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Editor's Note: Douglas Laycock is the Alice McKean Young Regents Chair in Law and Associate Dean for Research at The University of Texas Law School. He is the author of Modern American Remedies: Cases and Materials (1985), The Death of the Irreparable Injury Rule (1991), and numerous articles. Professor Laycock also argued the animal sacrifice case, Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993), before the United States Supreme Court, prevailing in a unanimous decision in favor of the Church's free-exercise rights. These remarks, sponsored by the Fordham Christian Legal Society, were delivered at Fordham Law School on October 27, 1993. They have been lightly edited, and footnotes have been added, but they retain the form and style of the oral remarks.

ESSAY

FREE EXERCISE AND THE RELIGIOUS FREEDOM RESTORATION ACT

*DOUGLAS LAYCOCK**

I want to do two things today, one in my academic hat and one in a more practical hat. I want to give you two frameworks or models into which some current events in the free exercise area can be fitted, and then I want to review some recent cases and pending legislation in light of those models.

I. TWO MODELS OF RELIGIOUS CONFLICT

A. *Post-Reformation Conflict*

The nature of conflict over religious liberty has changed, in ways that some of the churches recognized first, and that legal scholars, including myself, have been much slower to recognize. What is the problem to be solved by religious liberty, or, to put it another way, what does religious persecution consist of? For almost 500 years, the answer to that question has been based on the model of conflict in the wake of the Reformation. In the wake of the Reformation, for almost 200 years, European Christians killed each other over differences in faith. Obviously, that was a serious problem. Religious liberty was supposed to solve that problem: to end the problem in Europe and to make sure that it would never happen here.

The problem of the Reformation has not entirely gone away. Some of the cases I will talk about today are problems of mainstream religious groups exhibiting great hostility to decidedly non-mainstream minority religious groups. Different religious groups are not killing each other, at least in this country, and the range of groups that is accepted or at least tolerated has expanded considerably. But there remains a residue of religiously motivated hostility and discrimination against religious minorities that are too different or too threatening to the majority.

But these Reformation-style conflicts have largely been superseded.

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Differences among religions are no longer the most important source of conflict over religious liberty.

B. *Conflict Between Religious and Secular Interests*

The most important religious conflict in the United States is not the conflict of one religion against another, but of the secular against the religious. On one side are all those people who take religion quite seriously, for whom religion still makes a substantial difference in their lives. On the other side are all those people who do not take religion seriously, who cannot imagine why these superstitions persist, and who cannot understand why religious minorities are demanding special treatment from the secular administrative state.

This secular-religious conflict has become enormously more important for two reasons. One is simply the sheer growth of the state. In 1789, protecting churches from government regulation wasn't much of a problem because there wasn't much government regulation. Today, it is an enormous problem, because society is pervasively regulated.

Second, the secular-religious conflict has become a problem because today there are large groups of non-believers, many of whom are quite indifferent to religion, and some of whom are quite hostile to religion. There are interest groups with important and admirable causes that sometimes come into conflict with traditional religions, and who are no longer inclined to give much deference to religious traditions that get in their way. So we have lobbying fights between civil rights organizations or environmental organizations or gay rights organizations or animal rights organizations on one side and some traditional religion on the other.

Some of these interest-group conflicts can be assimilated to the post-Reformation model—indeed, I think this is a good way to look at it. All the people who don't take religion very seriously simply have a new answer to the traditional questions. Religion is an answer to questions about God, about whether there is a God, about whether there is anything after death. A negative answer to those questions is as much a religion for constitutional purposes as an affirmative answer. That is why the state can neither establish nor prohibit atheism. Widespread acceptance of negative answers to religious questions leads to new conflicts between people who give those answers and people who give other, more traditional answers, just as the emergence of Protestantism in the Reformation led to new conflicts with Catholicism. These new conflicts between affirmative and negative views of religion are religious conflicts. Once we realize that, at least those conflicts fit into the traditional model, and we can go about our business.

The people on the secular side certainly don't view it that way. They think that their views are not religious, and they mostly think that they are the solution to religious conflict and not part of the problem. They will resist assimilation to the Reformation model.

Moreover, even if I could assimilate the secularists to the Reformation model, that is only part of the new threat to religious liberty. There is also the conflict between religions collectively on the one hand and insensitive government regulation on the other. Imperious bureaucrats may have the fervor of a religion, but they are not answering religious questions. The conflict between religions and the regulatory state plainly cannot be fitted into the Reformation model. New models or new ways of thinking about religious-liberty problems have to be developed.

This historical shift in the nature of the problem is related to the theoretical and doctrinal debate that is going on in the Supreme Court and in the halls of Congress about exactly what we mean by the "free exercise of religion."

II. THE MEANING OF FREE EXERCISE

A. *Equality Rights*

There are currently in play two fundamentally different, inconsistent ways of defining religious liberty or government neutrality towards religion. One, most prominently associated with Justice Scalia, is that religious liberty is an equality right. Religious liberty consists of not being discriminated against: the law that applies to any religious minority will be the same as the law that applies to anybody else, and as long as that criterion is satisfied, religious liberty is fully protected.

So if it is the law that Catholics can't serve Mass on Sunday, as they couldn't in Ireland for 300 years, that law violates religious liberty because it is a law that singles out Catholics. But if it is the law that nobody can discriminate on the basis of sex in employment, and some aggressive litigator decides to challenge the exclusion of women from the Catholic priesthood, that lawsuit is not a problem of religious liberty. It is simply the application of a neutral, generally applicable law to a religious group that is violating the law, and who are these religious people to say that they are entitled to special treatment?

That's Scalia's version, and he got five votes for it in a case called *Employment Division v. Smith*[1] in 1990, which most of you know as the peyote case.

B. *Liberty Rights*

The other version is that the exercise of religion is not merely an equality right, not merely a right to non-discrimination, but that it is a liberty right. It is a substantive right not to be regulated with respect to certain matters that are very important to the individual. More precisely, because no right is absolute in our society, it is a right presumptively not to be regulated: the state should not burden a religious practice without a compelling reason. That was the rule that prevailed in the Supreme

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

Court from *Sherbert v. Verner*[2] in 1963 until just before the *Smith* case in 1990.

