CATHERINE M.A. McCAULIFF

Religion and the Secular State†

Congress shall make no law respecting an establishment of religion . . . or prohibiting the free exercise thereof." So provide the religion clauses of the First Amendment to the United States Constitution, referenced as the establishment clause and the free exercise clause. Their wording has remained unaltered since 1791, and their stable phraseology belies the sometimes turbulent changes in political and social attitude toward religion in this secular state. For at least forty years after the Bill of Rights amended the Constitution, it was clear to all concerned that the religion clauses prevented the United States Congress from interfering with the States' provisions regarding religion, including the establishment of a State-supported church. Massachusetts, for example, did not repeal its establishment until 1833.[1]

I. The Twentieth-Century Longing for Separation of Church and State

The notion of separation of church and state was not mentioned in the United States Constitution. Nevertheless, during the first half of the 20th century, separation became quite popular, most especially with secularists but also with members of some Christian denominations. In some instances, separationists did not like the stance of other Christian denominations.[2] The dislike of other denominations in some instances also extended to political perceptions about the other denominations and their adherents. This resulted in prejudice, particularly against Jews and Roman Catholics.[3] Masons had shown the way by "adopting eclectic rituals drawn from religions across the globe and throughout human history . . . [so that they] denied the distinctiveness of any particular religion."[4] Various Baptists, Jews, atheists and Masons were eventually joined by the Ku Klux Klan which was the most successful organization to popularize the notion of separation of church and state as a fundamental constitutional right. The Revised Klan during the years, between 1921 and 1926, "exerted profound political power in states across the country and, probably more than any other national group in the first half of the century, drew Americans to the principle of separation."[5]

The Klan made it seem that the founding fathers of the American Republic had provided for the separation of church and state, which, in fact, would have been

CATHERINE M. A. McCAULIFF, J.D. Ph.D, is Professor of Law at Seton Hall University School of Law, where she teaches Comparative Constitutional Law; Jurisprudence; European Legal History; English Legal History; First Amendment; Religion and the First Amendment; Theory of Contracts; Agency, Partnerships and LLCs; and Shakespeare and the Law. She is Co-Chair of Columbia University's Seminar on the History of Law and Politics and an elected member of the American Law Institute.

† This article first appeared in *American Journal of Comparative Law* 58 (2010): 31-49. The General Reporters are grateful for permission to reprint it here. It has not been revised for 2014.

1. Michael S. Ariens and Robert A. Destro, *Religious Liberty in a Pluralistic Society*, 2nd ed. (Durham, North Carolina: Carolina Academic Press, 2002), 48-53 [citing Jacob C. Meyer, *Church and State in Massachusetts from 1740 to 1833* (Cleveland: Western Reserve University Press, 1930) to the effect that the 11th amendment of the Massachusetts State constitution abolished the right to tax for public worship].

2. Philip Hamburger, *Separation of Church and State* (Cambridge: Harvard University Press, 2002), 400 (quoting from a Puritan descendant and advocate of separation of church and state, William M. Grosvenor, "[b]efore it is too late and the hordes of Europe and Asia have engulfed us, let us arise and fight, not with dreadnoughts, but for Puritan Ideals and Puritan morals, for Anglo-Saxon freedom and Anglo-Saxon discipline, for Almighty God. ...").

3. Id. at 401-402 (listing some articles in one anti-Catholic newspaper, the *Menace*, including "The Mother of Harlots and Her Children," "The Rape of Civic Honor – Americanism Betrayed," "Rome the Rum Dealer," and "Alice –The Cincinnati Convent Slave!" and stating its support for separation of church and state in political campaigns). Jews often advocated separation of church and state. Gregg Ivers, *To Build a Wall: American Jews and the Separation of Church and State* (Charlottesville: University Press of Virginia, 1995).

4. Hamburger, supra n. 2 at 397.

5. Id. at 407.

impossible while there were still State-established churches.[6] Klan members believed that attendance at public schools should be compulsory, sharing the assumptions of liberal intellectuals about parochial schools.[7] Therefore, it is not surprising that *Everson* – the first case construing the Establishment Clause of the First Amendment – concerned at least indirectly parochial-school education and opined that the "wall [of separation] between church and state . . . must be kept high and impregnable. We [the Supreme Court] could not approve the slightest breach."[8] The author of the opinion in *Everson* was Associate Justice of the United States Supreme Court Hugo L. Black (1886-1971), a Baptist politician from Birmingham, Alabama and a Klansman who was suspicious of Catholics, but progressive and concerned for the poor.[9] In the America of the 1930s and 1940s, "the separation of church and state flourished as a constitutional ideal, bringing together disparate groups by appealing to their aspirations for America and their loathing for Rome."[10]

Everson dealt with a New Jersey Township's reimbursement of bus transportation money to parents of children enrolled in parochial schools. This was done because children in public schools would be provided with school bus services while children in parochial schools would not. In *Everson*, a New Jersey taxpayer's challenge to this reimbursement was denied on the grounds that bus transportation is a *neutral*[11] government service. Despite the result the Court reached, Justice Black led with the notion of *separation* between church and state.[12] In the next Establishment Clause case after *Everson*, Justice Black applied the logic of *separation* to reach the conclusion that

6. Id. at 409 (quoting from the Klan member's oath of allegiance to protect "the sacred constitutional rights – and privileges of – . . . separation of church and state – liberty – white supremacy – just laws – and the pursuit of happiness – against any encroachment...").

7. Id. at 414 ("According to the Klan, in public schools, unlike in Catholic institutions, the young would 'be taught *how to think, not* what to think.' On such assumptions, which sometimes came remarkably close to those of liberal intellectuals, the Klan and allied organizations, including many Masonic lodges, joined movements for obligatory public schooling in various states . . .")(italics original, internal citation omitted).

