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I. INTRODUCTION

The Supreme Court's decision in *Employment Division v. Smith*[1] outraged most scholars of the Free Exercise Clause.[2] I am among the relatively few who believe that the Court reached the right doctrinal result in *Smith*.[3] My reasons are, I think, even more idiosyncratic than my position. They are founded on my discomfort with the rhetoric of free exercise discourse under the pre-*Smith* regime, in which generous promises of sensitivity to eccentric religious practices were routinely betrayed. In this essay, I explore the rhetoric of free exercise discourse. Part II focuses on two aspects of that rhetoric: the prevalence of strongly phrased "slippery-slope" arguments against *Smith* and the revitalization of originalist arguments in support of pre-*Smith* law. Part III explains why I believe that the more honest rhetoric of *Smith* is, ultimately, more respectful of religious exercise, even of religious exercise that is suppressed under *Smith* but that may have been protected under the pre-*Smith* regime.

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1. 494 U.S. 872 (1990).

2. For citations to the highly critical literature, see James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 n.15 (1992).

3. Some critics of the doctrine the Court announced in *Smith* suggest that the Court reached the correct result in finding it permissible for a state to refuse to exempt from its drug-abuse laws those who use drugs as part of a religious rite (or, more narrowly and more controversially, to allow a state to deny unemployment benefits to those fired from their jobs because of their [permissibly criminalized] drug use during a religious ceremony).

II. "THE SKY IS FALLING": DEALING WITH *Smith*

A. Down the Slippery Slope to Religious Persecution

Understandably, advocates generally find "slippery-slope" arguments effective, particularly when they are addressing nonspecialists. Therefore, opponents of *Smith* typically point out that, under the Court's new doctrine, governments can "dictate the location of an altar in a Catholic church" or "equate[] the rights of churches with the rights of pornographic movie theaters."[4] Even worse, according to one of the rhetorically effective anti-*Smith* slippery-slope arguments, a minister who allows minors to participate in communion could be prosecuted under *Smith* for violating a state's ban on serving alcohol to minors.

Upon inspection, however, the substantive failings of such arguments are evident. Indeed, the parade of horribles marshalled by those attacking *Smith* apparently broke rank even before the march got underway.[5] In that sense, the anti-*Smith* rhetoric resembles discourse about tort reform or political correctness. Horror stories are told to demonstrate the existence of serious problems;[6] yet, although some horror stories are doubtless true, readers are given no basis for determining the real rate or number of outrages. Accordingly, some skepticism is natural, and with regard to the claims that *Smith* threatens religious liberty in some novel way, such skepticism is more than justified. In practice, pre-*Smith* law was not all that protective of religious exercise, and because post-*Smith* law is constrained by nonconstitutional factors, the practical reality of religious protection after *Smith* is substantially similar to the practical reality of religious protection before *Smith* was decided.

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4. Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 2 (citing Cornerstone Bible Church v. City of Hastings, 740 F. Supp. 654, 663 (D. Minn. 1990)).

5. Sometimes genuine controversy may exist over whether the horribles that are paraded are really that horrible. This seems to be particularly true of the application of antidiscrimination and labor laws to some aspects of church-related operations. For Laycock's examples, see *id.* at 43-44. The question may be posed, "Is there now no constitutional barrier to unionized parochial schools?" *Id.* at 44. For me, if the answer is yes, the sky will not have fallen.

6. For a discussion of the rhetoric of political correctness, see Mark Tushnet, *Political Correctness, the Law, and the Legal Academy*, 4 YALE J.L. & HUMAN. 127 (1992).

To illustrate, consider Laycock's suggestion that *Smith* allows government to determine where an altar should be located in a particular church. Laycock utilizes this example on the first page of his article, significantly titled *The Remnants of Free Exercise*.[7] Laycock indicates that "[s]tate and local governments have already relied on *Smith* for authority to dictate the location of an altar in a Catholic church."[8] If a reader is less than diligent in reviewing Laycock's article and so careless as to ignore the footnotes, he or she might think that some government had actually succeeded in dictating the altar's location. The appended footnotes, however, deserve some attention. Laycock supports his assertion by citing a brief filed by the Boston Landmarks Commission in the Massachusetts Supreme Judicial Court.[9] Fifty-five pages later, the reader attentive to footnotes will discover that the Massachusetts court "ignor[ed] *Smith* and grant[ed] religious exemptions under [the] state constitution."[10] While advocates writing briefs will "rely on" whatever they think helpful to their client's position, whether their arguments accurately reflect the law is quite another matter. Treating the threat to the altar's location as posing a real risk of religious persecution is an overstatement.

The altar location case explicitly illustrates one set of constraints on the post-*Smith* regime. In addition, it implicitly directs attention to the most important feature of the pre-*Smith* regime. The Federal Constitution is not the only limiting force that keeps governments from engaging in religious persecution. Consider the example of serving liquor to minors at communion. Before someone could say that the Supreme Court's decision in *Smith* contributed to a minister's imprisonment, he or she would first need to consider the other barriers to the minister's prosecution that would need to be overcome before such a prosecution could be successful. First, a local prosecutor must decide to prosecute the minister. If, as the example is designed to show, the prospect of such a prosecution is truly horrible, we might imagine that the prosecutor would think long and hard about how such a prosecution would affect his or

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7. Laycock, *supra* note 4, at 1.
8. *Id.* at 1-2.
9. *Id.* at 2 n.4.
10. *Id.* at 55 n.218. For a discussion of post-*Smith* cases under state constitutions, see Neil C. McCabe, *The State and Federal Religion Clauses: Differences of Degree and Kind*, 5 ST. THOMAS L. REV. 49, 51-62 (1992).

her chance for reelection. Next, the courts, including the state's highest court, must determine that the statute banning the service of liquor to minors should not be construed to include an exemption for religious practices. Additionally, those courts must reject the argument that the state's constitution adopts a stricter standard in its free exercise provision than the federal standard articulated in *Smith*. All of these possibilities might occur. Given the political pressures that would generate such a (hypothesized) prosecution, however, one is entitled to wonder whether federal courts applying pre-*Smith* law would have stood up to such pressures.