The substantive view of religious liberty, the right to be let alone, says equality is not enough, non-discrimination is not enough. Rather, religious liberty protects both individuals and religious organizations from some of the regulation that is now imposed by the secular state. A religious minority, therefore, can be an enclave where different traditions can prevail, subject to the compelling government interest test. The compelling interest test allows government to regulate for sufficiently strong reasons, principally to prevent tangible harm to third persons who have not joined the faith. Because non-discrimination doesn't provide that enclave for free exercise, substantive exemptions are required. That is the core of the debate.

III. RECENT EXAMPLES

A. *Government Attempts to Prevent Worship Services*

The Supreme Court has been committed in recent years to the view that religious liberty consists merely of non-discrimination. The *Smith* case is the most important and the best known example. For those of you who don't know about it, let me tell you just a little bit.

Smith was one of three cases in the last three years in which very small, non-traditional, non-Western religious minorities were brought to the very brink of being outlawed religions in the classic sense. Their central religious rituals were about to become illegal or impossible in the United States of America. Now, as it happens, all three of them ducked the bullet. They ducked it by narrow margins and through a lot of work by many people around the country. But all three of these religions came very, very close.

The first was the religion involved in the Oregon peyote case, *Employment Division v. Smith*.[3] This case sounds like it was made up by a law professor for a final exam, but it is actually a real case. Smith had a friend named Black. One of them was an American Indian; one was not. Smith and Black wanted to go to a peyote service and see what it was like.

The peyote religion is bona fide. It was found being practiced in the Southwest by the first Spanish explorers, as described in the very earliest written records, in substantially the same way that it exists now. It uses peyote in intoxicating quantities in an all-night ceremony. Participants are required to sober up before they leave in the morning. The faithful believe that they directly experience the presence of God in peyote intoxication.

Peyote is not an important recreational drug; it never has been so and

2. 374 U.S. 398 (1963).
3. 494 U.S. 872 (1990).

it is not likely to become so. Peyote occurs naturally in certain cacti in the desert Southwest. You can get a license from the federal government to grow it for religious use. In far south Texas there are government-licensed peyote farmers. You take peyote by eating the cactus buds, which I understand—this is not first-hand reporting—are very difficult to get down. Lots of people get sick when they try to take them. But if you persist you can directly experience the presence of God, if you believe in this religion. So there is a payoff at the end, but it is not a recreational payoff.

This religion exists from northern Mexico to Alberta. It operates legally under the federal regulatory exemption and under state exemptions in many states—some sources say twenty-three states, others say twelve states; there is some argument about what it means to incorporate federal law in this area.[4] Oregon was not one of these states with an exemption, but no one had been prosecuting worshipers.

Smith and Black had the misfortune that they worked as drug counselors in a rehabilitation clinic that had an absolute no-tolerance rule for its employees. Their supervisor testified at one point that if they had gone to Catholic Mass and taken wine, he would have fired them for that too.[5] I don't believe him, but that's what he said, trying to show that there was no discrimination or hostile motive at work.

Smith and Black were fired, and they filed for unemployment compensation. The case came to the Supreme Court twice. The first time, the Court said it wanted to treat the case as though it were a criminal prosecution, even though it wasn't. The Court said it wanted to decide whether Oregon could criminally prosecute these people.[6] This came from five justices who like to complain about what's wrong with judicial activism and say that judges should decide only the narrow case before them.

When the case came back, it was argued entirely in terms of whether the war on drugs gave Oregon a compelling interest in the no-exceptions rule. No one suggested there might be a question about the compelling interest test. But Justice Scalia wrote an opinion for five justices, which said Oregon didn't have to satisfy the compelling interest test. Oregon didn't have to satisfy a substantial basis test. Oregon didn't even have to satisfy a rational basis test. As I read the opinion, it says that if the law itself is rational—if it's rational to ban peyote in Oregon—then Oregon need have no reason whatever for refusing to carve out a religious exemp-

4. *See* Reply Brief for Petitioners, Employment Div., Dep't of Human Resources v. Smith at n.8, 494 U.S. 872 (1990) (No. 88-1213), *available in* LEXIS, Gen. Fed. USPLUS Library (eleven or twelve states); Brief for Respondents, Employment Div., Dep't of Human Resources v. Smith text accompanying notes 16-17, 494 U.S. 872 (1990) (No. 88-1213), *available in* LEXIS, Gen. Fed. USPLUS library (twenty-three states).

5. *See* Black v. Employment Div., Dep't of Human Resources, 721 P.2d 451, 452 (Or. 1986), *vacated*, 485 U.S. 660 (1988).

6. *See* Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660, 662 (1988).

tion. Refusing a religious exemption is simply not a constitutional issue.[7]

Now, the civil liberties optimist reading this says something like: "Oh, it's a drug case. Drugs are special. We know the Court is crazy about drugs. And that's all it means." But if that were all it meant, Justice O'Connor wrote a concurring opinion that would have solved the problem—it's a drug case, there's a compelling interest, and no exceptions for drugs.[8]

The other way to look at *Smith* is that it was a worship-service case. The peyote ritual was the central worship service of this religion. The Supreme Court said it can be criminalized, and that criminalizing a worship service raises no issue to be decided under the free exercise of religion clause. Once the Court decides the law is neutral and generally applicable, there is simply no issue left. That was *Smith*.

Why did I say that the peyote religion came only to the brink of being outlawed? Because there was such a political outcry in Oregon that Oregon passed an exemption. After having made this bad doctrine for the rest of the country, Oregon then exempted everyone except prisoners from the ban on the peyote religion.[9]

The second case involved the Hare Krishnas.[10] The Hare Krishnas are not the favorite group of lots of people. I will tell you, however, that they are accepted as a legitimate branch of Hinduism by every major Hindu organization and religious authority, so far as I'm aware. The legal threat to the Hare Krishnas in the United States got front page coverage in newspapers in India.

The Hare Krishnas were sued in state court in California by the parents of one of their members, who had been under age when she joined them. The parents alleged that the Hare Krishnas had falsely imprisoned their daughter by persuading her to believe in their religion. It later came out that the parents had chained their daughter to the toilet to keep her from going to Hare Krishna meetings. No one sued over false imprisonment on that.

The parents' complaint had multiple counts. The Hare Krishnas, they said, had persuaded their daughter by teaching her things. Then, at the daughter's request, they concealed her location from her parents. That counted as false imprisonment. There was also a defamation count, an emotional distress count, and a wrongful death count—the Hare Krishnas were alleged to have caused her father's second heart attack.

