



8-1-2003

Religious Liberty in Spain and the United States: A Comparative Study

Conor B. Dugan

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

Recommended Citation

Conor B. Dugan, *Religious Liberty in Spain and the United States: A Comparative Study*, 78 Notre Dame L. Rev. 1675 (2003).
Available at: <http://scholarship.law.nd.edu/ndlr/vol78/iss5/7>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

RELIGIOUS LIBERTY IN SPAIN
AND THE UNITED STATES:
A COMPARATIVE STUDY

Conor B. Dugan*

INTRODUCTION

Recent events have amplified the perennial question of the proper role of religion in American society, politics, and the law. In the 2000 presidential election, then-Governor George W. Bush and Senator Joseph Lieberman, in particular, emphasized their faith and the role it played in their daily lives.¹ President Bush has been a forceful proponent of faith-based initiative programs in which the federal government subsidizes and aids religious groups who provide charitable services to society.² Just recently, the Supreme Court decided *Zelman v. Simmons-Harris*³ and upheld an Ohio program that provided vouchers to families in the Cleveland City School District, which could be used at private schools, including religious and parochial schools.⁴ The plaintiffs had argued that the vouchers were unconstitutional

* Candidate for Juris Doctor, Notre Dame Law School, 2003; A.B. Dartmouth College, 2000. I would like to thank Professor Paolo Carozza for the many helpful suggestions he gave me during the course of drafting this Note. My parents, Mike and Chris, and my sister, Molly, have been of immeasurable support during my whole time at Notre Dame. I am indebted to the staff of the *Notre Dame Law Review* for their editing work on this Note. I must also thank Laurel Sink, Joe Shimek, Keith Alexander, Tom Van Gilder, and Bruce Khula for their constant support and friendship. Finally, thanks must go to Patti Ogden and Dwight King for their research help during the writing of this Note.

1 See, e.g., *On the Religious-Political Trail*, 117 CHRISTIAN CENTURY 1032 (2000); M.W. Guzy, *Lieberman, the Un-Clinton, Should Lighten Up*, ST. LOUIS DISPATCH, Sept. 20, 2000, at B7; James M. Klurfeld, *Convention 2000 The Democrats: Candidates Blurring Church-State Line*, NEWSDAY, Aug. 16, 2000, at A37.

2 See, e.g., Elizabeth Becker, *Lieberman Joins Bush Bid To Push Aid-to-Charity Bill*, N.Y. TIMES, July 21, 2001, at A11.

3 536 U.S. 639 (2002).

4 See *id.* at 244–46.

under the First Amendment of the United States Constitution.⁵ The questions about the proper role of religion in society come against the backdrop of a nation which, by all accounts, is incredibly religious.⁶ Yet at the same time, the constitutional framework which safeguards and protects the freedom of religion has become in recent years confused, and in some eyes, directly or indirectly conflicts with the foundational American understandings of religious liberty and more generally with a proper understanding of what that liberty means in principle and practice.⁷

Whereas the American constitutional order aims to protect the free exercise of religion,⁸ partially by prohibiting any state establishment of religion, the current legal framework, which minimizes both the protections of the Free Exercise Clause and the possible collaboration between the state and religious bodies,⁹ proposes a paltry vision of religious freedom. Fundamentally, this means that the American vision of religious liberty is a minimalist one that sees religious liberty in strictly negative terms, ultimately privatizes religion, and, thereby, undermines the very goals that religious liberty hopes to foster. At the same time, if law is in some sense rhetoric that tells a story,¹⁰ American law is telling a very poisonous story about religious liberty. While formally endorsing religious freedom, the American constitutional regime tells a contradictory story about the value it places upon religion and religiously motivated activity.

To demonstrate these assertions, I will bring the American approach to religious liberty into conversation with the Spanish experience of religious liberty. In particular, I will examine Spanish

5 See *id.* ("The question presented is whether this program offends the Establishment Clause of the United States Constitution."); see also Jacques Steinberg, *Cleveland Case Poses New Test for Vouchers*, N.Y. TIMES, Feb. 10, 2001, at A1.

6 According to one survey, 95% of Americans believe in God, 85% of Americans are Christian, and 7% of Americans identify with a non-Christian faith. Barna Research Group, *Beliefs: General Religious*, at <http://www.barna.org/cgi-bin/PageCategory.asp?CategoryID=2> (last visited Mar. 24, 2003).

7 See, e.g., Ira C. Lupu, *Employment Division v. Smith and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 260 (describing *Employment Division v. Smith*, 494 U.S. 872 (1990), "as substantively wrong and institutionally irresponsible"); Michael W. McConnell, *Neutrality, Separation and Accommodation: Tensions in American First Amendment Doctrine*, in LAW AND RELIGION 63-74 (Rex J. Ahdar ed., 2000) (describing the confused and incoherent nature of American religious liberty law); Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 149 (1991) (arguing that the "intelligent constitutional commitment to religious freedom that once existed in this country has deteriorated").

8 U.S. CONST. amend. I.

9 See *infra* notes 211-53 and accompanying text.

10 See *infra* notes 335-38 and accompanying text.

protections of religious liberty and compare them to those of the United States in order to draw out important distinctions. One of the main contrasts will be that Spain achieves a more robust understanding of the freedom of religion, seeing it as something that requires positive governmental support. Moreover, Spain recognizes the social dimensions of religion, understanding religion not only as a sociological fact, but as a communal reality with social and cultural implications. In the United States, a more individualistic and private notion of religion exists that misses many of the insights of the Spanish approach.¹¹ Though the United States cannot adopt the Spanish model, it nevertheless can learn from the Spanish experience and see its insights as inspirations leading toward a fuller vision of the freedom of religion.

Because all law is contextual,¹² this discussion necessitates more than a simple description of the constitutional provisions or legislation that exists concerning religious liberty in both countries. Thus, my description of the legal approaches in each country is placed within its historical, political, and social context. Religious liberty law makes no sense apart from the historical and foundational principles that were the guiding force behind its very incarnation. Therefore, in this Note, I spend a considerable amount of time attempting to describe the understanding of religious liberty in each country.

Part I begins with a description of the long and often tortured Spanish experience with religious liberty. In Parts I.F and I.G, I analyze Spain's modern constitution and the legislative enactment that fleshed out the constitution's protections. Then in Part I.H, I evaluate the problems and developments that have arisen since the Spanish Constitution's enactment. Part II discusses the American constitutional experience with religious liberty. I first examine the historical and political milieu surrounding the framing of the First Amendment. Then, in Part II.D, I discuss the modern development of the religion clauses and attempt to describe the law as it now stands. After laying out both systems, Part III brings the two systems into conversation in order to show the shortcomings in the current American approach to religious liberty law.

11 See *infra* notes 291–95 and accompanying text.

12 MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 11 (2d ed. 1994) (arguing that one cannot understand the function of various legal rules and systems without “situating them in their legal, economic, and cultural context”).

I. SPANISH RELIGIOUS LIBERTY LAW

A. *An Introduction*

Article 16 of the Spanish Constitution, which was ratified in 1978, states,

1. Freedom of ideology, religion, and worship of individual and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law.
2. Nobody may be compelled to make statements regarding his religion, beliefs, or ideology.
3. There shall be no State religion. The public authorities shall take the religious beliefs of Spanish society into account and shall in consequence maintain appropriate co-operation with the Catholic Church and the other confessions.¹³

These provisions of the Spanish Constitution are a ringing endorsement of religious freedom and a guarantee of that freedom in law. Like all law, these provisions cannot be viewed abstractly; rather, they must be viewed within the context of Spanish culture and history—a culture and history that have, to say the least, not always been friendly to the rights of persons to worship and believe in freedom.¹⁴ As one observer of the Spanish situation has written, “An understanding of contemporary church-state relations in Spain requires . . . [an] historical review.”¹⁵ This historical review is necessary because Spanish history allows us to see the influences behind the 1978 Constitution and the dangers inherent when religious freedom is not guaranteed. Spain’s tortured history of religious liberty and the response to this history also offer the observer a decidedly different response than the American response.

B. *From 589 A.D. to the Nineteenth Century*

To begin understanding the contemporary nature of religious liberty law in Spain, one must return to 589 A.D., when the Spanish state became formally aligned with the Roman Catholic Church. It was in

13 LA CONSTITUCIÓN ESPAÑOLA [C.E.] art. 16, §§ 1–3 (Spain), *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 28 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998).

14 See, e.g., Daniel Basterra Montserrat, *The Constitutional Development of Religious Freedom in Spain: An Historical Analysis*, 4 J. TRANSNAT’L L. & POL’Y 27, 27 (1995) (“Unfortunately, even Spanish constitutional history is replete with examples of religious intolerance.”).

15 Gloria M. Morán, *The Spanish System of Church and State*, 1995 BYU L. REV. 535, 535.

that year that the king “proclaimed the religious (Catholic) and political unity of his Kingdom at the Council of Toledo.”¹⁶ This alignment of the Spanish kingdom with the Catholic religion did not, however, necessarily lead to gross religious intolerance. In fact, before the Protestant Reformation, “the political and religious conditions in Spain were unique among the other countries of Europe.”¹⁷ Spain was unique because, within its borders, the three Abrahamic religions—that is, Judaism, Christianity, and Islam—met and entered into creative dialogue. As one scholar notes, the Spanish cities of Toledo and Cordoba “were true lights that lit up all of Europe.”¹⁸ In fact, “[w]ithin these cities’ walls was an impressive forum of interchange, growth and hope, in which learned men, scientists and humanists gathered and unified. The three cultures and religions were able to coexist, all but unheard of during that time.”¹⁹

At the same time, the experience of the Spanish Jews illustrates that this religious tolerance was always in tension with the countervailing force of religious absolutism. While the Jews “were historically permitted to faithfully practice their religion” in certain sections of Spain, this “permission was never long-lasting.”²⁰ Thus, it seems that the situation on the ground oscillated between a far-reaching freedom of worship and terrible repression of religious plurality. In 1391, the Spanish massacred the Jews mercilessly.²¹ And a short “century later, with the taking of Granada, the Catholic kings in that city signed a far-reaching expulsion decree of all Jews who did not renounce their religion and embrace Catholicism.”²²

With the advent of Protestantism, Spain became “the principal bulwark against the Reformation.”²³ The Spanish experience of religious liberty during this period is best personified by Torquemada, “a destructive man for whom there was only one way of understanding the relationship of man with God.”²⁴ In short, though Spain had shown great promise in allowing religious freedom at various times during these years, “intolerance and persecution predominated the mainstream culture.”²⁵ Another scholar states that the “novelty” of

16 *Id.*

17 Montserrat, *supra* note 14, at 28.

18 *Id.*

19 *Id.*

20 *Id.* at 29.

21 *Id.*

22 *Id.*

23 *Id.* at 30.

24 *Id.*

25 *Id.*

the Spanish encounter with religion "involved Spain's exclusion of dissidents from Spanish territory and, perhaps, the royal zeal for religious reform."²⁶

Though these short few paragraphs can hardly do justice to the early Spanish experience of religious liberty, they do indicate that the Spanish understanding of religion and religious freedom was often contradictory, showing aspects of great tolerance mixed²⁷ with horrible instances of intolerance. At the same time, all of this history must be seen within the context that Spain was a confessional state throughout this period, proclaiming one true religion, namely Catholicism, to the exclusion of all others.²⁸

C. *The Nineteenth Century*

In this historical foray through the Spanish understanding of freedom of religion, we can next focus our energies on the nineteenth century. Enlightenment thought and the philosophies of the French Revolution influenced the Spanish Constitutional Convention of 1812.²⁹ Though Enlightenment principles affected the delegates to the Convention on a whole host of issues, these principles "were completely ignored in religious affairs."³⁰ Though a progressive priest presided over the delegates,³¹ they did not care, or did not desire, to break free of the Spanish history of state alliance with religion and religious intolerance. At the beginning of the constitution was "an invocation to the Trinity," and other provisions of the constitution re-

26 José Antonio Souto Paz, *Perspectives on Religious Freedom in Spain*, 2001 BYU L. REV. 669, 674.

27 Professor Montserrat has given further examples of notions of religious tolerance within the Spanish historical context. Among these are the fact that King Alfonso VI declared himself the king of two religions, another king included the history of all three Abrahamic religions in his personal history, and Francisco de Vitoria "defended the idea that 'infidels' who had not had the opportunity to learn the Christian faith had not committed the sin of infidelity" and "held the view of not forcing the infidels to profess the Catholic faith." Montserrat, *supra* note 14, at 31.

28 It must also be noted that Catholic teaching was still centuries away from developing a richer, fuller, and ultimately more authentic understanding of religious liberty and the necessity of this liberty to the full and free development of the human person. This development would occur at the Second Vatican Council. See *infra* Part III.A.

29 See Paz, *supra* note 26, at 675 (describing the Enlightenment philosophies that influenced the drafters of the 1812 Constitution).

30 *Id.* at 676.

31 Montserrat, *supra* note 14, at 35 (noting that Father Diego Muñoz Torrero, who presided over the drafting commission of the Constitution, was considered a "liberal priest").

quired Catholic Mass to be said before certain electoral meetings.³² But the most significant provision was Article 12, "which declared that Catholicism 'is and will perpetually be [the religion] of the Spanish nation,'" which stated that the state must "protect it 'by just and wise laws,'" and which mandated that the laws must prohibit the "'exercise of any other'" religion.³³ The Cadiz Constitution, as it was called,³⁴ was then hardly an expression of typical Enlightenment sentiments of free thought and free conscience. Rather, the delegates "established a strict regime of religious intolerance."³⁵ Spain was unable to escape the demons of its past.

Spain continued to suffer under the spell of these demons, showing ever-so-slight signs of recovery throughout the course of the nineteenth century, explicitly reiterating the "state's establishment of Catholicism . . . in the Constitutions of 1845 and 1876"³⁶ and implicitly reiterating this establishment in 1837 and 1869.³⁷ Though it might be more accurate to describe the Constitution of 1837 as making strides toward religious freedom, the Constitution of 1837 was "limited to describing" the social "reality" that Catholicism was the religion of Spain and the "precept that prohibited the exercise of another form of worship disappeared."³⁸ Nevertheless, this development disappeared with the next Constitution of 1845, which "inhibited rather than enhanced the current state of religious affairs."³⁹ The liberalizing trend returned with the subsequent Constitution of 1869. Though the State was still "bound to support the worship and ministers of the Catholic religion," there was a new recognition of religious liberty.⁴⁰ Non-Catholic foreigners and Spaniards were granted freedom of worship.⁴¹ With this development non-Catholic worship and practice returned to Spain.⁴² This freedom of exercise was short-lived, however. Seven years later, the Constitution

32 *Id.* at 35–36. It should be noted that some attendees of the Constitutional Convention thought that the invocation of the Trinity was not itself explicitly Catholic enough. *See id.* at 35.

