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Article 25

Questions and Answers to Panel 4

DePaul College of Law

QUESTIONS AND ANSWERS TO PANEL 4

IRA LUPU: I want you to imagine a world in which this society, acting through appropriate constitutional and political means, has eliminated the religion clauses from the First Amendment, leaving everything else in the Constitution intact. Is religion — and religious institutions and individuals — better or worse off after we have made that move?

EDWARD GAFFNEY: The next panel will, I think, address Professor Lupu's question directly, but my own answer is that we would be very much the worse off without a Religion Clause in our Federal Constitution. *The Williamsburg Charter,* a bicentennial document that celebrated the first of our civil liberties, religious liberty, offered five reasons to support this conclusion:

> (1) The First Amendment Religious Liberty provisions have both a logical and historical priority in the Bill of Rights. They have logical priority because the security of all rights rests upon the recognition that they are neither given by the state, nor can they be taken away by the state. Such rights are inherent in the inviolability of the human person. History demonstrates that unless these rights are protected our society's slow, painful progress toward freedom would not have been possible.
> (2) The First Amendment Religious Liberty provisions lie close to the heart of the distinctiveness of the American experiment. The uniqueness of the American way of disestablishment and its consequences have often been more obvious to foreign observers such as Alexis de Tocqueville and Lord James Bryce, who wrote that "Of all the differences between the Old world and the New, this is perhaps the most salient." In particular, the Religious Liberty clauses are vital to harnessing otherwise centrifugal forces such as personal liberty and social diversity, thus sustaining republican vitality while making possible a necessary measure of national concord.
> (3) The First Amendment Religious Liberty provisions are the democratic world's most salient alternative to the totalitarian repression of human rights and provide a corrective to unbridled nationalism and religious warfare around the world.
> (4) The First Amendment Religious Liberty provisions provide the United States' most distinctive answer to one of the world's most pressing questions in the late-twentieth century. They address the problem: How do we live with each other's deepest differences? How do religious convictions and political freedom complement rather than threaten each other on a small planet in a pluralistic age? In a world in which bigotry, fanaticism, terrorism and the state control of religion are all too common responses to these questions, sustaining the justice and liberty of the American arrangement is an urgent moral task.

> (5) The First Amendment Religious Liberty provisions give American society a unique position in relation to both the First and Third worlds. Highly modernized like the rest of the First World, yet not so secularized, this society — largely because of religious freedom — remains, like most of the Third World, deeply religious. This fact, which is critical for possibilities of better human understanding, has not been sufficiently appreciated in American self-understanding, or drawn upon in American diplomacy and communication throughout the world.[1]

Let me offer another reason for my conclusion. At the end of my paper I referred to the danger that the government's commands can become too all-encompassing. For religious believers like myself, that danger is described as idolatry. But the danger is very real for believers and nonbelievers alike. For example, there is no duty that the modern state lays on its citizens more onerous than the command to take the lives of others during wartime. It is no accident that the history of governmental abuse of civil liberties during wartime is also pretty dismal.[2] One way of checking the war power is to assure, as our Framers did, that this power is shared between the Congress[3] and the Executive.[4] Another way of hobbling the government's all-encompassing power in wartime is to assure that conscientious objection to participation in war is honored and respected. Although Congress did not enact a constitutional provision requiring this result, it has repeatedly provided for this result through legislation ever since the first Continental Congress. In this sense, concern for religious dissent has been a significant limit on the most awesome power of our government, even though conscientious objectors often paid a high price for preserving the integrity of their consciences.[5] On balance, then, I think that we would be much worse off on these matters without the protection of the Religion Clause of the First Amendment.

GERARD BRADLEY: If you are referring to the First Amendment to the Constitution, I think the religion clauses could go away and it

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1. THE WILLIAMSBURG CHARTER (1988), *reprinted in* 8 J.L. & RELIGION 5, 10-11 (1990).

2. *See, e.g.*, CHRISTOPHER N. MAY, IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918 (1989).