The jury brought in a total of $32 million in compensatory and puni-

7. *See* Employment Div., Dep't of Human Resources v. Smith 494 U.S. 872, 876-90 (1990).

8. *See id.* at 903-07 (O'Connor, J., concurring).

9. *See* Or. Rev. Stat. § 475.992(5), (6) (Supp. 1992).

10. *See* George v. International Soc'y for Krishna Consciousness, 262 Cal. Rptr. 217 (Cal. Ct. App.), *review denied and ordered not published* 1989 Cal. Lexis 5077 (Cal. Nov. 30, 1989), *vacated*, 499 U.S. 914 (1991).

tive damages on these various counts.[11] The trial judge reduced it to about $10 million, and the state appellate court reduced it to about $6 million.[12] The state supreme court denied review.[13]

The trial judge appointed a receiver to take possession of all the temples, all the places of worship, and all the ashrams or monasteries in California. Then the plaintiffs went on to file *lis pendens*—notifications that the property was in litigation—on all the temples and monasteries elsewhere in the country. All of this property would have had to be sold to pay the judgment. So in the same way that the Romans destroyed the Temple in Jerusalem and that Henry VIII seized the monasteries in England, all the places of worship of the Hare Krishnas in the country were going to be seized to pay this single judgment.

After the state supreme court denied review, the trial judge ordered the receiver to start selling the property. That was probably a tactical mistake. Michael McConnell, of the University of Chicago, represented the Hare Krishnas and got a chance to file an extra set of papers on a motion for an emergency stay of the sale.

The motion went to Justice O'Connor, who is the Circuit Justice for the Ninth Circuit. Those of you in a remedies course know that Justice O'Connor thinks that punitive damages are unconstitutional and widely abused.[14] So she was the right Justice to go to. She stayed the sale of the temples and the monasteries for reasons having nothing whatever to do with the First Amendment, so far as I can tell.

Then McConnell filed a petition for certiorari, and in March, the case was vacated and remanded[15] for further consideration in light of *Pacific Mutual Life Insurance Co. v. Haslip*,[16] a case about punitive damages against an insurance company. Again, this had nothing to do with the First Amendment, except that it followed the logic of the equal-treatment view of religious liberty: the Hare Krishnas had to be treated as well as an insurance company. On remand, the case eventually settled for an amount they could afford to pay, and so the Hare Krishnas ducked the bullet.

The third case is the one that I argued, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[17] involving animal sacrifice in south Florida.

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11. *See George*, 262 Cal. Rptr. at 231.

12. *See id.*

13. *See* George v. International Soc'y for Krishna Consciousness, 1989 Cal. Lexis 5077 (Cal. Nov. 30, 1989), *vacated*, 499 U.S. 914 (1991).

14. *See, e.g.*, TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2728-42 (1993) (O'Connor, J., dissenting); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42-64 (1991) (O'Connor, J., dissenting); Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282-301 (1989) (O'Connor, J., dissenting in part); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 86-89 (1988) (O'Connor, J., concurring).

15. *See* George v. International Soc'y for Krishna Consciousness, 499 U.S. 914 (1991).

16. 499 U.S. 1 (1991).

17. 113 S. Ct. 2217 (1993).

The religion is Santeria. It originated in West Africa several thousand years ago. It came to the Caribbean with slavery, where slaveowners tried to suppress it. African religion in the United States was totally suppressed under slavery. The Caribbean slave owners were less diligent, or the Caribbean slaves were more clever—I'm not sure which—but, anyhow, African religion survived in much of the Caribbean. It survived in part by taking on the trappings of Catholicism, and thus it evolved in different ways on different islands. The Cuban variant is called Santeria because it has absorbed many of the Catholic saints, and each African god is now identified with a particular Catholic saint.

Santeria came to the United States mostly with the refugees who fled from Castro. I don't think anybody knows, but the trial court found that 50,000 to 60,000 practitioners of Santeria live in south Florida.[18] Santeria practitioners sacrifice chickens and goats in the rituals associated with major life events: birth, death, marriage, sickness, and especially the initiation of new priests.[19]

Santeria has continued to practice underground. It is still mostly a religion of poor people, mostly black Cubans, although neither of those generalizations is entirely true. There are white Santeria, and there are middle-class and professional Santeria. There are people who are both Catholic and Santeria, or at least attend services in both faiths. The religion has been unpopular in south Florida, but before this case there had been no active efforts to suppress it.

The people I represented came to believe that their family was called to take Santeria public, to institutionalize it, to create a church: there would be a Santeria church on the corner like the Methodist church or the Catholic church on the corner. When they acquired property in Hialeah and announced that the church would open, the city responded with four ordinances that were designed to ban animal sacrifice anywhere in the city and to do so without affecting any other killing of an animal in the city for any reason.

Florida is not a big animal-rights state. Hunting is a constitutionally protected activity in Florida. There is a state supreme court decision that if they interfere with your deer lease they've got to pay you compensation.[20] It is a crime in Florida to help an animal escape from a hunter.[21] The state runs camps that teach junior high school kids how to hunt. But Hialeah was suddenly very concerned about the killing of animals in religious ceremonies.

The ordinances were written in religious terms. They made it unlaw-

18. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1470 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993).

19. *See id.* at 1470-71.

20. *See* Alford v. Finch, 155 So. 2d 790, 793 (Fla. 1963).

21. *See* Fla. Stat. Ann. § 372.705 (West Supp. 1993).

ful "to sacrifice."[22] "Sacrifice" was defined as "to unnecessarily kill . . . an animal in a . . . ritual or ceremony not for the primary purpose of food consumption."[23] So if you skipped the ritual it would be okay. You could kill your dog for no reason in the back yard, and you would not violate Ordinance 87-52 or 87-71. An "unnecessary" killing would violate Ordinance 87-40 even without a ritual, but in the context of surrounding Florida law and local practice, killing a surplus pet because you no longer wished to care for it would be a necessary killing, and therefore entirely legal. Florida law, incorporated into Ordinance 87-40, expressly authorized property owners to put poison in their yard to kill any animal that wanders by.[24] Even a killing in a ritual would not violate Ordinance 87-52 or 87-71 if the ritual were not the primary purpose. The City's position at trial was that this clause protected kosher slaughter, because in kosher slaughter the City thought that food consumption is primary and religion is secondary. But in Santeria the City thought the priorities were reversed, even though nearly all the animals are eaten in a ritual feast following the sacrifice.