33 *Id.* at 35–36.

34 *See id.* at 34.

35 Paz, *supra* note 26, at 678.

36 *Id.* at 676.

37 *Id.* at 676.

38 Montserrat, *supra* note 14, at 37.

39 *Id.* at 38.

40 *Id.* at 39.

41 *Id.*

42 *Id.* In fact, the "first synod of the Spanish Reformed Church began in Seville on July 15, 1869." *Id.*

regressed, continuing to ensure freedom of belief, but forbidding any non-Catholic ceremonies or public demonstrations.⁴³

D. 1931—The Second Republic

The monarchy, which had ruled Spain for fifty-five years, fell in 1931.⁴⁴ With the fall of the monarchy, a Republic was put into place.⁴⁵ Religion again played a central role in the national discussions over how to order the Spanish state.⁴⁶ The forces that won the day favored a radical "laicism" of society.⁴⁷ As Paz has written, "laicism should not be confused with the separation of church and state."⁴⁸ Rather, laicism was a policy by which religion was severely privatized; the state caused religion to "cease[] to exist as a public issue" and "reduc[ed] religion to a purely individual and private matter."⁴⁹ Whereas the Spanish state had previously been aligned with the Catholic Church, it now took an incredibly hostile stance toward all religion. All "religious groups were subject to a special law" that allowed the State to disband or dissolve any organizations that threatened "state security," required all such groups to be registered with the government, and forbade such groups from owning or obtaining property—except property "designated for the groups' upkeep and special needs."⁵⁰ Additionally, such religious groups were subject to the Spanish tax laws and forbidden from "engag[ing] in industrial, commercial, or proselytizing activities," and their property was subject to nationalization.⁵¹ The scope of the anti-religious propositions did not end there. The Jesuits were dissolved by a constitutional provision forbidding religious orders with any "vow of obedience to any power

43 *Id.* at 40.

44 *Id.*

45 *See id.* The First Spanish Republic lasted for a year from 1873 when King Amadeo abdicated the throne until December 1874 when the army declared Alfonso XII king. The monarch again ruled from 1875 through 1931. *See* HENRY KAMEN, A CONCISE HISTORY OF SPAIN 135–37 (1974) (describing the rise and fall of the First Spanish Republic and the Restoration of the Monarchy); *see also* PETER PIERSON, THE HISTORY OF SPAIN 106–09 (discussing the First Republic and its demise).

46 *See* Montserrat, *supra* note 14, at 40 (stating that the "issue of religion again cause deep divisions both in the Parliamentary assembly and throughout the country").

47 *See* Paz, *supra* note 26, at 680.

48 *Id.*

49 *Id.*

50 *Id.* at 683; *see also* Montserrat, *supra* note 14, at 41.

51 *See* Montserrat, *supra* note 14, at 41; Paz, *supra* note 26, at 683.

other than the State.”⁵² Finally, public religious demonstrations and expressions were allowed only with state permission.⁵³ And though “freedom of conscience and the right to profess and freely practice whatever religion”⁵⁴ was still protected under Spanish law, this protection was without much content in light of the above provisions and limitations.

E. Franco's Regime

The Second Republic's reign was short. In 1936, the Spanish Civil War began largely because of “popular dissatisfaction with the government's approach to church-state relations.”⁵⁵ At the end of the war, in 1939, General Francisco Franco and his supporters emerged victorious. In place of the disestablishment and “freedom of conscience” promised under the Second Republic, Franco's regime reestablished the Catholic Church as the state religion, granted “moderate religious tolerance,” and allowed “limited private, non-Catholic worship.”⁵⁶ Whereas the previous regime had been characterized by a deep anticlericalism, this new regime was characterized by a new clericalism.⁵⁷ The Church and state interacted in a symbiotic relationship in which the state received “privileges in religious matters” and the Catholic Church received privileges “in the political arena.”⁵⁸ Among the Church's privileges was the ability to nullify “laws or judicial decisions that did not comport with Catholic doctrine.”⁵⁹ Within this new establishment relationship, the religious beliefs of non-Catholics were still permitted, but they were utterly confined to the private sphere. The Sixth Article of the Fundamental Laws⁶⁰ stated that, “No one shall be disturbed as a result of their religious beliefs in the private exercise of their worship; *beliefs or external expressions* other than the Catholic religion shall not be permitted.”⁶¹

52 Paz, *supra* note 26, at 684 (quoting C.E. art. 26 (1931) (Spain)); *see also* Montserrat, *supra* note 14, at 41.

53 Montserrat, *supra* note 14, at 42.

54 *Id.* at 41.

55 Morán, *supra* note 15, at 536.

56 *Id.*; *see also* Paz, *supra* note 26, at 685.

57 *See* Morán, *supra* note 15, at 536.

58 Paz, *supra* note 26, at 686.

59 *Id.*

60 Professor Montserrat argues that one cannot accurately speak of a Spanish Constitution at this time. Rather, what existed were certain fundamental laws that were never approved by a popularly elected legislative body. *See* Montserrat, *supra* note 14, at 42.

61 *Id.* at 43 (quoting Fundamental Laws) (emphasis added).

In the second half of the Franco regime, it was the Catholic Church itself which began the slow process of disentangling the Church from the state. The Second Vatican Council reinvigorated the Church's own understanding of church-state relations.⁶² In the wake of the Council, the Catholic Church generally "demanded autonomy and independence from civil powers" and also demanded the recognition of religious freedom as a basic human right.⁶³ This brought about the 1967 Spanish Law of Religious Freedom, which granted "religious freedom to non-Catholic faiths."⁶⁴ At the same time, the Catholic Church still "retained" its "privileged legal status."⁶⁵ Though tensions still existed between the Church and the state and much still needed to be worked out between the two institutions and the manner in which religious freedom would be protected, the stage had been set for further and deeper developments in the law of religious freedom. In some sense, it seems that this development necessitated a conjunction of aims on the part of the state and Catholic Church. In the past, the Catholic Church had fought strongly for religious freedom where its own interests had been threatened. Now, it had placed its moral authority squarely behind the idea of religious freedom; it would take but a few short years for the state to catch up.

F. The Constitution of 1978

With the death of General Franco in 1975, a "period of political transition" ensued, culminating in the 1978 Spanish Constitution.⁶⁶ One commentator has described this constitution as having "deeply reformed the Spanish legal system and recognized the fundamental right of religious freedom in a country free of an established church."⁶⁷ The framers of this constitution felt influences to expand the protections of religious freedom both from within Spanish society and from outside the country.⁶⁸ The internal influences were several: one, as mentioned above, was the Catholic Church and its richer understanding of religious liberty; second, was the historical experience of the previous years, and even centuries, with its "failed political and legal solutions (both laicism and the religious state)."⁶⁹ The external

62 See Paz, *supra* note 26, at 687.

63 *Id.* at 687-88.

64 *Id.* at 688.

65 Morán, *supra* note 15, at 536.

66 *Id.* at 537.

67 *Id.*

68 Paz, *supra* note 26, at 689.

69 *Id.*

influences included various United Nations documents and the European Convention on Human Rights.⁷⁰

One additional internal influence that had a profound effect upon the drafting of the 1978 Constitution was an agreement reached between the Spanish State and the Catholic Church in 1976.⁷¹ The agreement ensured the following: "1) mutual independence of church and state; 2) healthy collaboration between both institutions; and 3) recognition of religious freedom as a civil right."⁷² The agreement also included a proviso that would "have a decisive influence on the drafting" and the development of the constitution; namely, the agreement ensured that the Catholic Church would not be "subject to a common regulatory system for all religions."⁷³

These were the various factors and influences the framers considered as they drafted the modern constitution of Spain. In the original formulation or draft of the constitution, the framers simply posited a constitutional regime that negatively protected religious freedom. The draft of Article 17, the precursor to the current Article 16, stated that, "1) Freedom of religion and worship, as well as philosophical and ideological expression, is guaranteed, with the only limitation being the public order protected by law" and that, "2) No person can be compelled to declare his or her religious beliefs."⁷⁴ The subsequent drafts and then the final draft of the constitution pushed past this negative conception of religious freedom, to one that was more positive and cooperative. The second draft added a provision stating that: "[n]o faith may be designated as the State's own. Public authorities shall be mindful of Spain's religious groups and will maintain cooperative relationships with all."⁷⁵ This innovation shifted "the secular state from a policy of indifference regarding religious matters to the role of an attentive observer."⁷⁶ That is, the framers constitutionalized the social fact of religion, requiring the State to take this fact into account and furthermore, to cooperate with the various religious bod-

70 See *id.* ("Freedom of thought, conscience, religion, and worship—both individually and collectively, in public and in private—are all recognized and guaranteed in these international documents.").

71 Agreement Between the Holy See and the Spanish State, July 28, 1976, Spain-Vatican (B.O.E. 1976, 230) [hereinafter Agreement]; see Paz, *supra* note 26, at 690.

72 Paz, *supra* note 26, at 690. In the provisions of the agreement the state "waived its privilege to name bishops and the Church waived its privilege to legal exemption." *Id.* (citing Agreement, *supra* note 71, art. I).

73 Paz, *supra* note 26 at 690.

74 *Id.* at 691 (quoting C.E. art. 17 (Draft 1977 (Spain))).

75 *Id.* at 692 (quoting C.E. art. 17 (Draft 1977 (Spain))).

76 *Id.*

ies within Spain.⁷⁷ It was an innovation reflected in the final text, which read:

1. Freedom of ideology, religion, and worship of individual and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law.
2. Nobody may be compelled to make statements regarding his religion, beliefs, or ideology.
3. There shall be no State religion. The public authorities shall take the religious beliefs of Spanish society into account and shall in consequence maintain appropriate co-operation with the Catholic Church and the other confessions.⁷⁸

In late 1978, King Juan Carlos signed the constitution, making it the law of the land. For Spain this seemed to mark the end of the thorny "religion question" that had plagued the country for hundreds of years.⁷⁹

G. Post-Ratification Developments

1. General Act of Religious Liberty

Though one can unequivocally state that the Spanish "religion question" was closed by the Constitution of 1978, this constitution—like all law—raised its own questions of how it was to be interpreted, implemented, and lived out in the shared social life of Spain. The constitution simply set in motion a legal framework to which the Spanish state would, in subsequent years, need to add substance. The first of this substance came in the form of the General Act of Religious Liberty,⁸⁰ otherwise known as the Organic Law on Religious Freedom,

⁷⁷ See *id.*

⁷⁸ C.E. art. 16, §§ 1–3 (Spain), *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 28 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998). One should note that the Spanish Constitutional protections apply not only against the state but also against private actors. Thus the Constitution protects a general right which private actors must also respect. C.E. art. 9, § 1 (Spain), *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 26 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998) (stating that "[c]itizens and public authorities are bound by the Constitution").

⁷⁹ Paz, *supra* note 26, at 697.

⁸⁰ See General Act 7/1980 of 5 July of Religious Liberty (B.O.E. 1980, 177) [hereinafter General Act], *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 41–46 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998).

which became law in 1980.⁸¹ The Act explicates the manner in which the freedom of religion can be exercised both by individuals and religious groups⁸²—it “contemplates the content of the guarantee” of religious freedom “in its individual and institutional aspects”⁸³—and, explicitly, “sets forth with complete clarity the rule of nondiscrimination for reasons of religious beliefs.”⁸⁴ The Act manifests the constitution’s mandate of cooperation at several points. One provision “to ensure true and effective application of these rights” requires the state to “adopt the necessary measures to facilitate assistance at religious services in public, military, hospital, community, and penitentiary establishments and any others under its aegis, as well as religious training in public schools.”⁸⁵ A second set of provisions allows the state to set up cooperation agreements with religious bodies that have registered with the State.⁸⁶

These registration and cooperation provisions merit a closer look. Article 5 “creates a public registry within the Ministry of Justice in which churches, faiths, and religious communities and their affiliates *may* enroll.”⁸⁷ One of the keys here is that religious groups are not required to register; “groups may choose instead to enroll in the common registry for associations.”⁸⁸ Furthermore, the registry is limited to “those groups that pursue a ‘religious purpose.’”⁸⁹ The Span-

81 Javier Martínez-Torrón, *Church Autonomy and Religious Liberty in Spain*, in CHURCH AUTONOMY: A COMPARATIVE SURVEY 345, 347 (Gerhard Robbers ed., 2001).

82 See General Act, art. II, *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 41–42 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998); *see also* Montserrat, *supra* note 14, at 46; Paz, *supra* note 26, at 697.

83 Montserrat, *supra* note 14, at 46.

84 *Id.* (describing General Act, art. I, § 2).

85 General Act, art. II, § 3, *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 42 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998); *see also* Montserrat, *supra* note 14, at 46.

86 General Act, arts. V, VII, *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 43–44 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998).

87 Paz, *supra* note 26, at 698 (emphasis added); *see* General Act, art. V, § 1, *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 43 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998).

88 Paz, *supra* note 26, at 698; *see* General Act, art. VI, § 2, *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 44 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998). Registration does however have its benefits including placing the religious entity under the “protective umbrella” of the General Act. Martínez-Torrón, *supra* note 81, at 349.

89 Paz, *supra* note 26, at 698–99 (quoting General Act, art. V, § 2, *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 43 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998)). As Paz states and my discussion

ish State "shall establish as appropriate" cooperation agreements with religious groups or bodies that have registered and that have obtained "notorious influence" in Spain "due to their domain or number of followers."⁹⁰ Parliament "must then approve all agreements made between the government and the religious groups."⁹¹ This same article allows these agreements to "confer" tax breaks and benefits to the entities with whom the agreements have been made.⁹²

At the same time, the General Act in Article 3 also spells out limits to the freedom of religion:

1. The rights deriving from the freedom of worship and religion may not be exercised to the detriment of the right of other [sic] to practise their public freedoms and fundamental rights or of public safety, health and morality, elements which constitute the order ensured under the rule of Law in democratic societies.
2. Activities, purposes and Entities relating to or engaging in the study of and experimentation with psychic or parapsychological phenomena or the dissemination of humanistic or spiritualistic values or other similar non-religious aims do not qualify for the protection provided in this Act.⁹³

Therefore, the General Act is not simply a document granting religious liberties and spelling out the manner in which the State can and should cooperate in helping religious entities but rather it sets limits on the manner in which that freedom rightly can be exercised.⁹⁴

below, *infra* notes 122-35 will show, what constitutes a religious purpose is not an easy question. Paz, *supra* note 26 at 699.