8. Everson v. Bd. of Educ. of the Twp. of Ewing, 330 U.S. 1, 18 (1947). See also Reynolds v. United States, 98 U.S. 145, 164 (1878) (referring to a "wall of separation between church and State" in criminalizing polygamy when a Mormon sought an exemption on the ground of free exercise); Ronald F. Thiemann, *Religion in American Public Life: A Dilemma for Democracy* (Washington, D.C.: Georgetown University Press, 1996) (arguing that "the introduction of the notion of separation into the Court's" jurisprudence led to confusion because the "only sense in which religious communities and the modern welfare state are to remain `separate' is that neither should exercise final authority over the values, beliefs and practices of the other").

9. Hamburger, supra n. 2 at 425-34 [citing Howard Ball, *Hugo L. Black: Cold Steel Warrior* (New York: Oxford University Press, 1996) and Roger K. Newman, *Hugo Black: A Biography* (New York: Pantheon Books, 1994)]. Black's first public client, in 1921, was a Klansman who had murdered a Roman Catholic priest. Black had been engaged by the Grand Dragon (head) of the Alabama Klan and won an acquittal. With Klan support and the Grand Dragon as his campaign manager, Black had become a United States Senator. He was nominated as Associate Justice of the United States Supreme Court in 1937 by President Franklin Roosevelt. Black's earlier Klan membership did not become known until after his confirmation by the Senate. Black said that "intolerant" opposition to him would only provoke retaliation against Catholics. Some of Black's Klan supporters lit crosses from Mountain Lakes, New Jersey, to Bancroft Tower near Worcester, Massachusetts, while others in Virginia sang "The Old Rugged Cross." Republican criticism was meant to embarrass the President and brought Democrats to his defence.

10. Id. at 434.

11. Note that certain words are italicized in both the text and the footnotes as a shorthand guide to the jurisprudence of the religion clauses: separation, neutral(ity), accommodation and exemption. They are keynotes to the four major approaches to the religion clauses. Due to space limitations, there is no major elaboration of these positions along the spectrum of disfavor to acceptance of the role of religion in American society.

Plaintiffs were taxpayers like the plaintiffs in *Frothingham* and *Flast*, referenced infra notes 57-58 and accompanying text.

12. Another justice and numerous people throughout the country thought that the reimbursement for bus transportation was a subsidy to parochial school education. Associate Justice Wiley Rutledge, a Unitarian, wrote in a long dissent from the result in *Everson* that bus reimbursement lessens the true cost of sending children to parochial school. If parents could not afford the transportation costs, they would have to turn to public schools. Parochial schools would eventually go out of business, as many people wished to see come about. Eliminating the bus subsidy would not constitute legal discrimination against parochial school parents. Even if the parents cannot afford to take advantage of it, they retain the theoretical right to send their children to parochial school. That reasoning, of course, does not take into account the fact that the parochial school parents have paid the same taxes other parents have paid and would thus be paying double.

indirect *accommodation* of religion was precluded by the wall of *separation*.[13] Not only were parochial schools isolated from society by the wall but public schools themselves were also secularized.

The wall of *separation* between church and state grew high in the two decades after *Everson* as on-site religious instruction,[14] the recitation of prayers[15] and Bible reading[16] were excluded from the public schools. By the beginning of the 1970s, however, the tone in some Supreme Court cases was very different, reflected in the shift to case-by-case determination, even when establishment violations were deemed to have occurred.[17] It was not, however, until the middle of the 1990s, that the change had begun to take hold.[18] At the time of *Everson* and for decades after, the *separation* interpretation of the Establishment Clause was being used to wage a war on various religious groups and on religion in general. That misuse of the Establishment Clause lasted with full vigor for 20 years. For a while thereafter, this application of the Establishment Clause retained its strength. As reflected in *Agostini*, it then took another 30 years for this interpretation of the Establishment Clause to decline. *Mitchell v. Helms* tells the story.[19] These cases signal departure from *separation* in funding involving parochial schools.

II. SHIFTING ATTITUDES ON ESTABLISHMENT AND FREE EXERCISE

Van Orden v. Perry presented a recent Establishment Clause objection to the presence of a monument displaying the Ten Commandments. Relief was denied on the grounds that the Commandments themselves carry "an undeniable historical meaning," in effect subordinating their "religious significance" to their secular function.[20] A pluralistic

13. Illinois *ex rel.* McCollum v. Bd. of Educ. of Sch. Dist. 71, 333 U.S. 203 (1948).

14. Id. at 203 (weekly religious instructions on the premises of the public school with the use of taxpayers' money struck down on establishment grounds as unconstitutional state action). Justice Jackson admitted that the Supreme Court was relying on "its own prepossessions." Id. at 238 (Jackson, J., concurring). Justice Stanley Reed's dissent in *McCollum* gave a different history from Justices Black and Rutledge in *Everson*, reflecting discord as early as the year after *Everson* concerning the Establishment Clause but without the ability to stop the wall of separation from growing higher. *But see* Zorach v. Clauson, 343 U.S. 306 (1952) (upholding released time from public schools for religious instruction off the premises of the public school). Like Justice Black, Justice Douglas adopted *separation* of church and state and *neutrality* but also called for *accommodation* of religion within the standard of *separation*.

15. Engle v. Vitale, 370 U.S. 421 (1962) (striking down as unconstitutional non-sectarian theistic prayer).

16. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (holding that the purpose of the legislation or practice must be secular and its primary effect must neither advance nor inhibit religion (*neutrality*)).

17. Lemon v. Kurtzman, 403 U.S. 602 (1971) (Rhode Island salary supplements and Pennsylvania state aid for books in parochial schools struck down as unconstitutional). Like *Everson*, the tone and direction of this case is at odds with its outcome for the schools affected. No longer is there such a high wall of separation as there had been in *Everson*, *McCollum*, *Engle* and *Abington*. Chief Justice Burger, even in striking down both States' provisions, was careful to recognize the contribution of the parochial schools. The "three-prong" test in *Lemon* consisted of reasoning used separately in earlier cases.

