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When the organizers of this Symposium asked me to discuss the future of the free exercise of religion, I thought I might address several subjects: *Employment Division v. Smith*,[1] and its treatment by the lower courts and legal scholars; important new developments in state constitutional law affecting religious liberty; the *Church of the Lukumi*[2] case, then pending before the U.S. Supreme Court; and the status of the proposed Religious Freedom Restoration Act (RFRA).[3] Once my turn to address the Symposium actually arose, however, a number of speakers had addressed *Smith* and its consequences, Professor Carmella had thoroughly assessed the state law developments,[4] and Professor Laycock—who argued the *Church of the Lukumi* case in the Supreme Court and has participated extensively in the legislative effort to enact RFRA—gobbled up much of what was left over.

Left with the crumbs, I faced an academic's mini-crisis: I could either remain mute or run the risk of boring the

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* Louis Harkey Mayo Research Professor of Law, National Law Center, The George Washington University. This paper is based (somewhat loosely) upon remarks made at a Symposium on New Directions in Religious Liberty, held at Brigham Young University on January 22-23, 1993. My thanks to Professors Fred Gedicks and Cole Durham, and to the *Brigham Young University Law Review*, for the invitation to participate in the Symposium and the splendid arrangements they made for it.

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

2. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993).

3. S. 578, 103d Cong., 1st Sess. (1993); H.R. 1308, 103d Cong., 1st Sess. (1993). The House passed H.R. 1308 on May 11, 1993, 139 CONG. REC. H2356-63 (daily ed. May 11, 1993), and S. 578 was approved by the Senate Judiciary Committee on May 6, 1993 by a vote of 15 to 1, 139 CONG. REC. D472 (daily ed. May 6, 1993); Adam Clymer, *Congress Moves to Ease Curb on Religious Acts*, N.Y. TIMES, May 10, 1993, at A9.

4. Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-*Smith *Jurisprudence*, 1993 B.Y.U. L. REV. 275.

(Saturday a.m.) audience by repeating much of what had been thoroughly discussed over the previous two days. Believing that originality and creativity may sometimes result from precisely this sort of squeeze,[5] I nevertheless ventured onward in my remarks. What follows is reasonably true to the address I delivered, which was in lieu of the thoughts that centrally occupied my mind that day—to wit, the beauty of Utah and the special qualities of its Mormon[6] community.

I. THE CONSEQUENCES AND FUTURE OF *Smith*

Like many others, I believe that *Employment Division v. Smith* is substantively wrong and institutionally irresponsible. For example, Justice Scalia, the author of *Smith*, claims to be an originalist.[7] *Smith* shows no signs, however, of any such orientation; the Court's opinion totally ignores both the text and history of the Free Exercise Clause. In addition, *Smith* offends institutional and process norms as well. Relying on overruled or doctrinally discredited decisions of the Supreme Court, as did the *Smith* majority,[8] is ordinarily frowned upon in legal circles, as is the practice of deciding major constitutional questions without giving the parties an opportunity to brief and argue them. Understandably, then, criticism of *Smith* on those grounds has become commonplace.[9]

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5. At least it works that way in science, in which, unlike the law, professional norms operate strongly against doing no more than repeating what is already known.

6. "Mormon" is a term used to refer to the Church of Jesus Christ of Latter-day Saints.

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

8. The *Smith* opinion cites approvingly Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), without mentioning that it was overruled three years later by West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). 494 U.S. at 872. A lawyer who did this in a brief to any court could expect to be publicly chastised for it. The *Smith* opinion also cites with approval the belief-action distinction originally created in free exercise law by Reynolds v. United States, 98 U.S. 145 (1978), without fairly describing the extent to which the *Reynolds* approach had been discredited and rejected in the twentieth century. 494 U.S. at 872.

9. For criticism of *Smith*, see James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1 (1991). Justice Souter's concurring opinion in *Church of the Lukumi* echoed many of these scholars' criticisms. Church of the Lukumi Babalu Aye, Inc. v. City of

What is less obvious and perhaps more intriguing, however, is why *Smith* matters. If, as has been repeatedly argued, free exercise law on the decision's eve was already quite hostile to religious liberty,[10] what explains the powerful reaction?