3. U.S. CONST. art. I, § 8, cl. 11 (granting Congress the power to declare war); *see also* U.S. CONST. art. I, § 8, cl. 12-16 (discussing congressional powers relating to the Army, Navy, and state militias).

4. U.S. CONST. art. II, § 2, cl. 1 (stating that the president is Commander in Chief of the Army and Navy).

5. *See, e.g.*, PETER BROCK, PACIFISM IN THE UNITED STATES: FROM THE COLONIAL ERA TO THE FIRST WORLD WAR (1968).

would not make much difference. If anything, we would be better off. And that is partly because they did not mean much at all before 1940; and since then, their judicial interpretation has been generally bad, that is, harmful for belief. And I think also because Madison may have been right in the first place in his arguments in *Federalist No. 10* about the multiplicity of sects. Given the limited nature of federal power, I think that we probably could have gotten along without the First Amendment religion clauses. Madison did not suggest that *Federalist No. 10* worked for the states; and it does not. State governments do not enjoy the limitations, or have the limitations, of the Constitution's enumerated powers imposed on them. So as to the state governments, I would say we would be worse off without provisions something like the First Amendment clauses, judicially enforced.

JEFFREY SHAMAN: I would speculate that if we repeal the religion clauses tomorrow, that at least in one respect it would make a very significant difference; and I think that is with government aid to religiously-affiliated schools and prayer in school also. I think that if the religion clauses were repealed, that many, many states would re-establish school prayer — which in my opinion, as I said before, is actually detrimental to religion and, I think, quite harmful to a nation as religiously and culturally diverse as ours. But nevertheless, I think that would happen. And I also think a number of states would begin to make direct grants to religiously-affiliated schools, which may be good or bad for religion. But at any rate, I think those would be very significant differences in our society.

EDWARD GAFFNEY: I would like to briefly respond to Professor Bradley's point that we would be worse off, and not better off. In the federal context, this is not simply because of the value of protecting rights at the state and local levels in the state constitutions, but because the federal compact is not enforceable solely through judicial injunctions. Law embodies the ability of someone like Professor Sturm to get up yesterday and describe philosophic anthropology. It has a power to teach us something important and imperative about our society. We want to refrain from an establishment and we want to protect free exercise of religion, and that is an important aspect of our federal compact as well as our state. That is embodied in the important legislation that goes back to the beginning of the Republic. Protection of constitutional values is not — as Professor Bradley has rightly pointed out — to be put into the judicial bag. There are

all kinds of ways in which we secure the rights that are mentioned and put forth in quite general language in the Preamble; and this is simply one of them: the "more perfect union" that the Founders sought to establish.

DOUGLAS LAYCOCK: This is a question for Professor Bradley. I think you are absolutely right that the greater threat is at the state and local levels — for reasons that Madison captures, although I think you are overly optimistic about the federal government. It was the federal government that persecuted the Mormons; it was the federal executive that court-martialed Captain Goldman for wearing his yarmulke, and so forth — but the great threat is at the states. And I think you analyzed that exactly right. Given that analysis in your answer to Professor Lupu, how can you tell us in your main speech that exemptions ought to be provided by legislatures and not by judges? Your faction analysis tells us that legislators are not going to do it and, indeed, that legislators will be persecuting rather than exempting at the state and local level.

GERARD BRADLEY: I am not sure if I could really join issue with you on that. I am not so sure that I am guilty of some inconsistency. It seems to me that most state legislators — who do not much care about what Mormons do or what Native Americans do or what wacky sects do — will respond to political pressure. State courts ought to enforce their constitutional provisions vigorously — that is, faithfully. What legislators will do, for example, is what the twenty-three states or twenty-five states that have exempted sacramental use of peyote did (including Oregon in the last year or so). In many ways, there are relatively unpopular, small sects which are, in a sense, surprisingly well treated by state legislators. My guess would be, knowing nothing much about political theory or practice, that if you have the sort of worst case scenarios for people who opposed the *Smith* result — what if they took away the sacraments of the Catholic Church? — well, I take it anybody belonging to that church would make reversing a position of that kind the number one priority and would bargain off their votes with no other exchange expected except reversal of a particular law. To the extent there are worst case scenarios imagined about persecution, I suspect politicians will respond because there will be a bloc of votes which can be purchased with no other rider attached other than reversing a decision which probably nobody cares about. But I do not think that is an inconsistent position; I do think that legislators do not care to