18. Agostini v. Felton, 521 U.S. 203 (1997) (federally funded program under Title I of the Americans with Disabilities Act for remedial instruction to the disadvantaged upheld despite attendance at a parochial school). It is commonly said that the religious question has receded in favor of concentration on the provision of a secular service so that "public welfare supersedes establishment." This decision does not permit "public funds or programs *to come under the control of religious authorities* . . . . Had the Court in *Agostini* interpreted the Constitution as maximizing religious freedom, the teachers administering Title I could have been hired or directed by the religious schools themselves." Amy Gutmann, "Religion and State in the United States: A Defense of Two-Way Protection," in *Obligations of Citizenship and Demands of Faith*, ed. Nancy L. Rosenblum (Princeton, New Jersey: Princeton University Press, 2000), 136. The Court's direction became much clearer in an opinion authored by Justice Thomas. Mitchell v. Helms, 530 U.S. 793 (2000) (upholding the use of taxpayer's money to purchase equipment in a general program for schools, not excluding parochial schools).

19. *Mitchell*, 530 U.S. at 829 (stating it was time to bury the disparaging phrase "pervasively sectarian" and the discrimination associated with it).

20. Van Orden v. Perry, 545 U.S. 677, 690 (2005). The 8th Circuit, sitting *en banc*, opined that *Van Orden* "is a passive acknowledgement of the roles of God and religion in our Nation's history." ACLU Neb. Found. v. Plattsmouth, 419 F.3d 772, 778 (8th Cir. 2005). One commentator remarking on *Plattsmouth* wondered how far the United States can "afford, in its public life, to treat the religious traditions of the country as mere quaint survivals." Roger Trigg, *Religion in Public Life: Must Faith be Privatized?* (Oxford: Oxford University Press, 2007), 225.

approach to American society would recognize that the Ten Commandments are valued by many as having religious significance, but this approach would not demean them as a mere historical remnant in order not to disrespect the non-belief of that growing minority without religious adherence.[21] The divisions among the members of the Court – which seem to be at least somewhat resolved for the purposes of aid to education, disabled and disadvantaged children and parental choice – were still strongly present in this aspect of establishment considerations. At virtually the same time that the Court decided *Van Orden*, the Court also decided *McCreary Co. v. ACLU of Kentucky* in the opposite manner. *McCreary* seemingly requires the same analysis as *Van Orden*.[22] The Court very narrowly distinguished the facts as presenting either a religiously-intended or a passive presentation of a monument that includes the Ten Commandments,

That dispute is reflected by the different authorship of each opinion. Chief Justice Rehnquist wrote the opinion in *Van Orden*, rejecting *Everson*'*s separationism*. Justice Souter wrote the opinion in *McCreary* on the basis that *Everson* is still operative. The Court's seemingly arbitrary jurisprudence led one commentator to summarize this line of cases as "a most convoluted and fractured line of Establishment Clause decisions."[23] Now five years later, neither Justice Souter nor Chief Justice Rehnquist remains on the Court. There is some hope that new justices might perceive a measure of compromise in the country and reflect that balance in future opinions.

Salazar v. Buono was argued before the United States Supreme Court in early October 2009.[24] The opinions in the Ninth Circuit are more centrally concerned with the treatment of religion in a secular age than the Supreme Court opinions in *Salazar v. Buono*. Judge McKeown wrote the opinion expressing the 9th Circuit's decision not to rehear *Buono en banc* and Judge O'Scannlain wrote the dissent. Some decades ago, Justice Kennedy had posed what appeared to be a noncontroversial hypothetical. He suggested that the Establishment Clause would forbid the government to permit the permanent erection of a large Latin cross on the roof of city hall. "[S]uch an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion."[25] According to Judge McKeown, author of the Circuit Court opinion, Justice Kennedy's hypothetical is realized in *Buono*. "A Latin cross sits atop a prominent rock outcropping known as 'Sunrise Rock' in the Mojave National Preserve."[26] Both Judge McKeown and Judge O'Scannlain admirably set the stage for the Supreme Court's treatment.

In 1934, the Veterans of Foreign Wars erected a World War I memorial, consisting of

21. Michael W. McConnell, "Believers as Equal Citizens," in *Obligations of Citizenship and Demands of Faith*, ed. Nancy L. Rosenblum (Princeton, New Jersey: Princeton University Press, 2000), 90. It is as "tyrannical" in Madison's terms to permit the minority to prevent acknowledgement of the majority's beliefs as it is to permit the majority to prevent those with minority (in numbers) beliefs from enjoying public expression, recognition and protection. For Madison's *Memorial and Remonstrance*, *see* the Appendix to *Everson*, 330 U.S. at 64. That does not mean that nonbelievers must be tasked with setting a manifesto in stone denying that their sense of morality comes from God or that they do charitable works for the sake of humanity and not for love of a God who created the needy and the rich. They must choose their own expression. For example, the NYC Metropolitan Transit Authority has recently accepted an ad copy proclaiming that "[o]ne million New Yorkers are OK without God" (In the largest American city, by that estimate, the atheist population is just over 10%). More commonly, nonbelievers' expression of choice presently appears to include popular book signing parties for best sellers explaining non-theistic views in large bookstore chains and appearances on television talk shows publicizing nontheistic views and books which provides a large audience so that they may reach people to explain their views.

22. McCreary Co. v. ACLU of Ky., 545 U.S. 844 (2005).

23. Angela C. Carmella, "RLUIPA: Linking Religion, Land Use, Ownership and the Common Good," *Albany Government Law Review* 2 (2009): 506.

24. Salazar v. Buono, No. 08-472 (argued 7 October 2009). Salazar v. Buono, 559 U.S (2010), No. 08-472, was decided on 28 April 2010 in an opinion by Justice Anthony Kennedy. See http://www.supremecourt.gov/opinion/09pdf/ 08472.pdf. The establishment clause issue was not before the Supreme Court which was mainly concerned with the implementation of the congressional land transfer statute. In a 5-4 vote, the case was remanded for further proceedings on the constitutionality of the land transfer statute.

