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# The Political (and Other) Safeguards of Religious Freedom

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# THE POLITICAL (AND OTHER) SAFEGUARDS OF RELIGIOUS FREEDOM

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## I.

The *Smith*[1] decision has been the target of sustained and withering criticism from scholars whose judgments I respect, and it has been widely excoriated as horribly and harmfully wrong. As Professor Laycock reported, almost immediately after the opinion came down, *Smith* "produced widespread disbelief and outrage."[2] And, he said, rightly so: The ruling was (and is) "demonstrably wrong as a matter of text, precedent, and original intent."[3] Professor McConnell's conclusion was the same, and he added "contrary to the deep logic of the First Amendment"[4] to the list of the case's demerits.

That any Court decision, regarding any topic, falls strikingly short with respect to these important criteria—that is, text, precedent, original meaning, logic—is bad enough. *Smith*, though, has been called a "sweeping disaster for religious liberty"[5]—one that hamstrung what President Clinton (following many others) called our "first freedom"[6] and tarnished the "lustre"[7] that James Madison was sure our religious-

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* Professor of Law and Associate Dean, University of Notre Dame. I am grateful to Professor Marci Hamilton for including me in the stimulating conference at which the papers collected in this Symposium were presented, and to the excellent scholars who were my fellow participants in that conference and who have, in many ways, shaped and challenged my thinking about the First Amendment and religious freedom. I also appreciate very much the patience and hard work of the editors and members of the *Cardozo Law Review*, the helpful comments of my friends Steven Smith, Paul Horwitz, and A.J. Bellia, and the assistance of my student at Notre Dame Law School, Steven Oyler.

1 Emp't Div. v. Smith, 494 U.S. 872 (1990).

2 Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 1.

3 *Id.* at 3.

4 Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1111 (1990).

5 Edward McGlynn Gaffney, Douglas Laycock & Michael W. McConnell, *An Open Letter to the Religious Community*, FIRST THINGS, Mar. 1991, at 44, 44.

6 William J. Clinton, Remarks at James Madison High School in Vienna, Virginia, 2 PUB. PAPERS 1075, 1076 (July 12, 1995).

7 *See* JOHN T. NOONAN, THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM (1998).

liberty experiment would bring to our country. It is one thing to judicially mangle a relatively inconsequential provision, but *Smith* is charged with gutting what many regard as the Constitution's headliner, the main event.[8]

In Professor Greenawalt's near-magisterial view, the *Smith* decision "eviscerated" the First Amendment and "turned the constitutional law of religion nearly upside down."[9] (In that position, John Courtney Murray might have quipped, "it can only gurgle . . . nonsense."[10]) Professor Smith is a bit, but only a bit, more gentle, observing that *Smith* left the Free Exercise Clause "without independent constitutional content and thus, for practical purposes, largely meaningless."[11] That a judicial decision renders a cherished and central provision of the Constitution "meaningless" hardly seems to weigh in its favor. *Smith* was a "travesty,"[12] a "tragedy,"[13] an "assault,"[14] a "dastardly and unprovoked attack,"[15] and so on. I should really hate this case. And yet, I do not.

Why not? The reason is not indifference to or complacency regarding the well-being of religious freedom. I am convinced that this is our first and foundational freedom—a fundamental, non-negotiable, inalienable human right. Little if anything else that matters is secure if religious freedom is not. Religious freedom is not merely the space conceded by political authorities to those beliefs and actions they have concluded do not intolerably interfere with their own projects.[16] It is, instead, a reality that corresponds to truths about the nature, goods, and destiny of the human person, namely, that we were made by God—whose love for us is precisely what imparts to us the worth that makes

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[8] According to Nat Hentoff, the famously civil-libertarian journalist, the late Justice William Brennan once said that the First Amendment is the Constitution's most important provision. *See* NAT HENTOFF, SPEAKING FREELY 138 (1997). According to Hentoff, Justice Brennan explained that the First Amendment "gives us this society. The other provisions of the Constitution merely embellish it." *Id.* (internal quotation marks omitted).

[9] Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145, 145, 157 (2004).