persecute, so to speak, and will respond to political pressure. I think many of them do have a rough and ready intention to promote religion as a good thing, and will see that exemptions in some circumstances, at least for some groups, would be a good thing because they are good for religion.

EDWARD GAFFNEY: I would like to make two comments about Professor Bradley's view of how legislatures grant religious exemptions. First, I think it is instructional that ancient Roman law contained a variety of exemptions for Jews, in order to accommodate their monotheistic belief within a pagan environment that worshiped national deities, including the emperor. Christians frequently benefitted from these exemptions on the ground that like Jews, they too were monotheists committed to the observance of the First Commandment. When, however, Christians moved beyond the status of a persecuted minority at the beginning of the fourth century to the status of the official religion of the empire in the second half of that century, one of the first things they did was to repeal the religious exemptions for Jews. The exercise of Jewish faith became far more difficult under the Christians than it had been under the pagans.

Second, I think that it is also important to focus on Justice Scalia's suggestion in *Employment Division v. Smith*[6] that religious minorities like the Native Americans should resort to legislatures for whatever relief they can get there. Given the insensitivity of the Court, that is not bad advice. But I think that there is no good reason why, in our tripartite system of government, the judiciary should not also afford realistic enforcement of a textually demonstrable commitment to an important value like religious freedom. Justice Scalia acknowledged that "leaving accommodation [of religion] to the political process will place at a relative disadvantage those religious practices that are not widely engaged in . . . ."[7] That understates the problem by a long shot. The real consequence of *Smith* is that sincerely held religiously based conduct is not to be afforded any significant protection from majoritarian control. Sending unpopular religious minorities to city councils and state legislatures for relief is like sending the Jehovah's Witnesses to the very legislative bodies in the 1930s that were doing their level best to get rid of them. The sad reality is that small religious communities have been

6. 494 U.S. 872 (1990).
7. *Id.* at 890.

vulnerable to persecution, bigotry, calumny, and violence that should be viewed as outrageous, but that has regrettably been deeply ingrained in American history.[8]

GERARD BRADLEY: My response is twofold. The first is: All of what you say is not an argument for changing the meaning of the Constitution. You are arguing that something bad might happen; and I agree something bad might happen. I am not that sanguine. My other remark is: Show me the evidence that judges have been demonstrably more concerned about minority religions and legislators. What evidence is there? It is an act of faith on your part. Against the evidence, as far as I can tell.

EDWARD GAFFNEY: You are right, but only partly so. It is an act of faith on my part that judges are capable of empathizing with religious minorities and securing their liberty. But I do not think that my faith flies in the face of all of the evidence, just some of it. On the downside, Jews have not been well treated by the Court in the Sunday closing law cases[9] or in the yarmulke case.[10] And the Court has been dismissive of the claims of unpopular religious minorities like Fundamentalists.[11] The Court has been schizophrenic towards the Amish, acknowledging their right to educate their own children in their own homes,[12] but forcing them to pay Social Security taxes for their employees, even though they take care of their elderly as a matter of religious obligation;[13] it was odd to see Chief Justice Burger suggest that a tiny group of people who do not collect Social Security benefits could be blamed for the threatened collapse of the Social Security system that Burger imagined would flow from exempting them from this tax.[14] And the Court's treatment of the spirituality of the Native Americans has been utterly insensitive.[15]

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8. *See, e.g.*, GUSTAVUS MYERS, HISTORY OF BIGOTRY IN THE UNITED STATES 158-62 (1943); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 416-20 (1986).

9. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961).

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

11. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

12. Wisconsin v. Yoder, 406 U.S. 205 (1972).

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

14. *Id.* at 259-60.

15. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872 (1990); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

The list of botched cases could go on, but there is another side to the story. For example, the Court has been fairly sympathetic to the religious faith of the Jehovah's Witnesses. In 1940, it protected the ability of the Witnesses to spread their message free from the threat of arrest for breach of the peace.[16] Three years later it protected the Witnesses from efforts to drive them out of town by taxing their distribution of religious literature.[17] In 1940, it denied their plea for an exemption from participation in the flag salute ceremony,[18] but three years later it reversed that decision and gave us one of the most ringing declarations on religious liberty: "[F]reedom of worship . . . may not be submitted to vote; [it] depend[s] on the outcome of no elections[19] . . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[20] I think that the widespread opposition to the Court's ruling in the *Smith* case stems from the fact that the majority expects the Court to be antimajoritarian when it comes to basic civil liberties. We found repugnant the Court's retreat from its earlier history of protecting the exercise of religion by requiring government lawyers to demonstrate a truly compelling interest before they could prevail over a sincere religious claim. In other words, the Court was right in *Sherbert v. Verner*[21] and wrong when it abandoned the compelling interest standard in *Smith*.

EMILY FOWLER HARTIGAN [University of Nebraska]: I think that the question is: Is the First Amendment hostile to religion as the Court now interprets the First Amendment? I think the loss of the "both/and" *is* hostile to religion. That is, of course we can hope that legislators will care about minority religions. Why should we give up one of the three branches? Why should we not want both branches to care about minority religions? I really do not understand why we should give up Supreme Court jurisprudence, which believes that the Bill of Rights is something that the Supreme Court should be concerned about. There are two points that I think frame

16. Cantwell v. Connecticut, 310 U.S. 296 (1940).
17. Murdock v. Pennsylvania, 319 U.S. 105 (1943).
18. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).
19. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).
20. *Id.* at 642.
21. 374 U.S. 398 (1963).

that, which come from Professor Lovin's remarks. He talks about the worry about the capture or the domestication of religion, which Professor Hauerwas talked about. I am concerned about what happens to law. If, in fact, religion is separated out from the public discourse, we lose the *spirit in the law.* That is, as a public, as a people, we lose. And I find this in teaching my students. If I can talk to them, they are worried about: "Can I be a lawyer and not lose my soul?" That is something which has profound impact on what the "public" will be when they go out as lawyers. In addition, there is a concern about what the quality of public discourse is, and how much inspiriting of the public discourse is allowable. And I think that that is tremendously important for law itself. It has become desiccated at the federal level. You can see in some of the state constitutional jurisprudence — particularly in the nineteenth century — where it is not desiccated, where there is still a notion of the spirit of the law which taps something like what Michael Perry calls "naturalism." But when you look at the federal constitutional jurisprudence, it is deadly. And so I am worried about the other side of it, that is, the hostility to the law as I understand it (with spirit), not as the Supreme Court at this time understands it. And I am not willing to give that up to the United States Supreme Court. But I think that the question, which does need to be profoundly deconstructed, is what the hostility to true law is.

The other thing that Professor Lovin talked about was wanting a relative or a situated freedom, that is, accepting the sense in which we are profoundly socially constituted and constituted by — for those of us who believe that — a Creator in a created world. My concern — and you talked about getting critical distance on that "relative" discourse and freedom — my concern about that is that if we leave it to majoritarian culture and the majoritarian institutions without the voice of the Other, we will get a recapitulation of what I have experienced at this conference — which is an incredible, just a tearing, alienation for me — because I come where people are speaking to the things which are the most crucial to me, and I come as a feminist, and I hear people speaking to my heart and then wounding it. I did not anticipate what was going to happen for me, because Professor Hauerwas is someone I know through people who love and respect him really deeply. And I sort of did not have my defenses up. And I was beginning to realize that these were all men talking and all unbelievably masculine, male discourse — except for