A. Cognition and Coase

Smith's sweeping terms plowed through the cognitive dissonance that had become pervasive among followers of free exercise trends. Before *Smith*, a long line of Supreme Court decisions rejecting free exercise claims could each be satisfactorily explained to most Americans by simply referencing the appropriate buzz words—an Indians case,[11] a military case,[12] a Muslims-in-prison case,[13] a tax-system-integrity case,[14] and several cases concerning churches that many suspected had a fraudulent air about them.[15] The average American could learn of all these cases and still believe that the Free Exercise Clause would protect him or her, even if it did not protect others.[16] This sort of thinking is always good for tyranny and bad

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Hialeah, 113 S. Ct. 2217, 2240 (Souter, J., concurring in part, concurring in the judgment). *But see* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991) (defending *Smith*'s outcome, but not the opinion itself); *see also* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (arguing that constitutional history does not support the concept of exemptions); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990).

10. *See, e.g.*, Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756-57 (1992).

11. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986).

12. Goldman v. Weinberger, 475 U.S. 503 (1986).

13. O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

14. United States v. Lee, 455 U.S. 252 (1982).

15. Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990); Hernandez v. Commissioner, 490 U.S. 680 (1989); Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985).

16. *Cf.* NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE (1992). Indeed, *Smith* itself had some of this character—did we really expect that the Supreme Court was going to legitimate the use of hallucinogenic drugs under the Constitution? Justice O'Connor did not disappoint us in this regard. Just as she indicated that the state should not endorse religion but blinded herself to such endorsement in Lynch v. Donnelly, 465 U.S. 668, 690-94 (1984) (O'Connor, J., concurring), she purports to believe in a robust religious liberty but nevertheless is prepared to deny it to those who practice the rituals of the Native American Church. *Smith*, 494 U.S. at 902-03, 906 (O'Connor, J., concurring). As former Attor-

for liberty. By ending the stream of decisions designed to appear as special exceptions—that is, by emphasizing a new general principle rather than focusing on the facts of the case—*Smith* raised consciousness of what had been occurring in the field.

Second, while the Reagan and Bush Administrations had been pushing a philosophy of judicial restraint for the previous decade, they may have been internally divided as to where that philosophy would take them with regard to free exercise. It may have been easy for some conservatives to think that the Bill of Rights is divisible; that is, that the Court in the 1980s would cut back on perceived excesses of its predecessors on questions of privacy, criminal procedure, freedom of expression, or nonestablishment, but that it would not similarly undermine prevailing law on the Free Exercise Clause. That hope, of course, was sheer fantasy; statism tends to swallow the entire Bill of Rights, rather than the particular provisions those in political power do not favor.

Third, if one focuses on the dynamics of litigation and settlement, the argument that *Smith* only clarified, rather than altered, the law is vastly overstated. Prior to *Smith*, prospective and actual litigants on both sides of free exercise questions had to consider the distinct possibility that a free exercise claim would successfully exempt a particular group or practice from an otherwise generally applicable law. Indeed, although the Supreme Court grew increasingly inhospitable to free exercise claims over time, such attacks occasionally prevailed in the lower courts, state[17] and federal.[18] Appraising the probability of success in light of these emerging developments presumably affected both a litigator's decision whether or not to bring suit in a particular circumstance, and his or her decision as to the terms and appropriateness of compromise.[19] Pre-*Smith* free exercise law inevitably cast a significant shadow over the bargains struck by parties to religious liberty disputes.

Smith has altered that shadow. The lower courts have

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ney General John Mitchell once aptly put it, "Watch what we do, not what we say." *See* David Broder, *FBI Building Named for Hoover Can Be a Reminder, Not a Tribute*, CHI. TRIB., Mar. 11, 1993, at 23.

17. *See, e.g.*, People v. Woody, 394 P.2d 813 (Cal. 1964).

18. *See, e.g.*, EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. Unit A July 1981), *cert. denied*, 456 U.S. 905 (1981).