[10] John Courtney Murray, *Law or Prepossessions?*, 14 L. & CONTEMP. PROBS. 23, 33 (1949).

[11] Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 233 (1991).

[12] JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 138 (3d ed. 2011).

[13] W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimensions of Religious Institutions*, 1993 B.Y.U. L. REV. 421, 448.

[14] Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 755 (1992).

[15] 137 CONG. REC. 17,035-36 (1991) (statement of Rep. Solarz).

[16] *See* Second Vatican Council, *Dignitatis Humanae* [Declaration on Religious Freedom] (Dec. 7, 1965) ¶ 2 [hereinafter *Dignitatis Humanae*], *available at* http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html ("[R]eligious freedom has its foundation [not in political convenience or indifference, but in] the very dignity of the human person . . . .").

rights-and dignity-talk meaningful[17]—to know, love, and serve Him in this world and to be happy forever with Him in the next. It is a fact of moral anthropology[18] that we are hard-wired to search for, and cling to, the truth about ourselves and the world. As Saint Augustine famously wrote, "you have made us for yourself, [O Lord,] and our heart is restless until it rests in you."[19]

Importantly, it is not only that we are by nature disposed to look for, and find, what will provide our "hearts" with rest; we *ought* to—indeed, we are obligated to—do so.[20] Madison insisted as much in his *Memorial and Remonstrance*: "It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him," he said.[21] "This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society," and it is precisely this "preceden[ce]" that religious freedom expresses and vindicates.[22] It is because this duty is real, and because its performance is, in John Garvey's words, a "good thing,"[23] that the law does and should respect, protect, and promote religious freedom.

I say all this not to preen or proselytize, but to shore up the *bona fides* of my commitment to religious freedom and, in so doing, to acknowledge and even highlight the strangeness of my relatively blasé stance toward *Smith*.

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17 *See* Richard W. Garnett, *Righting Wrongs and Wronging Rights*, FIRST THINGS, Oct. 2008, at 48 (reviewing NICHOLAS WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS (2008)), *available at* http://www.firstthings.com/article/2008/09/003-righting-wrongs-and-wronging-rights-19.

18 *See* Richard W. Garnett, *American Conversations With(in) Catholicism*, 102 MICH. L. REV. 1191, 1216 (2004) (reviewing JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY (2003)) ("[B]y 'moral anthropology,' I mean 'an account of what it is about the human person that does the work in moral arguments about what we ought or ought not to do and about how we ought or ought not to be treated.'" (quoting Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 543 (2003)).

19 SAINT AUGUSTINE, CONFESSIONS 3 (Henry Chadwick trans., Oxford Univ. Press 1991) (397-400).

20 *Dignitatis Humanae*, *supra* note 16, ¶ 2 ("It is in accordance with their dignity as persons . . . that all men should be at once impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth.").

21 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* 8 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland et al. eds., Univ. of Chi. Press 1973) (1785).

22 *Id.*

23 JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 49 (1996).

## II.

If this stance does not reflect a shaky commitment to or half-hearted embrace of religious freedom, then it could indicate instead either that I do not believe—or, at least, do not believe very confidently—that the decision actually is "demonstrably wrong as a matter of text, precedent, and original intent,"[24] or that I am not convinced that it is, even if "wrong," a "sweeping disaster for religious liberty."[25]

With respect to the first possibility, I have nothing to add to the rich and ongoing debate about the history of the First Amendment's Free Exercise Clause. I am, I confess, in some sense an originalist[26] (though probably a "faint-hearted" one[27]), and so am sympathetic to this debate's premise that the question of the merits of *Smith* is at least related to the question whether that decision's rule is consistent with the original meaning of the First and Fourteenth Amendments. As has already been noted, many—probably most—expert scholars have concluded that it is not.[28] Still, more than a few prominent and respected scholars have concluded otherwise; that is, they have concluded that the Free Exercise Clause was not understood, when it was ratified, as requiring (or even authorizing) judicially created exemptions from generally applicable laws for religiously motivated conduct.[29]

I have done my best, and continue to try, to engage conscientiously the arguments and scholarship to the effect that the *Smith* rule strays from the text and original meaning of the relevant constitutional provisions and authoritative judicial precedents.[30] However, I am not—not yet, anyway—convinced. Put aside, for present purposes,

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24 Laycock, *supra* note 2, at 3.