90 General Act, art. VII, § 1, *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 44 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998); *see also* Paz, *supra* note 26, at 700 (quoting General Act, art. VII).

91 Paz, *supra* note 26, at 700; *see* General Act, art. VII, § 1, *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 44 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998)

92 General Act, art. VII, § 2, *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 44 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998). Such tax benefits are further subject to the "principle of equality," which means that tax benefits cannot be given to one group with whom an agreement has been reached to the exclusion of others. *Id.*

93 *Id.* art. III, *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 42-43 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998). As Professor Morán has asked, this provision raises a serious question: "Can any state law distinguish religious values from spiritualistic values so that the regulation of humanistic or spiritualistic values does not violate the fundamental right to religious liberty?" Morán, *supra* note 15, at 539.

94 Some might argue that no such limits can ever be placed upon the exercise of religious liberty. This however confuses the true nature of religious liberty, which is not in of itself an absolute human right but one that is subject to certain limits. It is

2. Agreements with Religious Bodies

In the years since the ratification of the new Spanish Constitution and the enactment of the General Act on Religious Freedom, the Spanish government has entered into cooperative agreements with several different religious entities as provided for in both the General Act and the Constitution.

The first of these agreements was with the Catholic Church.⁹⁵ It is, in fact, more accurate to describe the agreement with the Catholic Church as a series of agreements.⁹⁶ Because the first of these agreements with the Catholic Church predated the General Act it did not fall under the auspices of Article 7 of that act.⁹⁷ In part this means that the agreements with the Catholic Church have “created certain [internal] mechanisms for interpreting and applying their content” apart from the “mechanisms . . . provided in ordinary legislation about such matters.”⁹⁸ At the same time, this set of agreements with the Catholic Church are also different from cooperative arrangements with other religious entities because they are “considered international treaties.”⁹⁹

Three main issues are addressed by the agreements between the Catholic Church and the Spanish State.¹⁰⁰ The first issue deals with “[j]uridical matters” by which the “state recognizes that each Catholic entity and institution is a legal organization.”¹⁰¹ Included under these juridical matters are such things as the understanding that Catholic churches and shrines are sacred, that the Catholic Church can give aid in public institutions such as hospitals and prisons, and that the Sabbath and Catholic Holy Days are state holidays.¹⁰² The second issue concerns education and cultural affairs. The Spanish government

not always state coercion for a state to prevent someone from acting out certain “religious” beliefs he might have. It would be coercion if the state attempted to disabuse that person from his belief. But it is wholly different to suggest that a state’s prevention of certain actions in order to promote and ensure the common good (and to avoid attacks on the rights of others) is a coercive act and therefore a violation of religious liberty. See SECOND VATICAN ECUMENICAL COUNCIL, DIGNITATIS HUMANAЕ [DECLARATION ON RELIGIOUS FREEDOM] ¶ 2 (1965) [hereinafter DIGNITATIS HUMANAЕ] (stating that the right to religious freedom is to be respected, “provided that just public order be observed”).

95 See *supra* notes 71–73 and accompanying text.

96 Morán, *supra* note 15, at 542.

97 See Paz, *supra* note 26, 702.

98 *Id.* at 702–03.

99 Morán, *supra* note 15, at 542; see also Paz, *supra* note 26, at 702.

100 Morán, *supra* note 15, at 542–43.

101 *Id.* at 542.

102 See *id.* at 542–43.

has agreed to "respect Catholic values in public schools"¹⁰³ and that "school curricula . . . 'shall include the teaching of the Catholic Religion in all Educational Centers, [under] conditions comparable to those of the basic subjects.'"¹⁰⁴ The Church, not the government, is the entity responsible for choosing what will be taught in these religion classes, the teachers who will teach, and the sources used in the teaching.¹⁰⁵ The third set of issues that these agreements cover concern state financial support of Catholicism and taxation exemptions. The Church receives a certain portion of the income tax of those taxpayers who elect to help support the Catholic Church¹⁰⁶ and receives exemptions from the income tax, as well.¹⁰⁷

The Spanish government has also reached agreements with three other religious bodies in the last twenty years. In 1992, the Evangelical Christian, Jewish, and Islamic communities entered into Article 7 Cooperation agreements.¹⁰⁸ Each of these agreements is basically the same.¹⁰⁹ These agreements protect the groups' "places of worship" and the professional capacities of their ministers, "including the recognition of confidentiality of facts learned during pastoral activities and permitting ministers to participate in Spain's Social Security program."¹¹⁰ In addition, the agreements civilly recognize the marriages performed in each of the three bodies and grant these religious bodies access to public institutions and organizations such as hospitals, prisons, and the military.¹¹¹ Most significant, however, is that these agreements grant to these religious bodies the same rights granted to the Catholic Church in the arena of education. Each of the groups is "guarantee[d] . . . access to school grounds as well as the availability of classrooms for religious instruction under the direction of ministers

103 *Id.* at 543.

104 Paz, *supra* note 26, at 705 (quoting Agreement Concerning Education and Cultural Affairs, art. 2 (B.O.E. 1979, 300), *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 58 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998)).

105 *See id.*

106 *See* Morán, *supra* note 15, at 543; *see also* Paz, *supra* note 26, at 703-04.

107 *See* Morán, *supra* note 15, at 543. A fourth minor issue that Professor Morán mentions is assistance to the armed forces. The Catholic Church no longer has a "monopoly over religious assistance." *Id.*

108 *See* Martínez-Torrón, *supra* note 81, at 355.

109 *See* Morán, *supra* note 15, at 545.

110 Paz, *supra* note 26, at 708.

111 *Id.* Permanent military chaplains of these bodies are not created under these agreements because "the number of non-Catholic believers in the military would not justify it," but rather the religious groups are granted "free access" to military establishments. Martínez-Torrón, *supra* note 81, at 355.

from each faith.”¹¹² For instance, the language of the Evangelical agreement, states that “students, their parents and those school organisms so requesting, shall be guaranteed the right to receive evangelical religious classes in public and private subsidised schools.”¹¹³ Also significant is the “special tax treatment” the state gives to contributions from the faithful of the various denominations.¹¹⁴ Each of the three groups, however, has refused to “accept any financial aid from their believers’ income tax.”¹¹⁵ Finally, one important difference between these agreements and the Catholic agreements should be noted. In these three agreements, questions of financial aid from the government are “left to [the] government agencies” that handle specific matters.¹¹⁶

H. Problems in Interpretation and Application

After examining the manner in which the government has filled in the content of the requirement of cooperation, we should briefly turn to several problematic issues that have arisen within the religious liberty context in the years since the ratification of the constitution and the General Act. These problems illustrate the Spanish religious liberty regime as a whole and of the possible gaps within this regime.

The first problem, which can serve as an example of the Spanish approach to religious liberty, arose early in the 1980s when a group of congressmen challenged the constitutionality of the system of governmental support of Catholic military chaplains.¹¹⁷ The congressmen reasoned that “there is no room in a neutral state for a system of religious assistance in which ministers of worship are classified as civil servants.”¹¹⁸ Though the Spanish Constitutional Court refused to rule

112 Paz, *supra* note 26, at 708.

113 Art. X, § 1 app. of the Law 24/1992, of 10 November, Approving the Agreement of Cooperation Between the State and the Federation of Evangelical Religious Entities of Spain (B.O.E., 1992, 272), *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 81 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998).

114 Paz, *supra* note 26, at 709.

115 See Morán, *supra* note 15, at 545–46; see also, Martínez-Torrón, *supra* note 81, at 355.

116 Paz, *supra* note 26, at 709. Nevertheless, as Paz states, “the government has extended financial aid to the three faiths in various ways, such as religious education and pastoral support. These actions have helped overcome the differences between the minority religions’ agreements and those of the Catholic Church.” *Id.*

117 Javier Martínez-Torrón, *Freedom of Religion in the Caselaw of the Spanish Constitutional Court*, 2001 BYU L. REV. 711, 730.

118 *Id.*

on the question of constitutionality because of procedural issues,¹¹⁹ the language of its ruling was nevertheless telling about the Spanish understanding of religious liberty:

The fact that the State provides Catholic religious assistance to the members of the Armed Forces not only does not constitute any violation of the Constitution but, on the contrary, offers the possibility to render actual the right to worship of individuals and communities. The right to freedom of religion and worship does not undergo any pressure, for members of the Armed Forces are free to accept or refuse the assistance they are offered. The right to equality is not violated either, as the religious service in favor of Catholics does not exclude religious assistance for the faithful of other religions, performed in due proportion and measure, which they can demand.¹²⁰

Notice that the court was saying that "providing Catholic religious assistance to the military was a way of *facilitating* the individual soldier's exercise of religious freedom."¹²¹ Far from infringing upon the religious liberty of those in the armed forces, the provision of military chaplains allowed the freedom of religion actually to mean something. Though the court did not state that the constitution required this exact form of cooperation, it nevertheless indicated that the Spanish understanding of the demands of freedom of religion was a very rich one. Under this understanding, state neutrality is not contravened by cooperation and cooperation allows the right of religious freedom to have a substance it would not otherwise have.

A second issue that presents a thorny problem in the Spanish context is the question of how one defines religion.¹²² Recall that under the General Act, that "[a]ctivities, purposes and Entities" that have "non-religious aims" are not protected by the Act.¹²³ At the same time, registration of religious groups requires a "declaration of religious purpose."¹²⁴ These two principles tie together; one cannot register with the government as a religious entity without showing that one has a religious purpose, as opposed to a non-religious aim.¹²⁵ A fail-

119 *Id.*

120 *Id.* at 731 (quoting STC, May 13, 1982 (S.T.C., No. 24)).

121 Martínez-Torrón, *supra* note 117, at 731 (discussing STC, May 13, 1982 (S.T.C., No. 24)) (emphasis added).

122 Martínez-Torrón, *supra* note 81, at 355.

123 General Act, art. III, § 2, *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 42-43 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998).

124 *Id.* art. V, § 2, *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 43 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998).

125 *See* Martínez-Torrón, *supra* note 117, at 741 n.97.

ure to register does not however impair one's right to exercise religious liberty; this right is still guaranteed under the constitution.¹²⁶ This of course raises the question of what the exact "legal concept of religion" is to be under the Spanish law.¹²⁷ Practically, this has presented hurdles to groups such as the Church of Scientology and the Church of Unification.¹²⁸ The Spanish mode of answering this question has been quite traditional. According to Professor Martínez-Torrón, the Spanish government has "considered that a certain entity could be qualified as religious, for legal purposes, when it accommodates to what could be called the functional structure" of either Judaism, Christianity, or Islam.¹²⁹

Thus, it was fitting that in 2001 a case came before the Constitutional Court on this very question. The Church of Unification was denied the right to register because the government deemed that it did not have a religious purpose and because it encouraged "activities that were contrary to the public order and morals."¹³⁰ The court overturned the administrative judgment of the Spanish government holding that the Church of Unification had to be allowed to register.¹³¹ According to the Court, "the authorities in charge of the Registry do not have any discretion . . . to examine the religious nature of any group that has applied to register."¹³² Rather, the authorities "must limit themselves to confirm[ing]"¹³³ whether a particular group conforms with Article 3, Section 2 of the General Act.¹³⁴ This decision is necessarily conflicted. If the authorities are to have no discretion in determining whether a group is religious, it seems that they cannot make a determination on whether a group conforms with the General Act. At the same time if the authorities are to determine whether a group conforms, then it seems, by necessity, they must investigate whether a group is religious. One scholar argues that the Court's rul-

126 *See id.*

127 Martínez-Torrón, *supra* note 81, at 357.

128 *See id.*

129 *Id.* at 348 ("In other words, a group can be considered of religious nature and aims when it possesses a body of dogmatic and moral tenets derived from the belief in a supreme being, who is worshipped through some external practices, or rites, and when it has an organizational structure endowed with certain stability.").

130 Martínez-Torrón, *supra* note 117, at 742 (quoting STC, Feb. 15, 2001 (S.T.C., No. 46)).

131 *Id.* at 743.

132 *Id.*

133 *Id.*

134 *See* General Act, art. III, § 2, *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 42-43 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998).

ing means that "the Registry will probably have to accept every application without further inquiries (except in the unlikely hypothesis that the applicant group explicitly recognizes, in [its] documents . . . that it is a non-religious organization)."¹³⁵ This conclusion appears correct considering that the Court simply allowed the Church of Unification to be registered, rather than allowing the Registry to make a determination as to whether the group did in fact have a "non-religious" purpose. In fact, originally the Registry had stated that the Church of Unification had a non-religious purpose, which would seem to have put it within the Court's holding.

Yet another question that arises under the Spanish religious liberty scheme is what constitutes the "notorious influence in Spanish society"¹³⁶ of a religious body required for the state to enter into an agreement with it.¹³⁷ This is not just a theoretical question. Though they desire to enter into an agreement, the Jehovah Witnesses and the Church of Jesus Christ of Latter-Day Saints have been shut out of agreements by the government.¹³⁸ The government is currently operating under a policy that no new agreements are necessary.¹³⁹ Yet, these groups have thousands of followers, many more than the Jewish Communities in Spain.¹⁴⁰ It seems to one scholar that the Spanish state only desires to enter into agreements with "the most traditional religions."¹⁴¹ This problem evidences what can occur under a scheme of cooperation. Necessary decisions and distinctions are made that leave out some groups and include others.

A final problem that can only be briefly touched upon is the danger inherent in a system that purposely eschews the idea that the State should be thoroughly secular and removed from any interactions with religion or religious bodies. This is the problem of favoring one body over another. In particular, Spanish law treats the Catholic Church

135 Martínez-Torrón, *supra* note 117, at 744.

136 Organic Law, art. 7, § 1, *reprinted in* MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 44 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998).

137 See Martínez-Torrón, *supra* note 81, at 357; Morán, *supra* note 15, at 544 (using the term "radication" instead of influence).

138 See Martínez-Torrón, *supra* note 81, at 357.

139 *Id.*

140 See *id.* at 357-58. Professor Martínez-Torrón also stated that, "Numbers are certainly not the only factor to determine the social rooting of a church, but a necessary element of it, and have an attractive advantage: they can be checked out with relative objectivity." *Id.* at 358.