19. These estimates may also have affected legislative bargaining over whether to create a religious exemption, although that is less likely.

ignored the Supreme Court's emphasis upon criminal laws of general applicability, and they have been quite willing to extend the reasoning of *Smith* to the fullest extent possible.[20] We all understand that *Smith* transfers power away from religion and toward the state; the angry reaction at the Symposium to Mark Tushnet's suggestion that state-church conflicts may help religious communities "clarif[y] [their] commitments"[21] was simply a local manifestation of that awareness. As the Mormon experience amply demonstrates,[22] clarification of this sort tends to be little more than a process of change coerced by state oppression or insensitivity.

Of course, those versed in law and economics might say I'm making too much of the argument that pre-*Smith* law influenced free exercise litigation strategies and settlements, partly because the free exercise entitlement was relatively weak before *Smith*, and partly because their general view is that the initial assignment of entitlements frequently does not matter. In the hypothetical world described by the Coase Theorem,[23] in which zero transaction costs are assumed, the parties are expected to bargain to an efficient result, regardless of the law's allocation of rights.

With regard to disputes over religion, however, this assumption is highly implausible. However irrational the challenged religious commitments may seem, communities of believers are deeply invested in them. The idea that such commitments can be bargained away without incurring substantial transaction costs, measured by the religious community's willingness to allocate resources in resistance to the state's encroachments upon its religious belief and practice, is absurd. When people believe that God has commanded some practice, and institutions have crystallized around that belief, fidelity to

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20. For decisions reading *Smith* broadly and extending it to civil matters, see Ryan v. United States Dep't of Justice, 950 F.2d 458 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2309 (1992); American Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405 (9th Cir. 1991); Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927 (6th Cir. 1991); Kissinger v. Board of Trustees, 786 F. Supp. 1308 (S.D. Ohio 1992); In re Chinske, 785 F. Supp. 130 (D. Mont. 1991); New Life Gospel Church v. Department of Community Affairs, 608 A.2d 397 (N.J. Super. Ct. App. Div. 1992).

21. Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 B.Y.U. L. REV. 117, 132.

22. *See, e.g.*, Frederick M. Gedicks, *The Integrity of Survival: A Mormon Response to Stanley Hauerwas*, 42 DEPAUL L. REV. 167 (1992).

23. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

it cannot be negotiated away without costly convulsions.[24]

Under these conditions, it will be very difficult for disputing parties to find common ground for compromise. One would therefore expect the substantive content of the law, rather than the parties' mutual understanding of their respective interests, to be the primary variable in the way disputes are settled. I suspect that the change in free exercise law that *Smith* represents will have a dramatic affect on the range of suits brought and settlements reached, as well as on the results of actual litigation, all to the detriment of religious liberty.

B. *The Importance of* Church of the Lukumi *in the Future of Free Exercise: Moderating the Effects of* Smith

Perhaps the pessimism of this analysis can be escaped by focusing upon what *Smith* leaves open, rather than upon the damage it may already have done. At the Symposium, Professor Laycock contended that the *Church of the Lukumi* case[25] presented little opportunity for substantive gains for free exercise.[26] At best, he said, a disaster for religious liberty might be avoided if the Justices accept his argument that the City of Hialeah engaged in an unconstitutional religious gerrymander when it enacted various ordinances prohibiting certain forms of ritual slaughter.[27]

With all respect to Professor Laycock's modesty in refusing

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24. Asymmetry of information between state and church officials is likely to further undermine any prediction that the parties will be indifferent to the choice of liability rule. As economists have argued, the presence of private information will skew the outcome of bargains. *See, e.g.*, Roger B. Myerson & Mark A. Satterthwaite, *Efficient Mechanisms for Bilateral Trading*, 29 J. ECON. THEORY 265 (1983). This has been measured in the context of the settlement of litigation, although the variables of interest to parties must be specified and quantified for the measurements to be reliable in economic terms. *See* Lucian A. Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404 (1984). Information asymmetry is of course endemic to church-state conflicts involving religious beliefs. Although the religious community may understand the state's policy concerns, state authorities are likely to be woefully ignorant and uneducable concerning the history and theological significance of a religious community's commitments. The recent tragedy at Waco, Texas involving the Branch Davidians' standoff with the FBI seems a good example of this sort of unbridgeable misunderstanding.

25. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993).

26. Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 255.