Professor Sturm, bless his heart, who said, "[t]he declaration of the rights of man [sic] . . ." and used inclusive language; and he is the only who has done that. And Professor Hauerwas is going through all of this wonderful prophetic speech and it's full of men. Not one woman was mentioned in any way. If you listen to his propositional thinking — what he is talking about in terms of his "truth" — the propositional version is "outrageous." But you listen to his stories — and you hear him saying, "Well, I want Jews to make Jews" — his story says, in fact, that he does not have a sort of imperialistic notion of truth. And he is a narrative theologian; the story is important. But then he told the story of *A Man for All Seasons*.[22] And he got to the one place where there was a woman — because it is Meg who tells her father what he attributes to the son-in-law. And goddamned if he did not tell an *untrue story*.[23] That is what I am worried about in terms of giving up the Supreme Court's notion — letting them say that Native Americans can be erased — because the *voices of the Others* are what is absolutely crucial. So we need to ask it from all three branches of government.

EDWARD GAFFNEY: I invite Professor Bradley to reply to Professor Hartigan. Why do you insist that only the political branches, and not the judiciary as well, should be engaged in protecting religious liberty?

GERARD BRADLEY: Well, I think maybe the distinction I was trying to draw has been either rejected or obscured again. Because I am saying that I think the enterprise of construing the Constitution starts in a certain place and time with a certain authoritative document, and is *not* the freestanding analysis of politics — good or bad — that you are proposing to me as a reason to construe the Constitution differently. I simply insist — if there is any insistence on my part — that this Constitution and *its* construction are not within the same order of discourse that the negative or hostile responses to my proposal are in. I agree that, philosophically, you can talk in a dif-

22. ROBERT BOLT, A MAN FOR ALL SEASONS: A DRAMA IN TWO ACTS (1962).

23. I struggled with this on reflection, and found that there was a hidden paradox. The play, as written by Bolt, has "son Roper" ask about "the words"; the movie, with Bolt's screenplay, sets the entire conversation between father and daughter. My students this semester, having used the movie as locus for their jurisprudence midterm, had focused on the intense symbolic and narrative significance of that very conversation, in terms of the role of the woman in More's story. So it is not that Hauerwas did not have his "homework" right in a technical sense, but that he unrelentingly told the male version of every text and story, even when the fuller, truer, more human version was available.

ferent way and come out with a different conclusion about what is right or wrong, good or bad. To me, that is not, as such, an argument for construing the Constitution differently. And I do not reject a role for the judiciary. But frankly, to engage the argument on its own terms — courts, especially the Supreme Court, have been on automatic pilot along the course of liberalism for the last forty years or so. They seem to have imbibed the harmony and neutrality principles in their youth, somewhere in their formative years. Other than viewing them as on automatic liberal pilot, I see them as simple bunglers.

EDWARD GAFFNEY: I am glad that Professor Bradley has clarified that the judiciary does have an important role in protecting religious liberty. I suppose now that the focus of my disagreement with him is over how bad the bungling of that task has been. For me the cases decided by the lower courts in the wake of *Smith* illustrate graphically a wholesale abandonment of responsibility to enforce the limits placed on our government by the Bill of Rights. I agree that in our democracy we must press our elected representatives to grant legislative exemptions for religious conduct from generally applicable laws. But part of that dynamic is that the representatives often take their lead from the courts. So when the courts abandon the field, that can send exactly the wrong message to the political branches. In other words, I think that the cases in the lower courts after *Smith* are a strong argument for Professor Hartigan's point that we need to ratchet up the judicial protection of religious liberty and not leave that precious freedom exclusively to local city councils or state legislatures.