141 *Id.* at 357.

differently from other religious bodies.¹⁴² This is not to suggest that other bodies are treated negatively. But relative to the position of the Catholic Church, other religious bodies are treated less well. And if one of the main “constitutional principles” of Spain is “equality”—namely, that “the State regulation of religious matters must respect the principle of [the] equality [of religious groups] before the law”¹⁴³—then it would seem that Spain is falling short of living up to this goal. As Professor Moran has stated, “While the unique treatment of the Catholic Church may be justified by the Church’s role in Spanish society and culture, this privileged treatment illustrates that equal treatment of religious confessions, though possibly a goal, is not a reality in Spain.”¹⁴⁴

These four problems help to fill out the landscape of the Spanish system of religious liberty. Others could have been mentioned.¹⁴⁵ Nevertheless, by examining these problems or questions, the advantages and disadvantages, triumphs and failures of the Spanish system can be more clearly understood and analyzed. Taken as a whole, the Spanish experience of religious liberty has been one fraught with tensions and successes, innovation and change. Regardless of its overall success, which incidentally seems to be high,¹⁴⁶ it offers the open observer important insights and contrasts to apply against the American system—a system to which we turn next.

II. U.S. RELIGIOUS LIBERTY LAW

A. *An Introduction*

The American experience and its legal framework of religious liberty offer a significant contrast to the Spanish experience and constitutional framework. Though America is a significantly younger country, it has a longer experience of protecting religion and religious freedom. As a noted scholar of American religious liberty law, Michael W. McConnell has written, “religion has a special and unique

142 See, e.g., Morán, *supra* note 15, at 542–44 (describing various benefits bestowed upon the Catholic Church including the promise to “respect Catholic values in public schools,” giving “ecclesiastical court opinions . . . civil effect,” and ensuring that Catholic religion can be a “main subject in any school”).

143 Martínez-Torrón, *supra* note 81, at 346.

144 Morán, *supra* note 15, at 542.

145 Freedom of conscience questions come to mind. See, e.g., Martínez-Torrón, *supra* note 117, at 748.

146 See Martínez-Torrón, *supra* note 81, at 356 (stating that the current religious liberty scheme is one generally accepted by both Spanish society and the various religious entities subject to it).

place in [the American] constitutional order.”¹⁴⁷ Religious liberty has a special place at the heart of the American constitutional experiment—an experiment that began nearly two hundred years before the Spanish Constitution enshrined the freedom “of ideology, religion, and worship” and disavowed any state religion.¹⁴⁸

Before examining the historical and cultural context surrounding the American notion of religious liberty, it is best to examine the core constitutional text that protects religious liberty in America. The Constitution’s protection of religion is found in the First Amendment, which reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹⁴⁹ Those sixteen simple words are the ground upon which the American religious liberty doctrines rest.¹⁵⁰ And though the Free Exercise Clause and the Establishment Clause “form a single grammatical unit and reflect a common history,” the two clauses have not been “interpreted complementarily.”¹⁵¹

*B. The Historical Framework In Which and From Which
the First Amendment Arose*

To understand better the meaning and nature of the First Amendment, it is important to briefly examine the historical milieu in which those sixteen simple words were framed. Here, two specific questions come to mind: what was the historical impetus behind enshrining religious liberty in the Constitution? What was the meaning of the religion clause or clauses?

Professor John Witte, one of the leading scholars on American religious liberty law, has described the First Amendment as “ex-

147 Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 15 (2000).

148 C.E. art 16, § 1 (Spain), reprinted in MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 28 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998).

149 U.S. CONST. amend. I.

150 The Constitution also forbids making political office subject to a religious test or oath. *Id.* art. VI, cl. 3. But this provision has never been one of the prime foundations of constitutional adjudication of religious liberty. See John Witte, Jr. & M. Christian Green, *The American Constitutional Experiment in Religious Human Rights: The Perennial Search for Principles*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 498 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

151 Michael W. McConnell, *Accommodation of Religion: An Update and a Response to Critics*, 60 GEO. WASH. L. REV. 685, 695 (1992).

press[ing] both theological and political sentiments.”¹⁵² In his view, the religion clauses, “reflect both the convictions of the religious believers of the young American republic and the calculations of their political leaders.”¹⁵³ What were the convictions and principles of the religious and political leaders who framed the First Amendment?

According to Professor McConnell, there were four basic approaches to the relationship between the state and religion in the American colonies.¹⁵⁴ The first model was a Puritan or Congregationalist model that predominated in the New England States.¹⁵⁵ There, “[b]oth civil and church governance were established in accordance with their ‘congregational’ understanding of church polity.”¹⁵⁶ The Puritans had come to the new world “to establish a Christian commonwealth where . . . society would be directed by the revealed word of God.”¹⁵⁷ It is important to note that the church and state were not intertwined to such a degree as to be indistinguishable. Rather, the church and state were two separate but cooperating institutions of “Godly authority”¹⁵⁸ working towards the same goal.¹⁵⁹ Nevertheless, the Puritans’ vision of the state as religiously motivated and ordained for God left no room for toleration. In the Puritan view, there was one path to God, and freedom to pursue other paths was simply impermissible.

A second, very different, model of relations between the state and religion was to be found in Virginia, where the Anglican Church was “established by order of the Crown” in order to control society.¹⁶⁰ There the church was controlled by the government.¹⁶¹ At the same time, religious dissent was not tolerated.¹⁶² The contrast between the Virginian and Puritan models has been aptly described by Professor McConnell: “[t]he New England establishments arose from a grass-roots movement born of the conviction that religious truth should

152 JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 23 (2000); *see also* Witte & Green, *supra* note 150, at 501.

153 WITTE, *supra* note 152, at 23.

154 *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990).

155 *Id.* at 1422.

156 *Id.*

157 *Id.*

158 Witte & Green, *supra* note 150, at 505.

159 *See id.* at 504–05.

160 McConnell, *supra* note 154, at 1423.

161 *Id.*

162 *Id.*

control all of society, while the Virginia establishment was imposed from above and dedicated to governmental control over religion.”¹⁶³

In some of the original American colonies, a third model of “benign neglect” dominated.¹⁶⁴ Colonies such as New York and New Jersey, tolerated religious dissent and diversity, in part, because of the wide array of religious believers who lived in these colonies.¹⁶⁵

The final model of religious toleration that appeared in the American colonies was that of safe-haven. This existed where colonies “were established explicitly as havens for religious dissenters.”¹⁶⁶ Five colonies were formed in this manner and each of them embraced a policy of religious toleration.¹⁶⁷ These four models necessarily informed the debate surrounding religious liberty in the English colonies, which soon were to become a nation.

Additional ideas made up the historical context. Professor Witte and Professor M. Christian Green describe two “theological perspectives” and two “political perspectives” that informed the American scene in the 18th century: these are the Puritan and Evangelical free-church religious views and the Enlightenment and Republican political philosophies.¹⁶⁸ The Puritan view, as described above, saw the church and the state as separate institutions, though both were ordained by God.¹⁶⁹ Certain basic “safeguards” existed to “ensure the . . . separation of the institutions of church and state.”¹⁷⁰ Though a certain level of separateness existed between the two institutions, they still were complementary in function. The state supported the church (even materially), and the church supported the state.¹⁷¹ And of course, even in the midst of this separation, the Puritan view “left little room for individual religious experimentation.”¹⁷²

163 *Id.*

164 *Id.* at 1424.

165 *Id.*

166 *Id.*

167 *See id.* at 1424–25 (describing the founding of Carolina, Delaware, Maryland, Pennsylvania, and Rhode Island as such havens). It should be noted that Maryland, which was founded as a Catholic haven, found itself controlled after 1689 by its Protestant majority, who made the Anglican Church the official religion and embraced a policy of religious intolerance. *Id.* at 1424.

168 Witte & Green, *supra* note 150, at 502–03.

169 *See id.* at 504–05 (describing how the Puritans saw “the church and the state as two separate covenantal associations, two seats of Godly authority”).

170 *Id.* at 504.

171 *See id.* at 505. (describing the aid given to the churches by state officials and the reciprocal material aid provided to the state by the churches).

172 *Id.* at 506.

Evangelical views, which emerged after the above four models were in place,¹⁷³ were, on the other hand, much more tolerant. Evangelicals “advanced a theological theory of religious rights and liberties,” holding that there was a right to liberty of conscience and a right to freedom of association.¹⁷⁴ They advocated prohibitions on any sort of religious establishment.¹⁷⁵ One preacher of the school even stated that “[t]he notion of a Christian commonwealth should be exploded forever.”¹⁷⁶ Witte and Green suggest that a theology of “[r]eligious voluntarism lay at the heart” of this thinking, under which every person “must be given the liberty of conscience to choose to change his or her faith.”¹⁷⁷

Enlightenment thinking also played a part in the development of religious liberty in America. Motivating the American Enlightenment thinkers was a desire to “free politics and the state from the influence of religion and the church.”¹⁷⁸ These thinkers wanted to end religion’s often coercive effect upon the political regime. Whereas the Evangelicals were motivated partly out of their experience of persecution to call for a disentanglement of religion from the state, the Enlightenment view arose out of a severe distrust of religion and a belief that its alignment with the state led to deleterious effects.¹⁷⁹ At the same time, Enlightenment thinkers believed that the state could not force a person to decide the “duty” he might have to the “Creator” and the exact way in which that duty should manifest itself.¹⁸⁰

Finally, a Civic Republicanism captured the minds of many during this period of American history. This group favored religious liberty but at the same time wanted to “cultivate” a larger “set of common values and beliefs for the new nation.”¹⁸¹ By its very nature,

173 See *id.* at 506–08 (describing how Evangelical views did not arise as a strong force until the middle part of the eighteenth century).

174 *Id.* at 507.

175 See *id.* (stating that the Evangelicals “agita[ted] for a fuller separation of the institutions of church and state” than the Puritans).

176 *Id.* (quoting John Leland, a Baptist preacher).

177 *Id.* Part of the motivation of the Evangelicals was their own experience of persecution. See *id.* at 508. (detailing the religious persecution suffered by the Evangelicals).

178 *Id.* at 509. Among these thinkers were Thomas Jefferson and James Madison. See *id.* at 509–10.

179 See *id.* at 509 (“Such views were based on a profound skepticism about organized religion and a profound fear of an autocratic state.”).

180 *Id.* at 509–10.

181 *Id.* at 511. Professors Witte and Green state that the “principal spokesmen” of this group included John Adams, George Washington, Samuel Adams, and James Wilson. *Id.*

this set of ideas saw a place for state support of religion.¹⁸² Because common civic values and beliefs were to underpin the nation, the state had a proper role in supporting those institutions that inculcated such common values and beliefs in the populace.

Professor Witte argues that these theological and philosophical views coalesced around a common understanding of basic principles of religious liberty.¹⁸³ These basic principles of religious liberty were: "liberty of conscience, free exercise of religion, religious pluralism, religious equality, separation of church and state, and disestablishment of religion."¹⁸⁴ A brief description of each is in order. The freedom of conscience was the right of each individual "to worship God" as he saw fit free from coercion, as well as the freedom from being discriminated against because of his religious beliefs.¹⁸⁵ The free exercise of religion "was the right to act publicly on the choices of conscience once made, without intruding on or obstructing the rights of others or the general peace of the community."¹⁸⁶ Religious pluralism consisted of a diversity of religious groups and diversity of religious associations;¹⁸⁷ free exercise protected churches and synagogues as well as "[f]amilies, schools, charities, and other learned and civic societies [which] were equally vital bastions of religion."¹⁸⁸ Religious equality was the simple principle that religious groups should be

182 See *id.* at 512.

183 See WITTE, *supra* note 152, at 57.

184 *Id.*

185 See *id.* at 40. It is important to note that some commentators have argued that in the use of the words "free exercise of religion," religion should not be taken as synonymous with conscience. That is, within the American context, freedom of religion does not mean freedom of conscience. As Professor McConnell has stated, "The Framers . . . seriously considered enacting a constitutional protection for 'conscience,' presumably a broader term, and deliberately adopted the term 'religion' instead." McConnell, *supra* note 147, at 12. Another commentator writes that the Free Exercise Clause "is, by its terms, about prohibiting the free exercise of religion rather than of unbelief. It follows that [it] is not an all-purpose conscience clause." Carl H. Esbeck, *The American System of Church-State Relations and Its Bearing on Church Autonomy*, in CHURCH AUTONOMY: A COMPARATIVE SURVEY 149, 156-57 (Gerhard Robbers ed., 2001). Rather than protecting all activity motivated by conscience, the clause "protects religiously informed belief and practice." *Id.* at 158. Perhaps these comments can be reconciled with those of Professor Witte by understanding freedom of conscience as Witte uses it not in terms of freedom to act upon every conclusion to which conscience arrives but rather as freedom of conscience in religious matters. Witte might even agree. See WITTE, *supra* note 152, at 86 (noting that the "Founders often used the term 'free exercise' synonymously with liberty of conscience" to indicate a more limited view of conscience than the one that now prevails).

186 WITTE, *supra* note 152, at 42-43.

187 See *id.* at 44-45.

188 *Id.* at 45.

treated equally "before the law."¹⁸⁹ The early Americans also held a similar understanding of the separation of church and state. This value understood the church and state to have different natures, and to be distinct institutions, and therefore that their "offices and officers" must be kept separate and distinct.¹⁹⁰ It is important to note that this did not mean that religion had nothing to say to the political realm. Rather, it meant that the political realm could not be the confused with the religious. Finally, a common principle of the founding era was the disestablishment of religion. This encompassed a belief that the state should no longer prescribe the religious tenets and practices of a political community.¹⁹¹

These models of church and state, these theological and philosophical views and these principles of religious liberty were the common heritage that necessarily influenced the drafting and ratification of the First Amendment. As Professors Witte and Green write, "It is in the context of this plurality of opinions and panoply of principles that the First Amendment religion clauses must be understood."¹⁹² In their opinion, the First Amendment—especially after it became incorporated against the states—must itself be read as incorporating the various principles and ideas that were part of the political milieu at the time of the First Amendment's ratification.¹⁹³ Thus, the final words which became the First Amendment,¹⁹⁴ after some debate,¹⁹⁵ must be understood not narrowly but broadly as integrating the various motivating principles discussed above. This of course makes marking off the boundaries of American religious freedom law an extremely difficult task. In fact, "[d]etermining the original understanding of the First Amendment has been the perennial challenge of the American experiment ever since" the ratification of that amendment some 200 years ago.¹⁹⁶ Let us then turn to the manner in which the American republic has undertaken this challenge in the years since the First Amendment was framed. And though legislatures are increasingly taking up their forgotten mantle in the arena of religious

189 *Id.* at 45–46.

190 *Id.* at 48–49.

191 *Id.* at 51. It does not appear that there existed clarity on whether disestablishment prohibited all state support of religion. In fact there seemed to be a split of opinion, some believing all such support to be barred and others seeing such support as "necessary for good governance." *Id.* at 53–54.