27. *Id.*

to proclaim the possibility of an important victory, I believe *Church of the Lukumi* proved to be much more significant than he suggested. First and foremost, the Court unanimously agreed that this was a religious gerrymander, and that such acts are presumptively unconstitutional.[28] By holding that the Constitution prohibits religious gerrymanders structured to the detriment of a particular faith, the Court has reaffirmed *Larson v. Valente*[29] and constructed an outer boundary beyond which the deterioration of free exercise protection will not pass. Although the Court's opinion is entirely true to the equal protection character of *Smith*, the right of religious minorities to be free from state discrimination, both overt and covert, is of both theoretical and practical significance. Furthermore, any constitutional victory for an unusual, numerically small religion constitutes a significant sign that the Free Exercise Clause still carries some punch.

Second, *Church of the Lukumi* provides important information about the views of Justices Souter and Thomas, each of whom replaced a dissenting Justice in *Smith*. The Court opinion in *Church of the Lukumi* expressly reaffirmed *Smith*'s underlying principle of formal free exercise neutrality.[30] Justice Thomas joined in this portion of the opinion, thus indicating his agreement with the basic principle in *Smith*. By sharp contrast, Justice Souter (fast becoming the darling of the law professors) wrote a concurring opinion arguing that *Smith* may have been wrongly decided and should be reexamined.[31] Thus,

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28. *Church of the Lukumi*, 113 S. Ct. at 2227-31.

29. 456 U.S. 228 (1982) (holding that the state may not legislate reporting requirements for religious fund raising that are designed to regulate "street religion" like the Unification Church while exempting mainstream religion). For an Establishment Clause variation on the anti-gerrymander theme, see Grumet v. Board of Education, 592 N.Y.S.2d 123 (N.Y. App. Div. 1992) (school district gerrymander designed to benefit religious community that will not send its children out of the community for special educational services violates the Establishment Clause).

30. "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi*, 113 S. Ct. at 2226. The Court spoke dishonestly, I believe, when it claimed that its "cases" establish this general proposition; only *Smith*, which is the only decision the Court cited, stands for this proposition, and *Smith* is in tension with all the other free exercise decisions of the past thirty years. Justice Souter's concurring opinion in *Church of the Lukumi* made this point forcefully. 113 S. Ct. at 2240 (Souter, J., concurring in part, concurring in the judgment).

31. *Id.*

the two against *Smith* (Justices Brennan and Marshall) have become Thomas for and Souter against, and the latter brings obvious fervor to the enterprise. The *Smith* lineup also reveals that the Court is now divided 6-3 in favor of retaining *Smith*, with one of the six (Justice White) about to be replaced by a nominee whose views on free exercise may be more sympathetic than those of her predecessor.[32]

Third, *Church of the Lukumi* reveals Justice Kennedy firmly committed to his vote in *Smith*. Among the *Smith* majority, he alone had shown an inclination to depart from tendencies reflected in his earlier Religion Clause opinions.[33] Because the Hialeah ordinances were so obviously gerrymandered against the practitioners of Santería, however, Justice Kennedy might have ruled for the Church while remaining silent on his more general views of free exercise exemptions from facially neutral, generally applicable laws. That he did not do so suggests he was determined to reassure his conservative colleagues that he would not abandon them here as he had on abortion and graduation prayer.[34]

C. *The "Hybrid Rights" Claim:* Smith's *Open Door*

Nothing in *Church of the Lukumi* expands, narrows, or clarifies *Smith*'s pronouncement concerning so-called hybrid right claims. These claims are based upon the conjunction of free exercise and other constitutionally significant rights, like free speech or parental control over the rearing of children. Whatever the theoretical explanation for greater receptivity to "free exercise plus" than "free exercise pure," a great many free exercise claims might be recast to take advantage of this construct. Although I doubt that *Smith* itself might be so transformed,[35] free exercise claims frequently involve expres-

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32. See Goldman v. Weinberger, 739 F.2d 657, 660 (D.C. Cir. 1984) (Judge Ruth Bader Ginsburg, dissenting from a denial of rehearing en banc of a panel opinion rejecting the claim of an Orthodox Jew to be exempt from an Air Force regulation outlawing the wearing of headgear while indoors), *aff'd*, 475 U.S. 503 (1986).