25 Gaffney et al., *supra* note 5, at 44.

26 *See generally* Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 411-16 (2009).

27 *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861-62 (1989).

28 *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1420 (1990). Professor Lash urges the view that it is the Fourteenth Amendment's Privileges or Immunities Clause, and not the First Amendment's Free Exercise Clause, that (sometimes) mandates accommodations for religiously motivated conduct. *See* Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994).

29 *See, e.g.*, Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

30 *See generally* Richard W. Garnett & Joshua D. Dunlap, *Taking Accommodation Seriously: Religious Freedom and the* O Centro *Case*, 2005-2006 CATO SUP. CT. REV. 257.

understandable reservations about the elegance or persuasive power of the Court's handling in *Smith* of the unemployment compensation cases,[31] or about the plausibility of its invocation—or, invention—of a "hybrid rights" theory to explain and justify the decision in, and asserted continued validity of, *Yoder*.[32] Those of us who teach *Smith* know all too well that these parts of the opinion make for some awkward moments in class. Still, at the end of the day, it is *Sherbert* more than *Smith* that strikes me as an innovation.[33]

Is *Smith*, even if defensible as a technical matter, nevertheless a "disaster for religious liberty," and so made sufficiently "wrong" by this undeniably bad consequence as to deserve the hatred that I have so far not managed to muster?[34] I do not think so.

For starters, I do not think *Smith* is best, or even fairly, read as endorsing or expressing the view that religious freedom is anything other than a fundamental human right. I do not "hear" in the majority opinion any reservations about the importance of protecting and promoting that freedom in the complicated conditions of a pluralistic, diverse society. I do not read *Smith* as constitutionalizing the claim that religion is simply a matter of private belief and is not also about conduct, worship, liturgy, ritual, association, and authority.[35] The message, or teaching, of *Smith* is not that religion-blind formal "neutrality" is the appropriate, let alone the required, approach for governments to employ with respect to religious belief, believers, and their actions.[36] It does not announce a rejection of Professor McConnell's correct statement that governments may and should "take religion specifically into account" for the purpose of "allowing individuals and groups to exercise their religion."[37] True, Justice Scalia, writing for the majority, emphasizes the continued need for

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31 Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

32 Wisconsin v. Yoder, 406 U.S. 205 (1972); *see* Emp't Div. v. Smith, 494 U.S. 872, 881-82 (1990).

33 That the *Sherbert* "strict scrutiny" standard was an innovation is suggested by the fact that government actions burdening or constraining religiously motivated conduct almost always managed to satisfy it, or avoid it altogether. *See Smith*, 494 U.S. at 883.

34 *See* Cass R. Sunstein, *Of Snakes and Butterflies: A Reply*, 106 COLUM. L. REV. 2234, 2234, 2238 (2006) ("The abstract idea of interpretation cannot support originalism or indeed any judgment about the competing (reasonable) approaches to the Constitution. Any such judgment must be defended on pragmatic grounds, which means that it must be attentive to consequences.").

35 *See Smith*, 494 U.S. at 876-77.

36 *Id.* at 890 ("Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.").

37 Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 688 (1992).

judicial enforcement of a rule against anti-religious discrimination and "governmental classifications based on religion";[38] he does not, however, declare that religious freedom is reducible to nothing more than freedom from religion-related discrimination or that our commitment to religious liberty is only a particular illustration of or vehicle for our more general commitment to equality,[39] or to liberty,[40] or to "conscience."[41]

