Taking Accommodation Seriously: Religious Freedom and the *O Centro* Case

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> The Government's argument echoes the classic rejoinder of bureaucrats throughout history:
> If I make an exception for you, I'll have to make one for everybody, so no exceptions.[1]

For church-state junkies, the Supreme Court's most recent term offered something of a break, even a welcome breather. After all, the Court's previous 2004–2005 session featured an exhausting cluster of closely watched and widely remarked Establishment Clause blockbusters.[2] In *Cutter v. Wilkinson*,[3] the Court rejected—unanimously—the argument that Congress had unconstitutionally established religion by passing legislation that specially accommodates the needs of religious believers in prisons.[4] In *McCreary County v. ACLU*,[5] a bare majority of the justices concluded that two particular displays of the Ten Commandments lacked the "secular" purpose required by the Court's precedents.[6] And, in *Van Orden v. Perry*,[7] a different,

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[1]Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 126 S. Ct. 1211, 1223 (2006).

[2]See generally, e.g., Marci A. Hamilton, The Establishment Clause During the 2004 Term: Big Cases, Little Movement, 2004–2005 Cato Sup. Ct. Rev. 159 (2005).

[3]544 U.S. 709 (2005).

[4]*Id.* at 714.

[5]125 S. Ct. 2722 (2005).

[6]*Id.* at 2739–41.

[7]125 S. Ct. 2854 (2005).

but still 5-4, majority decided that a large stone Ten Commandments monument, on the grounds of the Texas State Capitol, was a permissible recognition, not an illegal endorsement, of religion.[8] As it happened, *Van Orden* was the final opinion authored by Chief Justice Rehnquist during his long and distinguished service to the Constitution and to the country, a service whose highlights included a number of landmark opinions in Religion Clauses cases.[9]

This past term, however, the big Supreme Court stories were about military commissions and enemy combatants, political redistricting and campaign contributions, and the nomination and confirmation—the first in more than a decade—of two new justices. Largely overlooked in the crush of Court-related coverage was the term's lone church-state decision, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, involving a small religious community from Brazil and their ritualized, but illegal, use of a hallucinogenic tea called ''hoasca.''

Strictly speaking, *O Centro* was not a Religion Clauses case at all. Instead, it involved the interpretation and application of a particular statute, the federal Religious Freedom Restoration Act (RFRA).[10] Congress enacted this measure in 1993, in response to the Court's controversial decision in *Employment Division v. Smith*.[11] In *Smith*, the justices concluded that, generally speaking, the First Amendment's Free Exercise Clause does not require governments to exempt religiously motivated conduct from the reach of neutral and generally applicable regulations.[12] If the use of a drug like peyote is unlawful, that use remains unlawful even when motivated by religious conviction or obligation. True, Justice Scalia wrote, the First Amendment does not allow governments to single out religiously motivated practices for penalty or disfavor;[13] and, he observed, a society that, like ours, is committed to respecting and protecting religious belief

[8] *Id.* at 2864.

[9] See generally, e.g., Richard W. Garnett, William H. Rehnquist: A Life Lived Greatly, and Well, 115 Yale L.J. 1847 (2006).

[10] 42 U.S.C. §§ 2000bb et seq.

[11] 494 U.S. 872 (1990).

[12] See, e.g., *id.* at 878–79 (''We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.'').

[13] *Id.* at 877–78.

is one we should expect to accommodate, in legislation, religiously motivated practice.[14] Still, as the Court once observed, the First Amendment does not require governments to permit the religious believer ''to become a law unto himself.''[15]

By enacting RFRA, however, Congress codified an apparently broad, bipartisan, and ecumenical consensus that the *Smith* rule does not adequately protect and respect religious liberty.[16] The act constrained governments more tightly: It outlawed the imposition by officials of substantial burdens on religious exercise—even through generally applicable laws—unless it is the ''least restrictive means'' of furthering a ''compelling governmental interest.''[17]

In one sense, then, the *O Centro* case is unremarkable and prosaic—a mid-term sleeper—and involves only the allocation of burdens of proof in cases arising under a specific federal statute. The justices agreed with the lower courts that the act required the government to demonstrate, in a particularized, more-than-conclusory way, that its refusal to exempt from the scope of the drug laws the otherwise-illegal religious use of hoasca was justified by a compelling state interest.