Of course, the horror stories may have a function apart from their "predictive" value with regard to *Smith*'s consequences. Using symbols the reader values, they may be designed to mobilize the reader's sympathies by illustrating the impact *Smith* had on the Native Americans who were denied the ability to use peyote in their ceremonies. Readers who, in *their* religious exercise, view communion as having a sacred prominence similar to that of peyote for the Native American Church are invited to imagine what it would feel like if the government denied their children the opportunity to participate in the ceremony.

For some audiences, this rhetorical device may work. Others, however, may deny that the peyote ceremony is at all similar to communion. They may argue that one is an animist ritual while the other is participation in the one true church; or, that one is drug abuse while the other is a religious ceremony. Thomas Nagel makes the point more generally:

> This is really a problem of how to interpret the familiar role-reversal argument in ethics: "How would you like it if someone did that to you?" That argument invites the further question, "How would I like it if someone did *what* to me?" Since there is more than one true description of every action, the selection of the morally operative one is crucial. If someone believes that by restricting freedom of worship he is saving innocent people from the risks of eternal damnation to which they are exposed by deviation from the true faith, then under *that* description he presumably *would* want others to do the same for him, if he were in spiritual danger. But under the description "restricting freedom of worship," he wouldn't want others to do it to him, since in light of the fact that his

> is the true faith, this would be to hinder his path to salvation.[11]

Regardless of whether they are used as prediction or rhetorical trope, the horribles paraded by those opposing *Smith* implicitly illustrate that pre-*Smith* law dealing with historic preservation law and church property was not that protective.[12] For example, Laycock indignantly discusses the Second Circuit's decision upholding the designation of St. Bartholomew's Church as a historic landmark, which severely impaired the church's ability to raise money for its religiously motivated charitable operations. But Laycock fails to point out that the Second Circuit affirmed a district court's application of pre-*Smith* law.[13]

Indeed, the point is much more general. As Judge Noonan and others have shown,[14] the actual protection afforded religious exercise by the Supreme Court and federal appellate courts applying pre-*Smith* law is not nearly as great as post-*Smith* rhetoric suggests. One enumeration lists seventeen Supreme Court cases between 1963 and 1990 addressing free exercise claims, of which only four (twenty-three percent) prevailed.[15] Similarly, out of ninety-seven cases in the courts of appeals during the 1980s, free exercise claims prevailed in only twelve (twelve percent).[16] Another article, compiling almost

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11. THOMAS NAGEL, EQUALITY AND PARTIALITY 162 (1991). Nagel's example flips the *Smith* problem around, but the analytic point remains the same.

12. *See, e.g.*, Lakewood Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983) (holding that a municipal zoning ordinance which prohibited the construction of church buildings in virtually all residential districts of the city did not violate the Free Exercise Clause); Grosz v. Miami Beach, 721 F.2d 729 (11th Cir. 1983) (holding that a zoning ordinance prohibiting church meetings in homes was constitutional).

13. Rector of the Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991), *discussed in* Laycock, *supra* note 4, at 57-58. Laycock treats cases involving "judicial destruction of a minority faith" through the imposition of "multi-million dollar tort judgments" in similar fashion. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1014-15 & n.89 (1990) (citing cases imposing liability under pre-*Smith* law).

14. EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 627-29 (9th Cir. 1988) (Noonan, J., dissenting), *cert. denied*, 489 U.S. 1077 (1989). On the cited pages, Judge Noonan lists 72 courts of appeals cases raising free exercise claims, of which seven (nine percent) prevailed.

15. Ryan, *supra* note 2, at 1458. Of the four cases, three were unemployment compensation cases that the Court found indistinguishable from Sherbert v. Verner, 374 U.S. 398 (1963), the doctrinal source of pre-*Smith* law.

16. Ryan, *supra* note 2, at 1459-62.

one hundred pre-*Smith* cases from state supreme courts and federal courts of appeals for a period ending in 1989, found that the free exercise claim was sustained in only fourteen of eighty-five cases (sixteen percent).[17]

Candid critics of *Smith* acknowledge this rather dismal picture of the regime to which they wish to return.[18] Of course a twenty-five percent chance of winning, under pre-*Smith* law in practice, is better than no chance of winning under *Smith*. Still, the change occasioned by *Smith* is not a change from the bright daylight of religious freedom to the dark night of religious persecution. If the metaphor is apt, even before *Smith* it was deep twilight.

The defense of the pre-*Smith* regime takes a peculiar turn when these statistics are raised. Admitting that the chances of winning litigated cases under pre-*Smith* law were not really that favorable, defenders of pre-*Smith* law suggest that *Smith* impaired religious freedom not so much by changing the ultimate outcome in cases that are litigated, but by taking an argument away from those defending religious liberty. Under pre-*Smith* law, opponents of regulation could point out that the proposals they were fighting had to serve a compelling state interest. Thus, notwithstanding the fact that courts found things "compelling" that lay observers might consider rather unimportant, in the arena of legislation and negotiation the compelling state interest argument was often effective.

By removing the free exercise issue from the bargaining table, *Smith* necessarily eliminates the potential effectiveness of the free exercise argument and its compelling state interest standard. Of course, because it frequently failed if a case went to litigation, the free exercise argument was usually not a powerful bargaining chip to begin with. *Smith* essentially changes the probability of the argument's success from low to nothing at all. Nevertheless, the defense seems to go, because lawyers representing religious institutions tend to be better than their government opponents, the former can flimflam the latter into

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17. Anthony A. Cavallo, The Free Exercise of Religion: Is It Truly Free or Merely Convenient to the States? (Spring 1990) (unpublished paper, on file with author). I am grateful to Professor Gerard Bradley for making this paper available to me.