ROBIN LOVIN: I thought that the last point that Professor Hartigan made was powerful and really needs to be allowed to stand on its own. But I did want to say in response to the first part of what she has suggested — and maybe in response to some of the general discussion that has been going on — that there is a problem with some of our jurisprudence and some of our legal philosophy that it is locked in this modern period of solution to the problem of church and state. And I just want to open up the possibility that some of the things that we have been pointing to — in terms of, as you say, "never meeting a statute that you did not like," the growth of a very positivist and statist interpretation of these constitutional provisions — reflects the fact that when the mainstream modern position of reliance on individual reason and conscience fails, we fall back upon

the Hobbesian and Marsilian solution: We have got to have a sovereign who will decide for us. And among the other dangers it represents, this is a fallback to what I regard as the least desirable of the modern solutions to the problem, and a real failure to come to grips with that problem of situated freedom which seems to me to be what we have really got to address in legal theory as well as philosophically.

QUESTION: This is directed mostly towards Professor Lovin. Your comments on the postmodern phrasing of the question of religious freedom suggested to me that the other commentators have set forth kind of a litany of the history of how the majority's views of religion have worked their way into the interpretation of the First Amendment. I am wondering if what some of the postmodern thinkers are suggesting is that there is no such thing as a "disestablishment clause" because it is inevitable that the majority's will is going to be imposed in the process of decisionmaking because — as you said — there is no concept of freedom or distancing from one's history. Could you just comment on that?

ROBIN LOVIN: Right, there would be no disestablishment because what you operate with is some kind of hegemony theory that says: Always, the religious beliefs of the controlling powers in the society are going to be enforced by all of the power mechanisms in the society. So there would be no legitimate disestablishment clause. But also, of course — as I say — there would not be a legitimate Free Exercise Clause either, because there is not such a thing as what the Framers of the First Amendment would have understood as freedom that could be legally recognized.

QUESTION: I hesitated throughout the Conference to articulate a question that concerns me. It seems that there are many different paradigms of church. There's the theologian's church. There's Stanley Hauerwas's church. There's the lawyer's church. And then, from my own particular point of view, there is the church administrator's church that represents an enormous economic, an enormous social, established institution that depends almost entirely for its continuing existence on various forms of government subsidy as well as regulation. I have been working for quite a number of years with religious women. Many small orders of religious women — who maintain their own colleges, school systems, hospitals, and such things as these — were unable financially to get into the Social Security sys-

tem years ago in 1962 when that became a possibility. They now are in real deep financial problems. You are all aware, of course, of the extent of these problems. But this brings into question — and it brings to my mind constantly — the whole relationship of 401K plans and the enormous amount of money involved in religiously related institutional funds and their administration and so forth, as well as the overall comportment of religious entities — the major, established religious entities — in lobbying for protection of these funds as well as the other types of institutional concerns. For example, *Bowen v. Kendrick*[24] would never have even been possible thirty or forty years ago had there not been a pre-existing social agency structure that was capable of absorbing these funds. So I think that there are many different concepts of church. I think some of the hostility that is felt by leaders of church entities arises — as Professor Bradley indicated rather bleakly — out of state court tort litigation, the general demise of charitable immunity, and the conceptualization of church institutions much as if they were businesses, and the lack of any kind of specific prerogatives. So when you take a look at hostility and you take a look at the role of religion, the establishment of religion in America, I think there are many different paradigms of religion. There is a hostility that is engendered by abuses of the television ministries and the amount of money that is involved there. And there is a certain amount of hostility engendered in people going into Congress and being subjected to very sophisticated, very professional lobbying that twenty or thirty years ago would not even have been conceivable. So I think, when you look at the institution and where the First Amendment is right now, the questions that you have addressed have been so captivating and interesting I have hesitated to inject this; but I think it is a little element of realism. And this is my question: Since 1940, since *Cantwell,*[25] the First Amendment is applicable to the states; but to what extent does it immunize the church from being treated in a state court — or a church institution, a retirement fund, a religious community, a hospital, a school, or anything else — just as if it were a business? Robert Clark wrote a very strong article about ten years ago to the effect that charitable hospitals, religiously related or not, should no longer be considered charities; they are simply

24. 487 U.S. 589 (1962).
25. Cantwell v. Connecticut, 310 U.S. 296 (1940).

businesses.[26] I wonder if I can formulate a question in these terms: To what extent is it a violation of either one of the clauses to be treated in state court as if you were simply a business?