25. County of Allegheny v. ACLU, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

26. Buono v. Kempthorne, 527 F.3d 758, 768 (9th Cir. 2008) (*Buono IV*).

a cross and a wooden sign to notify the visitor that the cross was erected in memory of the "Dead of All Wars." In terms of prior precedents, this sign suggests a secular purpose of remembering the soldiers who died for the United States in foreign wars. The fact that no controversy existed about the memorial for more than sixty years shows that its presence was not divisive. That long, peaceful use might appeal to Justice Breyer, for example. In his concurrence in *Van Orden*, Justice Breyer found the fact that the display of the Ten Commandments had occasioned no dispute for nearly two generations so that it is arguably not divisive, unlike the "short (and stormy) history of the courthouse Commandments' display" at issue in *McCreary*.

In 2002, Frank Buono, who had retired from the National Park Service which administers the Mojave National Preserve, sued to remove the cross from federal land as a violation of the Establishment Clause. Similar issues had arisen elsewhere. In the 7th Circuit, conveyance of the government land to private parties had made any further judicial consideration moot because there was no longer any possibility of government action.[27] Here, perhaps following the logic of the 7th Circuit, an exchange of land occurred during one of the *Buono* phases of litigation. The exchange of land was arguably facilitated when the 9th Circuit expressly refused to consider the issue.[28]

Despite the condescending emphasis on the secular purpose of the war memorial over the religious significance of the cross, the land transfer is likely to be persuasive to some Justices when the Court decides *Buono v. Salazar*. Indeed, the precedent of *Van Orden*, even with the contrasting result in *McCreary*, presages a similar outcome in *Buono*. With the perspective of more than 20 years, the Latin cross sitting "atop a prominent rock outcropping known as 'Sunrise Rock' in the Mojave National Preserve" now private looks nothing like the "large Latin cross on the roof of city hall." In his 9th Circuit dissent in *Buono IV*, Judge O'Scannlain invoked the principle from *Amos* that "[t]here is ample room under the Establishment Clause for benevolent *neutrality* which will permit religious exercise to exist without sponsorship and without interference."[29] That is perhaps the most interesting point of speculation about *Buono*. Will the Supreme Court state that the Establishment Clause does not require disavowal of religion in upholding the constitutionality of the war memorial with the Latin cross on now--private land? As Justice White put it in *Amos*, "[a] law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. . . . government itself [must advance] religion through its own influence and activities."[30]

The tone of Supreme Court free-exercise cases during the early 1970s was pluralistic and entertained the notion of a free-exercise *exemption*.[31] Nevertheless, the effect of more than twenty years of deliberate secularization was substantively felt in the free exercise area, even as the availability of an *exemption* from laws of general applicability for religious free exercise became more clearly articulated with accountability standards and limitations.[32] Much of the legacy of, or depending on one's outlook, the fallout from, interpretation of the Establishment Clause as requiring *separation* of church and state eventually spilled over into the area of free exercise as well.

Thus, *Smith*, one of the most significant Supreme Court pronouncements in the last decade of the 20th century, focused on the general applicability of the law in question

27. Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2000) (upholding the sale of a portion of a municipal park with a statue of Jesus); Mercier v. Fraternal Order of Eagles, 395 F.3d 693, 702-03 (7th Cir. 2005) (upholding the sale of a portion of a municipal park with a monumental presentation of the Ten Commandments).

28. Buono v. Norton, 371 F.3d 543, 550 (9th Cir. 2004) (*Buono II*).

29. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334 (1987) (emphasis added and internal quotations omitted).

30. *Amos*, 483 U.S. at 337.

31. Wisconsin v. Yoder, 406 U.S. 205 (1972) (granting Amish children an exemption from two years of compulsory high-school education required by Wisconsin public school law). "A regulation *neutral* on its face may, in its application, nonetheless offend the constitutional requirement for government *neutrality* if it unduly burdens the free exercise of religion." Id. at 220 (emphasis added).

32. See Angela C. Carmella, "Responsible Freedom under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good," *West Virginia Law Review* 110 (2007): 403-447.

rather than on the burden for the individual seeking free exercise of his religion when the legislature inadvertently failed to provide an *exemption* for religious purposes.[33] "[L]eaving *accommodation* to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself," wrote Justice Scalia, echoing *Reynolds* which he says controls. *Smith* signifies that the reach of the Free Exercise Clause of the First Amendment is limited.

Reaction to this decision was dramatic. Congress, the States and commentators acted vigorously in the face of this apparent disrespect for free exercise of religion and the constitutional clause protecting it.[34] Congress responded to constituents who wished to protect free exercise when facially *neutral* laws failed to *accommodate* religious needs. The legislature quickly passed the Religious Freedom Restoration Act (RFRA).[35] This act sought to prevent the government from burdening free exercise of religion without a compelling governmental interest by providing *exemptions* from generally applicable, facially *neutral* laws. The Supreme Court, however, held RFRA unconstitutional when applied to the States. According to Justice Kennedy's analysis for the Court, Congressional power under § 5 of the Fourteenth Amendment, which provided the basis for RFRA, is limited to enforcing the provisions of the Fourteenth Amendment. That means § 5 is only remedial. Accordingly, Congress cannot legislate the substance of the Fourteenth Amendment's restrictions on the States. RFRA is not enforcing legislation. Congress therefore needs to respect the doctrine of separation of powers. RFRA, however, remains in force in so far as it affects only the federal government.

Congress went back to the drafting board and avoided the separation of powers problem. In its second free exercise statute, The Religious Land Use and Institutionalized Person Act (RLUIPA), Congress continued with its purpose of protecting religious expression that comes into conflict with government provisions.[36] Congress retained the notion from RFRA of requiring government to show a "compelling interest" for interfering with religious free exercise. It also retained the standard that the State or local government use the least restrictive manner to impose on religious practices. That is the "no less restrictive alternative means" requirement found in cases before *Smith*. RLUIPA covers only land use regulations (such as zoning and historic preservation) and people in government housing, medical facilities or jails. RLUIPA also has a more limited scope than RFRA in that RLUIPA addresses the issue of the burden placed on the free exercise of religion. In this way, Congress ties the burden to a program or activity receiving federal

33. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990), reh'g denied, 496 U.S. 913 (1990) (requiring a burdened individual to go to the legislature for an exemption from establishment clause strictures).