Finally, to prove a violation of Ordinance 87-40, 87-52, or 87-71, the City had to prove that the killing was "unnecessary."[25] An opinion from the State Attorney General said animal sacrifice is "unnecessary." If you know that Santeria is a false religion, then you know that Santeria sacrifices are unnecessary. The Attorney General either thought he knew that, or more likely, he gave the issue no serious thought. If Santeria is a true religion, then Santeria sacrifice is absolutely necessary. And if anything is clear it is that the state cannot decide whether Santeria is a true or false religion. Every prosecution under the ordinance would be a heresy trial.

The fourth ordinance, 87-72, made it unlawful to kill an animal for food purposes except in a place zoned for a slaughterhouse.[26] But there was an exception for the small scale slaughter of hogs and cattle![27] The City conceded that it had not meant to prohibit the boiling of live lobsters. The Court viewed Ordinance 87-72 as simply part of the package designed to suppress Santeria.[28]

The case was tried before I got involved in it by three volunteer lawyers for the ACLU. It was tried before *Smith*, under the compelling in-

22. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2236-38 (1993) (reprinting City of Hialeah, Fla. Ordinance No. 87-52 (September 8, 1987), City of Hialeah, Fla. Ordinance No. 87-71 (Sept. 22, 1987)).

23. *Id.* at 2236 (reprinting City of Hialeah, Fla. Ordinance 87-52 (Sept. 8, 1987)).

24. *See id.* (reprinting City of Hialeah, Fla. Ordinance 87-40 (June 9, 1987)); Fla. Stat. Ann. § 828.08 (West 1976).

25. *See id.* at 2235-38 (reprinting City of Hialeah, Fla. Ordinance No. 87-40 (June 9, 1987); City of Hialeah, Fla. Ordinance 87-52 (Sept. 8, 1987); City of Hialeah, Fla. Ordinance 87-71 (Sept. 22, 1987)).

26. *See id.* at 2238 (reprinting City of Hialeah, Fla. Ordinance No. 87-72 (Sept. 22, 1987)).

27. *See id.* (reprinting City of Hialeah, Fla. Ordinance No. 87-72 (Sept. 22, 1987)).

28. *See id.* at 2230.

terest standard. The trial judge found four compelling interests: sacrifice was bad for the animals, it was bad for children, it was unsanitary, and it interfered with zoning.[29] The compelling interest test has become much watered down in recent times.

I agreed to do the appeal, and then *Smith* came down. I thought the case was hopeless, but then I looked at the ordinances and, seeing how they were drafted, decided that *Lukumi* should be argued in the Supreme Court as a discrimination case.

The Supreme Court does not get many such cases. Indeed, the first paragraph of the opinion talks about the "fundamental nonpersecution principle" that the Court rarely has occasion to enforce.[30] That's Justice Kennedy speaking. We had presented the case that way. Here was one of the few cases the Supreme Court had ever seen where government set out to suppress a single religion. The Court struck down these ordinances 9-0, but without casting the slightest doubt on *Smith*. There seemed clearly to be six votes for *Smith* in the *Lukumi* opinions. Blackmun and O'Connor adhered to their separate opinions in *Smith*,[31] and Justice Souter wrote a long, scholarly opinion in which he set out the choice between an equal-treatment model of religious liberty and a no-substantive-interference model of religious liberty. He said that issue remained open, that *Smith* didn't settle it, and, in an appropriate case, the Court should reconsider *Smith*.[32]

Those are the recent Supreme Court cases. It seems to me that those cases suggest a real crisis. The worst result was avoided in all three of them, but in all three of them we had, in a land that was supposed to have been founded for religious liberty, a worship service central to a minority faith at the very brink of suppression. The worship service was made criminally illegal in two of the cases, and the minority faith was faced with losing all its facilities for worship in the third case.

B. *Other Regulation of Churches*

More generally, even mainstream churches are having lots of conflicts with government regulation. These conflicts are sometimes over faith matters, but more commonly they are over institutional matters, where the government tends to see no religious liberty issue at all.

One such case is *Jimmy Swaggart Ministries v. Board of Equalization of California*,[33] which didn't get nearly as much press as *Smith*. But in some ways, *Swaggart* is just as important. The holding in *Swaggart* is

29. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467, 1485-86 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993).

30. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2222 (1993).

31. *See id.* at 2250-52 (Blackmun, J., concurring).

32. *See id.* at 2240-50 (Souter, J., concurring).

33. 493 U.S. 378 (1990).

that there is no constitutional right to religious tax exemption.[34] The tax exemption of church property, in effect in every state, is now a matter of legislative grace. Tax exemption is probably not in much danger, at least with respect to core church property; it probably is in danger with respect to collateral property like retreat houses, summer camps, and the like.

Part of the reasoning of *Swaggart* was that economic burdens and regulation of the church raise no free-exercise issue unless they require the church to violate a specific doctrinal tenet. Swaggart did not think it was a sin to pay the taxes, so there was no free-exercise problem. This is a thoroughly secular view of religion—it views God as the great schoolmarm who lays down certain rules, and it defines religion as obeying those rules. There are ministers who present religion in this way, and there are people who experienced religion in this way and who consequently left their church, and who retain the image of religion as simply a set of rules to be obeyed. Obeying the rules is an aspect of religion, and in some faiths obeying a set of rules is one of the central aspects of the religion. But most people who stayed in their religion see a lot more than simply obeying rules. They see positive benefits; they see a community of which they are a part that is doing a lot of things, only some of which are obeying the rules.

Jesse Choper has offered what may be the extreme form of this notion that you don't have a claim unless you are obeying God's rules: do you fear extra-temporal consequences? If you're going to hell for it, it's a religion. Other than that, we're not sure it's covered by the free exercise clause.[35]

This definition of religion has astonishing consequences that the Supreme Court has not explored. Let me tell you about some lower court cases and some cases that didn't make it to court at all.

There are lots of things that are obviously religious that are not required. The Second Circuit told some high schoolers they didn't have a free exercise claim about their right to pray, because they weren't Muslims. Muslims are required to pray at a certain time every day and that might fall during school hours, but Christians don't have that problem. Prayer isn't mandatory for Christians and so it isn't a free-exercise issue, according to the court.[36]

The Supreme Court of Washington said that becoming a minister is not free exercise of religion because no one is required to do that.[37] I'm

34. *See id.* at 378.

35. *See* Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. Ill. L. Rev. 579, 601-04.