192 Witte & Green, *supra* note 150, at 530.

193 *See id.* at 531.

194 *See* U.S. CONST. amend. I.

195 For explanation of this debate, see WITTE, *supra* note 152, at 63–72.

196 *Id.* at 72.

liberty,¹⁹⁷ the focus of our investigation will be the Supreme Court, which has been the prime "laboratory . . . [of] the American experiment" in recent years.¹⁹⁸

C. *Supreme Court Religious Liberty Jurisprudence Before 1940*

Throughout much of the life of the American republic, the Supreme Court "had little occasion to interpret and apply the First Amendment religion clauses."¹⁹⁹ The rationale behind this was that it was generally "understood that state constitutions . . . governed most religious and ecclesiastical affairs."²⁰⁰ In most of the handful of cases addressed by the Supreme Court in these first 150 years of the republic, the Court said little of import about religious liberty. However, in a few cases the Court was, according to Professors Witte and Green, "more forthcoming" about religious liberty.²⁰¹ Among the issues decided by the Court was whether the federal government could monetarily support the building of a Catholic hospital²⁰² and whether it could support the operation of a "Catholic mission school among the native American Indians."²⁰³ In both instances, the Court endorsed the governmental action. At the same time, "the Court insisted that religious bodies may resolve their property disputes among themselves . . . , may hold monastic properties in community despite countervailing private property rules, [and] may appoint clergy from abroad without Congressional interference."²⁰⁴ Outside of these few instances however, the Court had little occasion to fill in the contours of the religious liberty landscape. This, of course, was in part because states regulated religion and because the Court had yet to incorporate the First Amendment against the states. All this changed in the 1940s with the cases of *Cantwell v. Connecticut*²⁰⁵ and *Everson v. Board of Education*,²⁰⁶ which incorporated the Free Exercise and Establishment

197 See Witte & Green, *supra* note 150, at 500 (stating that "state legislatures have become bolder in conducting their own experiments in religious liberty").

198 *Id.* at 499.

199 *Id.* at 533.

200 *Id.* In fact only twenty-three cases involving "religious questions . . . came to the United States Supreme Court . . . between 1789 and 1940." *Id.* at 534.

201 *Id.*

202 *Bradfield v. Roberts*, 175 U.S. 291 (1899).

203 Witte & Green, *supra* note 150, at 534 (describing *Quick Bear v. Leupp*, 210 U.S. 50 (1908)).

204 *Id.*

205 310 U.S. 296 (1940).

206 330 U.S. 1 (1947).

Clauses, respectively, against the states.²⁰⁷ These cases ushered in a new era of religious liberty law. To this era, we now turn.

D. *Modern Religious Liberty Law*

Now that we have scrutinized the historical context of American religious liberty law and the Court's handling of religious liberty issues in the first 150 years after the Constitution's ratification, we can turn to the modern interpretation of the First Amendment. Because the Supreme Court has chosen to interpret the religion clause not as one single whole, but rather as two separate clauses, this section will consider religious liberty law under both the Free Exercise and Establishment headings. Lest one think that the historical exercise has been for naught, an important point must be emphasized. Precisely because the Constitution is so vague as to what constitutes establishment and what is an infringement of free exercise, the Supreme Court has had to "'draw lines' to define the scope of protection" of the religion clauses.²⁰⁸ In order to draw such lines, the Court has "in part . . . rel[ie]d] on historical documents that tend to reveal the framers' intent in enacting the First Amendment."²⁰⁹ The Court's foray into the religious liberty arena has necessitated returning to the sources of the amendment—returning, if you will, to the political and religious milieu of early America and looking to the principles that inspired and informed the crafting of the new constitutional order.

Also, to better frame the analysis of each clause of the First Amendment separately, one must keep in mind that "[t]he free exercise principle 'singles out' religion for special protection against governmental hostility or interference," while the "disestablishment principle prevents the government from using its power to promote, advocate, or endorse any particular religious position."²¹⁰ Because the modern Court first addressed the free exercise question, we will begin there and proceed to the modern American understanding of the Establishment Clause.

1. Free Exercise

The Free Exercise Clause reads, "Congress shall make no law . . . prohibiting the free exercise" of religion.²¹¹ At its most basic, this

207 See Witte & Green, *supra* note 150, at 535.

208 Inke Muehlhoff, *Freedom of Religion in Public Schools in Germany and in the United States*, 28 GA. J. INT'L & COMP. L. 405, 410 (2000).

209 *Id.*

210 McConnell, *supra* note 147, at 43.

211 U.S. CONST. amend. I.

clause "protects religiously informed belief and practice."²¹² This is not to say that the government is free to run roughshod over the beliefs of the non-religious. That is, the government cannot force its citizens to take a particular religious view or engage in specific religious practices. This is something protected not by the Free Exercise Clause but by the Establishment Clause.²¹³

Modern free exercise law began with the *Cantwell*²¹⁴ case. There, the right to freely exercise one's religion was given broad meaning.²¹⁵ Professors Witte and Green have written that "the Court read the free exercise clause in capacious terms—as a protection for the beliefs of conscience and religious actions of all religious faiths, up to the familiar limits of public peace and order, and countervailing constitutional rights."²¹⁶ In subsequent years, the Court began to apply this broad reading of the clause, holding, among other things, that the state could not require a student to pledge allegiance to the flag,²¹⁷ and striking "down several permit, licensing, and taxing ordinances that targeted, and burdened, the core proselytizing activities of Jehovah's Witnesses."²¹⁸ One of the themes running through these cases was that religions should be treated equally and without discrimination.²¹⁹ No formal test, however, was established until *Sherbert v. Verner*.²²⁰ Professors Witte and Green aptly describe this test:

Henceforth, any governmental policy or law that was challenged under the free exercise clause had to meet four criteria to pass constitutional muster. The policy or law must: (1) serve a compelling state interest; (2) be narrowly tailored to achieve that interest with the least possible intrusion on free exercise rights; (3) be non-discriminatory against religion on its face; and (4) be non-discriminatory against religion in application. Governmental policies that met all four criteria could be enforced, even though they had an adverse impact on religion. Policies that did not meet such criteria were

212 Esbeck, *supra* note 185, at 158.

213 *See id.* at 158–59.

214 *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

215 *See id.* at 309–11 (reversing a judgment affirming defendants' convictions for unauthorized soliciting and breach of the peace for playing a recording of statements attacking organized religions as part of a door-to-door campaign).

216 Witte & Green, *supra* note 150, at 536.

217 *Id.* at 537 (discussing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

218 *Id.* (citing seven Supreme Court cases from the years 1943 to 1946).

219 *Id.* at 538.

220 374 U.S. 398 (1963).

either to be struck down, or applied in a manner that minimized, or eliminated, their affront to religion.²²¹

The Court was striking a balance between the legitimate interests a state has in regulating conduct and the very real and important right to exercise one's deepest religious beliefs.²²² This appeared to comport with the fundamental principles that informed the drafting of the Constitution and the First Amendment. The Framers did not understand free exercise to be absolute; one could not act upon one's beliefs no matter what the consequence or potential infringement on others.²²³ And the *Sherbert* test protected equality and non-discrimination interests that had informed the Framers as well. It is also important to point out that, though the government had a difficult burden to meet these four criteria, it nevertheless prevailed in most of the free exercise cases brought after the test was put into place.²²⁴

The scheme put into place under *Sherbert* would not last forever. Some twenty-seven years later, in *Employment Division v. Smith*,²²⁵ the Court would reconsider its test and offer a new one which, at least facially, seemed to give religious exercise much less protection. In short, *Smith* "signaled a sharp break from the Court's earlier willingness to consider religious exemptions from generally applicable laws."²²⁶ Repudiating its former doctrine, the Court stated that the "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"²²⁷ Practically, this meant that if a "law is 'generally applicable', [sic] the government need not show that it serves an important (let alone compelling) purpose, even if its effect . . . is to make the practice of a religion virtually impossible."²²⁸ The new *Smith* doctrine deconstitutionalized religious exemptions; no

221 Witte & Green, *supra* note 150, at 539; see also *Sherbert*, 374 U.S. at 402–07.

222 *Sherbert*, 374 U.S. at 406 (considering whether "some compelling state interest enforced in the eligibility provisions of the South Carolina Statute justifies the substantial infringement of appellant's First Amendment right").

223 See *supra* notes 183–91 and accompanying text.

224 See Muehlhoff, *supra* note 208, at 434 (citing JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 17.6 (5th ed. 1995)). This is not to say that the test was without effect. Professors Witte and Green argue that the test "rendered the free exercise clause a formidable obstacle to both subtle and overt forms of religious prejudice and insensitivity against religious individuals." Witte & Green, *supra* note 150, at 540.

225 494 U.S. 872 (1990).

226 Muehlhoff, *supra* note 208, at 435.

227 *Smith*, 494 U.S. at 879.

228 McConnell, *supra* note 7, at 68.

longer would the Constitution be seen as exempting those with a religiously grounded objection to a law or governmental regulation from that law or regulation.

After *Smith*, the law can be distilled to three main principles. The first of these can be stated simply: it is unconstitutional for the government to use its "regulatory power . . . to discriminate against religious exercise."²²⁹ The second principle is that "neutral and generally applicable" regulation is generally permitted.²³⁰ Nothing in *Smith* forbade state legislative bodies from exempting individuals from a law or regulation for a religious reason. In fact, Justice Scalia wrote in *Smith* that "to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required."²³¹ The Court's argument was not that such exemptions were forbidden but, rather, that such exemptions were not *constitutionally* required. Therefore, a third principle is discernable. At the "discretion of the legislature, religious exercise may be exempted from neutral and generally applicable laws."²³² This third principle is subject to the further caveats that such an "accommodation" must be "'designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause,' and [that it] would not 'have the effect of "inducing" religious belief.'"²³³

At the same time, a further gloss must be put on *Smith*. Though many argued that *Smith* sounded the death knell for free exercise,²³⁴ others have been more hopeful about the decision.²³⁵ In fact, it seems that *Smith* leaves open a pretty expansive set of exceptions to its general rule. The general rule of *Smith* that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid

229 McConnell, *supra* note 147, at 41 (citing *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)).

230 *Id.* (citing *Smith*, 494 U.S. at 890).

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

232 McConnell, *supra* note 147, at 41.

233 *Id.* (citations omitted).

234 *Smith*, *supra* note 7, at 232 (arguing that "*Smith* reaches a low point in modern constitutional protection under the Free Exercise Clause").

235 Professor Richard Duncan states that "[a]ccording to the conventional wisdom in the community of First Amendment scholars, in [*Smith*] the Supreme Court 'abandoned' its longstanding commitment to protecting the free exercise of religion and 'created a legal framework for persecution' of religious dissenters." Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi, and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 850 (2001). Duncan, however, believes that "[t]he Free Exercise Clause is the Mark Twain of Constitutional Law, because the recent report of its death 'was an exaggeration.'" *Id.*

and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'" is subject to a strong exception.²³⁶ A law which burdens free exercise cannot be underinclusive in pursuing its purpose.²³⁷ Such a law "is underinclusive, with respect to any particular government interest, if the law fails to pursue that interest uniformly against other conduct that causes similar damage to that government interest."²³⁸ To determine if such underinclusiveness exists, the analysis employed must raise two important questions:

First, what governmental purposes are being served by the restrictive law at issue? Second, does the law exempt or otherwise leave unrestricted secular conduct that endangers those governmental purposes in a similar or greater degree than the prohibited or restricted conduct of the party seeking the protection of the Free Exercise Clause?²³⁹

With these additional qualifications, *Smith* seems less burdensome, or at least potentially less burdensome than initially thought. Nevertheless, *Smith* signaled a departure from previous case law and possibly a departure from the constitutional roots of free exercise.²⁴⁰

At the same time, *Smith* cannot be seen as the monolithic representative of America's current understanding of religious liberty. In fact, as evidenced by congressional action shortly after the *Smith* decision, there is a significant gap between the Court's understanding of religious liberty and a large portion of the political community. In 1993, Congress passed the Religious Freedom Restoration Act (RFRA),²⁴¹ which "was specifically designed to repudiate the *Smith* approach to free exercise analysis, and to restore the 'compelling state interest' test."²⁴² RFRA stated:

(a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

236 *Smith*, 494 U.S. at 879.

237 See Duncan, *supra* note 235, at 868.

238 *Id.*

239 *Id.*

240 This is especially true considering that the founding generation considered religious free exercise a prerogative only to be limited by the safety and peace of the state and other constitutional protections. See *supra* notes 183–91 and accompanying text.

241 Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb to 2000bb-4 (2000)).

242 Witte & Green, *supra* note 150, at 546.

(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.²⁴³

As one commentator wrote, RFRA “was a bold attempt to restore a stricter standard of review for free exercise cases”²⁴⁴ and to reinvigorate American protection of freedom of religion. Criticism and praise for RFRA abounded,²⁴⁵ and it was not long before the act found itself before the Supreme Court. In *City of Boerne v. Flores*,²⁴⁶ the Court held that RFRA was “unconstitutional, at least as applied to the states.”²⁴⁷ Because RFRA “fundamentally changed the free exercise law,”²⁴⁸ Congress's argument that it was simply employing its powers of enforcement under the Fourteenth Amendment failed.²⁴⁹ The *Smith* test was restored for “free exercise claims against state and local laws.”²⁵⁰ Nevertheless, RFRA was an indication that a tension existed between the popular political understanding of the First Amendment and the constitutional doctrine laid down in *Smith*. This meant that *Smith* was not only a significant departure from the historical underpinnings of the First Amendment, it was a departure from current American understanding and the values of the American citizenry.

In the wake of *Smith* and *Boerne*, it is appropriate to ask whether the four different strands of influence that existed at the time of the framing and the various values concerning religious liberty of the founding generation are still equally present.²⁵¹ It is not entirely clear that they are. The different understandings that were present at the

243 42 U.S.C. § 2000bb-1.

244 WITTE, *supra* note 152, at 124.

245 See, e.g., *id.* at 124–25; Witte & Green, *supra* note 150, at 547 (“Some defend it as the only sensible constitutional remedy to end the contemporary ‘crisis of religious liberty,’ and . . . [o]thers denounce the statute as a violation of the principle of separation of powers.”).

246 521 U.S. 507 (1997).

247 WITTE, *supra* note 152, at 124.

248 *Id.* at 125; see also *City of Boerne*, 521 U.S. at 534 (stating that Congress was attempting through RFRA to make “substantive alteration” to the *Smith* holding).