34. "Religious liberty is popular in the abstract, but unpopular in its concrete applications. A secular society is far too quick to decide that its interests in uniform application of the law override the needs of religious minorities, or even of the religious mainstream . . . . One function of judicial review is to protect religious exercise against such hostile or indifferent consequences of the political process. The Court has abandoned that function, at least in substantial part and perhaps entirely." Douglas Laycock, "The Remnants of Free Exercise," *Supreme Court Review* (1990): 1-68. *Contra* William P. Marshall, "In Defense of Smith and Free Exercise Revisionism," *University of Chicago Law Rev*iew 58 (1991): 308-328. For the immediate reactions at the State level, see Angela C. Carmella, "State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence," *BYU Law Review* (1993): 275-325 and Tracey Levy, "Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of Employment Division v. Smith," *Temple Law Review* 67 (1994): 1017-1050 (noting that ten States adopted laws based on RFRA).

35. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997). See also Angela C. Carmella, "New Roles for Congress, the President, and the Supreme Court in Protecting Religion," *Religion & Values in Public Life* 3 (1995): 1-4; Jed Rubenfeld, "Antidisestablishmentarianianism: Why RFRA Really Was Unconstitutional," *Michigan Law Review* 95 (1997): 2347-2384; Eugene Gressman and Angela C. Carmella, "The RFRA Revision of the Free Exercise Clause," *Ohio State Law Journal* 57 (1996): 65-143.

36. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (codified as 42 U.S.C. § 2000cc). This statute returns to the free exercise standard of burden on religious exercise balanced against a "compelling state interest" used in *Yoder*, 406 U.S. 205 and Sherbert v. Verner, 374 U.S. 398 (1963) (granting unemployment compensation to people such as Seventh-day Adventists, unable to work on Saturday because it is their Sabbath when the statute had no free exercise exemption).

financial aid, interstate commerce or a regulation that permits individual assessments of a proposed property use. Thus, President Clinton signed RLUIPA based on the congressional spending power and regulation of commerce among the States rather than on the enforcement power of the Fourteenth Amendment.

When *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*[37] was decided not long after *Smith*, it became apparent that the small area left for the free exercise clause was almost restricted to ordinances or laws not of general applicability but directly discriminating against a targeted group. Facial *neutrality* is required in a city ordinance or State legislation. In the early 1990s, some 50,000 people (particularly in the Cuban community in southern Florida) practiced Santeria, a religion requiring animal (here, chicken) sacrifice. In its ordinance, the city could have dealt with cruelty toward animals for any reason but it protected animals sacrificed only for religious purposes. Justices Blackmun and O'Connor, concurring in the judgment, said that *Smith* was wrongly decided because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an anti-discrimination principle. It began to become clearer that federal statutory provisions, and not the Free Exercise Clause, would now be the main vehicle for addressing free exercise claims. In effect, after *Smith*, plaintiffs with any other free-exercise burdens would have to qualify under RLUIPA or their State constitutions.

III. EARLY TWENTY-FIRST-CENTURY DEVELOPMENTS: TWILIGHT OF CONSTITUTIONAL FREE EXERCISE BUT LOWERING OF SOME ESTABLISHMENT BARRIERS

Cutter v. Wilkinson relied on RLUIPA when prisoners in Ohio complained that prison officials failed to *accommodate* their free exercise of various minority religions.[38] The prison officials argued that RLUIPA violates the Establishment Clause because it advances religion by giving greater protection to religion than to other constitutionally protected rights.[39] More specifically, the 6th Circuit in *Cutter* had been worried that a prisoner who was a member of the Aryan Nation would be less likely to be able to keep his materials after suing without benefit of RFRA than a member of a minority religion. If the 6th Circuit's fears were realized, political rights would be disadvantaged compared with the treatment of religious exercise. This fear led the 6th Circuit to see an establishment violation. Addressing that concern, the Supreme Court noted that even if prison officials had to prove a compelling governmental interest in the case of an Aryan Nation member, they would be able to meet the test. Their officials' action in confiscating such materials would be taken to prevent prison violence, more likely when another prisoner discovers inflammatory racist literature than if (s)he discovers material from a minority religious group.

The Court was very careful to make sure that the reader knows this is a statutory case. The same result would probably have been reached more straight forwardly under the former desire of the Court to protect minority religions, as Justice Brennan did in *Sherbert*, because anyone so disadvantaged could invoke the protection of the Free Exercise Clause and not just those under the supervision of the United States

37. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (declaring the city of Hialeah ordinance protecting chickens unconstitutional for discrimination against the Santerians).

38. Cutter v. Wilkinson, 544 U.S. 709 (2005) (holding that § 3 of RLUIPA falls between the Establishment and Free Exercise Clauses and permissibly accommodates religion, thereby statutorily protecting the prisoners' free exercise rights and alleviating exceptional government-created burdens on free exercise). RLUIPA § 3 provides, among other things, that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," subject to a compelling government interest implemented by the least restrictive means. RLUIPA § 3.

39. Because people who qualify under § 3 are in prisons, mental hospitals and other state institutions receiving federal aid, they do not control their own circumstances and "are unable freely to attend to their religious needs," being dependent on government *accommodation*. Adherents of mainstream religions in the Ohio prisons regularly have access to chaplains, worship services, religious books and other items. Without incorporation by RFRA and RLUIPA, both *Sherbert* and *Yoder* would have been consigned to the history books.

government.[40] This brave new statutory world has been issued into prominence, since as Justice Scalia put it in *Smith*, judges no longer wish to "weigh the social importance of all laws against the centrality of all religious beliefs." The abdication of judicial review under the free-exercise clause was the subject of lengthy and deep analysis beyond the recollection of the Court's "traditional role as protector of minority rights against majoritarian oppression. The 'disadvantaging' of minority religions is not 'unavoidable' if the courts are doing their job . . . [which is] the very purpose of a Bill of Rights."[41] The pattern of deconstitutionalizing free exercise and committing it to Congress is underlined in *Cutter*. Justice Ginsburg, in *Goldman v. Weinberg*, approvingly noted in this regard the parallel action with regard to members of the military.