33. *Compare* Lee v. Weisman, 112 S. Ct. 2649 (1992) *with* County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989) (Kennedy, J., dissenting).

34. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); Lee v. Weisman, 112 S. Ct. 2649 (1992).

35. The peyote experience is apparently an inward one, and therefore does not involve the sort of communication that might qualify it as expression for constitutional purposes. *See, e.g.*, CARLOS CASTANEDA, THE TEACHINGS OF DON JUAN: A YAQUI WAY OF KNOWLEDGE (1968). *See generally* Ira C. Lupu, *Keeping the Faith:*

sion, association, or parental concern for the religious upbringing of their children. The last of these, of course, is the most important; it is the foundation of *Wisconsin v. Yoder*,[36] and because it depends upon the judge-made right of parental control as a boost to the textual right of free exercise, it is the most controversial member of the hybrid rights set.[37] In addition, a great many free exercise claims involve the parent-child-state triangle,[38] so *Yoder*'s fate is of crucial significance to the development of the law in the field.

Creative lawyering might thus preserve the force of many potential claims. At the very least, pressing hybrid claims wherever plausible will presumably result in either an explanation and reaffirmation of "free exercise plus," or an ultimate admission by the Court that the theory was no more than an unprincipled attempt to pretend that *Yoder* survived *Smith*.

D. The Changing Court and the Future of Smith

Of course, as Justice White's resignation[39] brought home, the Justices that decided *Smith* will not be around forever. We have a new President from a political party associated with at least some degree of commitment to the Bill of Rights and judicial enforcement of it. President Clinton is likely to have the opportunity to name several Justices, and a Court so reconstituted may ultimately reverse the course charted by *Smith*. When nominating future Justices, however, President Clinton is unlikely to put a high priority on Religion Clause considerations in general, or Free Exercise Clause concerns in particular. The most a foe of *Smith* might hope for is a new Justice who takes the Bill of Rights seriously and believes in some version of the Warren Court's commitment to strenuous enforcement of those rights.[40]

Religion, Equality, and Speech in the U.S. Constitution, 18 CONN. L. REV. 739, 773-78 (1986) (contrasting the elements and contours of free exercise claims and those of free speech claims). Whether the peyote ritual, or the animal sacrifice rituals of Santería, contain sufficient components of association to qualify either under the hybrid right theory may present closer questions.

36. 406 U.S. 205 (1972).

37. Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. REV. 73, 87.

38. *See, e.g.*, Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988); Walker v. Superior Court, 763 P.2d 852 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989).

39. Linda Greenhouse, *White Announces He'll Step Down from High Court*, N.Y. TIMES, Mar 20, 1993, at 1.

40. See *supra* note 32 for a fragment of evidence concerning Judge Ginsburg's

If this were to happen, we would be reminded that the set of constitutional rights we enjoy are ultimately indivisible. It is very difficult to sustain the position that the Free Exercise Clause should be actively enforced by courts, but that the Speech Clause, the Press Clause, and the criminal procedure provisions in the Fourth, Fifth, and Sixth Amendments should not. Nor can one legitimately advocate free exercise activism while at the same time arguing that the Fourteenth Amendment's guarantees of equality, procedural fairness, and (as construed) privacy should not be similarly enforced.[41]

Ultimately, this is a roundabout way of asserting that the Free Exercise Clause may be reinvigorated only if Justices with constitutional philosophies akin to those of Thurgood Marshall or William Brennan are appointed. Of course, not everyone who is unhappy with *Smith* would be prepared to accept a Warren Court civil libertarian-type in exchange for *Smith*'s overruling. When contemporary egalitarian concerns are added to this stew—that is, the possibility that a Marshall-Brennan type will be prepared to uphold restrictions upon religious freedom enacted in the name of nondiscrimination[42]—*Smith* might turn out to be something many of its opponents will decide they can live with after all.

II. THE MOVE AWAY FROM THE SUPREME COURT

Whatever the future course of free exercise adjudication in the Supreme Court, *Smith* has already resulted in a flood of activity with the potential to alter the course of religious liberty in American law. The energies flowing in *Smith*'s wake are academic, judicial, and political. As is evidenced by this Symposium, legal scholars have turned substantial attention to the

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views on free exercise.