Decisions by the Supreme Court not only have the Article III function of resolving "cases," they also form, teach, and inculcate values in citizens. They settle particular disputes, but they also shape ongoing, big-picture debates. It would, then, be something to worry about, and to regret, if *Smith* had not only misinterpreted and misapplied the Constitution, but also distorted our conversations about, or weakened our commitments to, religious freedom. But the case need and should not be read as rendering and proposing that we embrace a negative, wary verdict on the role of religion or religious "power" in civil society or political life.[42] Its rejection of a "strict scrutiny" standard for religion-neutral regulations that burden religiously motivated practices does not proceed from the conviction that religiously motivated conduct is particularly or especially harmful to other persons or to the common good, or that danger and disorder necessarily travel more closely with religious accommodations than with other exemptions. Justice Scalia does quote approvingly the fear, expressed more than a century earlier in *Reynolds*, that to permit "a man [to] excuse his practices to the contrary [of laws] . . . would be to . . . permit every citizen to become a law unto himself,"[43] but this somewhat grumpy aside should be understood as a warning about lawlessness, not accommodations of religion.

*Smith* affirms not the irrelevance or the dangers of religious freedom, but instead what my colleague Professor Kelley has called the relative primacy of political actors in the accommodation of religion.[44] In other words, it is less a case about the content and foundations of religious freedom, or about minimizing the harms that religiously motivated conduct can cause to the common good, or about throwing up judicial roadblocks to exemptions, accommodations, and compromises,

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38 *Smith*, 494 U.S. at 886 & n.3.

39 *Cf.* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007).

40 *Cf.* James W. Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941 (2005).

41 *Cf.* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008).

42 *Cf.* Marci A. Hamilton, Commentary, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 814-22 (1999).

43 *Smith*, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1878)).

44 *See* William K. Kelley, *The Primacy of Political Actors in Accommodation of Religion*, 22 U. HAW. L. REV. 403 (2000).

than it is about institutional competence, comparative advantage, federalism, and the limits of judicial review.[45] These considerations should not be regarded as unwelcome or hostile interlopers in the religious liberty conversation.

It has, after all, always been the case that constitutional protections for religious freedom in America have been shaped by a recognition that religiously motivated conduct can disturb (as some early state constitutions put it) the "peace or safety of [the] state."[46] Again, we were optimistic at the founding that our commitment to religious freedom would bring "lustre to our country,"[47] but we did not imagine that this commitment would be costless or that it could be absolute.

Modern and contemporary human rights instruments reflect a similar recognition. For example, Article 9 of the European Convention on Human Rights provides that the freedom to "manifest one's religion or beliefs" may be subject to "such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."[48] In a similar vein, the Second Vatican Council acknowledged in its landmark *Declaration on Religious Freedom* that this freedom—of individuals, communities, and institutions alike—is shaped and bounded by considerations of the "rights of others" and the "just demands of public order."[49] According to this document, "[t]he right to religious freedom is exercised in human society: hence its exercise is subject to certain regulatory norms," and "[i]n the exercise of their rights, individual men and social groups are bound by the moral law to have respect both for the rights of others and for their own duties toward others and for the common welfare of all."[50] The right is not denigrated, or its close connection to human dignity denied, by the *Declaration*'s acknowledgment that "society has the right [and duty] to defend itself against possible abuses" in order to secure a "genuine public peace."[51]

The crucial enterprise of protecting and promoting religious freedom, and of accommodating enthusiastically, to the greatest extent possible, the religious motivations and commitments of citizens, necessarily involves costs, risks, trade-offs, compromises, and

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[45] *See Smith*, 494 U.S. at 890 ("[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.").

[46] City of Boerne v. Flores, 521 U.S. 507, 553-54 (1997) (gathering examples).

[47] *See supra* note 7 and accompanying text.

[48] Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, ¶ 2, Nov. 4, 1950, 213 U.N.T.S. 221, 230.

[49] *Dignitatis Humanae*, *supra* note 16, ¶ 4.

[50] *Id.* ¶ 7.

[51] *Id.*

uncertainty. That this is true does not make the enterprise any less worthy or pressing, but it does make it more difficult.