> We note in this regard the Federal Government's accommodation of religious practice by the military. We held that the Free Exercise Clause did not require the air force to exempt an Orthodox Jewish officer from uniform dress regulations so that he could wear a yarmulke indoors. Congress responded to *Goldman* by prescribing that 'a member of the armed forces may wear an item of religious apparel while wearing the uniform' unless 'the wearing of the item would interfere with the performance [of] military duties [or] the item of apparel is not neat and conservative.'[42]

In 1791, the United States was comfortable with the prohibition that "Congress shall make no law" prohibiting the free exercise of religion. Indeed, it did not say 'Congress shall make no law . . . promoting or advantaging religion.' After *Smith*, the Supreme Court approvingly left free exercise to Congress and the State constitutions. Is this an abdication of its historic role of judicial review under the aegis of the First Amendment or is it simply streamlining judicial resources for docket control when Congress can tailor legislation to pinpoint rights for different classes of plaintiffs who come under the thumb of federal supervision? While State and lower federal courts dealt frequently with free exercise claims, the United States Supreme Court had before *Smith* "rejected every claim requesting exemption from burdensome laws or policies to come before it" since 1972.[43] The free exercise clause was pronounced dead in *Smith*, although it did not carry a "Do Not Resuscitate" sign over its bed. The concept of free exercise itself was given new life in a different, nonconstitutional, form through such statutory law as RLUIPA and the federal application of RFRA. As the product of the political sphere, this free exercise does not have constitutional status. Does it matter that freedom of conscience is not, at the present time, honored with the constitutionalizing which characterizes the American legal approach when it wants to recognize the importance of a particular right to the life of the country?[44]

The term after *Cutter* was decided, the Court was presented with a reprise of the facts

---

40. Of course the plaintiffs had to bring their case citing the statute, but this is the direct result of the judicial repudiation in *Smith* of protecting free exercise under the First Amendment. "In *Sherbert v. Verner*, Justice Brennan's majority opinion characterized a religious exemption as 'reflecting nothing more than the governmental obligation of neutrality in the face of religious differences.'" Michael W. McConnell, "Free Exercise Revisionism and the Smith Decision," *University of Chicago Law Review* 57 (1990): 1133.

41. Id. at 1129 (exploring the effect of *Smith* on the judicial role, constitutional anomalies, denominational *neutrality* and other consequences of the opinion). In *Cutter*, Justice Ginsburg notes that RLUIPA responded to Justice Scalia's disavowal of inquiring into "whether a particular belief or practice is `central' to a prisoner's religion'" by restricting inquiry to the sincerity of the believer's professed belief. *Cutter*, 544 U.S. at 725, n. 13.

42. *Cutter*, 544 U.S. at 722 (internal citations omitted).

43. McConnell, supra n. 40 at 1110, n. 2 (noting that unemployment compensation claims routinely continued to come before the Supreme Court).

44. More than 65 years ago, it was recognized that public opinion about what is right in school funding cases has a lot to do with constitutional status and judicial enforcement. "Should present constitutional provisions barring public funds to Catholic schools be generally repealed, the courts would still be in a position to invalidate appropriations for them on this ground. A judicial disinclination to do so, however, is likely to be present when public opinion has been sufficiently strong to remove express restrictions." "Catholic Schools and Public Money," *Yale Law Journal* 50 (1941): 925.

in *Smith* but had to decide the case under RFRA because in accordance with the holding in *Smith*, the Free Exercise Clause was foreclosed. Brazilian-American members of UDV, a spiritist sect with 130 members, use a hallucinogenic tea called hoasca in their communion service. When the Customs inspectors seized a shipment of hoasca, UDV sued several federal officials, including the Attorney General, under RFRA.[45] With a statutory substantial burden test, the Court would not have to inquire about the centrality of the practice in question to the plaintiff's religion, an inquiry which was too burdensome for the Court in *Smith*. Nevertheless, Chief Justice Roberts did not shy away from noting that receiving communion through hoasca was "[c]entral to the UDV's faith." Though the Controlled Substance Act allows the Attorney General to grant an *exemption*, as had been done for the Native American Church which uses peyote, the government argued that the Court could not grant such an *exemption* under the Act.

The government's argument provided the occasion for the Chief Justice to educate the government and opinion-readers alike about the vitality and capacity of the judiciary, despite the abdication in *Smith*. "[T]hat is how the law works," and the courts are "up to the task" of judging, even though "the task assigned by Congress to the courts under RFRA" is not easy. "Indeed, the very sort of difficulties highlighted by the Government here were cited by this Court in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause. But Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue." Without the prod of RFRA, Justice Brennan in *Sherbert* and Chief Justice Burger in *Yoder* had proved to be "up to the task" constitutionally speaking when the free exercise clause of the First Amendment provided sufficient judicial guidance to grant specific *exemptions* to particular religious claimants.[46]

Now RFRA requires that analysis during the post-*Smith* abeyance in which the generally applicable law or government mandate has occupied the judicial vacancy. While it is not edifying to see the judiciary called by Congress in RFRA (*UDV*) and RLUIPA (*Cutter*) to do its job, it must be said that the Chief Justice's opinion in *UDV* and Justice Ginsburg's in *Cutter* clearly demonstrate that the judiciary is eminently "up to the task." Perhaps in the coming decades, some plaintiffs left out by the scope of these statutes will find that space beyond anti-discrimination, which in theory is still left to the Free Exercise Clause after *Smith*.

Shortly before *Cutter*, in a small area of the Cleveland City School District with its 75,000 children, the Pilot Project Scholarship Program deemed all children, including those attending any religious schools, eligible to receive vouchers for school tuition.[47] The effect of the United States Supreme Court's holding in *Zelman v. Simmons-Harris*, the voucher case, as Justice David Souter described it in his dissent is that:

> Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic.[48]

45. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (applying RFRA to a substantial burden on the group's religious practices to grant an *exemption* to the Controlled Substances Act).