18. The only area in which free exercise claims prevailed with some regularity are prison food and appearance cases. *See* Ryan, *supra* note 2, at 1434-37 (noting that cases were "judged under a less exacting standard than the compelling interest test" and suggesting that outcomes would therefore not be changed by *Smith*).

giving up some of their position by presenting them with an argument that probably will not succeed. Having to confront even a low-probability risk of losing, city and state attorneys will be more accommodating than if they face no risk at all.

As a hard-line legal realist, I have some sympathy with this argument, but I doubt that taking pre-*Smith* doctrine away from these superior lawyers really makes it that much harder for them to prevail. *Smith* does not, after all, guarantee that government regulators will win; they may lose on various statutory or state constitutional grounds. In addition, in light of its weaknesses, the mere fact that the free exercise argument is a constitutional one should not influence bargaining positions in any significant way. Perhaps the absence of the free exercise argument would make a difference if it rested upon a clear constitutional mandate, and deprived of it, lawyers for religious institutions were relegated to obscure arguments about implied exceptions to otherwise clear statutory language. But again, pre-*Smith* law was not clear enough to provide that kind of clear constitutional argument. Hence, although *Smith* dictates a marginal shift in the bargaining context, that shift is too small to justify the strong claims found in anti-*Smith* rhetoric as to just how terrible *Smith*'s effects are.[19]

B. Back to the Founders

Smith appeared just before Michael McConnell's major reexamination of the original understanding of free exercise was published in the *Harvard Law Review*.[20] In a petition for rehearing, the *Smith* Court was told that McConnell's article "demonstrates that the broader reading of the [Free Exercise] Clause rejected by the Court was contemplated by the Framers of the First Amendment."[21] One commentator says that

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19. One real effect on bargaining should be noted. Before *Smith*, litigators could sometimes structure their cases under the Civil Rights Act. 42 U.S.C. § 1983 (1988). If they prevailed, even—to some extent—on nonconstitutional grounds (if those grounds were in some important sense related to the free exercise claim), they would be entitled to attorneys' fees. 42 U.S.C. § 1988 (1988). After *Smith*, the chances of recovering attorneys' fees in such a case are much smaller. *Smith*, that is, reduced the stakes of losing for government regulators.

20. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990).

21. Petition for Rehearing at 5, Employment Div. v. Smith, 494 U.S. 872, *reh'g denied*, 496 U.S. 913 (1990). The petition refers, without citation at this point, to

McConnell "conclud[es] that the framers believed that the [Free Exercise Clause] requires exemptions from generally applicable laws that burden religious practices."[22]

McConnell's conclusions were in fact more qualified. He found that religious exemptions were familiar to the Framers' generation, and that some evidence indicated that pre-*Smith* free exercise doctrine was compatible with the Framers' understanding of free exercise. Many of McConnell's readers, on the other hand, believe his article stands for the stronger proposition that pre-*Smith* doctrine was "what the Framers intended." That his readers would reach that conclusion is quite understandable. McConnell's article employs the best sort of "law office history," a rhetorical form designed to give historical evidence favorable to an advocate's position the most weight it can bear, while at the same time explaining away apparently unfavorable evidence.

Although McConnell's formal conclusions are carefully qualified,[23] he regularly construes ambiguous evidence in favor of his interpretation, when it could just as easily be construed against it. For example, in examining the history surrounding the drafting of the First Amendment, he treats changes to the Amendment's language that seem to go against mandatory exemptions as "no more than stylistic" changes or "mistranscription[s]." He massages other changes to show that they are at least consistent with the view that exemptions are mandatory.[24]

Perhaps more dramatically, he summarizes the postadoption judicial interpretations of the principle of free exercise in this way:

> One lower court in New York squarely adopted the exemptions interpretation, and the supreme courts of Pennsylvania and South Carolina rejected it. None of these decisions was

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"recent research on the history of the Free Exercise Clause." *Id.* Elsewhere it refers to McConnell's article as a "detailed recitation of the origins of the Free Exercise Clause." *Id.* at 11. Professor McConnell was one of 55 law professors who were of counsel on the petition for rehearing.

22. *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 209 n.91 (1990).

23. *See, e.g.*, McConnell, *supra* note 20, at 1420 (stating that "[t]he historical record *casts doubt* on" the current interpretation of the Free Exercise Clause) (emphasis added); *id.* at 1513 (stating that "[t]he history subsequent to adoption of the first amendment is inconclusive but tends to point against exemptions," but that the cases are "weak indicators of the original understanding").

24. *See id.* at 1482-83.

> handed down within twenty years of the [First Amendment], and they are therefore weak indicators of the original understanding. The Pennsylvania holding is entitled to especially little weight since it was connected to a rejection of constitutional judicial review in general.[25]

As stated, this conclusion is accurate, but it overlooks material that McConnell, an honest scholar, had previously presented. McConnell's conclusion simply ignores a 1793 Pennsylvania Supreme Court holding that rejected a religious exemption.[26] The Pennsylvania court reached its holding within two years of the First Amendment's adoption, and as far as we can tell, the court's holding was not connected to some principled opposition to judicial review. Of course, McConnell might respond, as lawyers drafting briefs typically do, that the 1793 holding is "cryptic" and unelaborated.[27] Still, one inclined to a different interpretation might evaluate the evidence differently.

The evidence is compatible with this alternative interpretation: Every appellate court that considered the question in the decades after the adoption of the First Amendment rejected the argument that the principle of free exercise required that religious believers be exempted from compliance with generally applicable statutes. One unreported decision of a New York trial court supports exemptions, but that decision survives only because one of the lawyers in the case distributed the decision in pamphlet form; there is no reason to believe that the opinion or pamphlet reflected anything more than one judge's views. Perhaps the understanding of the free exercise principle changed in the decades after 1791, but the religious history of this country does not suggest that such a dramatic transformation occurred. Thus, taken as a whole, the evidence of postadoption interpretation strongly suggests that the free exercise principle does not require the government to exempt religious believers from generally applicable laws.