It would be a mistake, though, to move past the decision too quickly, for at least two reasons. First, it is no small thing that the new Roberts Court—unanimously—has made it clear that the tighter constraints imposed by Congress on the national government really do bind. The *Smith* case teaches clearly that the political process is the main arena, and politically accountable actors are the primary players, when it comes to accommodating the special needs of religious believers. *O Centro*—and RFRA—are entirely consistent with

[14] *Id.* at 890.

[15] *Id.* at 879 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

[16] See William K. Kelley, The Primacy of Political Actors in Accommodation of Religion, 22 U. Haw. L. Rev. 403, 438 (2000) (''In the wake of *Smith*, a broad coalition—even a consensus—emerged that it would be appropriate to pass a statute to protect religious liberty more broadly than the Court had interpreted the Free Exercise Clause to require.'').

[17] 42 U.S.C. §§ 2000bb-1(a), (b). In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the justices ruled that Congress lacked the power under the Fourteenth Amendment to apply this more demanding standard to the actions of state and local governments.

this teaching.[18] However, it also underscores the point that when that process, and those actors, produce such an accommodation, courts and officials are to take it seriously. Second, it appears that the justices have, with one voice, rejected the notion that such accommodations amount to an unconstitutional privileging, endorsement, or establishment of religion. Again, the Constitution for the most part permits—for better or worse—governments to regulate in ways that, in effect, burden religious exercise. At the same time, and no less certainly, it allows—and even invites—governments to lift or ease the burdens on religion that even neutral official actions often impose. Notwithstanding our constitutional commitment to religious freedom through limited government and the separation of the institutions of religion and government, it is and remains in the best of our traditions to ''single out'' lived religious faith as deserving accommodation.[19]

I.

Before turning to the details and implications of the *O Centro* case, it makes sense to set out a brief and necessarily incomplete overview of the basic problem. In a nutshell: The First Amendment to our Constitution protects the ''free exercise'' of ''religion'' and prohibits

[18] This is not to deny, of course, that RFRA and similar state statutes confer substantial discretion on judges. The point is, the authorization for the exercise of this discretion has been conferred—and this exercise may be monitored and corrected—by politically accountable actors.

[19] As now-Chief Justice Roberts once wrote, in another context, ''[A]ccommodation by the government of the religious beliefs of its citizens 'follows the best of our traditions.''' Brief for the United States as Amicus Curiae Supporting Petitioners at 35, Lee v. Weisman, 505 U.S. 577 (1992) (No. 90-1014) (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)). See generally, e.g., Michael W. McConnell, The Problem of Singling Out Religion, 50 DePaul L. Rev. 1 (2000). Cf., e.g., Andrew Koppelman, Is It Fair to Give Religion Special Treatment?, 2006 U. Ill. L. Rev. 571, 574 (''Government may privilege religion, but the First Amendment requires that it do so at a very high level of abstraction. . . . Because religion is a distinctive human good, accommodation of religion as such is not unfair.''). But see, e.g., Steven G. Gey, Why Is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment, 52 U. Pitt. L. Rev. 75, 79 (1990) (arguing that ''the accommodation principle is incompatible with a proper understanding of the religion clauses'' and insisting that ''[t]he establishment clause should be viewed as a reflection of the secular, relativist principles of the Enlightenment, which are incompatible with the fundamental nature of religious faith'').