And so, the question that *Smith* answers is not: Is the free exercise of religion a good thing, and a fundamental human right? Nor is it: Should governments accommodate religiously motivated requests for exemptions from generally applicable laws? *Smith* can be read as saying "yes" to both of these questions—at least, it need not be read as saying "no" to them—and we should say "yes" to them too. However, the question that is the case's focus is, perhaps, more prosaic: When it comes to the means to be employed, the balance to be struck, and the costs to be absorbed in connection with the accommodation of religiously motivated objections to otherwise valid regulations aimed at protecting and securing the common good, who decides? According to *Smith*, the undisputed importance of religious liberty does not require that it be an unelected federal judge.[52]

That there are things that matter very much—decisions that are very important, and that go to the heart of our constitutional enterprise—but that are nevertheless, for the most part, best handled politically and not through judicial review, is not an unfamiliar or novel idea.[53] For example, those of us who are fortunate enough to teach the basic constitutional law course know that we have been arguing since the beginning about the extent to which the Constitution's structural features—separation of powers, federalism, limited and enumerated powers, checks and balances, and so on—can and should be judicially enforced and maintained. These features and their well-being are not arcane or trivial. The notion—the "first principle"[54]—that ours is a national government of enumerated, limited, separated powers, and that the design of that government serves to protect freedom and promote flourishing, is as old as the Constitution itself. And yet, at least since Chief Justice Marshall, it has been contended that not all of the important features of this design are to be, or are capable of being, closely supervised and safeguarded by courts.[55] In landmark New Deal-

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[52] *See* Emp't Div. v. Smith, 494 U.S. 872, 886-87 (1990); *cf.* Richard W. Garnett, *Judicial Enforcement of the Establishment Clause*, 25 CONST. COMMENT. 273, 275 (2008) ("[W]e might think that judges are neither better equipped nor more likely than are politically accountable actors to identify the outcome that best respects the 'complex, often competing' values that are in play in establishment clause cases.").

[53] *See generally, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

[54] *See* United States v. Lopez, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers.").

[55] *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) (Marshall, C.J.) ("The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances . . . the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.").

era cases like *Darby*[56] and *Wickard*,[57] and more recently in decisions like *Garcia*[58] and *Raich*,[59] majorities have insisted, for better or worse, that the implementation of important federalism principles is best left to politics and to the politically accountable branches of government.

In fact, it is not clear that the so-called "political safeguards of federalism"[60] are sufficient, or are assumed in the Constitution to be sufficient, to actually safeguard the Constitution's liberty-enhancing structure. The Court's move in *Carolene Products*' famous footnote might have been too quick.[61] And so, the Court has, from time to time—and more often in recent years[62]—occasionally stepped in, when the actual consequences to national policy are minimal, to insist—if only for show—on a judicial role in policing the Constitution's basic structural features. Still, for the most part, when the questions are "when is an effect on commerce sufficiently substantial or direct?," or "when is an exercise of federal power 'necessary and proper?,'" or "at what point does a spending condition unconstitutionally coerce a state?," we leave the matter to politics. And we do so despite the fact—perhaps, in part, because of the fact—that these questions are important and their answers matter. A valuable and instructive "takeaway" from *Smith* is that a similar approach might make sense when it comes to the balancing, estimating, and trading-off that is unavoidable in the context of accommodating religious believers through exemptions from generally applicable laws.

## III.

What was true before *Smith* is still true today, twenty years or so later: Political authorities may and should take advantage of the "ample room"[63] that our Constitution leaves for the accommodation of religious believers; when they do so, they act in accord with the "best of our traditions."[64] Our politics should, in general, regard the free exercise of religion not primarily as a danger to be contained or a nuisance to be managed, but as a human, social, and political good to be both protected

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56 United States v. Darby, 312 U.S. 100 (1941).

57 Wickard v. Filburn, 317 U.S. 111 (1942).

58 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

59 Gonzales v. Raich, 545 U.S. 1 (2005).

60 *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

61 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

62 *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 138 S. Ct. 3138 (2010); Printz v. United States, 521 U.S. 898 (1997); United States v. Lopez, 514 U.S. 549 (1995).

63 *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338 (1987).