McConnell's article also obscures another difficulty. He ends his discussion of early judicial interpretations by saying that "the actual practice favored exemptions, even though the appellate decisions went the other way."[28] To the modern ear, this immediately triggers the thought that the Constitution did

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25. *Id.* at 1513.
26. *Id.* at 1504 (citing Stansbury v. Marks, 2 Dall. 213 (Pa. 1793)).
27. *See id.*
28. *Id.* at 1511.

not require religious exemptions precisely because practice favored them. In modern terms, practice involves decisions to extend exemptions as a matter of public policy—decisions made by the executive and legislative branches of government, not the courts. Such permissible accommodations of religion raise no free exercise questions at all, but only questions about whether they violate the antiestablishment principle. In contrast, pre-*Smith* doctrine dealt with mandatory accommodations of religion—those accommodations as to which legislatures are deprived of choice by the free exercise principle. Accordingly, some 200 years of legislative practice may indicate that exemptions are not required by the free exercise principle—a conclusion that is at least marginally strengthened by McConnell's devotion of several pages in his article to an examination of such permissive legislative accommodations.[29]

Of course, one can construct an argument connecting the legislative practice of extending religious exemptions to a doctrine of mandatory accommodation. According to that argument, prior to the First Amendment's adoption, legislatures were the only government institutions available to enforce a generally agreed-upon principle that religious beliefs must be accommodated by government. When they enacted accommodations of religion, legislators were not—in their own eyes—doing something they were merely permitted to do; rather, they were doing what they believed the fundamental principle of free exercise required them to do. That is, pre-1791 practice reflects a principle that was ultimately articulated in the First Amendment.

Following the Amendment's adoption, the judiciary was available to enforce the principle of mandatory accommodation when legislatures failed to accommodate religious exercise voluntarily. And, McConnell argues, the best interpretation of the standard used in legislative practices—language akin to "destructive of peace and good order"—is the equivalent of pre-*Smith* doctrine. As McConnell puts it:

> If, . . . as seems to be the case, the exemptions were granted because legislatures believed the free exercise principle required them, it is reasonable to suppose that framers of constitutional free exercise provisions understood that similar applications of the principle would be made by the courts,

29. *Id.* at 1466-73.

> once courts were entrusted with the responsibility of enforcing the mandates of free exercise.[30]

Admittedly, this is an ingenious argument, but it is an argument not strongly supported by history because only one court seems to have accepted a principle of mandatory accommodation following the First Amendment's adoption in 1791.

As a historian, McConnell is a fine lawyer. Like nearly all efforts to invoke original understanding to support contemporary positions in constitutional law, his analysis resolves evidentiary ambiguities with more precision than the evidence justifies and, more important, imposes a modern frame of thinking on old material with which it does not comfortably fit. Like the "slippery-slope" rhetoric's exaggeration of the difference between the protections afforded religious liberty before and after *Smith*, McConnell's analysis of the Framers' original understanding exaggerates the similarities between the Framers' understanding and the doctrine the Supreme Court adhered to before *Smith*.

C. A Modern Paradigm

A case involving Georgetown University provides a final example of the rhetoric of free exercise scholarship and serves as a useful transition to Part III of this essay. *Gay Rights Coalition v. Georgetown University*[31] is regularly offered as an example of how government can impose severe regulatory constraints on the religiously dictated aspects of a religious organization's operations when it is pursuing interest-group influenced legislative agendas—agendas that are well-intentioned and arguably desirable when applied to nonreligious institutions. As Laycock puts it, the case illustrates the kind of clash between religion and government in which "churches . . . find that they simply cannot practice important parts of their faith, even within the enclave of the religious community."[32]

The case involved the application of the District of Colum-

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30. *Id.* at 1473. To the extent that McConnell presents evidence of the reasons for enacting accommodations, it seems to me to point against principle and in favor of policy, as in his quotation from the resolution of the Continental Congress. *Id.* at 1469 (certain exemptions made grudgingly in recognition of "alleged scruple of conscience"); *id.* at 1470 (difficulty in enforcing assessments for support of religious establishments).

31. 536 A.2d 1 (D.C. Cir. 1987).

32. Laycock, *supra* note 4, at 56.

bia human rights ordinance to the student activities programs of Georgetown University, an institution affiliated with the Society of Jesus. The human rights ordinance bans discrimination on the basis of sexual orientation, and the gay-rights plaintiffs contended that, because the University "recognized" other student groups, it had to "recognize" the gay-rights group on equal terms. The University was willing to provide facilities to the group on an equal basis—allowing it to reserve rooms, use bulletin boards, and the like—but contended that any further "recognition" of the group would constitute a form of endorsement inconsistent with the University's religious commitments. In interpreting the ordinance, the court of appeals held that the city required the University to provide services and facilities to gay-rights groups on the same terms it provided them to other student organizations, but it did not find that the ordinance required the University to formally "recognize" the group.

Two aspects of the Georgetown gay-rights case deserve note. First, it shows that a case often presented as an example of how religious institutions can be persecuted is not at all a good example of persecution. From the University's point of view, the government was not attempting to persecute it or otherwise violate its religious commitments by applying the human rights ordinance to the University's student activities program. In fact, the University did *not* find that the ordinance, as interpreted by the court of appeals, intruded on any of its religious commitments. Moreover, although Congress has enacted a statute barring the District of Columbia from enforcing its human rights ordinance against religious institutions, Georgetown has not relied on that statute or changed the way it treats the gay-rights group. Thus, *Smith* is completely irrelevant to the Georgetown story; the government asked nothing of the University that conflicted with its religious commitments.

