doctrine of 'separate but equal' has no place." 347 U.S. at 495.

55. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890).
56. For a moving account of the Mormon choice between faithfulness and survival, see Frederick M. Gedicks, The Integrity of Survival: A Response to Stanley Hauerwas, 40 DePaul L. Rev. (forthcoming 1992).
This decision has since been reversed, in an opinion that is doctrinally confused, or perhaps simply sly, but entirely sound in its understanding of what was really at stake. The Minnesota Court of Appeals said that application of the gay rights ordinance to the church violated the federal Free Exercise Clause because it excessively entangled the state with religion. Entanglement has been an Establishment Clause doctrine, even though if it were taken seriously it would lead to exemptions that serve free exercise policies.

The court took entanglement seriously; the opinion does not even mention Smith.

The Salvation Army was ordered to close its missions to homeless alcoholics because it did not and could not pay its beneficiaries the minimum wage for their services. It was saved by political outcry, not by the Army's right to religious liberty.

Mother Teresa's order of nuns was ordered to close its shelter for the homeless in New York. Why? Because it was on the second floor, and it had no elevator. "What about the handicapped homeless?" the City said. The nuns responded that they would carry any handicapped homeless up the stairs. The City's response: "You don't carry people up and down in our society. That's not acceptable here." That is my nominee for the most frivolous compelling government interest ever asserted: better that they sleep in the street than be carried up to bed. But compelling interests are no longer required; formal neutrality is enough. The shelter is closed.

Cornerstone Bible Church in Hastings, Minnesota was zoned out of town, left with no place to worship. This zoning was upheld by a trial judge that equated the rights of churches with the rights of pornographic movie theaters. That is what formal neutrality means; the church gets exactly the same rights as some other group selected for comparison. The court of appeals reversed and ordered a trial, in large part because it selected a different comparison group. It accepted the relevance of Supreme Court precedent on pornographic theatres, but it insisted that the city must "provide some


59. Id. at 357.

60. For an earlier argument that entanglement claims should be reformulated as free exercise claims, see Laycock, supra note 34, at 1382-83, 1391-94.

61. See Carmella, supra note 8, at 800-01; Anthony DePalma, Salvation Army is Told to Pay Minimum Wage, N.Y. TIMES, Sept. 16, 1990, part 1, at 42; see also Salvation Army v. Department of Community Affairs, 919 F.2d 183 (3d Cir. 1990) (rejecting most of Salvation Army's challenges to application of boarding house regulations to its shelters).


63. Id.


65. Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 468 (8th Cir. 1991).
type of factual support” for its belief that excluding churches enhanced commercial development, and that it must have some rational basis for treating churches differently from other noncommercial uses. The fate of Cornerstone Church depends on the trial on remand; the press reports other communities that have barred or limited churches without even getting sued.

Under Swaggart and Smith, churches will frequently find that they simply cannot practice important parts of their faith, even within the enclave of the religious community. They will lose much of their capacity to preserve their distinctive traditions and values; they will gradually be suppressed or forced into acculturation. The churches will lose much of their role as mediating institutions and havens for pluralism.

If churches must share control of their institutions with administrative agencies, unions, and labor boards; if every church personnel dispute is resolved under secular standards with potential recourse to secular courts; if egalitarian sex roles may be enforced in church employment, or in the church itself as a place of public accommodation; if church schools must conform to secular models of curriculum, student discipline, and academic freedom; if church disciplinary processes are subject to secular standards of due process, or if any church discipline at all risks liability for intentional infliction of emotional distress; if all new ministries require notice to the neighbors and approval from the zoning board; in short, if churches are neutrally subjected to the full range of modern regulation, it is hard to see how they can sustain any distinctive social structure or witness.

The impact would be greatest on the faiths most committed to traditional values and traditional sources of authority and most alienated from modern understandings of liberty and equality. Some will view it as a good thing to drag these “backward” institutions into the secular virtues of the post-modern age, but that assumes a totalitarian confidence in contemporary secular values. Believers who want a more libertarian or egalitarian church can find one; those who want no church at all can easily have that. Believers who want a more traditional religious community are entitled to it.

66. Id. at 471.
67. Id. at 472. The court expressly rejected the compelling interest test, id. at 472 n.13, strangely treating the express exclusion of churches as merely uneven impact instead of unequal treatment. Once the court agreed that churches and other noncommercial uses were analogous, so that different treatment required justification, the compelling interest test would seem to be applicable even under Smith: “[W]here the state has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” Employment Div. v. Smith, 494 U.S. 872, 884 (1990).
68. R. Gustav Niebuhr, Here is the Church; As for the People, They’re Picketing It, WALL ST. J., Nov. 20, 1991, at A1.
Are there any remedies for these problems? One possibility is the state courts and state constitutions. After Smith, it is malpractice for an attorney to file a claim under the Religion Clauses of the federal Constitution without also pleading the state constitution. At the moment plaintiffs have a far better chance of success with the state constitutions than with the federal. Some state courts will do no better than the federal courts, but some will do much better.\textsuperscript{69}