249 See WITTE, *supra* note 152, at 124–25; see also *City of Boerne*, 521 U.S. at 520–36 (dismissing the claim that Congress was simply using its powers under the Fourteenth Amendment).

250 WITTE, *supra* note 152, at 125. In the realm of federal laws, RFRA remains good law and has subsequently been applied. *Id.*

251 See *supra* notes 154–91 and accompanying text.

founding of America have become unwoven. Now it can be argued that the Enlightenment model that saw the state as needing to be free of religion has gained a dominant position.²⁵² In particular, Civic Republicanism,²⁵³ which saw an important public place for religion, does not seem to have as influential a role in the American legal discourse on religious liberty.

2. Establishment

Modern Establishment Clause jurisprudence has its foundations in the *Everson*²⁵⁴ case, where at issue was a provision by a school board to reimburse parents for the transportation costs to send their children to school. The school board made payments to parents who sent their children to Catholic schools.²⁵⁵ Though the Court upheld these payments, it was the language it employed in doing so that was significant. The Court wrote,

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. . . . [T]he clause . . . was intended to erect “a wall of separation between church and State.”²⁵⁶

Later the Court stated that the “First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”²⁵⁷ Nevertheless, the Court found no breach of the wall of separation. Because of this, commentators found the decision contradictory and confusing.²⁵⁸

252 See *supra* notes 178–80 and accompanying text.

253 See *supra* notes 181–82 and accompanying text.

254 *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

255 *Id.* at 3.

256 *Id.* at 15–16.

257 *Id.* at 18.

258 See McConnell, *supra* note 7, at 70–71 (“Justice Black’s opinion for the Court was uncharacteristically indecisive; it resembled one of those comedy routines in which the good angel whispers in the character’s right ear and the naughty devil in the left.”).

The principles laid out in *Everson* were applied in a host of cases in the following years. Most of these cases dealt with establishment questions in public schools.²⁵⁹ In one case, *Illinois ex rel. McCollum v. Board of Education*,²⁶⁰ the Court struck down a provision allowing students time during the school day to take religious education classes offered onsite at the public school.²⁶¹ The Court premised its decision on an understanding of the First Amendment in which "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."²⁶²

Because *Everson* had not formulated a clear rule as to what constituted a violation of the Establishment Clause, the Court finally made such a formulation in *Lemon v. Kurtzman*.²⁶³ As Professors Witte and Green describe it, to conform with the requirements of the Establishment Clause, a governmental law or policy would need "a secular, non-religious purpose," while having "a predominantly secular, or non-religious effect," and at the same time, not foster an "excessive entanglement between church and state."²⁶⁴ In the wake of the *Lemon* test, "many traditional forms and forums of collaboration between church and state in delivering education" were rendered unconstitutional.²⁶⁵ In one of the most striking examples, "[t]he Court disal-

259 See Witte & Green, *supra* note 150, at 548 n.223.

260 333 U.S. 203 (1948).

261 *Id.* at 209–10; see also Muehlhoff, *supra* note 208, at 414.

262 *McCollum*, 333 U.S. at 212. Amazingly, four years later the Court upheld a similar "time release" program where the students took their instruction offsite. See Muehlhoff, *supra* note 208, at 414–15 (discussing *Zorach v. Clausen*, 343 U.S. 306 (1952)).

263 403 U.S. 602 (1971).

264 Witte & Green, *supra* note 150, at 549. The Supreme Court in *Lemon* stated, Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion[]; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon, 403 U.S. at 612–13 (internal citations omitted).

265 Witte & Green, *supra* note 150, at 549. It is important to note what this does not mean. Professor Esbeck wrote,

[T]he Establishment Clause is not violated when a governmental restriction (or social welfare program) merely reflects a moral judgment, shared by some religions, about conduct thought harmful (or beneficial) to society. Accordingly, overlap between a law's purpose and the moral teachings of a variety of well-known religions does not, without more, render the law one concerning "an establishment of religion."

Esbeck, *supra* note 185, at 165–66.

lowed states from loaning or furnishing religious schools with textbooks, various supplies and films, and various counselling and other personnel, all of which were made mandatory by state policy.”²⁶⁶

The departure of the Court from at least the tacit understanding of religious liberty and the practices of the founding generation was remarkable. The Court seems to have pushed the principles of disestablishment and separation of church and state further than they had existed during the founding, and out of balance with other values that they intended to protect. Perhaps, in part, this led the Court to begin to depart from the *Lemon* test in recent years. The Court “held that the *Lemon* test was not violated when Congress afforded church-affiliated counseling centers . . . funding” for a federal program,²⁶⁷ or when a law allowed “students equal access . . . to school facilities” for religiously-based “activities after school hours.”²⁶⁸ This departure was seen most readily in *Mitchell v. Helms*²⁶⁹ and *Zelman v. Simmons-Harris*.²⁷⁰ Writing for a plurality of the Court in *Mitchell*, Justice Thomas upheld a program that lent “educational materials and equipment to public and private schools,” including religious schools.²⁷¹ He stated that

if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose . . . then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.²⁷²

Though the government was no longer barred from giving aid such as textbooks to religious schools, the Court still emphasized the principles of neutrality and secularity. In *Zelman*, the Court placed much emphasis on the fact that the program in question directed money toward religious schools only through private choice. The Court stated,

[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to a challenge under the Establishment Clause.

266 Witte & Green, *supra* note 150, at 550 (describing *Meek v. Pittinger*, 421 U.S. 349 (1975)).

267 *Id.* at 552 (describing *Bowers v. Kendrick*, 487 U.S. 589 (1988)).

268 *Id.* (describing *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990)).

269 530 U.S. 793 (2000).

270 536 U.S. 639 (2002).

271 *Mitchell*, 530 U.S. at 801 (plurality opinion).

272 *Id.* at 810 (plurality opinion) (citation omitted).

A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.²⁷³

The Court concluded that the Cleveland program—the program at issue—was an example of “true private choice.”²⁷⁴ The emphasis on private choice and the Court’s focus on the detachment of the government from direct subsidization of education at religious schools is striking.

Even in light of these recent developments and this minor rapprochement of the tradition, the Court is still arguably far from many of the animating ideas of the First Amendment. And, at the same time, a new rule has not been explicated and the *Lemon* test has not been overruled, leading to a situation in the law of the Establishment Clause that two commentators have called “a state of confusion.”²⁷⁵

III. SPAIN AND THE UNITED STATES: A CONVERSATION WITH A CONCLUSION

In the preceding two Parts, I gave a broad overview of the Spanish and American approaches to religious liberty. It is apparent from reading these sections that the systems are significantly different in the manner in which they protect and promote the basic human right of religious liberty.²⁷⁶ They attempt to actualize this right in very different manners. These differences are apparent in each system’s understanding of free exercise, each country’s understanding of establishment, the connection between free exercise and establish-

²⁷³ *Zelman*, 536 U.S. at 652.

²⁷⁴ *Id.*

²⁷⁵ Witte & Green, *supra* note 150, at 553. According to Professors Witte and Green,

The Court has transmuted the *Lemon* test into at least four principles, which the Court is now seeking to integrate. Justice Souter has urged the principle of governmental neutrality toward religion. Justice O'Connor would strike down policies that reflect governmental endorsement or condemnation of religion. Justice Kennedy would strike only governmental action that coerces or compels an individual or group to accept or adopt religion. Justice Scalia and [Justice] Thomas would accord great weight to historical practices and legislative preferences. Though each of these new principles has captured a majority of the Court in an individual case, none of them has as yet come to dominate establishment clause jurisprudence.

Id.

²⁷⁶ On this basic human right, see *infra* Part III.A.

ment in each context, and finally, in the overall story told by each country's system of religious liberty.

A. *The Basic Human Right of Religious Liberty*

Before bringing the Spanish and American legal approaches into conversation, it is beneficial to discuss briefly the very freedom which religious liberty law seeks to protect. As noted above, religious freedom in Spain was recognized in part because of developments in the teaching of the Catholic Church concerning religious liberty.²⁷⁷ This development was seen most significantly in *Dignitatis Humanae*,²⁷⁸ the Second Vatican Council's Declaration on Religious Freedom. Because this document served as an impetus for Spanish reform, and because it lays out a vivid and rich vision of what religious liberty is and why it exists, I will briefly discuss it here. *Dignitatis Humanae* unequivocally states "that the human person has a right to religious freedom."²⁷⁹ This freedom is something that flows from the dignity of the person: "the right to religious freedom has its foundation in the very dignity of the human person."²⁸⁰

Because of their nature, men and women are "impelled . . . and also bound by a moral obligation to seek the truth, especially religious truth."²⁸¹ To live out their nature and fulfill their obligation, therefore, it is necessary that men and women be free from limits and "external coercion."²⁸² Thus, governments are obligated to give their citizens a zone of freedom in which the religious quest can be lived out by each person. This freedom should not be a merely individual or personal freedom. Because of the human person's "social nature,"²⁸³ the right to religious freedom is "to be recognized . . . when [individuals] act in community" as well.²⁸⁴ This is a recognition of the necessary social implication of religion. The religious impulse makes itself felt not only in the recesses of the conscience but also in the social and cultural life of a nation.

Attached to an understanding of the individual and social aspects of religion, is a set of positive obligations placed upon the state to promote religion. The document envisages a freedom of religion that not only places negative limits upon the power of government over

277 See *supra* notes 62–65 and accompanying text.

278 See *DIGNITATIS HUMANA*E, *supra* note 94.

279 *Id.* ¶ 2.

280 *Id.*

281 *Id.*

282 *Id.*

283 *Id.* ¶ 3.

284 *Id.* ¶ 4.

religious matters,²⁸⁵ but also places affirmative, positive duties upon government to build up the religious life of the state. In paragraph six, the document states,

Government is also to help create conditions favorable to the fostering of religious life, in order that the people may be truly enabled to exercise their religious rights and to fulfill their religious duties, and also in order that society itself may profit by the moral qualities of justice and peace²⁸⁶

This is a vision which holds religion to be a good in and of itself, and one that sees that in order to be fully lived, religious freedom necessitates positive support on the part of the government. Finally, the right to religious freedom is not an absolute right. Because the right is exercised within society, it is "subject to certain regulatory norms," most notably "the moral principle of personal and social responsibility."²⁸⁷

Below, as I bring the Spanish and American systems into conversation, it is the vision of religious freedom of *Dignitatis Humanae* that I have in mind as I discuss the strengths and failings of the respective systems. Most important to note is the document's understanding of religious freedom having both an individual and social quality.

B. *Understandings of Free Exercise*

As we saw above, the American approach to free exercise—at least in its most recent incarnation—appears to allow severe curtailments of religious free exercise. One can imagine a prohibition upon the sale of any form of alcohol which is applicable to all and does not contain any statutory exemptions for religious groups to purchase wine for religious purposes.²⁸⁸ Imagine further, that the law allows no exceptions for any other group. The law is motivated by a desire to end abhorrent debauchery associated with drinking; no religious animus animates the law. The law is perfectly constitutional under *Smith* even though it would severely affect those who believe that their religious rites require wine. The American approach would allow someone to believe that his religion requires him to use wine during its rites but not allow him actually to exercise his beliefs. That, of course, does not mean that any law which deleteriously affects religion is al-

285 See *id.* ¶ 6 (stating that "government is to assume the safeguard of the religious freedom of all its citizens . . . by just laws and by other appropriate means").

286 *Id.*

287 *Id.* ¶ 7.

288 I thought of this hypothetical after reading an article mentioning Prohibition's exemption for sacramental wine. See McConnell, *supra* note 151, at 706.

lowed nor that laws such as this would actually come into being. Nevertheless, this example illustrates the thin vision of free exercise that the Supreme Court has recently proposed.²⁸⁹ Before contrasting this with the Spanish model, it should be remembered that such a conception of free exercise did not seem to animate the drafters of the Free Exercise Clause. For them, free exercise meant the ability to act out one's religious beliefs so long as the public peace and the rights of others were not disturbed.²⁹⁰ Behind the phrase "prohibiting the free exercise" of religion was the idea that religious exercise could not be limited but for extreme circumstances where the public peace and/or the rights of others were intruded upon. The Court has, arguably, now turned this idea on its head and held that a governmental burden on religion is only unlawful where the burden was specifically placed on the religion and not on other groups.

On the other hand, the Spanish conception of free exercise is thicker, more comprehensive, and ultimately deeper. This is evident both from the specific language used in the Spanish constitution, where the exercise of religion can only be limited when it "may be necessary to maintain public order"²⁹¹ and the early decision of the Spanish Constitutional Court affirming the use of military chaplains.²⁹² Recall that in that decision the court stated that the government's provision of Catholic chaplains was not only constitutional, but actually was the avenue by which free exercise became meaningful.²⁹³ Though the court did not state that the government had to give such aid, its language came fairly close to making this a requirement.²⁹⁴ All the same, the court's language underlined a sharp difference in Spanish discourse about free exercise. The right to freely exercise one's religion in Spain not only means that the government must refrain from certain actions—namely, those that infringe upon that right—but that the government has a positive duty to help foster the free

289 Of course, legislative enactments can make this understanding of free exercise much thicker. Any law which has the potential to burden religion could simply be written with religious exemptions.

290 See *supra* note 186 and accompanying text.

291 C.E. art. 16, §§ 1–3 (Spain).

292 STC, May 13, 1982 (S.T.C., No. 24).

293 See Martínez-Torrón, *supra* note 117, at 731 (quoting STC, May 13, 1982 (S.T.C., No. 24) ("The fact that the State provides Catholic religious assistance to the members of the Armed Forces not only does not constitute any violation of the Constitution but, on the contrary, offers the possibility to render actual the right to worship of individuals and communities.")).

294 *Id.* (quoting STC, May 13, 1982 (S.T.C., No. 24) (stating that such aid in fact "offers the possibility to render actual the right to worship of individuals and communities")).

exercise of religion. The case for this reading of the Spanish experience is made even stronger when the Spanish equivalent of the free exercise clause is read in conjunction with the section requiring state cooperation with religious entities.²⁹⁵ Religious liberty achieves a deeper meaning within the Spanish context because the government is limited from infringing upon, but also positively charged with promoting, religion itself. The Spanish approach seems to be saying something like, to have genuine substance, free exercise must be something fostered and supported, not simply allowed. This is significantly different from the American approach.