Second, I do not mean to suggest that reaching the ultimate outcome in the gay-rights case was painless to the University. The positions the University took in litigation sometimes caused unnecessary difficulty within the institution itself, particularly because the distinction between "recognition" and equal treatment with respect to facilities was both ill-defined and difficult to explain to the numerous University constituencies. In the end, however, the difficulties associated with the litigation were productive. For over a decade, the University's constituencies received an education in the University's reli-

gious commitments: they were forced to confront the implications and commitments entailed in Georgetown's affiliation with the Society of Jesus. Such confrontation suggests a different perspective on law-religion relations after *Smith*.

III. LIVING WITH *Smith*: THE RELIGION-STATE INTERACTION

From the outside, a religious institution's religious commitments are often taken as somehow fixed in advance: there simply "is" a Catholic or Baptist position on controversial issues, which can be identified in authoritative statements from leaders of the affected religious communities. It is as if everyone knew what Georgetown's affiliation with the Society of Jesus implied for the question of gay rights. In fact, the story is significantly more complicated.

On the most superficial level, one must distinguish between a religion's position and the statements made by religious leaders.[33] In congregational churches, statements by ministers ordinarily do not define the church's position. Even in hierarchical churches, statements by authoritative leaders may not be authoritative as to the government regulation at issue. The Pope, for example, has issued statements about homosexuality—not all of which have equal authoritative status. Indeed, the implications of those statements for a Jesuit university's treatment of student organizations devoted to promoting gay rights are not self-evident. And, because the Society of Jesus has a special legal position within the Catholic Church, statements specifically directed at the gay-rights issue by the Cardinal with jurisdiction over the District of Columbia, for example, may not be authoritative.[34] Accordingly, if "the church's" position can be contested from within the church, and if some within the church find acceding to a particular government regulation either acceptable or affirmatively desirable, it is not evi-

33. In this analysis, I put to one side the issues that arise when a person unaffiliated with a church claims that his or her personal religious beliefs impel some action (or when a person affiliated with a church claims that his or her personal religious beliefs, which differ from those of church leaders, impel some action). The Court held it irrelevant, for purposes of the constitutional analysis required by the Free Exercise Clause, that a person's beliefs were "not compelled by their religion." Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 834 (1989).

34. I find it at least moderately interesting that the gay-rights controversy implicated Georgetown, affiliated with the Society of Jesus, not Catholic University, a pontifical university with a different legal relation to the Cardinal and the Pope.

dent to me why those who are not church members ought to be troubled by the Court's decision in *Smith*.[35]

More important, a church will usually not have a well-defined position on a particular government regulation when the regulation is proposed or goes into effect. Leaders often use the regulation and the burdens it places on their church to develop a particularized position. For example, as the litigation proceeded, Georgetown's leaders began to refine their understanding of what "recognition" might entail, and they developed proposals for how the University might relate to the gay-rights group in ways short of formal "recognition." In more general terms, confrontations between government and religious institutions may force both institutions to think in more sustained and focused ways about their own commitments. Such deliberations might otherwise not occur were the government to assume that it could not regulate any aspect of the institution's operations because some people, although not the institution itself (when the controversy began), believed that regulation adversely affected the institution's religious commitments.

To state it yet another way, religious commitments are not predefined and knowable in the abstract. Rather, they are produced at least in part by complex negotiations. Some negotiations occur within religious institutions. Often the government does not occupy the position of "other" to all members of a religious community. Some church members will agree with the position asserted by the government, and, acting from within the church, will argue that a careful consideration of the church's religious commitments will reveal that the church can comply with both its faith and the government's demands. To revert to the "interest group" image of government regulation, church members are also members of the interest groups that pressure the government to act.

Sometimes, too, church members are initially so bound up with what they view as the church's "requirements" that they

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35. The critical observation that someone is "more Catholic than the Pope" captures something of this. Professor Hancock's response on this point suggests his adoption of a version of the "slippery-slope" argument to which Nagel's comment, *supra* text accompanying note 11, is an answer. *See* Ralph C. Hancock, *Monistic and Dualistic Paths to Radical Secularism: Comments on Tushnet*, 1993 B.Y.U. L. REV. 141. It also suggests the fear that someone inside a church might end up as a "loser" at the conclusion of the church's internal discussions. As I indicate below, *see infra* text accompanying note 36, I do not believe that the law on this matter should be shaped by the view of such people.

overlook or undervalue the secular policies the government seeks to promote through its general regulations. A forceful statement by the government may encourage those believers to take a more thoughtful approach to the religion's commitments. In turn, this increased attention to religious commitment, occasioned by the government's regulatory efforts, leads to dialogue within a religious institution.

The dialogue might result in a position the church had not taken before, or it might result in the church becoming even more firmly committed to its prior position, now with a greater appreciation of the relation between that position and its fundamental faith commitments.[36] Such dialogue also extends beyond the boundaries of the church. Church members are usually voters, and they can demonstrate politically their discomfort with the government's demands. Even small sects can mobilize support from other churches by invoking general concerns about freedom of religion. This is borne out by the enactment of statutory exemptions for peyote use by the Native American Church. In this sense, churches are interest groups too. And, of course, just as church members may reconsider what commitment to their faith requires when confronted with a particular government regulation, government regulators may reconsider what their secular goals require when confronted with resistance by churches.

These "negotiations" can produce a deeper—or at least a different—understanding of what the institution's religious commitments really are, both within and without the institution. In this sense, the benefits of government efforts to regulate religious institutions include the possibility that such efforts will enhance the institution's religious commitments through clarification of those commitments. If it had been clear from the outset that the District of Columbia simply could not apply its human rights ordinance in any way to Georgetown, the occasion for the University's serious and extended inquiry into the meaning of its religious commitment would have been deferred or, perhaps, lost entirely.