46. For an appreciation of the different approaches of Chief Justice Burger and Justice Brennan, see Catherine M.A. McCauliff, "Constitutional Jurisprudence of History and Natural Law: Complementary or Rival Modes of Discourse?," *California Western Law Review* 24 (1988): 321-25.

47. In the Cleveland Pilot Project Scholarship Program (voucher program), for example, neither Christian nor Moslem schools themselves were aided. Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (holding that the establishment clause did not prevent parents from receiving vouchers and using them at the schools of their choice). See Catherine M.A. McCauliff, "Distant Mirror or Preview of our Future: Does Locke v. Davey Prevent American Use of Creative English Financing for Religious Schools?" *Vermont Law Review* 29 (2005): 365-406. The holding in favor of parental choice in Cleveland means that parents who otherwise could not afford the tuition could enroll their children in a private school under the Project.

48. *Zelman*, 536 U.S. at 687.

The picture Justice Souter paints of all religious schools eligible to receive money certainly avoids the original harm in establishment, the favoring of one religion to the exclusion of all other viewpoints in the attempt to provide social order through uniformity. Programs today do not focus on the religion of the recipient but on the purposes and particulars of the program itself, whether science equipment and materials for schools or grants or scholarships for students. So long as the program in question is open to all otherwise qualified to participate, no one can now be kept out because of his religion or lack of it. The Establishment Clause is no longer being used to manage the government's discrimination against particular religious groups. *Zelman* has returned these cases to a political solution. Beliefs, values and sentiments – secular and no longer Protestant -- are transmitted in the public schools. The absence of God in public education conveys that God's role in education is only private while reading, writing, mathematics, science and languages may all be found in school in the course of the educational day.

Despite the demise of a *separation* interpretation of the First Amendment, a Washington State scholarship program successfully excluded study for the ministry, even though the recipient chose to pursue that study, thereby interposing himself between the State and the religious institution. Joshua Davey, the student whose application the State denied, decided to sue on free exercise grounds under the United States Constitution.[49] Davey argued that the Free Exercise Clause required the State (which finances secular education) also to finance religious education.[50] The Supreme Court, however, could not say that the Free Exercise Clause controlled the issue in this case because the Washington State Constitution, which has an 1889 amendment dealing with the establishment of religion,[51] was more rigid than the wording of the First Amendment in 1791. This case illustrates that "some state actions [are] permitted by the Establishment Clause but [are] not required by the Free Exercise Clause."[52] The free exercise clause and the equal protection clause of the 14th Amendment were not strong enough to overcome State considerations of establishment. Most American school legislation and funding comes from State and local government.[53] Ultimately, school funding for American religious schools will be worked out with state and local government, as *Locke v. Davey* recognizes.[54]

IV. POURING SEPARATION INTO DIFFERENT OLD-WINE CASKS? STANDING REDUX

The perennial question of standing[55] has recently assumed greater importance in

49. Locke v. Davey, 540 U.S. 712 (2004).

50. The Free Exercise Clause has been narrowly construed. See Mary Ann Glendon & Raul F. Yanes, "Structural Free Exercise," *Michigan Law Review* 90 (1991): 489.

51. The state constitutional amendments (known as "baby Blaine amendments") dealing with establishment of religion have been recognized as bigoted. (The Blaine Amendment in Washington State's constitution is reflected in Articles I, section 11 and IX, section 4.) See Robert F. Utter and Edward J. Larson, "Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution," *Hastings Constitutional Law Quarterly* 15 (1988): 451-478 (treating the Washington State Constitution and its relationship to earlier similar provisions against establishment).

52. 540 U. S. at 716.

53. See, e.g., John Dayton, "Serrano and Its Progeny: An Analysis of 30 Years of School Funding Litigation," *Education Law Reporter* 157 (2001): 447-464.

54. It will be up to State court plaintiffs to challenge the separationist ethos of various States by seeking recognition of their free exercise rights in the State courts. The teachers' unions had always opposed vouchers because many religiously affiliated schools had no unions, thereby decreasing the power of the unions, the benefits, salaries and equipment and materials available to teachers and arguably the standards of the teachers themselves, who may or may not have had to meet the same requirements as public school teachers, depending on local laws. "At the behest of the teachers' unions, the Democrats had just shut down a successful District of Columbia voucher program." David Brooks, "The Quiet Revolution," *New York Times*, 23 October 2009, A35 (explaining that for the most part, so far the $4.3 billion Race to the Top fund administered by a reforming Education Secretary, Arne Duncan, has been able to leverage change and not pork, thereby receiving support across the political spectrum).

55. For standing in an Establishment Clause case in a different guise, see Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S.1 (2004). There Chief Justice Rehnquist, concurring in the judgment, dissented from the Court's use of the standing doctrine to avoid deciding the establishment question on the merits. He thought that

taking the country's temperature on church-state relations. This has in part occurred because the Establishment Clause is providing a less reliable way for secularists and those believers who support *separation*, rather than *neutrality* or *accommodation*, to prevail. Despite the recent growth in the number of Moslem Americans (by one estimate from about 800,000 to over 3 million in a quarter of a century), the country is growing more secular in the sense that fewer Americas have ties to traditional Christian and Jewish denominations.

In *Hein v. Freedom From Religion Foundation, Inc.*, the Foundation sought standing as taxpayers under Article III of the Constitution to claim that conferences of the Faith-Based and Community Initiatives program violated the Establishment Clause of the First Amendment.[56] The claimed violations consisted of giving speeches using "religious imagery" and praise of the faith-based programs. The Foundation based its claim on *Flast v. Cohen*.[57]

Justice Alito characterized *Flast* as a narrow exception to the prescription against giving taxpayers standing set forth in *Frothingham v. Mellon*.[58] He also noted that the conferences the Foundation questioned were not paid for from statutory funds but from general executive branch appropriations, thus placing an additional layer between the taxpayers and standing because *Flast* itself limited standing to challenges to exercises of "congressional power." Discretionary executive branch expenditures were not contemplated in *Flast*.