36. *See* Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

37. *See* Witters v. State of Washington Comm'n for the Blind, 771 P.2d 1119, 1123 (Wash.) (en banc), *cert. denied*, 493 U.S. 850 (1989).

not making this up. They did say it in a context where there was a countervailing establishment clause issue.

The Boston Landmarks Commission argued that it could tell Jesuits where to put the altar in their chapel in Boston, because there was no doctrinal tenet that said the altar had to be in one place or another.[38] The Supreme Court of Massachusetts avoided *Smith* and *Swaggart* on that one, protecting the Jesuits by turning to the state constitution, which is a sensible place to turn if you are a defendant in one of these cases.

Mother Teresa's shelter for the homeless here in New York was shut down without any litigation because, after *Swaggart* and *Smith*, Mother Teresa clearly didn't have a defense.[39] The shelter was shut down because it didn't have an elevator and it was on the second floor, and the authorities said there was no access for the handicapped homeless. The nuns said that if they got handicapped homeless, they would carry them up the stairs. The authorities said that was unacceptable. "This isn't India, this is America, and carrying people up the stairs is inconsistent with American notions of human dignity." Better they should sleep in the streets apparently. That's my nominee for the most frivolous compelling interest ever asserted. But, after *Smith*, no compelling interest is required.

There are a very large number of church zoning cases.[40] It is almost impossible for a church to claim that it's a tenet of the faith that the church or any of its functions must be in any particular place. So, under *Swaggart*, none of those churches has a claim.

One of the post-*Smith* cases that got litigated and reported is *Cornerstone Bible Church v. City of Hastings*.[41] The case reveals much about the equality model of religious liberty. Cornerstone appears to have been a small, non-denominational, evangelical Protestant, entrepreneurial-minister-type church. It rented space in a downtown storefront—disturbing no one, so far as we can tell from the opinions—for three years. Then someone discovered that it was operating in violation of the zoning laws. In Hastings, Minnesota, unlike most other towns in America, churches could not be in a commercial zone. There is lots of litigation over laws prohibiting churches in residential zones, but Hastings said they could not be in a commercial zone. The church said that there was no other space in town that it could afford and that was on the market. Telling Cornerstone that it could not be in a commercial zone was the

38. *See* Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571, 573 (Mass. 1990).

39. *See* Sam Roberts, *Fight City Hall? Nope, Not Even Mother Teresa*, N.Y. Times, Sept. 17, 1990, at B1.

40. *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 Sup. Ct. Rev. 1, 48-50; Laurie Reynolds, *Zoning the Church: The Police Power Versus the First Amendment*, 64 B.U. L. Rev. 767 (1984); Marc D. Stern, *God's Shrinking Little Acre: Zoning and Religious Institutions*, 4 Seton Hall Const. L.J. (forthcoming 1994).

41. 740 F. Supp. 654 (D. Minn. 1990), *aff'd in part and rev'd in part*, 948 F.2d 464 (8th Cir. 1991).

same as kicking it out of town. The city said, "tough"—or maybe "good"—it's not clear which.

The trial judge found a case that he thought was squarely on point that said the inability to afford property with the necessary zoning was irrelevant to a First Amendment challenge to the zoning law. If the First Amendment plaintiff could not compete economically in the real estate market, that was plaintiff's problem, not the zoning authority's problem. The case was *City of Renton v. Playtime Theatres, Inc.*,[42] about the First Amendment zoning rights of pornographic movie theaters. Again, it is the logic of equal treatment. Churches and pornographic movie theaters are both engaged in First Amendment activities. They have different political valences, and pornography gets only limited constitutional protection because it is thought to be speech of low value,[43] but pornographic zoning cases provide a comparison point for applying the equal treatment view of the free exercise clause.

The court of appeals reversed on the theory that, although the church had been treated as well as pornographic movie theaters, it had been treated less favorably than the Masonic Lodge.[44] And the church and the Masonic Lodge were both not-for-profit organizations.[45] So again, you have to find some sort of discrimination to prevail in one of these cases.

IV. THE RELIGIOUS FREEDOM RESTORATION ACT

The Religious Freedom Restoration Act[46] is a response to these theoretical and practical problems. It is an effort to enact the theory that the free exercise of religion is a substantive civil liberty, that the religious minorities among us get to practice their faith and not merely to think about it or to believe in it. It is an attempt to create a statutory right to the free exercise of religion, pursuant to Congress' power under Section 5 of the Fourteenth Amendment to enforce the Fourteenth Amendment and therefore presumably to enforce all the rights incorporated in the Fourteenth Amendment.

The Act was first proposed shortly after *Smith* itself. The bill was supported by a wall-to-wall coalition of religious and civil liberties

42. 475 U.S. 41 (1986).

43. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (plurality opinion) ("[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ."). *Renton* rests on the holding of *Young*, and applies *Young* much more restrictively than *Young* itself, but it does not explicitly repeat the plurality's reasoning about the low value of pornography.

44. *See* Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 471 (8th Cir. 1991).

45. *See id.*

46. Pub. L. No. 103-141, 107 Stat. 1488 (1993).

groups, including the ACLU, People for the American Way, the National Council of Churches, major Jewish organizations, the National Association of Evangelicals, the Mormons, and some conservative religious groups of which most of you have never heard. The President said at the signing ceremony that only divine intervention could explain this coalition.[47]

The one important group outside the coalition was the Catholic Bishops, who opposed the bill for two years because they feared it would somehow create a religious right to abortion. After the Supreme Court's *Casey*[48] decision continued constitutional protection for abortion, the stakes got a lot lower, and a solution was eventually negotiated. The stakes had been a lot higher when everyone thought that *Roe v. Wade*[49] was going to be overruled. So the abortion issue was finally worked out, and then all the major religious groups in the country were supporting this bill.

At that point the prison authorities demanded that prisons be excluded from the bill. They could not have religious liberty in the prisons because prisoners would make up phoney religions demanding steak and champagne for dinner and guns and knives for their services. Janet Reno asked Senator Kennedy for two weeks to study this issue, and to her great credit, she came back and said that no exemption was necessary. She said that the compelling interest test would take care of any legitimate security and safety issues, and she stared down the Federal Bureau of Prisons.