To all this one might respond that, however beneficial to a church this sort of interaction and dialogue might be, surely

36. To the extent that Professor Hancock's response is predicated on his determination that I hold views that I expressly disclaim, here and elsewhere, I cannot respond to it except by suggesting that readers can consider whether his interpretation of my text is accurate.

Smith does not promote it. For, under *Smith*, the government can take the position that it is bound to prevail no matter how the church's discussions come out. Why bother, then, to struggle within the church over what its commitments entail? If the church changes its position, why should anyone treat that change as "clarifying" its commitments rather than submitting to the sheer power of the state?

To answer the first question, it is helpful to remember the nonconstitutional protections of religious exercise. State constitutional law, statutory interpretation, executive discretion, and most important, legislative discretion, all combine to protect religious exercise. Observing a dialogue within the church concerning some regulation that could be imposed on the church without violating the Federal Constitution pursuant to *Smith*, legislators, executive officials, and judges might consider alternative ways of accomplishing their goals. For example, if the discussions within Georgetown demonstrate that the institution has particular difficulties with formal "recognition" of a gay-rights group, perhaps the relevant statute could be interpreted to require the University to provide equal treatment in all respects short of formal recognition. Thus, those within the church would be foolish to throw up their hands—or view themselves as facing an onslaught of persecution—when faced with burdensome regulation, for conducting an internal discussion to define more precisely the meaning of the church's commitments might produce benefits to the church, even if that dialogue results in reiterating the church's opposition to the proposed regulation.

Answering the second question—why should a change in position by the church be treated as clarification rather than submission—requires a more extended discussion. We should begin by asking who is raising this question. An outsider might be skeptical about church leaders' claims that they truly do believe that complying with the government's regulation is consistent with their "new" understanding of their religious commitments. But, again, it is not clear to me why the outsider's perspective is relevant.

Consider next the possibility that those who "lost" within the church are raising the question. They believe that their church's original understanding of its commitments was truer to their faith and what they view as the faith of their church than its new one. Why, though, should their vision of the true faith prevail over what is, at least hypothetically, the vision

offered by the church's authoritative leaders?

In short, it seems to me that the position the church takes after conducting its internal dialogue must be received, for legal and religious purposes, as an authoritative statement of the church's religious commitments. Moreover, it must be viewed as authoritative even if it is a dramatic change from an earlier position and even if the change appears to have been induced by threats of government oppression. As a thought experiment, suppose that one hundred years pass, and as historians we then examine the church's position. It is certainly possible that we will see the new position as unauthentic—a mere submission to coercive state pressure. Here, the position Georgetown ended up taking in the gay-rights litigation would be seen as a failure of nerve and faith. Yet, it seems possible as well that we will see the old position as unauthentic—resting on a thoughtless failure to consider the implications of the church's fundamental commitments and faith when approaching problems that were unforeseen by those who formulated the old position. Pursuant to this alternative view, the position Georgetown *initially* took in the gay-rights litigation would be understood as a thoughtless adherence to mindless tradition.[37]

It seems worth mentioning that churches reconsider the implications of their commitments in response to a wide range of social forces. Churches have rethought their positions on gay rights in jurisdictions that never tried to apply human rights ordinances to them. Women have been ordained in denominations that previously strenuously resisted that change, without any law being brought to bear, and indeed in the face of express exemptions from civil rights laws. I doubt that anyone could seriously defend the proposition that these changes are unauthentic capitulations to social pressure (although, again, outsiders and "losers" have put forth that proposition; and again, with hindsight they may indeed be viewed as capitulations).

If we cannot reasonably treat such voluntary changes as capitulations (without demonstrating disrespect for a church's own statements about its faith commitments), why can changes induced by government regulation be viewed in that way?

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37. It should be clear, and if not this note should make it clear, that I take no position on the authenticity of either Georgetown's pre- or postlitigation interpretation of what its religious commitments require.

While it is analytically possible to distinguish sharply between changes induced by dialogues responding to noncoercive social forces and those induced by dialogues responding to the threat of coercion, only lawyers would consider that distinction important, particularly in a society and culture like the United States that is generally, though not universally, tolerant with respect to religious matters. From within a church, the distinction between mere social pressure and state coercion is not categorical; what matters is which is stronger, and, again, only lawyers would think that the threat of state coercion is categorically stronger than social pressure.

In the end, of course, *Smith* means that a government may disregard a church's religious commitments and impose burdensome regulations. Even this, however, has some facets worth examining to determine whether something can be salvaged for religious liberty.

I begin with observations about the uneasiness I feel in seeing religious institutions seek exemptions from general regulations. One source of my uneasiness is really no more than a suspicion or a sense about constitutional interpretation in the free exercise area—a suspicion that is confirmed by the Supreme Court's behavior prior to *Smith*, and by Justice O'Connor's concurring opinion therein. Stated simply, I believe that courts interpreting the Constitution to require some exemptions, for some religious institutions, and for some religious practices, are likely to do so in a troublingly discriminatory manner. The closer a practice is to the mainstream, the more likely it is that the courts will find no compelling interest for the regulation.

The overall effect of such discriminatory extension of religious exercise exemptions creates three levels of free exercise law. First, legislatures protect truly mainstream religions by enacting exemptions under the doctrine of permissible accommodation of religion or by avoiding enactments that have a troublesome impact on mainstream practices. Second, courts protect religions on the close-in borders of the mainstream. Third, neither the courts nor the legislature protect exotic religions. In eliminating the possibility of this type of discrimination, *Smith* eliminates the second tier. This elimination does not come without cost, but it has some benefits that are too easily overlooked.

