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IS THE FIRST AMENDMENT HOSTILE TO RELIGION?

PROTECTING RELIGIOUS LIBERTY: JUDICIAL AND LEGISLATIVE RESPONSIBILITIES

*Gerard V. Bradley**

Is the First Amendment hostile to religion? Answering that question requires at least the usual professorial ration of caveats. I assure you that I *will* directly answer the question. I submit, though, that the caveats constitute a more important, deeper response, a response which questions the question itself. Were I more radical in my intellectual sympathies, I would propose to deconstruct the question.

I take the question to be about the religion clauses of the First Amendment. Are *they* hostile to religion? Before World War II that question was rarely posed. That is only partly because a negative response, surprisingly even among Mormons and Roman Catholics who found their protections a bit thin,¹ could be presumed. They thought that the First Amendment was a great thing and also thought it was being ignored by various political officials. Mostly it is because prior to World War II — that is, prior to their judicial incorporation via construction of the Due Process Clause — the religion clauses were unimportant to the religious life of the nation. The Supreme Court's 1845 *Permoli v. Municipality No. 1*² decision put the matter succinctly. The Court stated that “[t]he Constitution

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1. See *Davis v. Beason*, 133 U.S. 333 (1889) (upholding a law which prohibited bigamists or polygamists from voting in elections), *overruled by* *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Reynolds v. United States*, 98 U.S. 145 (1878) (upholding a criminal statute prohibiting bigamy and affirming a Mormon's conviction under that law), *overruled by* *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Permoli v. Municipality No. 1*, 44 U.S. (3 How.) 589 (1845) (upholding a city ordinance which prohibited any corpse to be exposed in Catholic churches), *superseded by statute as stated in* *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985).

2. 44 U.S. (3 How.) 589 (1845).

makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."³

The vast bulk of interaction between the legal order and our religious life had been and continues to be at the state level.⁴ That is where schools, churches, and orphanages come into daily contact with the law, where authority over church property disputes is located, and where laws governing incorporation are promulgated. *Permoli*, for instance, involved a New Orleans regulation confining Catholic funerals to a single, designated chapel.⁵ That regulation was a political intervention on one side of a protracted schism in the Louisiana Catholic Church, one of the many conflicts between Catholic trustees and clerics in the antebellum era.⁶ The Supreme Court did not hesitate to decline jurisdiction.⁷

It is only within the last generation or two that our religious pluralism has reached the point where a large range of responses to the question from the believer's perspective is possible. From the law's point of view, pluralism in constitutional construction opens up another range of possible responses.⁸ Any answer to the question is impossible until a specific meaning is ascribed to the religion clauses. To do *that* we must adopt a particular methodology for constitutional construction. There are lots of alternatives. Even after agreeing upon a method — for instance, originalism — we are still liable to disagree about the results of historical investigation. Just consider the contrary historical conclusions of Leo Pfeffer⁹ and Leonard Levy¹⁰ on one side, and Robert Cord¹¹ and Justice Rehnquist¹²

3. *Id.* at 609.

4. See Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 778 (1986) ("[T]he first amendment left the protection of religious liberty at the state level to the states themselves and . . . the Framers expressed no intent concerning how the states should exercise their responsibilities in the matter.").

5. *Permoli*, 44 U.S. (3 How.) at 590.

6. See *id.* at 591-92.

7. *Id.* at 610 ("In our judgment, the question presented by the record is exclusively of state cognizance . . .").

8. See, e.g., J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (discussing pluralism with respect to First Amendment free speech).

9. Leo Pfeffer embraces the strict separation of church and state. See LEO PFEFFER, *RELIGIOUS FREEDOM* (1977) (commenting on the historical development of free exercise rights).

10. Leonard Levy favors strict separation of church and state. See LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986).

on the other side, of the Establishment Clause debate.

Moreover, it can be difficult to determine if religion has been treated in a hostile manner by any particular judicial decision. Is religion adversely treated when Jehovah's Witnesses are allowed to,¹³ or legally prevented from,¹⁴ setting up in a residential neighborhood a loudspeaker blaring a virulent anti-Catholic message? What if it is an entirely Catholic neighborhood? What if the Witnesses have fully imbibed Judge Rutherford's¹⁵ teaching that all earthly institutions, including all government as well as the Roman Catholic Church, are works of the devil? Is it "hostile" to the Witnesses to be fined by political powers whose illegitimacy is the message they preach, especially if we view, from a purely sociological perspective, the "hostile" reaction as a boon to group cohesion?