EDWARD GAFFNEY: I guess this is a classic instance of the lawyerly reply, "It depends." For example, I do not think that there is any constitutional violation in requiring a religious organization to pay tax on unrelated business income.[27] And I do not think that religious organizations are constitutionally entitled to charitable immunity from litigation over contracts that they form or over torts that they commit. On the other hand, I think that it would be a profound mistake to expand Dean Clark's point to mean that religious organizations should be subject to every form of regulation that the government can conceive of for business corporations. To me, one of the deepest dangers presented by the *Smith* case is that we will begin to think that there is really nothing very special about religion in our society, that mere formal neutrality is enough. As Professor Laycock has demonstrated, mere formal neutrality — treating religion like everyone else — is a sure recipe for disaster.[28]

Let me illustrate this point by reference to an unpopular religious group that I have had the privilege of representing in California, the Hare Krishnas. These people are devotees of an ancient faith that seems new or strange to many of us Westerners. They are now subject to losing all of their monasteries and places of religious worship throughout the country because of a single tort. The tort consisted of inflicting emotional injury on the parents of a young devotee by lying about her whereabouts. I have no brief to write in defense of the lie. In fact, one of the things that most impressed me about the Hare Krishnas is that they were willing to acknowledge their mistake and to change their policy of accepting teenagers into their community without their parents' consent. But no matter what one thinks about their liability for the infliction of emotional distress, the sum that the jury awarded against them — over $32 million in punitive damages — is an awful lot of money for an emotional injury. The award was reduced on remittitur and by the court of appeals, but is was exceeded in legal history only by the award against

26. *See* Robert Charles Clark, *Does the Nonprofit Form Fit the Hospital Industry?*, 93 HARV. L. REV. 1416 (1980).

27. I.R.C. §§ 511-515 (1988 & Supp. 1990).

28. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

the Ford Corporation in the Pinto case.

I do not think that the Hare Krishnas or any other religious organization should be treated the same as for-profit corporations. Here is why. Stockholders risk their capital when they invest in a for-profit corporation. They stand to benefit from the corporation's activities, so there is some basis for making them pay for the corporation's wrongdoing. That rationale does not fit very well in the context of a not-for-profit corporation, to which people contribute with no expectation of personal financial gain, and over which they have no direct control. More specifically, it seems outrageous to me for the government to reach into the collection plate of a religious organization to provide a large windfall for a fully compensated victim. Moreover, we do not allow a jury to impose punitive damages on a municipal corporation sued for a civil rights violation committed, for example, by a police officer, because to do so would be to force the taxpayers to pay for an act over which they had no control.[29] A similar logic prohibits the imposition of punitive damages on labor unions even when they are guilty of a failure to represent all of the workers, for it would be the rank and file who would actually have to pay for the errors of their leadership.[30] For reasons like these, I am opposed to the imposition of punitive damages on religious organizations.

Let me draw an analogy from *New York Times v. Sullivan*.[31] First, let me simply observe that the *Sullivan* case illustrates the benefit of the incorporation doctrine. The *Sullivan* Court performed an invaluable service for the protection of the human rights of African-Americans who were being clobbered by state and local authorities in the Old South of the 1960s. If state libel law had gone unchecked by federal judicial power at that time, it would have crushed the civil rights movement, or at least dealt the movement a severe blow. Perhaps Professor Bradley's opposition to the incorporation doctrine is limited to the incorporation of the Religion Clause, but in any event I am glad that the Free Speech and Free Press Clauses were thought to be incorporated against Alabama through the Fourteenth Amendment.