But a number of state attorneys general, on behalf of state prison wardens, brought immense pressure on their senators. Under the Senate rules, one or two senators can hold up a bill indefinitely, and the bill was on hold for about three months. The bill had passed the House unanimously; it had been recommended out of the Senate Judiciary Committee 15-1.[50] It had fifty-seven co-sponsors in the Senate; the President was saying he wanted the bill on his desk so he could sign it, but the bill couldn't get to the floor for a vote.

The day I spoke at Fordham, the bill got to the floor. The prison amendment was voted down 58-41; the main bill passed 97-3. The House later accepted a minor Senate amendment, and the President signed the bill on November 16, 1993.

We are now in a posture that is somewhat like the Voting Rights Act, where the Supreme Court interpreted the constitutional protections against race discrimination in voting very narrowly, and Congress responded with a statutory protection that was much broader. Here, the

47. *See* Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. Times, Nov. 17, 1993, at A18.

48. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

49. 410 U.S. 113 (1973).

50. *See* Religious Freedom Restoration Act of 1993, S. Rep. 111, 103d Cong., 1st sess. 14 (1993).

Court adheres to the non-discrimination, formal-equal-treatment view of religious liberty. Congress adheres to the view that religious liberty is a substantive liberty and that no substantial burden should be placed on a religious practice without a compelling interest. I assume that this conflict between the branches will encourage a constitutional challenge to the Act. Some state government will say that RFRA is beyond Congress' power. I think that that constitutional challenge should be and will be rejected. Nearly every sitting Justice, including the most conservative ones, has written opinions acknowledging the constitutionality of the Voting Rights Act, and I think the same theory applies here.

Smith and RFRA mean that most religious liberty litigation henceforth will be under the statute rather than under the Constitution, or maybe under state constitutions rather than under federal law, but the principal federal claim will be statutory. That means that if an unpopular religion prevails in court and Congress gets excited enough about it, Congress can amend the statute to cut that religion out.

The vote on the prison amendment was some test, at least at the moment, of congressional willingness to enact RFRA across-the-board and keep it across-the-board. I am less confident that the coalition that got the bill enacted can be held together in the future with respect to particular amendments. If some strong secular interest group with lots of support on the Hill and some support among one sector of the religious community comes in demanding an amendment, for example, to eliminate the exemption for discrimination in employment in religious schools, I don't know what might happen. Similarly, I don't know what might happen with the landmark people, the zoning people, and all sorts of folks who could come in and demand amendments at some time in the future. I certainly hope that the coalition and the Congress will stand on principle and resist amendments that would erode the Act. But for now, we have a statutory guarantee of free exercise that is as broad in its terms as the constitutional guarantee that the Court so dramatically narrowed in *Smith*.

QUESTIONS & ANSWERS

QUESTION: *When you argued the* Lukumi *case, did you make a conscious litigation strategy decision not to try to chip away at* Smith *because you could win on equal treatment grounds?*

MR. LAYCOCK: Basically yes. One of the things about the Supreme Court is you get to have it both ways on the breadth of your argument. There were five amicus briefs that did consciously chip away at *Smith*—told them how wrong it was, told them what impact it had, gave them five different ways to limit it or narrow it or trim it back without squarely overruling it. The amici viewed it as an opportunity to educate the justices.

But I made a deliberate decision not to breathe a hint that we wanted

Smith overruled or that this was a stepping-stone to get it overruled. One reason was that I don't think they would have granted certiorari to consider that. The cert. petition presented the question as follows: this is the first chance to tell us what *Smith* meant. What is a neutral and generally applicable law? That's the important new issue.

A second reason to limit the argument is that you get only fifty pages. You can argue only so many things. There were four ordinances, there were four alleged compelling interests. It was numbingly dull at times, but we had to go through every one of them. If they found that any one of the ordinances had a section that was neutral, that was enough to suppress the practice; it didn't matter if we won on fifteen other issues, we lost. Similarly, if they found that any one of the compelling interests was really compelling, we would have lost. There was no space left to tell them what was wrong with *Smith*. We left all that to the amici.

QUESTION: *Were the lead and amicus briefs a concerted effort by the people on your side, or was it just serendipitous?*

MR. LAYCOCK: For the most part it was concerted. I think on both sides there was a great deal of cooperation. We had five briefs, twenty-some organizations all together. They had five briefs, seventeen animal rights organizations. There was a major effort on our side not to proliferate the number of briefs. We had what we called the "mainstream brief," by Michael McConnell at Chicago and Ed Gaffney at Valparaiso. We tried to get all the mainstream churches and civil liberties organizations united on that brief.

And then, there were other people with special concerns of their own who, for whatever reason, wanted to say their own thing and didn't want to join the main brief. The Catholic Bishops filed a brief in support of neither side but saying *Smith* was bad. The Orthodox Jewish organizations, not surprisingly, filed a brief that said this is a real threat to kosher slaughter, and besides that *Smith* is bad. The Rutherford Institute nearly always files on its own; it prefers to maintain an independent voice. It's not that they were uncooperative, but they were going to do their own thing, and that was pretty clear from the beginning. The Council on Freedom of Religion filed without consulting me in advance. I think the experience on the other side was pretty similar.

QUESTION: *I want to ask if this model of litigation in the Supreme Court is an increasingly commonplace model, where there is a concerted effort among various parties on both sides of the issue; and if that is an increasingly common model, how does that reflect on the Supreme Court as a neutral dispute resolution agency?*

MR. LAYCOCK: I don't know that it's increasing. It is very common, and I think it has been common for a long time. In part, it is simply people weighing in to let the Court know they care about the issue. Sometimes, the amicus is free to say things that the party can't say, like what was wrong with *Smith*. Sometimes the amicus brings real information to bear.

We wanted a Muslim brief because Muslims sacrifice, but we couldn't get one. I think we probably didn't have the personal ties to the Muslim community to do it. We didn't know whom to approach, and the few people we did approach didn't want Islam to be associated with what they viewed as a less reputable religion. They thought they had enough image problems of their own already. So we didn't get that brief.

It was very important to me to get some mainstream religious groups simply to say that this was a legitimate religion. Santeria is not a bunch of kooks who made something up last week, and I wanted someone besides me to say that. A good deal of maneuvering went into making that happen.

It's much easier to get these kinds of briefs in the Supreme Court than it is in the court of appeals, because the organizations and the lawyers who write them can only spread themselves so thin. How do you decide which cases are important enough in the court of appeals? I wanted that kind of legitimation in the court of appeals, and it was hard to get. The liberal denominations had animal rights people on their staff or in their pews that they were afraid to offend, and the conservative denominations had people in their pews who thought this was satanism or idolatry. So it was very hard to get amici on board.