True, we are accustomed to viewing the First Amendment religion clauses as guaranteeing religious liberty. Besides Stanley Hauerwas's argument that religious liberty has been a disaster for the Christian church,¹⁶ consider the claims of liberal theorists like John Rawls and Jeff Stout that religion is treated as hospitably as possible, consistent with an overriding commitment to avoid sectarian warfare.¹⁷

Suppose we agree to apply the religion clauses to state government. Suppose we have adopted a methodology and it has yielded an

11. Robert Cord advances the view that the Establishment Clause does not prohibit government aid to religion on a nonpreferential basis, rather it is designed to prevent the government from discriminating between religions or favoring one religion over another. Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 968 n.125 (1989).

12. Justice Rehnquist believes that "[t]he true meaning of the Establishment Clause can only be seen in its history." *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985). He further asserts that the Establishment Clause does not require total government neutrality between "religion and non-religion." *Id.* at 92.

13. See *Saia v. New York*, 334 U.S. 558 (1948) (holding that an ordinance which prohibited the use of loudspeakers except with permission of the police chief was unconstitutional).

14. See *Kovacs v. Cooper*, 336 U.S. 77 (1949) (asserting that sound amplification is subject to reasonable time, place, and manner restrictions).

15. Judge Joseph Franklin Rutherford took over the leadership of the Jehovah's Witnesses in 1917. See William S. McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997, 1007 (1987).

16. For Hauerwas's views, see STANLEY HAUERWAS, *A COMMUNITY OF CHARACTER: TOWARD A CONSTRUCTIVE CHRISTIAN SOCIAL ETHIC* (1981).

17. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971). Rawls, a modern liberal theorist, believes, like the Enlightenment thinkers, that "publicly loosed religion leads in the short run to unmanageable conflict and in the long run to an authoritarian polity." Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 LA. L. REV. 1057, 1059 (1989).

intelligible principle or norm. Further assume only one potential beneficiary is party to the case. Let's call our principle or norm "religious liberty." Still, we may ask: Whose definition of "religious liberty" do we use? There is no neutrality here, and no Esperanto.¹⁸ There is not only a plurality of religions but, not accidentally, a plurality of conceptions of "religious liberty."

Consider the long struggle in our history between Protestants and Catholics over the definition of two critical terms: "liberty of conscience" and "religious liberty." For Protestants, liberty of conscience has always meant, positively, individual interpretation of Scripture and the direct unmediated encounter of the soul with God through grace.¹⁹ For Catholics, it has commonly, and negatively, been understood as an anti-Catholic slogan which expressed hostility to the Church, especially the priesthood. It was what we now might call a "code phrase" for Bible reading in the public schools.

Spiritual or religious liberty has historically meant to American Catholics about the same thing as ecclesiastical liberty.²⁰ This is not the Protestant notion of individual liberty of conscience,²¹ but it focuses on the immunity and freedom of the church as an organized religious body in society. To Protestants, especially Calvin, the spiritual in earthly manifestation was the person and his conscience.²² The church was a more ephemeral teaching instrument, not the ark of salvation. Indeed, to most Protestant Americans, the ecclesiastical has been the enemy of the spiritual. To Catholics, ecclesiastical and spiritual have been not only harmonious but practically identical.

We should here note various vignettes alongside this central

18. See Gerard V. Bradley, *The Enduring Revolution: Law and Theology in the Secular State*, 39 EMORY L.J. 217, 249 (1990).

19. See M. SEARLE BATES, *RELIGIOUS LIBERTY: A CONSTITUTIONAL INQUIRY* (1972).

20. See Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1587 (1989) (identifying the issue regarding the relationship between ecclesiastical and civil matters).

21. Donald A. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development*, 80 HARV. L. REV. 1381, 1386-87 (1967) (explaining the historical evolution of the concept of religious liberty).

22. "There is nothing of Christ, then, in him who does not hold the elementary principle, that it is God alone who enlightens our minds to perceive his truth, who by his Spirit seals it on our hearts, and by his sure attestation to it confirms our conscience." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1490 n.417 (1990) (quoting JOHN CALVIN, *Reply to Letter by Cardinal Sadole to the Senate and People of Geneva*, in JOHN CALVIN: SELECTIONS FROM HIS WRITINGS 81, 105 (J. Dillenberger ed., 1971)).

theme, including the nineteenth-century Mormons who, it seems to me, concluded that political autonomy was essential to their religious freedom.²³ For the Mormons, as for most Muslims, Native Americans,²⁴ Clifford Geertz's *Negarans*,²⁵ and for any inhabitant of a cosmologically ordered society, there is no separation of church and state. Consequently, they do not regard religious liberty in the *central* sense defined by our Constitution — a state which is theologically agnostic.²⁶

Is the First Amendment hostile to religion? Here I answer the question as directly as I can — as judicially interpreted between 1947 and until a couple years ago, the First Amendment was hostile to all religion which was not privatized.²⁷ This answer depends, however, on what the judicial doctrine of the Establishment Clause is. If courts interpret the Establishment Clause to require “no endorsement,” I stand by my answer. I do not agree that *Employment Division v. Smith*²⁸ was hostile to religion, insofar as it abandoned a line of cases which, in my view, reinforced the privatization of religion.