41. The story becomes still more complex when one recalls that the Establishment Clause can be a serious limit on the political branches' capacity to accommodate religion. *Compare* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) *with* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987). For scholarly debate on the subject, compare Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992) with 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 (1990) and Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against the Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991).

42. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (upholding denial of tax exemption to university with racially discriminatory policies); *see also* Tushnet, *supra* note 21, at 127.

problems and issues raised by *Smith*. As so well documented by Professor Carmella in her remarks,[43] some state courts have begun to develop state constitutional law in response to the gap created by *Smith*. And, on the legislative front, the United States Congress continues to consider the Religious Freedom Restoration Act[44] and the very recently introduced amendments to the American Indian Religious Freedom Act.[45] I want to comment briefly on each of these phenomena, because I believe that in combination they may eventually lead to and sustain a deep and powerful structure of religious liberty law that is largely independent of the Supreme Court's view of the First Amendment's religion clauses.

A. Academic Commentary

With respect to the academic commentary, my point is simple. Criticizing *Smith* is no longer original or useful; we have all become repetitive in our criticisms, and by now, our audiences are either persuaded or turned off. What remains before us is the hard work of reconstruction, made more difficult by the chaotic and unsatisfactory state of free exercise law as it stood on the eve of *Smith*. In other words, it will not do to complain about *Smith* without offering concrete and detailed proposals for how free exercise principles should be shaped in the future. If such efforts are fruitful, the "new" era of free exercise may turn out to be far more coherent and substantively adequate than anything that has come before.

B. State Law and Religious Liberty

State courts may play a vital role in providing a solid foundation for future protection of religious liberty. Prior to *Smith*, state supreme courts—even those with a strong religious liberty clause in their respective state constitutions—were quite reluctant to tie their views of the subject to state law. Rather,

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43. Carmella, *supra* note 4, at 310.

44. Senators Kennedy and Hatch recently introduced the proposed legislation in the 103rd Congress as S. 578, the Religious Freedom Restoration Act of 1993. *See* S. 578, *supra* note 3; *see also* H.R. 1308, *supra* note 3. The House passed H.R. 1308 on May 11, 1993, 139 CONG. REC. H2356-63 (daily ed. May 11, 1993), and S. 578 was approved by the Senate Judiciary Committee on May 6, 1993 by a vote of 15 to 1, 139 CONG. REC. D472 (daily ed. May 6, 1993); Adam Clymer, *Congress Moves to Ease Curb on Religious Acts*, N.Y. TIMES, May 10, 1993, at A9.

45. S. 1021 (Native American Free Exercise of Religion Act), 103d Cong., 1st Sess. (1993); H.R. 518, 103d Cong., 1st Sess. (1993).

pursuant to their own versions of "the devil made me do it," they tended to integrate state law with federal law and explicitly follow the federal law wherever it led.[46]

The consequences of this refusal to articulate independent state constitutional law are serious. On the road to *Smith*, federal law became increasingly less protective of religious liberty. By ignoring the possibility of independent state law protection for religion, state courts became both dependent on the U.S. Supreme Court and vulnerable to the erosion of religious liberty that resulted from the backsliding force of federal law. Because state courts failed to rely upon their state constitutions to fill the widening gap between federal law and an adequate conception of religious freedom,[47] state law initially provided no insulation against *Smith*'s blistering effect on free exercise norms.

Fortunately, as Professor Carmella illustrates, state courts have begun to rely upon state constitutions in an effort to resurrect some aspects of religious liberty.[48] In addition to the substantive advance this represents, such state court behavior advances process values as well. It permits the development of constitutional norms of religious freedom without the brooding omnipresence of a single, authoritative national tribunal or the lesser (but significant) presence of a single set of national rules and standards. If and when *Smith* is overturned by the Supreme Court, federal law may have a number of well-developed judicial models, tested in the crucible of real adjudicative systems, from which to borrow and learn.