Various other possible barriers to standing, such as concerns about separation of powers, make standing less possible than before. The taxpayers suggested that standing should be extended to discretionary Executive Branch expenditures because an agency could use its discretionary funds to buy Stars of David, stars-and-crescents, or crosses in bulk for distribution. Justice Alito suggested that such improbable abuses could be challenged through other than taxpayer standing. Finally, Justice Alito addressed Justice Scalia's position that *Flast* is unstable and must be expanded or overruled by emphasizing that the exception in *Flast* had always been very narrow. *Hein* effectively forecloses Article III taxpayer standing from being used as a new vehicle to claim that an Establishment Clause violation had been caused by a governmental actor. Thus, taxpayer standing is as unsuccessful a way to challenge public *accommodation* of religion as it was some eighty years ago in *Frothingham*.

---

the Court would probably have decided that the School District's policy does not violate the Establishment Clause of the First Amendment. The School District's policy was that willing teachers and students recite the Pledge of Allegiance (including the words "under God" since 1954).

The problem of deeming references to God as "more properly understood as employing the Idiom for essentially secular purposes" is that "one nation under God" reflects the centuries-old invocation of God to protect, for example, all the English people or in the pledge of allegiance to the flag, all the American people. In her concurrence in *Newdow*, Justice O'Connor deems such language "ceremonial deism." One commentator attempts to explain this dismissive categorization in the following way: "O'Connor seems so to concentrate on the private side of religious commitment, that she fails to see the importance of an admission that nations too are guided by God." *Trigg*, supra n. 20 at 219. Perhaps Jacques Maritain said it best:

> There is real and genuine tolerance only when a man is firmly and absolutely convinced of a truth, or of what he holds to be a truth, and when he at the same time recognizes the right of those who deny this truth to exist, and to contradict him, and to speak their own mind, not because they are free from truth but because they seek truth in their own way, and because he respects in them human nature and human dignity and those very resources and living springs of the intellect and conscience which make them potentially capable of attaining the truth he loves, if someday they happen to see it.

Jacques Maritain, "Truth and Human Fellowship," in *On the Uses of Philosophy: Three Essays*, ed. Jacques Maritain (Princeton, New Jersey: Princeton University Press, 1961), 24; quoted in Martha C. Nussbaum, *Liberty of Conscience* (New York: Basic Books, 2008), 23.

56. Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587 (2007) (denying taxpayer's standing to challenge faith-based community groups' eligibility to compete for federal financial support as a violation of the establishment clause).

57. Flast v. Cohen, 392 U.S. 83 (1968) (granting federal taxpayers standing to challenge programs including parochial schools on establishment grounds).

58. Frothingham v. Mellon, 262 U.S. 447 (1923).

V. JUSTICE SCALIA, AT LEAST, WANTS TO AVOID APPLYING THE ESTABLISHMENT CLAUSE TOO

From the briefed arguments, *Pleasant Grove* is ostensibly a public forum case under the Free Speech Clause of the First Amendment, but Justice Alito says it is in fact predominantly about First-Amendment "government speech."[59] The doctrine of government speech is perhaps a new category or, in the words of Justice Breyer, a much more flexible "rule of thumb."[60] In *Pleasant Grove*, a religious group wanted a permanent copy of its commandments to accompany the Ten Commandments donated by the Fraternal Order of Eagles and other donated statues and objects from the public finding a permanent home on the grounds of Pioneer Park. The careful analysis of time, place, and manner is rehearsed only to be deemed irrelevant to government speech which is not subject to First-Amendment challenge.

In his concurrence in *Pleasant Grove*, Justice Scalia, reprising the insight from *Smith* that the Court does not have to apply the Free Exercise Clause, writes as if he is blowing Justice Alito's cover. According to Justice Scalia, in *Pleasant Grove*, "government speech" serves as an end-run around the Establishment Clause. If this proves true over the next cases, we will be without effective constitutional protections against establishment as well as having narrow, if any, constitutional protection for free exercise. Is speech a broad enough category to protect religion and individual conscience constitutionally? There is always freedom of association, as we know from the First Amendment holiday and ethnic parade cases. In 1215, clause one of Magna Carta protected the liberties and freedom of the church, in effect acting as a clause for the protection of freedom of assembly and association as well as institutional protection. Arguably, that clause of Magna Carta died in 1532, with the establishment of parliamentary supremacy when the Canterbury Convocation of the English Church assented to a new notion of sovereignty on 15-16 May 1532. *Gobitis*, *Smith* and possibly *Pleasant Grove*, if it proves to be a circumvention of the Establishment Clause, are the intellectual heirs to that parliamentary supremacy, which harkened to generally applicable statutes deemed to encourage social unity and uniformity.[61]

59. Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009) (holding that the city's decision to accept or reject a donated monument for a place on the grounds of Pioneer Park is a matter of First-Amendment government speech).

60. Justice Breyer joined the Court's opinion, but concurred to warn that the Free Speech Clause could turn into "a jurisprudence of labels." Justice Stevens finds the decisions relying on government speech "of doubtful merit," including Garcetti v. Ceballos, 547 U.S. 410 (2006); Johanns v. Livestock Marketing Assn, 544 U.S. 550 (2005); Rust v. Sullivan, 500 U.S. 173 (1991) (Stevens, J. concurring).

61. Catherine M.A. McCauliff, "Parliament and the Supreme Headship: Church-State Relations according to Thomas More," *Catholic University Law Review* 48 (1999): 653-684 [reviewing Peter Ackroyd, *The Life of Thomas More* (New York: Chatto and Windus, 1998)]. In the current situation, legislative occupancy of the judicial void has so far proved benign. The democratic reaffirmation of principles once committed to constitutional adjudication has been successful in providing pinpointed statutory causes of action for many claimants. The judicial decision voluntarily to withdraw from a vital constitutional domain remains inexplicable and controversial.