The courts defined the boundary between the second and third tiers under pre-*Smith* law. In this regard, Justice

O'Connor's opinion in *Smith* is instructive. Justice O'Connor applied pre-*Smith* law and found a substantial burden on free exercise, but concluded that the burden was justified by the government's compelling interest in promoting a drug-free society.[38] Surely, were one to predict the outcome under *any* test, the religious claimants were bound to lose this case;[39] the only question was how they were going to lose.[40] Pre-*Smith* doctrine enabled Justice O'Connor to present herself as a person serious about problems of religious intolerance and concerned about the imposition of unnecessary damage on a minority religious community. At the same time, pre-*Smith* law allowed her to impose the very damage she was ostensibly concerned about. In other words, pre-*Smith* doctrine is too comforting to judges who often act similarly to other power-wielders. Accordingly, when its magnitude is honestly measured, eliminating a judicially rationalized discrimination among religions is a benefit that may well outweigh the cost to religious liberty occasioned by *Smith*.

My uneasiness about the discriminatory extension of religious exemptions is paralleled by an uneasiness with Establishment Clause doctrine regarding government use of religious symbols. As is well known, the Court's Establishment Clause doctrine gives governments incentives to represent that the symbols they deploy are not religious, at least not deeply or seriously religious.[41] This is particularly true when governments are embroiled in litigation over the symbols they have employed. To my mind, it seems not wildly idealistic to think that, on the whole, religions would be better off if the government adhered to a strict separationist position with regard to religious symbols. At a minimum, such an approach would

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38. Employment Div. v. Smith, 494 U.S. 872, 905-07 (1990) (O'Connor, J., concurring).

39. Imagine the headlines and the editorial comments had the case come out the other way: "Supreme Court Says Drug Agencies Cannot Fire Drug Users."

40. I acknowledge that, formally speaking, two Justices who joined Justice Scalia's opinion for the Court might have said, "If we are required to apply the 'compelling state interest' test, we find ourselves reluctantly compelled to find no such interest here, and therefore hold for the claimants." For a version of such a statement by a Justice who joined Justice Scalia's opinion in *Smith*, see Texas v. Johnson, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring). I cannot, however, identify who those Justices might be.

41. For a comment to this effect, see Kenneth Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 522-24 (1992).

enable religious symbols to be truly religious.

Pre-*Smith* doctrine also gave judges incentives to minimize the seriousness of the intrusions on religious liberty that they routinely authorized. The parallel to the Establishment Clause argument is that perhaps religions would be better off if decision-makers were forced to face up to the harm they inflicted on religious liberty. Pre-*Smith* law encouraged decision-makers to pass the buck. A legislator or an assistant prosecutor would say, "We shouldn't do this because it infringes on religious liberty." Naturally, given the country's legal culture, someone would respond by saying something like, "The courts will sort out the constitutional issue, so we can do what we think is sound policy." Yet, when the cases were heard in court, the judges actually applied a weak "compelling state interest" test, including deference to the legislature. Ultimately, they ended up saying, "Well, the legislature thought that it had a good reason for adopting this regulation despite its impact on religious minorities, and who are we to displace its judgment?" The result of this process was that no one ever really considered the statute's impact on religious minorities, who were persecuted without anyone taking responsibility. At least under *Smith*, people know whose hands are bloody.

Finally, a third source of my uneasiness is that pre-*Smith* law put religious believers in the position of supplicants and may have confounded two domains of life that ought to be kept separate.[42] One reading of James Madison's *Memorial and Remonstrance*[43] offers a sectarian justification for this almost jurisdictional separation. Madison claimed that a person's duty to God is "precedent both in order and time, and in degree of obligation, to the claims of civil society," from which he concluded that "in matters of religion, no man's right is abridged by the institution of civil society."[44] Thus, "[t]he religion . . . of every man must be left to the conviction and conscience of every man."[45]

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42. I acknowledge that this uneasiness should be present—and, in my case, is present—in connection with requests for legislative accommodations of religious exercise. That, in part, accounts for the parenthetical in the title of my first essay on legislative accommodations, Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988).

43. JAMES MADISON, RELIGIOUS FREEDOM: A MEMORIAL AND REMONSTRANCE (Lincoln & Edmonds 1819).

44. *Id.* at 6.

45. *Id.* at 5.

Madison wrote against a background of an established church. When the government in that environment enacts legislation respecting religion, it claims authority to do so because of its religious warrant. If those living under such a regime accede to its claims, they give a human institution authority equivalent to that of Deity.[46] A state with an established church, to the extent that it claims authority to determine for its citizens what they ought in conscience do, is idolatrous. As Madison put it, religious establishments, considered in this way, "impl[y] . . . that the civil magistrate is a competent judge of religious truth," which is "an arrogant pretension."[47] "[N]o man's right is abridged by the institution of civil society," then, because no human institution can—when the concepts of authority and Deity are properly understood—displace the authority of Deity.

Two points should be noted about this interpretation of Madison's thought. First, as Professor McConnell has stated, the question of free exercise exemptions arises only when "a law or government practice . . . makes no reference to religion and has a secular justification unrelated to the suppression of religion."[48] Yet, the secular justifications for these practices indicate that the government is not claiming religious authority as their basis.[49] Therefore, they are not expressions of the sort of idolatry to which, on my interpretation, Madison's thought

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46. My thoughts along these lines have been influenced by comments made by Stanley Hauerwas and John Howard Yoder at a conference on "Religious Freedom: Exemptions Based on Conscience." The conference was held at the Georgetown University Law Center on April 3-4, 1989, as part of the University's bicentennial celebration. I do not suggest, however, that Hauerwas or Yoder would agree with my conclusions. *See* John H. Yoder, *Response of an Amateur Historian and a Religious Citizen*, 7 J.L. & RELIG. 415 (1989).