Is the First Amendment hostile to religion? Let me now answer the question directly. The question conflates two quite different modes of discourse about our common life. What the First Amendment means is a question of construing an enactment. It is a matter of textual construction and thus presents a question of interpretation for which an interpretive, or perhaps an exegetical, theory is appropriate.

For reasons that cannot even be briefly sketched on this occasion,

23. See *Reynolds v. United States*, 98 U.S. 145 (1878) (illustrating the conflict between state law and the Mormons' religious acceptance of bigamy), *overruled by* *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

24. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (illustrating a conflict between the government's need to build a logging road and the Native Americans' desire to preserve their ancient burial grounds).

25. For a discussion of the *Negarans*, see CLIFFORD GEERTZ, *NEGARA: THE THEATER STATE IN NINETEENTH CENTURY BALI* (1980).

26. See Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1491 (1987). *But see* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987) (criticizing the rationale of the “no endorsement test”).

27. “The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.” *Larkin v. Grendel's Den, Inc.* 459 U.S. 116, 126 (1982) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971)).

28. 494 U.S. 872 (1990).

I think some form of originalism²⁹ is the appropriate vehicle for such a task. Originalism, however, cannot tell us whether the religion clauses are good or bad for religion. To make such a value judgment is a matter for legal theory and its parent disciplines of ethics, social theory, and political theory, all informed by the descriptive disciplines including sociology, anthropology, and ethnography. Therefore, it is not merely a matter of interpretation or exegesis. We *may* arrive at some judgment as to what is the most rationally appealing account of religious liberty, but perhaps not. If the near universal condemnation of *Smith*³⁰ is any barometer, we will probably settle on some version of liberalism's harm and neutrality principles.

Therefore, a better and more critical question is whether *liberalism* is hostile to religion. In other words, is recent judicial interpretation of the First Amendment hostile to religion? This question of whether liberalism is hostile to religion must be distinguished from, and seen as properly having little to do with, the meaning of the religion clauses.

I propose to leave free exercise about where the *Smith* Court left it: neutrality of reasons.³¹ Government may not make the truth or falsity of a theological proposition the basis for action.³² Put differently, any law aimed at the suppression of an action because of its religious significance is unconstitutional. Absolutely. There is no balancing test here. I think *Smith* accords not only with the original understanding, but with the tradition of its judicial construction. Before 1940 it was *the* judicial doctrine of free exercise virtually

29. The core tenet of originalism holds that judges should interpret the Constitution by ascertaining and giving effect to the original intent of the Constitution's Framers and ratifiers. James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 3 (1991).

30. See, e.g., James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Kenneth Marin, *Employment Division v. Smith: The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431 (1992); William L. Montague, Jr., *Employment Division v. Smith: Overlooking the Middle Ground in Free Exercise Analysis*, 80 KY. L.J. 531 (1991-92); Tom Stacy, *Death, Privacy, and the Free Exercise of Religion*, 77 CORNELL L. REV. 490, 559 (1992).

31. See *Smith*, 494 U.S. at 880-81.

32. "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Id.* at 887 (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)). See also *United States v. Ballard*, 322 U.S. 78, 86-88 (1944) (holding that the district court judge correctly withheld all questions from the jury which concerned the truth or falsity of the respondent's religious beliefs and tenets), *rev'd on other grounds*, 329 U.S. 187 (1946).

without exception in all fifty jurisdictions. In the 1940s, starting with *Minersville School District v. Gobitis*³³ and more so in *West Virginia State Board of Education v. Barnette*,³⁴ its reign was challenged and modified. But not until the 1960s was it killed and formally buried.³⁵ Still, among the many cases reported in the 1961 volume of the United States Reports, only *McGowan v. Maryland*,³⁶ *Braunfeld v. Brown*,³⁷ and *Two Guys from Harrison-Allentown, Inc. v. McGinley*³⁸ remain. *Two Guys* excerpts, quite approvingly, though it is difficult to say its reasoning was adopted, the Pennsylvania Supreme Court opinion of 1848 in *Specht v. Commonwealth*.³⁹ *Specht* is a perfect statement of what the original understanding of free exercise was. We should take it as the principle of free exercise judicially enforced, and conduct the remainder of the debate in the public square, outside the courthouse.