Second, I note that in *Sullivan* the Court did not hold that the

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29. City of Newport v. Fact Concerts, Inc. 453 U.S. 247 (1981).

30. International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979).

31. 376 U.S. 254 (1964). For a discussion of the case in its historical setting, see ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991).

tort of libel is constitutionally invalid, but it did offer sound reasons why that tort is subject to constitutional restraints arising from the profound national commitment to vigorous political debate. I would conclude from *Sullivan* that the Free Exercise Clause does not necessitate the doctrine of charitable immunity for religious organizations, but that it does mandate at least the kind of concern for the well-being of religious institutions that the Court showed in *Sullivan* for the news media. Religious organizations should not in my view be put out of business through outrageously high punitive damages for mistakes they make in conducting the corporal works of mercy, works they engaged in as part of their spiritual ministry long before these acts became part of the tender outreach of an all-compassionate, or at least an all-encompassing, government after the New Deal.

QUESTION: One of the things that we are missing in society today is that real commitment to sacrifice. And one of the leaders in the church of which I am a part said once that "any religion that's in truth a religion is worth dying for." I am pleased that he didn't say, "worth killing for." But it is worth dying for. It is worth sacrificing for. It is worth giving for. I was appalled yesterday by Professor Hauerwas's comments as well. In particular insofar as he said, "Well, you know, there are going to be some people who are going to suffer out there. And that's just the way it is." I think what we have done to the Native Americans' religion and cutting the heart out of their religion and the suffering we have created is not only just appalling but not a very wise thing for us to do in an anthropological sense. I think if we did more to nurture conscience, if we did more in community, we would be a lot better off as a world. If we created a system — if Professor Marshall, instead of saying, "I don't want any exemptions; we're going to have equality here, no exemptions!," said, "We're going to create a system where we respect these kinds of exemptions and respect sacrifice and do what we can to facilitate it!," especially in those areas, whether it is feminism or whether it is religion, those things that we feel so deeply that we are compelled to do — that if we had a system like that, that what we ought to be talking about is how we create that kind of system where there are perhaps some limitations on the excesses but where we really protect that core. And I find also appalling what Professor Bradley said, in the sense of the same sense that Professor Hartigan did. I mean, give us every opportunity to be able to argue these

cases. Now, I think you are right in one sense in that we ought to take it to the legislature where we can get something more than an interstitial answer and an answer that historically has been "no" but that we ought to have every recourse available for the Native American or if my daughter goes to school fasting because of our religion and they tell her at noon, "By golly, you're going to eat because eating makes you healthy and makes you a better student." I mean, where do we draw those kinds of lines? And I think Professor Marshall would be a lot better off if he would just broaden conscience to include ideology and recognize it. In fact, if any ideology's worth its salt, it is worth sacrificing for just like religion. And that Professor Bradley would do better to say, "We ought to look to the legislature but we'll leave this door open as well."

WILLIAM MARSHALL: I would not disagree with that. I think we would be better if we broaden conscience to include a protection for nonreligious conscience as well. A number of years ago, Professor Tushnet said — looking at the then Supreme Court, which looks like a bastion of liberalism compared to the current one — that that would be unlikely given the Court's make-up. I think that is right. The question of what we do now, I think, is dealing with the Court we have. And it is a difficult choice. Professor Laycock and Professor Shaman have both made incredibly strong arguments that the inequality between religions, which failing to grant exemptions creates, is a terrible problem. But it still seems to me that a deliberate preference of one kind of belief over another kind of belief in this context politically empowers that type of belief and leads to some of the other problems that we discussed before, as well as just being plain not called for by history or precedent. And I just think it is wrong to say that a guy working in an armaments factory is going to be excused from working there if he couches his belief in religious terms but is not going to be excused if that very same belief, regardless of the level of passion, regardless of the level of commitment, is couched in moral and philosophical terms. I would agree with you that a better world would protect consciences of all kinds. With respect to what we have now, I think it is better either to deny them all or to grant them all.