47. MADISON, *supra* note 43, at 8.

48. McConnell, *supra* note 20, at 1419.

49. There remains a problem in situations where the legislature establishes a religion in the core sense. Would the courts be claiming improper authority, in my terms, were they to overturn such an establishment? Madison's statement in the *Memorial and Remonstrance* that "[r]eligion is wholly exempt from [the] cognizance" of civil society, MADISON, *supra* note 43, at 6, suggests his perhaps inadequate answer: that the government lacks *both* power and authority to enact such an establishment, and that judicial invalidation of an establishment does not thereby set up the judges as people who can determine the boundaries between the Deity and civil society. Hamilton restated the argument in the following terms: "For why declare that things shall not be done *which there is no power to do*?" THE FEDERALIST NO. 84, at 535 (Alexander Hamilton) (Benjamin F. Wright ed., 1961) (emphasis added). This articulation is somewhat more adequate when applied to a national government with enumerated powers.

was directed. Second, and perhaps more important, the pre-*Smith* regime instituted a form of idolatry in its acquiescence to the judiciary as an institution that can authoritatively determine when religious conscience ought, in the worldly domain, yield to government demand.[50] The judiciary may have the *power* to determine the boundary between conscience and executive or legislative power, but, on the sectarian interpretation of Madison's thought, it can never have *authority* to determine that boundary. Yet, on this interpretation, the idolatry that Madison criticized consisted precisely in that very confusion of power and authority.

In one aspect, *Smith* almost explicitly offers this justification. Before *Smith*, government practices imposing burdens on religious exercise could be justified by some important or compelling secular interest. As courts struggled with this understanding, they came to believe that they had to consider the place, central or otherwise, that the burdened activity had in a believer's religious universe; otherwise, they concluded, the government would be unable to promote substantial yet noncompelling interests when they burdened trivial aspects of religious exercise. *Smith* argued that such an evaluation of the centrality of religious belief was essential to the coherence of the previous approach, and that judicial evaluation of the centrality of religious beliefs was fundamentally inconsistent with the premises of the Constitution's religion clauses.[51] In other words, to the extent that a doctrine of free exercise exemptions requires such evaluations, it places judges in an authoritative position over religious belief in an idolatrous manner.

IV. CONCLUSION

How should believers respond to governmental assertions of authority? I have suggested a sectarian position, that they ought to deny such authority while acknowledging the sheer power of government to have its way. That, though, is precisely the regime that *Smith* establishes. In this way, *Smith* might be

50. Permissible accommodations—that is, those chosen by legislatures as a matter of policy—might not raise the question of idolatry, because they might rest, not on a legislative claim of authority to determine when conscience ought to yield, but on the legislature's recognition of the social reality that enforcing its prescriptions in the face of religious conscience would produce more social disharmony than that produced by allowing an exemption.

51. *See* Employment Div. v. Smith, 494 U.S. 872, 886-87 & n.4 (1990).

viewed as a sectarian decision that acknowledges the power of government to act in matters affecting religious conscience but denies it the authority to do so.

Still, this is a sectarian justification, and the First Amendment need not be interpreted to rely on a particular and contestable view of the relation between religion and the rest of society's institutions. Therefore, as a matter of constitutional law, I do not offer this perspective as a defense of *Smith*. Rather, I offer it as an extraconstitutional view of the decision, a view that might be offered by an observer of the practice of constitutional law (as distinct from a practitioner of constitutional law).[52]

Suppose that *Smith* does license the possibility of serious religious persecution. In this venue I need not remind readers that some religions have been shaped by the experience of persecution, and indeed, they have made that experience central to their understanding of the relationship between God and the secular universe. The jurisdictional division I have sketched ultimately rests on the view—taken by my religion—that religious believers reside in two territories: that of the state, in which they are physically located, and that of God.[53] (In this way, being somewhat removed from law making is inherent to my understanding of my religious tradition.) Adherents of religions that have been shaped by the experience of persecution cannot easily forget that there *are* two territories, even during the occasional periods of unilateral declarations of truce by the state. They know that their religions are always at risk.

Others, though, may become too comfortable with the state in which they happen to reside. People may live too easily with the illusion that they will not suffer at the hands of others. For me, therefore, the issue is how to dissipate that illusion. And, in the end, that is necessarily a strategic judgment. I am not

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52. The distinction between observers and practitioners is, of course, not sharp. Though I may not make law in the direct sense that a legislator or judge does, or in the somewhat less direct sense that a litigator does, as a scholar I contribute to discussions that help shape legal and public understanding of the law. In that indirect sense, then, I am a practitioner. Yet, it is precisely the fact that I am somewhat removed from direct law making that allows me to offer my perspective.

53. I put aside for the present the question of what happens when the Messiah comes—a point central to controversies between some orthodox Jews and religious Zionists, and a point that shows quite clearly that the perspective I am exploring is theological.

firmly committed to the position that *Smith* is strategically justified in this sense; the illusion that the state is not "the Other" might be dissipated by other doctrines. However, the possibility that *Smith* is strategically justified is worth considering. Perhaps religion is special, so that the lesson *must* be taught in connection with religion. Alternatively, perhaps the tradition of specifically religious tolerance in the United States has induced greater complacency as to religion than is justified.

Finally, consider the three-tiered structure of pre-*Smith* law. Adherents of mainstream religions might not have seen the government as "the Other" because they benefited directly from legislative accommodations, and because they could take satisfaction in judicial protection of "close-in" nonmainstream religions. The latter religions are "close in" precisely because adherents of mainstream religions can sympathetically identify with them without sharing their views. The third tier consists of exotic religions, which are exotic precisely because adherents of mainstream religions *cannot* sympathetically identify with them. Before *Smith*, these religions would be persecuted, and adherents of mainstream religions would not be troubled. By eliminating the second tier, *Smith* authorizes the persecution of religions with which most people can sympathetically identify. It thereby demonstrates to all that the state is "the Other."

All things considered, I believe that everyone ought to appreciate that we are all fundamentally at risk because of our religious commitments. In teaching that lesson, *Smith* makes an important contribution to the cause of religious liberty.