64 Zorach v. Clauson, 343 U.S. 306, 314 (1952).

and promoted. The government need not, and should not, be "neutral" with respect to this good,[65] even though it should (of course) be scrupulously and substantively "neutral" with respect to individuals' religious choices and conscience.[66]

How can we make this work? That is, if *Smith*'s preference in the accommodation-of-religion context for the work of "political actors," rather than the judgment of federal courts, is to be justified, what should be true of our politics and elsewhere in our law?

Obviously, for starters, it is necessary that citizens be informed and formed to appreciate not only that religious freedom is a fundamental human right, but also that respecting that right sometimes—not always, but sometimes—requires creating exemptions from well-meaning and otherwise valid laws and regulations for religiously motivated conduct. This appreciation, and a willingness to act in accord with it, cannot be taken for granted, and should not be assumed to arise and thrive unaided or unencouraged. "Liberty," after all, "lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it . . . ."[67] A culture that has uncritically absorbed, and that too enthusiastically promotes, the view that respect for religious freedom consists only of those concessions that cause no inconvenience and is not, instead, what is owed by a political community to human dignity, is probably not one whose "political safeguards" will do much safeguarding. But, of course, such a culture is probably not one whose courts—whatever doctrines they purport to be applying—will do much better.

More specifically, such a culture should cultivate and act in accord with a policy-related attitude toward religious accommodations that is not merely reactive. It should not settle for identifying and lifting, to the extent possible, the burdens that, given our religious diversity, will inevitably be imposed even by conscientious legislators. We should, in addition, attend to what Professor Balkin has called the First Amendment's "infrastructure."[68] "[C]ertain institutions—newspapers, political parties, interest groups, libraries, expressive associations, universities and so on. . . . play a[n important] structural—

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[65] *See* GARVEY, *supra* note 23, at 49 (contending that our Constitution protects religious freedom because religion is a "good thing").

[66] *See generally* ANDREW KOPPELMAN, RELIGIOUS NEUTRALITY IN AMERICAN LAW: AN ANALYSIS AND DEFENSE (forthcoming 2012) (explaining that, and why, the law may be religiously "neutral" while still treating religion-in-general as a distinctive human good).

[67] LEARNED HAND, *The Spirit of Liberty*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 190 (Irving Dillard ed., 1952).

[68] *See* Jack M. Balkin, Address at the Second Access to Knowledge Conference (A2K2) at Yale University: Two Ideas for Access to Knowledge—The Infrastructure of Free Expression and Margins of Appreciation (Apr. 27, 2007) (transcript available at http://balkin.blogspot.com/2007/04/two-ideas-for-access-to-knowledge.html) (noting that freedom of speech rests on an infrastructure of free expression).

or . . . 'infrastructural'—role in clearing out and protecting the civil-society space within which the freedom of speech can be well exercised."[69] The same thing can be said about religious freedom:[70]

> Just as the "[f]reedom of speech . . . depends on an infrastructure of free expression," the freedom of religion depends on an infrastructure of, well, religious freedom. Part of this infrastructure—in addition to its more obvious components, like open and functioning courts, legal accommodations, thriving communications networks, etc.—is a web of independent, thriving, distinctive[, self-governing (in their appropriate spheres)] institutions.[71]

In resolving to rely, as the Court did in *Smith*, on a culture that values religious freedom and on the "political safeguards" of that freedom, we should also resolve to attend conscientiously to the health of this infrastructure. Turning again to the Second Vatican Council's *Declaration on Religious Freedom*, the call in that document for governments to exercise respectful care for the "conditions favorable to the fostering of religious life"—that is, the conditions within which "people may be truly enabled to exercise their religious rights and to fulfill their religious duties"[72]—reflects just such a resolution. To be clear, such a resolution, and such attention, need not involve abandoning our well-established rule that civil governments' legislation should have a "secular purpose";[73] it simply proceeds from the recognition that non-coercive support for the conditions—again, the infrastructure—that make it possible for people to pursue a human good and enjoy a human right has, in fact, an appropriately "secular" purpose.[74]

Now, endorsing—or even merely making the best of—the Court's decision in *Smith* to give to the political processes the bulk of the work of accommodating religion does not mean giving up entirely on the necessary, even if more limited, role of judges and judicial review in

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69 Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 274 (2008); *see also* Jack M. Balkin, *The Infrastructure of Religious Freedom*, BALKINIZATION (May 5, 2007, 3:15 PM), http://balkin.blogspot.com/2007/05/infrastructure-of-religious-freedom.html ("Freedoms like speech, press, and religion require more than mere absence of government censorship or prohibition to thrive; they also require institutions, practices and technological structures that foster and promote these freedoms.").