C. The Proposed Religious Freedom Restoration Act

Whether Congress will act to overturn *Smith* by enacting some form of the Religion Freedom Restoration Act[49] (RFRA)

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46. *See, e.g.*, People v. Woody, 394 P.2d 813 (Cal. 1964) (Free Exercise Clause protects Native American Church member against criminal prosecution for ritual use of peyote); *accord*, State v. Whittingham, 504 P.2d 950 (Ariz. Ct. App. 1973), *cert. denied*, 417 U.S. 946 (1974). *See generally* Ronald K.L. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Hans Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980).

47. *See generally* Lawrence G. Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985).

48. Carmella, *supra* note 4, at 310.

49. *See* S. 578, *supra* note 3; H.R. 1308, *supra* note 3. The most prominent prior version of the proposed Act was H.R. 2797, 102d Cong., 1st Sess. (1991). The

remains an open question as of this writing. For the past few years, the legislation was bogged down in partisan bickering over the abortion question—that is, whether a statutory protection of religious freedom might become a platform for abortion rights were *Roe v. Wade*[50] to be overturned.[51] The fear that RFRA might operate in this way always seemed to me to be grossly exaggerated. Bill Clinton's election to the presidency, when coupled with *Planned Parenthood v. Casey*[52] and Justice White's retirement,[53] may settle the *Roe* question for the foreseeable future. Accordingly, as recent news reports suggest,[54] the ghost of abortion may stop hovering over RFRA's prospects.

I have elsewhere analyzed extensively the constitutionality and likely construction of RFRA.[55] Here, I wish to emphasize three additional points.

First, the 1993 version of RFRA that has passed the House differs in one significant respect from the version I discussed in my earlier work. The 1993 version declares its purposes to include the restoration of "the compelling interest test as set forth in Federal court cases before . . . Smith."[56] The predecessor provision which appeared in prior incarnations of RFRA recited a purpose of restoring the "compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder."[57] Because the "federal court cases" leading up to *Smith* had so

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bill (H.R. 1308) passed the House on May 11, 1993, 139 CONG. REC. H2356-63 (daily ed. May 11, 1993), and it was approved by the Senate Judiciary Committee on May 6, 1993 by a vote of 15 to 1, 139 CONG. REC. D472 (daily ed. May 6, 1993); Adam Clymer, *Congress Moves to Ease Curb on Religious Acts*, N.Y. TIMES, May 10, 1993, at A9.

50. 410 U.S. 113 (1973).

51. *See Abortion May Split Backers*, USA TODAY, April 17, 1991, at A2; Robert P. Hey, *Religious Freedom Legislation Could Snag on Abortion Controversy*, CHRISTIAN SCI. MONITOR, July 1, 1991, at 8.

52. 112 S. Ct. 2791 (1992).

53. *See supra* note 39.

54. *See Catholic Group Will Back Act on Religious Freedom*, L.A. TIMES, Mar. 13, 1993, at B4 (reporting a compromise, pursuant to which legislative history but not the legislation would assert that the Act was abortion-neutral); *see also* the recent statement by Senator Kennedy, introducing RFRA of 1993, and asserting that the U.S. Catholic Conference now supported the Bill. 139 CONG. REC. S2823 (daily ed. March 11, 1993) (statement of Senator Kennedy).

55. Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 52-66 (1993).

56. H.R. 1308, *supra* note 3, § 2(b)(1) (set out at 139 CONG. REC. H2356 (daily ed. May 11, 1993)).

57. H.R. 2797, *supra* note 49, § 2(b)(1) (set forth in the Statutory Appendix to Lupu, *supra* note 55, at 87).

eviscerated *Sherbert* and *Yoder*,[58] this drafting change has the potential to dilute quite significantly the force of the Act. The change is most certainly in tension with the "finding," remaining in the 1993 version, that "the compelling interest test as set forth in Sherbert . . . and . . . Yoder is a workable test for striking sensible balances between religious liberty and competing governmental interests."[59] At the very least, the revised purposes provision signals to the Supreme Court that the Congress will be receptive to a continuation of a free exercise standard that is nominally favorable but operationally hostile to religious freedom.[60] RFRA, so construed, would do little good other than generate political benefit for its sponsors.