The Christian Legal Society, the Baptist Joint Committee on Public Affairs, and the Rutherford Institute were the three amici in the court of appeals. Two of them said they wouldn't do it alone, that they needed some other groups for political cover. The other side did not have that problem, but I'm sure they had the same sort of coordination.

In the graduation prayer case, I did an amicus brief for the American Jewish Committee, the American Jewish Congress, the Anti-Defamation League, the National Jewish Community Relations Advisory Council, the National Council of Churches, the Baptist Joint Committee on Public Affairs, the Stated Clerk of the Presbyterian Church (U.S.A.), the Seventh-Day Adventists, People for the American Way, and the New York Committee on Public Education and Religious Liberty. It was the same strategy, trying to get all the mainstream amici on a single brief. But it was difficult at places to hold that range of groups on a single brief. There were places where we had to write, "Some of these amici believe X and some of these amici believe Y, but that's not at issue here. The only thing at issue here is Z, and we're all agreed on Z." That kind of coordination goes on in most of the big cases that you read about and in some of the smaller cases as well.

QUESTION: *Will the Religious Freedom Restoration Act lead to federal regulations that enumerate protected religions?*

MR. LAYCOCK: I hope not, and I don't think so. This is not a bill that creates an agency or a bureaucracy for its operation. I don't think there are going to be any regulations.

The principal enforcement mechanism is a private right of action with attorneys' fees. Now, it applies to the federal agencies as well as the state

and local governments. It may be that some of the federal agencies will promulgate regulations about their own operations, setting out how they deal with their responsibilities under the Religious Freedom Restoration Act. That could happen.

But I certainly hope that no one undertakes to promulgate an official list of religions. Such a list almost certainly would not get the right answer, and as your question implies, such a list would raise problems of establishment.

QUESTION: *The rule announced in* Smith *is not a new rule. It just reaffirmed the rule that was set out in* Reynolds v. United States,[51] *the polygamy case. I always thought that was a good rule because the citizenry in general, I think, will treat religious citizens fairly well. Judges, on the other hand, have shown considerable hostility to religious citizens—in their distortion of the establishment clause, for example. The statute just passed gives judges the last word as to what the law shall be, what burdens shall be imposed on religious citizens. I don't know that that's a good thing.*

MR. LAYCOCK: Well, that goes to the essence of the Madisonian dilemma. Somebody has got to have the last word. It can't be the religious minority defining for itself how far its liberty goes.

QUESTION: *It could be the legislature.*

MR. LAYCOCK: It could be the legislature, but that just means the majority would define for itself what minorities to tolerate. There would be no *right* to religious liberty but only a policy goal of religious liberty. And I think your reading of history and recent experience differs from mine. The legislature hasn't been so good.

But the case for the statute, or for a judicially enforceable free exercise clause, does not depend on an assessment of which branch is more protective. The important point is that cases do not get to the judges until after the legislature has already rejected the religious claim. That is, if the legislature leaves the religious practice unregulated or grants a religious exemption, then the judges don't get to second-guess that. The Supreme Court is quite clear that exemptions do not violate the establishment clause. They were unanimous on that in *Amos v. Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints*[52] in 1987.

So, in effect, what the statute does is that it gives the religious minority a second forum. If they can prevail in the legislature or if they can prevail in the court, then they may get an exemption and be able to practice their faith.

Some of these cases involve hostility; some of them simply involve indifference or ignorance. But there is a remarkable number of these cases that comes up. And it is also important that it's not just the legislature we're talking about. It's often some regulatory bureaucracy appointed to

51. 98 U.S. 145 (1878).
52. 483 U.S. 327 (1987).

implement a single group of statutes, and often committed to the goals of an interest group that doesn't want to brook any exception.

QUESTION: *I should have said that I think, in the long run, liberal democracy will treat religious citizens better more often than judges will.*

MR. LAYCOCK: That may be. I certainly don't think judges are heroes. Judges didn't do anything for the Mormons. They upheld laws that abolished the church, confiscated its property, and deprived all members of the right to vote. On the other hand, the judges saved the Jehovah's Witnesses in the 1940s and 1950s from very hostile regulation.[53] I think the second chance is worthwhile. But I don't necessarily think that, on average, judges are better than legislators. I really don't believe that. I think that what constitutional rights do is to give minority groups a second forum.

QUESTION: *How far can the Supreme Court go taking the teeth out of the Act by just watering down the compelling state interest test to a point where it's so narrow that it doesn't really mean anything?*

MR. LAYCOCK: I think that's the principal danger to the bill. The Supreme Court has been very inconsistent on what it means by compelling state interest. There is no government bureaucrat in America who doesn't believe that his program serves a compelling interest in every application. I think the animal sacrifice case is a clear example of how weak the compelling interest test can become in the hands of a judge who doesn't want to grant the claim.

The trial judge in Miami equated compelling interest with a rational basis. He said that protecting animals is a compelling interest because it has long been held to be a legitimate interest, citing two cases that it was within the scope of police power to protect animals.[54] If you asked him whether he realized he had just said that compelling interest and rational basis are the same thing, I think he would have said he didn't realize he had done that. But that is exactly what he had done.

Most federal judges right now are inclined to be highly deferential to the legislature. There was some fear in the Senate that judges were going to run amok and protect all sorts of crazy stuff. I think the greater risk is that they will be highly deferential and not protect nearly enough.

On the other hand, the Supreme Court's opinions on what the compelling state interest test means in the context of free exercise are really quite protective. There were a lot of cases that carved out exceptions before *Smith*, cases where the Court did not apply the compelling interest test.[55] But when they apply it, they're pretty stout about it. *Wisconsin v.*

53. The cases from these two experiences are collected in Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L.J. 409, 416-20 (1986).

54. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hiadleah, 723 F. Supp. 1467, 1486 (S.D. Fla. 1989) (citing Humane Society of Rochester v. Lyng, 633 F. Supp. 480, 486 (S.D.N.Y. 1986) and C.E. America, Inc. v. Antinori, 210 So.2d 443, 444 (Fla. 1968)), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993).

55. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439,

Yoder[56] is the most important and most famous case, where they said that the last two years of compulsory education, which certainly sounds important, wasn't compelling enough in the context of the Amish. All the unemployment compensation cases say that saving money isn't compelling enough.[57] All those cases say that speculative fears don't count; you've got to have real evidence that bad things are about to happen.