70 *See generally* Garnett, *supra* note 69.

71 *See id.* at 295 (first alteration and omission in original) (footnote omitted) (quoting Balkin, *supra* note 68).

72 *Dignitatis Humanae*, *supra* note 16, ¶ 6.

73 *See generally* Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002).

74 *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 327, 335 (1987) (noting that it is "a permissible legislative purpose . . . to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions").

enforcing the Religion Clauses and protecting religious freedom. It makes sense, and it complements *Smith*, for the Court to craft and implement doctrines in other areas—that is, areas other than "religious accommodations and exemptions"—that will help the political and structural safeguards of religious freedom to work better.[75] The Establishment Clause, for example, should be understood (and, generally speaking, is understood) as allowing a great deal of leeway for accommodations that are not constitutionally required.[76] The Free Speech and Establishment Clauses should be understood (and, generally speaking, are understood) as protecting the place of religious expression and activism in the public square and in the civic arena.[77] We should avoid constitutional rules or methods that treat participation and advocacy—and success—by religious believers in politics as somehow illegitimate.[78] The Establishment Clause should not be interpreted or applied (and the Court's precedents no longer require that it be interpreted or applied) to forbid cooperation between political authorities, on the one hand, and religious schools and social welfare institutions on the other, and the terms of this cooperation should not require these religious institutions to discard or bracket their religious character and mission.[79]

In addition, it remains both possible and necessary—even after *Smith*—to identify and enforce what we might think of as the core commands and requirements of the First Amendment, commands that translate better into judicially manageable standards than does the general idea that religious accommodations are good. For example, courts can and should enforce a no-discrimination-against-religion rule.[80] They can and should enforce, in appropriate contexts, "formal" equal-treatment requirements.[81] And they can and should clearly and

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[75] For a recent comprehensive and enlightening exploration of the role of the Religion Clauses in a liberal democracy, see generally PAUL HORWITZ, THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION (2011). Professor Horwitz is more critical than I am of the *Smith* decision. *Id.* at 190-92. The book's animating proposal, though—that governments as a general matter ought to regard religion, its claims, and its demands sympathetically—seems consistent with this paragraph's suggestions.

[76] *See generally, e.g.*, Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000). *But see, e.g.*, Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 79 (1990) (arguing that "the accommodation principle is incompatible with a proper interpretation of the religion clauses" and insisting that "[t]he establishment clause should be viewed as a reflection of the secular, relativist political values of the Enlightenment, which are incompatible with the fundamental nature of religious faith").

[77] *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

[78] *See, e.g.*, Harris v. McRae, 448 U.S. 297, 319-20 (1980).

[79] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[80] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

[81] *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001). *But see* Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263 (2008) (arguing that, in some (limited) circumstances, governments may exclude religious actors and entities from support programs).

carefully vindicate the ideas that religious and political authorities are distinct, independent, and separate; and that the right to religious freedom includes the freedom of religious communities to govern themselves with respect to matters of doctrine, discipline, and polity.[82]

This last point is crucial. Just as every person has the right to seek religious truth and to cling to it when it is found, religious communities have the right to hold and teach their own doctrines; just as every person ought to be free from official coercion when it comes to religious practices or professions, religious institutions are entitled to govern themselves and to exercise appropriate authority, free from official interference; just as every person has the right to select the religious teachings he or she will embrace, churches have the right to select the ministers they will ordain. These latter rights reflect a vital, structural principle—a principle of church-state "separation," properly understood—that should not depend on politics for its vindication because, in a real sense, the proper functioning of politics depends on it.[83]

Therefore, the courts should, notwithstanding *Smith*, constitutionalize and enforce a robust "ministerial exception" and a "no religious decisions principle," and defer to religious authorities in intra-religious disputes.[84] That they should is no more surprising than the fact that, notwithstanding *Wickard* and *Darby*, the Court has nevertheless, in appropriate—and admittedly rare—cases,[85] enforced the Constitution's authority-allocating structural features. It is true that the *Smith* decision did not engage in any detail what is today a pressing and difficult challenge, namely, protecting—and identifying the limits of—this freedom of religious communities and institutions to govern themselves. However, the Justices will soon have an opportunity to do so, and they should.[86]

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82 For a fuller discussion of this point, see, for example, Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & RELIGION 503 (2006-2007); Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2007).