Second, there is legislation. In Smith, the Supreme Court said that legislatures may exempt religious exercise from formally neutral laws.\textsuperscript{70} If those exemptions must be obtained one statute at a time, they are not a workable solution. Every request for a legislative exemption will arouse an interest group on the other side, and the religious minority will be trying to amend that interest group's statute. These battles can be endless; the fight over student gay rights groups at Georgetown University so far has resulted in ten published judicial orders and two Acts of Congress.\textsuperscript{71} And religious minorities have to win these fights over and over, at every level of government. They have to avoid being regulated by the Congress, by the state legislature, by the county commissioners, by the city council, and by the administrative agencies at each of those levels. They have to avoid being regulated this year and next year and every year after that. If they lose in any forum in any year, they have lost; their religious practice is subject to regulatory interference. That is not a workable means of protecting religious liberty.

The proposed Religious Freedom Restoration Act of 1991 (RFRA)\textsuperscript{72} would avoid these problems by legislating religious exemptions all at once, across the board. RFRA would provide that states must exempt churches and believers from laws that burden religious practice, unless the burden is part of a formally neutral law and serves a compelling interest by the least restrictive means.

RFRA has a chance to work because it is as universal as the Free Exercise Clause. It treats every religious faith and every interest group equally, with no special favors for any group and no exceptions for any group. That is the only hope to rise above the paralysis of interest group politics and to restore protection for religious liberty.

As the principal sponsor of the bill has said, "religious liberty is popular in the abstract, but unpopular in specific applications."\textsuperscript{73} The school boards say, "We're all for religious liberty, but don't

\textsuperscript{69} See Donahue v. Fair Empl. & Hous. Ct. Comm'n, 2 Cal. Rptr. 2d 32 (Ct. App. 1991) (holding that Smith did not affect earlier decisions granting religious exemptions under state constitution) review granted, (Cal. 1992); State v. Hershberger, 462 N.W.2d 393 (Minn. 1990) (granting religious exemptions under state constitution); State v. French, 460 N.W.2d 2 (Minn. 1990) (en banc) (same); Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990) (granting religious exemptions under state constitution without mention of Smith).

\textsuperscript{70} 494 U.S. 872, 890 (1990).

\textsuperscript{71} The judicial and legislative history is summarized in Clarke v. United States, 915 F.2d 699 (D.C. Cir. 1990).


make us do it in the schools.” The prison authorities say, “We’re all for religious liberty, but don’t make us do it in the prisons.” The military authorities say, “We’re all for religious liberty, but don’t make us do it in the military.” No government bureaucrat admits that he is against religious liberty, but every government bureaucrat thinks his own program is special and needs an exception.

The same mentality surfaces on the religious side. Many citizens complaining about free exercise of religion are concerned mostly, or only, about their own religion. “I’m all for religious liberty, but not peyote, or sacrificing chickens; that’s not my idea of religion. My own religion and other religions very much like my own are what I think of when you say religion. They are harmless and deserve protection.”

RFRA’s universal scope feature attempts to cut through all this special pleading. With one-hundred-sixty bipartisan cosponsors, the bill was set to sail through Congress. Now it is in mortal danger, caught in a battle over deeply felt side issues that have aroused competing interest groups. That is a tragedy—RFRA is religious liberty’s only hope for the foreseeable future.

Although I am still writing briefs and articles and fighting on in the courts, I have little hope for liberty in the federal courts in my lifetime. The Democrats have not appointed a justice to the Supreme Court since 1967. The Republicans have as an important part of their coalition a political faction that believes judges should be extraordinarily deferential to the states and the political branches. This belief is partly a reaction to real and perceived excesses of earlier judges. Whatever the causes, and without implying anything about partisan politics on any other issue, I simply note that the Republican dominance of Presidential elections has led to a Supreme Court that interprets constitutional liberties very narrowly. Someday we will have another political realignment, and this pattern of decisions may change, but this is the current pattern. Smith grows out of this pattern.

As I read what the Court has done in religious liberty, in free speech, in criminal procedure, and in other areas of the Bill of Rights, I feel a little like Viscount Grey, who said in August, 1914: “The lamps are going out all over Europe; we shall not see them lit again in our lifetime.” We must keep fighting in the courts, but we should not rely on the courts. We need the Religious Freedom Restoration Act.

In effect, Smith repealed the substantive component of the Free

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Exercise Clause. RFRA asks whether we are willing to reenact it. To hold that bill hostage for an exception, however important, is like holding the Free Exercise Clause hostage for an exception. If you care about religious liberty, set aside all the other issues you care about, save them for another day—there will be plenty more opportunities to fight them out—and rally around RFRA.

Government officials look at the number of requests for religious exemptions and conclude that free exercise exemptions are unworkable. But the number of requests for exemptions is also the measure of the cumulative burden of government on religious exercise. Government regulation is crushing some religions and significantly changing others. Government is rarely crushed by religious exemptions, and when it is, the compelling interest test will preserve the government's interest. In the absence of a compelling reason for an exception, the free exercise of religion must include the right of citizens to be left alone in their religious practice.