Second, and contrary to Professor Laycock's assertions,[61] RFRA would not have equally protective consequences for all religions. In particular, its terms would tend to exclude an important set of religious liberty claims—those made by members of Native American Indian tribes seeking to protect sacred Indian sites from the potentially destructive effect of government land development. As currently drafted, RFRA protects religions from government inflicted "burden[s]."[62] In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[63] however, the Supreme Court held that government construction on public lands cannot constitute a cognizable burden upon religion so as to trigger the protection of the Free Exercise Clause—even when that construction inflicts serious damage upon the Indian sacred sites located on those lands.[64] Unless Congress chooses a term other than "burden" to trigger the stringent protections of RFRA, or otherwise clearly articulates its intent to overturn *Lyng*,[65] RFRA's enactment will not alter the *Lyng* result and

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58. Lupu, *supra* note 55, at 53-54.

59. H.R. 1308, *supra* note 3, § 2(a)(5). The predecessor version of RFRA had an identical provision. H.R. 2797, *supra* note 49, § 2(a)(5) (set forth in Lupu, *supra* note 55, at 87).

60. *See id.* at 65-66 (suggesting that the Supreme Court may in any event seek ways of construing RFRA which narrow the gap between Congress-made and Court-made law).

61. Laycock, *supra* note 26, at 235.

62. S. 578, *supra* note 3, § 3(a)-3(b); H.R. 1308, *supra* note 3, § 3(a)-3(b).

63. 485 U.S. 439 (1988).

64. I criticize *Lyng*'s theory of claim cognizability in Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

65. The proposed amendments to the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1988), would overturn the result in *Smith* by preempting all state law which inhibits use of peyote in religious rituals by Native Americans,

thus may leave an entire category of important religion-based claims outside the protection of federal law.

Third, it would be unfortunate if enactment of RFRA operated to stifle the promising state constitutional law developments previously discussed.[66] State courts should treat RFRA as a foundation upon which state constitutional law can build. Indeed, if the Supreme Court cuts RFRA back in the course of statutory interpretation,[67] a post-enactment return by state courts to the practice of dovetailing state law with federal law would have tragic consequences.

III. CONCLUSION

In *Smith*'s wake, the responsibility for creatively elaborating norms of religious liberty rests substantially with law-shaping and law-making institutions other than the Supreme Court. The law that may serve this purpose will, for the most part, be the *corpus juris* outside of federal constitutional law.[68]

As has always been the case, however, the future of free exercise may well rest more upon sociological than legal considerations. The law cannot create the atmosphere of religious tolerance and mutual respect upon which religious liberty ultimately depends. Recall Judge Learned Hand's general view of the extent to which judicial review can preserve liberty:

> [A] society so riven that the spirit of moderation is gone, no court *can* save . . . a society where that spirit flourishes, no court *need* save . . . [and] in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.[69]

Employment Division v. Smith cannot destroy religious liberty in a society that truly respects it; nor, by the same token, can an overruling of *Smith* save that liberty in a society

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and would reverse the general approach taken in *Lyng* to the problem of reconciling government land use with Indian religion. *See* S. 1021, *supra* note 45, § 606; H.R. 518, *supra* note 45, § 606.

66. *See supra* note 48 and accompanying text.

67. *See* Lupu, *supra* note 55.

68. Similar prescriptions might fairly be made of other areas of rights law, such as that concerning privacy or new frontiers of equality, in which the Supreme Court has retreated or called an end to growth. *See* Lupu, *supra* note 55, at 37-52 (discussing the proposed Freedom of Choice Act as a response to *Casey* and other decisions involving reproductive rights).

69. Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, *in* THE SPIRIT OF LIBERTY 172, 181 (Irving Dilliard ed., 1952).

which does not. The future of free exercise rests with a citizenry committed to the enterprise. Given the dramatic differences among religions, the all-too-frequent nexus between religion and violence, the psychologically threatening character of any religion not one's own,[70] and the history of religious intolerance in our country,[71] it requires a triumph of hope over experience to be confident that religious exercise will remain free in the third century of our Bill of Rights. To the extent law matters on such questions, however, liberating our commitment to religious freedom from the imperialistic grip of the Supreme Court and federal constitutional law may be the course of action most likely to produce salutary results.

70. *See* William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843 (1993).

71. *See generally* Edward M. Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263 (1992).