What, if anything, do these differences mean? If it is assumed that both countries safeguard and protect religion because religious liberty is a human right and because religion, itself, is a good to be fostered, then one must ask which of the two approaches best achieves this goal. On the one hand, it can be argued that because the American approach minimizes the questions that the Court needs to ask about religion, this is therefore better for religion because it reduces the contact and friction between government and religion. The U.S. approach reduces the potential for abuse. One of Justice Scalia's stated concerns in *Smith* was that a broader conception of the limits free exercise could place on government would lead to "a system in which each conscience is a law unto itself."²⁹⁶ The chaos that might result from such circumstances would undermine constitutional order and, therefore, necessarily affect the very religious liberties protected by that order. But one wonders if the potential dangers against which Justice Scalia warned are in truth so likely. Every conscience would not become a law unto itself because not every dictate of conscience is a religiously-based one.²⁹⁷ And, in truth, religious free exercise can be limited for the peace of society and to ensure the rights of others;²⁹⁸ but Justice Scalia and the Court extend the circumstances under which religious liberty can be curtailed to any and all situations which the government deems necessary. By carving out a narrow zone for religious protection, the Court seems to eviscerate the very meaning of religious liberty.

The Spanish system of free exercise, on the other hand, sees the right of free exercise not simply as a negative limit upon government,

295 See *supra* note 13 and accompanying text.

296 *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

297 Of course, this raises questions of separating religious-based motivations from other motivations.

298 See *DIGNITATIS HUMANA*, *supra* note 94, ¶ 7.

but as a positive obligation of the state to foster.²⁹⁹ In the Spanish Constitution, freedom to exercise one's religion not only denotes the right to hold certain beliefs and the right to act on those beliefs if one has the means, but also the right to aid to make possible the actual realization of that freedom.³⁰⁰ Because religious expression is a true good to be attained, the State must help individuals along the path of its attainment. Judged against the backdrop of the goal of promoting religious liberty, the Spanish system then seems closer to hitting the mark of fostering and encouraging religion.

All of this might be indicative of a more fundamental difference in each country's conception of the good of religion. Free exercise can be seen as ensuring the ability of people to exercise religious beliefs—of protecting the “good of religion.” But religion can be good for different reasons. On the one hand, it can be good merely because people hold it personally and a society finds it desirable to protect deep beliefs whether those beliefs are in and of themselves valuable—that is, the freedom of religion is merely an instrumental good.³⁰¹ On the other hand, religion can be understood as an intrinsic good; society desires its citizens to worship because such behavior is fundamentally good in itself.³⁰² Viewed through this distinction, it seems that Spain values religion as an intrinsic good, whereas the American system tends to protect religion simply as a mean to some socially desirable end—simply because people have such beliefs called “religion.” This is most striking when we juxtapose the Spanish practice (required in law) of cooperating and supporting religion as a

299 This seems to conform more with the view put forward in *Dignitatis Humanae*. See *supra* notes 278–287 and accompanying text.

300 See *supra* notes 78–21 and accompanying text.

301 Professor Michael Stokes Paulsen aptly describes the liberal approach to religious liberty. He writes,

Under the liberal view, religion is presumptively entitled to no greater protection than secular-rationalist claims to individual autonomy, and probably deserving of less, because of its intrinsically irrational or anti-rational nature. Religious liberty is not, on this view, a pre-constitutional inalienable right that exists because religion is recognized as valuable; it is, rather, an instrumental freedom, granted only because not granting it would create larger social costs. Thus, freedom of religion is not a preferred freedom, but an anomaly to be hemmed in on all sides, in order to mitigate its perceived anarchic tendencies.

Michael Stokes Paulsen, *God is Great, Garvey is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1599 (1997) (book review) (footnotes omitted).

302 On religion as a good in and of itself, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 89–90 (1980) (discussing the basic good of religion). See also *DIGNITATIS HUMANA*, *supra* note 94, ¶ 6 (discussing the “moral qualities of justice and peace” which flow from a “faithfulness to God”).

means to encourage free exercise, with the *Smith* decision where the U.S. Supreme Court weakened free exercise protections. *Smith* recognized no objective good of religion as such; in fact, one of the Court's stated concerns was that allowing an expansive understanding of free exercise would lead to practices which would conflict with law and thus result in chaos.³⁰³ One might counter that the uproar and legislative action³⁰⁴ since *Smith* are actually evidence that the American approach has not yet abandoned the richer understanding of the good of religion. Further, one could argue that the original American constitutional understanding recognized the good of religion as such; religious liberty, unlike the other liberties protected by the Constitution, was not an instrumental good but rather something good in-and-of-itself. While speech might have received protection so as to ensure free and open discourse, religion received protection because of the inherent value of religion. Nevertheless, the current legal doctrines that guide and shape religious liberty law do not seem to countenance such a view, and certainly seem to fail to recognize the constitutional patrimony. In contrast, Spain seems to avoid such problems.

None of this is to say that the Spanish system is without its difficulties or dangers. Certainly, any approach which places obligations upon the State in the realm of religious liberty, risks the entanglement of religion with the state and the state with religion. Not only is this potentially harmful to good government, this is also potentially deadly for religion. Where the State interacts with a religious body, even where it does not establish that body as the religion of the land, there are temptations to intermeddle with the body's proper autonomy and, therefore, the risk of detrimentally affecting the body's function as religion. Also, a state's involvement in religion can ultimately coerce people to choose one or the other religious body, or tempt the state to absolutize the claims of one religious body over those of other bodies, or of other secular philosophies within the state. These are real dangers, yet, they are not insurmountable. Where religion and the state are given proper autonomy, such concerns are simply not as strong. Two bodies can be autonomous while still mutually supporting each other. That is, the Church and the state rightly have different functions and goals. If each supports the other, this is not to collapse the distinctions between the two bodies. In fact, as I have

303 *Or. Dep't of Human Res. v. Smith*, 494 U.S. 872, 890 (1990) (stating that a broader conception of free exercise would create "a system in which each conscience is a law unto itself").

304 *See* Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb to 2000bb-4 (2000)); *see also supra* notes 241-43 and accompanying text.

argued here and as I believe the Spanish model shows, such cooperation not only allows each to remain autonomous, it also allows religious liberty to become more fully what it is meant to be. These points are more clearly seen when we look at the context of establishment, to which we now turn.

C. *Understandings of Establishment*

The American and Spanish approaches to establishment and the separation between church and state are very different. In the United States, government aid to religion has been significantly curtailed in recent history.³⁰⁵ In Spain, not only is cooperation allowed, it is mandated.³⁰⁶ These differences are fairly remarkable.

An important point of difference manifests itself here. Under the U.S. regime, religion cannot be helped as religion; the State cannot cooperate with religion qua religion. Certainly, the state can help religion as a secular actor with secular goals. As long as it meets a stringent test and avoids becoming too entangled with religion, the government can give support to a religious body—but only where there is a congruence between some secular aim of the state and some non-religious action of the religious body.³⁰⁷ Notice how different the Spanish approach to the cooperation between religion and the state is. In Spain, the government helps religious bodies precisely because they are religious. Religion is aided qua religion—because of what it is, namely religious. And not only may the Spanish state help religious bodies, it *must* help religious bodies.³⁰⁸ This is a constitutional mandate, further concretized in the General Act.³⁰⁹

305 See *supra* notes 263–66 and accompanying text.

306 See C.E. art 16, § 3 (Spain) (stating that the Spanish state must take “into account” the religious beliefs of the people and “maintain appropriate co-operation” with the various religious bodies).

307 See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (establishing the *Lemon* test).

308 See C.E. art 16, § 3 (Spain) (mandating that the state cooperate with religious bodies).

309 See General Act, art. II, § 3, reprinted in MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 42 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998) (requiring the state to “adopt the necessary measures to facilitate assistance at religious services in public, military, hospital, community, and penitentiary establishments and any others under its aegis, as well as religious training in public schools).

Abstracting for a moment from the question of whether the Spanish approach is even constitutionally possible in the United States,³¹⁰ important differences become readily apparent. First, the Spanish approach to the establishment question recognizes an anthropological fact about religion—namely, that religion is a social reality, which cannot be relegated to the sphere of the individual person.³¹¹ One professor has deemed this the “principal advantage” of the Spanish Constitutional approach to religious liberty.³¹² He argues that the Spanish Constitution

recognizes religion not only as isolated within the confines of individual conscience, but as a collective, plural, social fact. In other words, religion, understood as a social reality, becomes a necessary link in the exercise of governmental power. Given the state’s recognition of this social reality, civic authorities were then required to be cooperative.³¹³

There are three ways of understanding the social fact of religion. First, it can be understood as a simple recognition that religion exists within society—that there is this phenomenon called religion, that religion is a sociological and empirical fact. Second, it could mean that religion is recognized as a phenomenon that by its very nature is communal and social; that is, religion itself has social expressions and dimensions—religion is not just individualistic. Third is a meaning which sees that religion is not simply collective or individualistic, but rather that religion and religious belief have necessary public, social consequences for all realms of life; there are cultural consequences of religious belief. The Spanish system seems to approach religion with all three of these understandings. Certainly, under the Spanish constitutional scheme, religion is recognized as a sociological fact, but this is not the most important of the understandings. Spanish law goes further, recognizing that religion has social or communal dimensions by its very nature—dimensions which must be protected and fostered by the State.³¹⁴ But the Spanish approach goes even further, understanding that religion has necessary cultural implications. This

310 Of course, even if such an approach is constitutionally possible, it might be politically impracticable. It is an interesting question whether such political aversions might not be the cause of a regime that has privatized religion.

311 On this idea of religion as social reality, see *supra* notes 278–87 and accompanying text.

312 Paz, *supra* note 26, at 693.

313 *Id.*

314 This is evident in the Spanish Constitution which requires not only that the state respect the freedom of the individual but that state take into account the “religious beliefs of Spanish society” as a whole. C.E. art 16, §§ 1, 3 (Spain).

can be illustrated by briefly examining the situation of the Catholic Church in Spain. Not only does the State recognize or allow each individual to hold Catholic belief and exercise that belief (the first understanding),³¹⁵ it also allows—among other things—taxpayers to choose to support the mission of the Catholic Church with a portion of their taxes (the second understanding).³¹⁶ Furthermore, the manifestation of the third understanding is illustrated by Spain's allowance and support of Catholic religion classes in the Spanish schools.³¹⁷

This is ultimately a recognition of the cultural and social implications of religion. Perhaps, the most fundamental of these cultural implications is the manner in which religion is passed from one generation to the next.³¹⁸ Therefore, Spain recognizes that parents must be given the right to hand on their religion to their children.³¹⁹ And that is not simply a negative right preventing the State's encroachment of parents' fundamental rights to hand on their religion to their children; rather, it is positive right which the State must help to effect.

It seems, then, that the Spanish approach recognizes that religion is not solely a question of the individual's relationship to God; religion is also about each individual's relationship to fellow believers in community; and that belief has necessary social and cultural implications.

315 See C.E. art 16, § 1 (Spain).

316 See Morán, *supra* note 15, at 543 (detailing how taxpayers can choose to have a portion of their taxes support the Catholic Church).

317 See Agreement Concerning Education and Cultural Affairs, art. 2 (B.O.E. 1979, 300), reprinted in MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 58 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998) (mandating that schools must teach Catholic religion while any individual may opt out of these classes).

318 See, e.g., DIGNITATIS HUMANAЕ, *supra* note 94, ¶ 5. In *Dignitatis Humanae*, the Catholic Church stated that

[t]he family, since it is a society in its own original right, has the right freely to live its own domestic religious life under the guidance of parents. Parents, moreover, have the right to determine, in accordance with their own religious beliefs, the kind of religious education that their children are to receive. Government, in consequence, must acknowledge the right of parents to make a genuinely free choice of schools and of other means of education, and the use of this freedom of choice is not to be made a reason for imposing unjust burdens on parents, whether directly or indirectly.

Id.

319 See General Act, art. II, § 1(c), reprinted in MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 43 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998) (stating that the freedom of religion includes the right to "[r]eceive and give religious teaching" and to "choose religious and moral education in keeping with [one's] own convictions" for oneself and one's children).

It is not clear that the American approach is able to reach this insight. This is in part because the American approach sees the Establishment Clause solely as a negative limit, rather than a positive opportunity for the manner in which the government can interact with religion.³²⁰ The Spanish approach, on the other hand, takes disestablishment as a positive opportunity to embrace religious bodies in their fullness by actively cooperating with them.

A second insight that the Spanish approach attains is that freedom of establishment does not necessitate a strict and formalistic divide between the State and religious bodies. To aid, support, and buttress a variety of religious bodies is not the same as establishing a religion. That is, support is not the same as establishment. In fact, if the state is supporting a variety of religions whose tenets—at least some of them—are in conflict, it becomes a tenuous argument that the state is establishing a religion. At that point, the State is not establishing a religion but establishing religions, in the equivalent of a state-sponsored smorgasbord of religions. Might the more persuasive argument be that, in a situation where the State cooperates with a variety of religions, it is not in fact establishing or endorsing a religion and its tenets but rather endorsing the larger principle that religion is a good—a virtue—to be promoted and inculcated within society? This is certainly not the same as establishing a religion. And if one returns to the deeper roots of why religious liberty is so valued—why religion is given such an exalted place in constitutional regimes and in the international discourse about human rights—it seems that this is precisely the goal that framers of these protections hoped to effect. Religion is a good that should be promoted and ensured.³²¹

At this point, one might interject that this is the very reason that the American approach so strongly opposes the intermingling of the state in religion. Allowing such an entanglement necessarily impinges upon religious liberty; therefore, to enhance religious liberty, such entanglements must be guarded against by our constitutional jurisprudence.³²² Certainly, one can agree that religion is potentially harmed where one religion is endorsed to the exclusion of all others because of the coercion this places upon citizens, impinging their free exercise. But the same is not necessarily true of a broad-based support of

320 See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (establishing the *Lemon* test, which circumscribes the aid the government can give to religious groups).

321 See *supra* note 302.

322 See Witte & Green, *supra* note 150, at 510 (detailing the concerns present at the founding, including worries about the “ravages of religious establishment” and the effect such establishment would have on the freedom to worship).

religions.³²³ And, unless one makes the argument that the First Amendment religion clauses were enacted to protect the state from religion, it cannot be that actions which seem to promote and enhance religion in fact impinge upon religion in a constitutionally impermissible manner. This is especially true if religious bodies are supported without discrimination.³²⁴ But, as we saw above, the principal motivations of the Establishment Clause were rooted in desires to enhance and promote religion—to allow religion to flourish.³²⁵ Therefore, it seems that the Spanish approach in fact more closely adheres to the original logic of the American method and, therefore, more fully promotes the good of religious liberty.