Smith does not leave us with simple facial neutrality, as its critics suggest. A statute which says nothing whatsoever about religion may still be unconstitutional. Examples include post-*Gobitis* ordinances which conditioned a permit to distribute literature *solely* on the applicants giving the flag salute and Pledge of Allegiance.⁴⁰

Note another criticism of *Smith* which misses its mark. Critics argue that *Smith* mutes the religious voice, that it subordinates con-

33. 310 U.S. 586 (1940) (upholding a school regulation requiring schoolchildren to salute the flag and recite the Pledge of Allegiance over the objection of Jehovah's Witnesses), *overruled by* *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

34. 319 U.S. 624 (1943) (overruling *Gobitis* because the state regulation was not a permissible means of achieving national unity).

35. See Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 GA. L. REV. 923, 1064-66 (1991).

36. 366 U.S. 420 (1961) (upholding a Maryland law which prohibited certain activities on Sunday).

37. 366 U.S. 599 (1961) (upholding a Sunday closing law).

38. 366 U.S. 582 (1961) (upholding a Sunday closing law as not violating the First Amendment because its purpose was secular).

39. 8 Pa. 312 (1848). The court states:

In a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period to rest from labour, it is not surprising that that day should have received the legislative sanction: and as it is also devoted to religious observances, we are prepared to estimate the reason why the statute should speak of it as the Lord's day, and denominate the infraction of its legalized rest, a profanation. *Yet this does not change the character of the enactment. It is still, essentially, but a civil regulation made for the government of man as a member of society . . .*

Id. at 323 (emphasis added).

40. McAninch, *supra* note 15, at 1019. See, e.g., *Kennedy v. City of Moscow*, 39 F. Supp. 26 (D. Idaho 1941).

science to the fiat of government, even that *Smith* means there is no sovereign God.⁴¹ Nearly the opposite is true. Of course, nothing in *Smith* prevents government from opening the flood gates of exemptions. And momentarily I suggest why government ought largely do so. *Smith* simply gets courts *out* of the business of declaring conscientious action subordinate to legal commands, out of the business of declaring that religiously motivated actions are a threat to compelling government interests. *Smith* says that no deliberate attack upon religion is permitted, period.⁴² *Smith's* critics are the ones who prefer authoritative declarations of subordination, and who prefer to "balance" God's commands against the needs of Caesar. Caesar, experience has shown, almost invariably wins.⁴³

The conflation of the interpretive and normative projects and deliverance of the consolidated enterprise into the hands of the Constitution's black-robed guardians is *not* unprecedented before World War II. What is unprecedented is that it should *characterize* constitutional law, so much so that, especially in the church-state area, almost no one self-consciously distinguishes the normative question — the most cogent account of religious liberty — from constitutional construction.

How should the normative problem be handled? As I said, the Constitution provides a regulative principle, one that should not often need to be invoked by parties to the conversation. That is one reason why the conflation of normative and interpretive discourses has been mischievous: we need to think about religious liberty free of the mental constraints that implicit commitments to judicial enforcement impose.

I think that public debate about religious liberty in our pluralistic society can proceed quite well if grounded in reason. Reason discloses that religion is truly a good for everyone, and society rightly promotes it. Religion is a personal relationship with a more than human source of meaning and value. Religion, or the good of it for human persons, is intrinsically voluntary because it involves adherence to certain propositions as *true*, as really disclosing a transcendent reality which is a fit object of worship and prayer. Religion is, and should be acknowledged as, a basic human good. Government

41. See Gordon, *supra* note 30, at 110; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1151 (1990).

42. *Employment Div. v. Smith*, 494 U.S. 872, 877-78 (1990).

43. *Matthew* 22:21.

ought to promote it. The religion clauses, construed faithfully on an originalist basis, work no barrier to that proposal. The *Lemon* test⁴⁴ does. Thus, we should get rid of the *Lemon* test.

Conscience, which is harmony among a person's feelings, beliefs, judgments, and actions, is also a good for everyone, and society rightly promotes it. Autonomy is a condition for realizing this good too. Together with free exercise's foreclosure of religious truth as a ground for government action, these two goods of all persons make for a powerful presumption in favor of freedom to act on the basis of religious belief. Only good reasons may justify intrusion upon conscientious action.

I insist that judges are not well suited to make these calculations. The challenge is to determine the ensemble of social conditions most conducive to realization by everyone of the diverse basic human goods. This complex, prudential judgment will *not* be well done by politically isolated persons, employing the restricted reasoning of law to facts adduced in the course of litigation.

44. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (providing a test to determine whether a statute violates the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster an excessive government entanglement with religion").