83 *See generally* Richard W. Garnett, *Standing, Spending, and Separation: How the No-Establishment Rule Does (and Does Not) Protect Conscience*, 54 VILL. L. REV. 655 (2009).

84 *Cf.* EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 800-01 (4th Cir. 2000) (explaining and collecting authorities to the effect that the "ministerial exception" survives *Smith*).

85 *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997); INS v. Chadha, 462 U.S. 919 (1983).

86 As this Essay was being completed, the Supreme Court agreed to review the decision of the Court of Appeals for the Sixth Circuit in *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & School*, 597 F.3d 769 (6th Cir. 2010), *cert. granted*, No. 10-553, 2011 WL 1103380 (U.S. Mar. 28, 2011), in which the Sixth Circuit ruled that the ministerial exception was not a bar to a disability discrimination lawsuit brought by a former teacher at a religious school. The Supreme Court's decision could clarify both the constitutional basis for and the scope of the exception.

Many are skeptical about this freedom and sensitive to the fact that it can be abused.[87] And yet, it is essential. The "political safeguards" of religious freedom can be effective only if there are at work in society free associations and authorities that are not merely political. As the great legal historian Harold Berman observed, it is an eleventh century Pope's (temporary) vindication of the "principle that royal jurisdiction was not unlimited . . . and that it was not for the secular authority alone to decide where its boundaries should be fixed" that sits as the foundation of the Western tradition of constitutionalism.[88] It would be a mistake to see in *Smith*'s assignment to politically accountable actors of the fact-sensitive, contextual project of crafting exemptions and accommodations for religiously motivated conduct a retreat from careful judicial enforcement of what is, after all, the beating heart of the Religion Clauses—namely, the rule that there are "things that are not Caesar's."[89]

## CONCLUSION

I was more confident about the health and prospects for religious freedom after *Smith*, and in the justifiability of my equanimity regarding the case, before I presented this Essay to the participants in the conference at Cardozo than I was afterward, and than I am now. This is in part, I suspect, because of the cold water thrown on my own relatively sunny contribution, with its premise that religious freedom both is and is generally regarded as a good thing, by that of my friend and colleague Professor Smith, who observed, among other things, that "[f]rom the secular egalitarian standpoint, that is, insofar as religious freedom immunizes views and practices that deviate from and work to subvert the secular orthodoxy, religious freedom is *not* obviously a good thing; it may be a distinctly *bad* thing."[90] After canvassing the views of those occupying this standpoint, Smith concludes that, given the "new and daunting challenges" we can expect religious freedom to face,

> for the friends of religious freedom, *Smith*'s repudiation of the *Sherbert* doctrine may come to seem a more tragic loss than it was at the time the decision was rendered. The *Sherbert* doctrine may have been largely superfluous when it was the accepted doctrine. But its

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[87] *See, e.g.*, Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-up*, 29 CARDOZO L. REV. 225 (2007).

[88] HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 269 (1983).

[89] *See* JACQUES MARITAIN, THE THINGS THAT ARE NOT CAESAR'S (J.F. Scanlan trans., 1931).

[90] Steven D. Smith, *Religious Freedom and its Enemies, Or Why the* Smith *Decision May Be a Greater Loss Now than it Was Then*, 32 CARDOZO L. REV. 2033, 2054 (2011).

> potential value (now unrealized) may be greater now that it has been discarded. *Smith*, conversely, may come to seem more regrettable now or in the future than it was at the time.[91]

I hope not.

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91 *Id.*