A third insight, which is directly connected to the reasoning above, is that present within the Spanish legal framework is an understanding that religious liberty can be more fully realized when religion is supported and aided by the state. The method embraced by the Spanish system is one in which the seed of religion not only must be given the space to grow by the state but must also be watered by the state. This is a controversial claim. Nevertheless, perhaps the Spanish experience with religious liberty can help to answer American concerns about whether the government can or should support religion. One reason that establishment of religion was feared in the United States was because of the effect it might have or could have upon other principles of religious liberty.³²⁶ Establishing a religion or supporting religions often leads to a situation in which religion cannot be freely exercised.³²⁷ By giving support to various religious bodies, though not specifically endorsing a religion or making a particular religion's tenets mandatory, the state seems to creep closer to establishment and to impinging upon the equality of religions. The freedom to decide one's duty to God in conscience becomes less secure.

323 There are, of course, extremely difficult questions about what constitutes religion.

324 It is conceivable that where a select group of religious bodies are supported to the exclusion of others, this could detrimentally affect the free exercise of those who adhere to beliefs from the excluded religious bodies.

325 See *supra* notes 184–91 and accompanying text.

326 See WITTE, *supra* note 152, at 51 (“[T]he founders understood the establishment of religion to mean the actions of government to ‘settle,’ ‘fix,’ ‘define,’ ‘ordain,’ ‘enact,’ or ‘set up’ the religion of the community—its religious doctrines and liturgies, its religious texts and traditions, its clergy and property.”).

327 Indeed, among the concerns animating the founders was the fear that establishment could impinge on the individual's religious liberty. See Witte & Green, *supra* note 150, at 509–10. Note, however, that this fear was in part motivated by an understanding of religion as “primarily a matter of private reason and conscience.” *Id.* at 509.

But this does not seem to be the Spanish situation. There, religious bodies receive the support and aid of the state. In fact, with the arrival of groups new to Spain such as the Church of Latter Day Saints,³²⁸ a good case can be made that religious liberty is actually flourishing. The stronger case might be made that in a system such as America's, where disestablishment has been read to preclude many forms of state aid to religion, religion suffers.

A final note can be made here on a related but different theme. Recall that in *Everson*, the U.S. Supreme Court spoke of the high wall of separation between church and state.³²⁹ The Spanish experience shows that separation of Church and state can take a variety of forms—that it can fall along a wide spectrum. That the Church and state are separate is not the same thing as saying that the state cannot help to support, buttress, and enhance the Church (or churches). It could very well take that form, but not necessarily. The two can be autonomous institutions or spheres that still commingle—each supporting the other to pursue its legitimate and separate goals. This ultimately seems to be the lesson of the Spanish approach to religious liberty. Incidentally, it is an approach which seemed to exist at least to a certain degree within the United States previous to modern constitutional doctrine.³³⁰

D. A Necessary Third Comparison: Organic Connection Versus Disjunction

The very fact that the preceding analysis was split into a section on free exercise and one on establishment suggests the bias of an American comparativist. But, we can actually turn this bias to our advantage to push our analysis further. Though splitting the analysis into these two sections helps us to more neatly engage the differences between the systems, it also prevents us from seeing an even more important difference between the Spanish and American approaches to religious liberty. In Spain, the spheres of free exercise and establishment are not bifurcated and separated from each other; rather, there is an organic connection between the Spanish understanding of free exercise and those subjects that in America would fall into the sphere of establishment questions (e.g., aid to religious entities, religious education in public schools, etc.).

328 See Martínez-Torrón, *supra* note 81, at 352 (describing the many Mormons and Jehovah Witnesses who now make up the Spanish citizenry).

329 See *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (speaking of the “high and impregnable” wall between church and state).

330 See *supra* notes 199–207 and accompanying text.

The preceding sections were evidence of this organic connection.³³¹ In Spain, governmental cooperation with religion and the right to freely believe as one chooses are two sides of the same coin. Moreover, the Spanish scheme also makes an organic connection between the individual's freedom to believe as he chooses and the concrete, social manifestations of that belief. To make freedom of exercise meaningful, the state must give the individual and his religious community support, aid, and a proper zone in which to exercise this freedom.³³² Because religion manifests itself communally and because religion necessarily implies cultural consequences, the state must positively reinforce these aspects of religion.³³³ But all of this might still be insufficient to understand fully the Spanish innovation. For within the Spanish understanding, religious free exercise is not something separate from governmental support of religion (the realm of establishment law); rather, free exercise necessarily includes governmental support. That is, free exercise is both freedom for the individual to believe and necessary responsibilities on the part of the government to promote further that belief.

It is evident how profoundly different this is from the American approach. In the United States, free exercise is connected to the zone of establishment in a negative and tenuous way. State establishment, including, it seems, much of the sort of aid that the Spanish state sees as required, is prohibited partly because of the effect it might have upon the free belief of citizens.³³⁴ But the law of each realm is not tied together and has in fact developed separately and, at times, at cross-purposes with the other.

In short, the Spanish and American religious liberty regimes have very different understandings of the relation between what, in the

331 See *supra* Parts III.B–C.

332 See, e.g., C.E. art 16, § 3 (Spain) (stating that the Spanish state must take “into account” the religious beliefs of the people and “maintain appropriate co-operation” with the various religious bodies); Morán, *supra* note 15, at 543 (detailing how taxpayers can choose to have a portion of their taxes support the Catholic Church); Agreement Concerning Education and Cultural Affairs, art. 2 (B.O.E. 1979, 300), reprinted in MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 58 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998) (mandating that schools should teach Catholic religion while any individual may opt out of these classes).

333 *Dignitatis Humanae* states, “Religious communities are a requirement of the social nature both of man and of religion itself.” *DIGNITATIS HUMANA*, *supra* note 94, ¶ 4. It continues, “Religious communities also have the right not to be hindered in their public teaching and witness to their faith.” *Id.*

334 At least this was one of the historical motivations. See Witte & Green, *supra* note 150, at 509–10 (describing the worry of the founders that establishment could encroach on the religious freedom of the individual).

American context, are the free exercise and establishment spheres. In Spain, these are organically connected in a way which makes separating them nonsensical. In America, the two spheres are autonomous and often end up pursuing contradictory goals.

E. The Story Being Told

Professor Mary Ann Glendon has spoken of law's educative and rhetorical nature. She emphasizes law's "concern . . . with the right education for citizenship."³³⁵ She realizes that the "idea that law might be educational, either in purpose or technique, is not popular"³³⁶ in contemporary times, but nevertheless stresses that law does have a "pedagogical aim."³³⁷ Moreover, Professor Glendon believes that law tells a story. She writes,

Whether meant to or not, law, in addition to all the other things it does, tells stories about the culture that helped to shape it and which it in turn helps to shape: stories about who we are, where we came from, and where we are going. . . . Indeed, it may be that law affects our lives at least as much by these stories as it does by the specific rules, standards, institutions, and procedures of which it is composed.³³⁸

For Glendon, the law is much larger than the rules, procedures, and various institutions that make up its tangible form. Law is not simply a set of commands or strictures; it is not simply the courts, the legislatures, and the various legal associations that go into making law. In fact, though not unimportant, these are possibly less interesting and less important aspects of the law. More important is what the law is saying by the things it allows or forbids, by the stresses or emphasizes it places on certain things and leaves off others. Understanding law as a story raises important questions: "[w]hat stories are being told [by a certain body of law] at the present time? How do these stories affect what issues are raised and treated as important and which are excluded from discussion or perhaps even obscured from view?"³³⁹ These are questions directly applicable to the legal questions raised in this Note. What does the religious liberty law of Spain and the United States say about how each country values religion? What effects do the stories told by each country's laws have? Are the stories told at odds or

335 MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 6 (1987).

336 *Id.* at 7.

337 *Id.* at 8.

338 *Id.*

339 *Id.* at 9.

in conformance with the stated values that are to be fostered by religious liberty law?

The Spanish law of religious liberty reveals much about the manner in which Spain values religious liberty. The constitutional provisions dealing with religious liberty send a rich and complex message. First, religious expression is to be protected. This is made more significant when placed against the backdrop of Spanish history. The 1978 Constitution departed from years of religious establishment and suppression.³⁴⁰ Under these circumstances, the value of religious expression manifested in the law takes on significant importance. The law expresses a desire for, and an affirmation of, religious freedom. A second message sent by the Spanish Constitution is that religious liberty is a communal good. Not only is the individual free to practice his religious beliefs, but the state recognizes that these beliefs are rarely, if ever, practiced apart from a larger community. Finally, related to this second point, is the message that not only is religion an individual freedom that is practiced in a community, but that for this freedom truly to have meaning, it must be fostered and supported by the government and society. This is significant. The Spanish story is that religious belief and expression are goods to be protected, but also goods to be made better by the larger community's support.

This message is bolstered by the General Act and the various cooperation agreements into which the government has entered with religious bodies. The General Act again emphasizes the uniqueness and importance of religion; it is an act that deals, not with all associations but with a specific kind of association, namely religious associations and entities.³⁴¹ The cooperation agreements³⁴² are another chapter of the story begun with the Constitution of 1978: religion is a good made better when the government helps it to flourish. At the same time, the General Act, the cooperation agreements, and subsequent decisions in which religious groups are to be allowed to register³⁴³ may well tell a story about what counts as religion. Recall that the broadest benefits of the religious liberty regime have been extended to traditional religions in the Abrahamic patrimony or those that confers to the "functional structure" of the Abrahamic reli-

340 See *supra* Parts I.A–E.

341 See General Act, art. I, § 1, reprinted in MINISTERIO DE JUSTICIA, SPANISH LEGISLATION ON RELIGIOUS AFFAIRS 43 (Alberto de la Hera & Rosa María Martínez de Codes eds., 1998) (describing the state's duty to safeguard the "right to freedom of worship" in accordance with the Act).

342 See *supra* Part I.G.2.

343 See *supra* Part I.H.

gions.³⁴⁴ By favoring these groups and not others, the Spanish government paints a picture of which groups have value as religions and which do not. This is possibly a significant shortcoming. Nevertheless, in the rich story told by the Spanish experience, there are telling successes. Religion is not something that is private and individual, but rather something that is very much public, communal, and that has cultural implications. Religion, therefore, has a greater role in the public sphere. Government helps to lend religion a certain degree of legitimacy in the public square.

The story told by the religious liberty law of the United States is a dramatically different one from that of Spain. The message sent by the text of the First Amendment is certainly one that religion and religious expression are valued. As the above discussion about the motivations and principles of the Founders indicates, free religious expression was a treasured value in early America, and one that they hoped to proclaim as such in the First Amendment.³⁴⁵ The text bears this out. Religious free expression is protected and the establishment of religion, which the Founders thought negatively impeded religion as a whole, is forbidden. Yet, even facially, this language should strike us as telling a different story from the Spanish Constitution. The language is about the negative limits upon government rather than the positive rights of persons and religious communities; certainly, some of the principles and practices of the early times recognized a thicker conception of what religious liberty meant,³⁴⁶ but the story told by the text, by the words written down in the First Amendment is drastically different. Even if we take the Free Exercise Clause to protect an individual right, its significance is just that—it protects an *individual* right. The story told by the constitutional text is that religious liberty is an individual right exercised alone in the deep wells of one's conscience. While this is right on a phenomenological level, it is incorrect at the anthropological level: persons actualize this right *with* others.³⁴⁷ Such a telling however is missing from the original American constitutional protections. At the same time, the Constitution says nothing about the support of, or cooperation with, religion; according to the original story of the Constitution, religion must go it alone.

344 See Martínez-Torrón, *supra* note 81, at 348.

345 See *supra* Part II.B.

346 See, e.g., Witte & Green, *supra* note 150, at 511–14 (describing the Civil Republicans who recognized a place for the state support of religion and an important role for religious values in the public sphere).

347 See DIGNITATIS HUMANAЕ, *supra* note 94, ¶ 4 (“Religious communities are a requirement of the social nature both of man and of religion itself.”).

Subsequent developments in American jurisprudence surrounding religious liberty have continued to tell a very different story from that of Spain. The *Smith* decision sends a striking message. First, it states that Free Exercise primarily protects belief rather than the right to manifest belief in practice.³⁴⁸ One is entitled to his *private*, religious opinions. These religious beliefs or opinions, can manifest themselves only to the extent that they do not conflict with the law. The story this tells about the nature of religion is equally striking. Religious belief and expression are bifurcated, separated. Religious belief in this picture is fine and allowable; religious expression is more suspect. This reinforces an understanding of religion as something individual and private, rather than as communal and public. The story told by Establishment Clause jurisprudence is quite similar. There, the language employed by the Court in *Everson* spoke of a "wall of separation"³⁴⁹ dividing religion and the state. Furthermore, the criteria employed under *Lemon* to determine whether government interaction with religion is permissible³⁵⁰ tell a story of religion and government as bodies that are to be hermetically sealed from each other. Suggesting that government support can only be for a neutral, secular purpose, denigrates religious purposes. At the same time, the establishment law further indicates that religion is not a communal enterprise but a private one; public support of a religious body would breach what is a personal and private choice of conscience. Even the latest developments in *Zelman v. Simmon-Harris*³⁵¹ indicate that the Court and the American system have not overcome such difficulties. Recall that in *Zelman* the vouchers were in part upheld because government money was given to individuals who could make their own

348 *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (stating that free exercise does not allow one's belief to trump a "'valid and neutral law of general applicability'" (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

349 *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (internal quotation marks omitted).

350 Recall that there the Court stated,

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion[]; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations omitted).

351 536 U.S. 639 (2002).

private choices as to how to spend the money.³⁵² The government program in *Zelman* was not supporting religion as a social reality. Rather, it was further indicating that religion is private and merely an aspect of personal choice. Overall, this suggests a picture of religion as something from which government and society must be protected, and as something private and personal having no bearing upon the public discussion engaged in by society.

The stories told by Spanish and American legal discourse on the subject of religious liberty are dramatically different. The former emphasizes the communal and public aspects (while not excluding the understanding of the private and individual nature of religion) of religion and sees religion as a good to be fostered and promoted. The latter emphasizes the private and personal aspects of religion (to the exclusion of the public and communal) and sees religion as something from whose influence society must be protected.

CONCLUSION

Spain and the United States offer dramatically different examples of legal discourse on the question of religious liberty. Though each protects freedom of exercise and forbids the state to establish a religion, each does so in very different ways.

The Spanish method obviously cannot be adapted and established wholesale here in the United States. Nevertheless, it offers ideals and aspirations for the American legal regime. If American law wishes to foster the good of religion rather than simply to protect religious belief, then Spain offers an example of how more fully to realize this. The open question is whether America desires to realize this goal.

352 See *id.* at 652 (stating that where “genuine and independent private choice” exists, a program is not as “readily subject to a challenge under the Establishment Clause”).