A couple of times in the past two years, in *Lukumi*[58] and in some speech cases,[59] they've said compelling really means what it says and that it is a "rare case" where the compelling interest test is satisfied. On the other hand, when they want to uphold something, compelling doesn't mean what it says, and lots of interests are important enough. So I think you put your finger on the main line of litigation over the next few years.

My own view, which I offered to the Court in *Lukumi* without picking up any response, is that the compelling interest test is an implied exception to the constitutional text.[60] As Justice Black always told us, the text is indeed absolute. We can't live with absolute protection; we know that. But the exception is implied by necessity, and that tells you something about what the exception means—that it ought to be limited to cases of clear necessity. I think this is the only way to make sense of what the compelling interest test does in constitutional doctrine. But the Supreme Court has never committed to any theory of the compelling interest test in the past, and I suspect that it never will.

QUESTION: *I suspect they will be resistant to applying a compelling state interest test because in* Smith *they denied that they ever applied it, I believe.*

MR. LAYCOCK: Justice Scalia had only five votes. He apparently believed he couldn't overrule anything, and so he didn't. He distinguished everything away instead. He said that some of the cases turned on hybrid rights of free exercise and something else. At one point he said the Court had "purported" to apply the compelling interest test, but except for *Yoder* and the unemployment cases, he said the Court had never actually done it. He said that what the Court purported to call the com-

450-53 (1988) (use of government property); O'Lone v. Estate of Shabazz, 482 U.S. 342, 349-53 (1987) (prisons); Bowen v. Roy, 476 U.S. 693, 699-700 (1986) (internal government operations); Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (military).

56. 406 U.S. 205, 235 (1972).

57. *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 831-33 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-46 (1987); Thomas v. Review Board, 450 U.S. 707, 719-20 (1981); Sherbert v. Verner, 374 U.S. 398, 406-09 (1963).

58. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2233 (1993).

59. *See* Burson v. Freeman, 112 S. Ct. 1846, 1857 (1992).

60. This view is elaborated in Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 Yale L.J. 1711, 1744-45 (1990) (reviewing Robert F. Nagel, Constitutional Cultures: The Mentality and Consequences of Judicial Review (1989)).

pelling interest test was really something less. That's one way of putting the cases together.

That is a type of opinion that Scalia likes to write. It's not limited to this context. He has done the same thing in civil procedure cases. He says that they "purport" to say that due process depends on a balancing test, but that in fact they uphold anything that comes before them, and that they should admit they will uphold anything that comes before them. He says that service of process on somebody who is just passing through the airport is constitutional because it's traditional, not because it makes sense.[61] He wrote that same opinion in two punitive damages cases, *TXO*[62] and *Pacific Mutual v. Haslip*.[63] He said the Court claims that due process imposes a limit on traditional procedure, but that the Court never strikes anything down, and it would be better to admit that.

There is a running debate between Justice Scalia, who says that none of the Court's tests mean what they say, and really anything goes, and Justice O'Connor, who says it's very important to maintain the test, but when she applies it, then anything goes, except in the punitive damages context.

QUESTION: *Do you know who the three Senators were who voted against the Religious Freedom Restoration Act?*

MR. LAYCOCK: I was told one was Jesse Helms, who had been helping to lead the charge on the prison amendment; one was Matthews from Tennessee; and one was Byrd from West Virginia; but I don't know why.

QUESTION: *With respect to this interpretation of the free exercise clause as just guaranteeing facial neutrality, it seems to me that any claims under that can be taken care of under the equal protection clause. I mean, what's left of the free exercise clause under that view? My second question is, as between that view and the substantive-right view, which is prevailing in the academic circles?*

MR. LAYCOCK: I think you're right. Nothing is left for free exercise under the equal-protection view. The free exercise clause just tells you that religion is special for equal-protection purposes, in the same way we know that race is special for equal-protection purposes. So you get a compelling interest standard for discrimination, instead of merely a rational basis standard for discrimination. I guess free exercise is just that. But this interpretation really does just make it an adjunct of the equal protection clause.

As to which view is prevailing, I don't know how much academic circles matter. The substantive theory just prevailed this morning in Con-

61. *See* Burnham v. Superior Court, 495 U.S. 604, 623-25 (1990) (plurality opinion).

62. TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2727 (1993) (Scalia, J., concurring).

63. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 36-38 (1991) (Scalia, J., concurring).

gress, and the equality theory is prevailing in the courts, and that has become an interbranch separation-of-powers problem.

Academically, I think that the substantive-protection view greatly predominates. But if you simply read the published articles, the debate appears much more balanced. Good scholars have written strong articles supporting the basic standard in *Smith*, although not the opinion.[64] I think there are more articles criticizing it[65] than defending it, but the imbalance is not great.

On the other hand, there were fifty-five constitutional law professors who signed a petition for rehearing in *Smith*, and those signatures were gathered in a matter of days. So I think the general opinion among constitutional law professors is more lopsidedly against *Smith* than the published literature, but I don't know that for sure.

QUESTION: *Under the new statute, does the statute as a whole have to serve a compelling interest, or does the government have to have a compelling reason for refusing an exemption from the statute? And what is a substantial burden on religion under the statute?*

MR. LAYCOCK: The state has to have a compelling interest in imposing the burden on the individual's religion. An exemption would avoid imposing a burden, so we are focused only on the interest in denying exemptions.

Part of the problem legislatively was that no one could draft any new language. You had to do the whole thing in terms of familiar formulas, to hold the coalition together. That broad-based a coalition couldn't agree on new language. So it doesn't say some things as explicitly as I would like it to. It does not explicitly say anything about the *Swaggart* standard. The Committee report and the floor debate keep offering zoning cases as an example, which is evidence that Congress' conception of burden is also broader than the Supreme Court's conception of burden in *Swaggart*, but neither the statute nor the legislative history ever says that explicitly.

64. *See, e.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308 (1991); Suzanna Sherry, Lee v. Weisman, *Paradox Redux*, 1992 Sup. Ct. Rev. 123; Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 Sup. Ct. Rev. 373; Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 Notre Dame J.L. Ethics & Pub. Pol'y 591 (1990).

65. *See, e.g.*, John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 Ind. L. Rev. 71 (1991); 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); Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 B.Y.U. L. Rev. 7.