its ''establishment.''[20] So far, so good. But what do these two constitutional commands *mean*? What does the Constitution's requirement that governments not ''prohibit[] the free exercise'' of ''religion'' actually demand of officials, particularly in the contemporary context, where government actors and action are ubiquitous, and ''religion'' is an increasingly tailored-to-suit phenomenon?[21] What limits does the First Amendment's ban on ''establishment[s]'' of religion impose on the political community's ability to acknowledge, respect, and even to support the role religious faith plays in the private experiences of individuals and the common spaces of public life? And, more specifically, what do these provisions mean for government's efforts, or obligation, to accommodate religious conviction by lifting burdens from religious exercise? Does the protection afforded ''free exercise'' require governments to exempt religiously motivated conduct from the scope of generally applicable laws? If so, when? If not, why not? Or, does the First Amendment's ban on ''establishment[s]'' of religion reflect a judicially enforceable commitment to privatized religion, and to a bright line between the domains of faith and law, such that even legislative decisions to accommodate religious believers are suspect? If not, where is the line between permissible accommodations and impermissible privileges? For many years, these and related questions have been at the heart of First Amendment conversations, litigation, and scholarship.[22]

So far as Supreme Court precedent and ''black letter'' law go, the modern doctrine centers on and emerges from three principal cases:

[20] U.S. Const. amend. I.

[21] See generally, e.g., Alan Wolfe, The Transformation of American Religion: How We Actually Live Our Faith (2003); Richard W. Garnett, Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine, 51 UCLA L. Rev. 1645, 1662–66 (2004).

[22] See, e.g., Gerard V. Bradley, Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism, 20 Hofstra L. Rev. 245 (1991); Philip A. Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992); Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990); Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109 (1990); Douglas Laycock, Formal, Substantive and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993 (1990).

Sherbert v. Verner,[23] *Wisconsin v. Yoder*,[24] and *Smith*.[25] Mrs. Sherbert, a Seventh-Day Adventist, was fired for refusing to work on Saturday, the ''Sabbath Day of her faith.''[26] The South Carolina Employment Security Commission denied Mrs. Sherbert's claim for unemployment benefits because the ''restriction upon her availability for Saturday work brought her within the provision disqualifying [her] for benefits.''[27] Mrs. Sherbert challenged the commission's decision as a violation of her rights under the Free Exercise Clause. In the Supreme Court, Justice Brennan concluded for the majority that because Mrs. Sherbert's conduct—*i.e.,* refusing to work on her Sabbath—did not pose a threat to public safety, peace, or order, the First Amendment required the government to show that the burden on her free exercise imposed by the commission's decision was ''justified by a compelling state interest.''[28] The burden on Mrs. Sherbert was clear: Putting to her the choice between ''following the precepts of her religion and forfeiting benefits,'' on the one hand, and ''abandoning one of the precepts of her religion in order to accept work,'' on the other, imposed the ''same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.''[29] Nor was this burden justified by a compelling governmental interest. Justice Brennan insisted that ''no showing merely of a rational relationship to some colorable state interest would suffice,'' but only '''the gravest abuses, endangering paramount interests','' would permit the government to limit an individual's free exercise of religion.[30]

In *Yoder*, the Court reviewed the convictions of members of the Old Older Amish who had violated Wisconsin's school-attendance law. Notwithstanding the state's requirement that young people attend school until the age of sixteen, the Yoders declined to send their children to public or private school after the eighth grade,

[23] 374 U.S. 398 (1963).

[24] 406 U.S. 205 (1972).

[25] See *supra* note 11.

[26] Sherbert, 374 U.S. at 399.

[27] *Id.* at 401.

[28] *Id.* at 403 (internal quotation marks and citation omitted).

[29] *Id.* at 404.

[30] *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

opting instead for ''informal vocational education'' designed to prepare them for life in their community.[31] Writing for the Court, Chief Justice Burger agreed with the state that governments have a strong interest in regulating and requiring education. At the same time, he insisted that even such a weighty interest is ''not totally free from a balancing process when it impinges on fundamental rights . . . such as those specifically protected by the Free Exercise Clause.''[32] More specifically, the chief justice wrote that ''in order for Wisconsin to compel school attendance . . . it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.''[33] In *Yoder,* the Court was convinced that the application of the compulsory-attendance law would ''gravely endanger if not destroy the free exercise of respondents' religious beliefs.''[34] And, it was not willing to accord decisive weight to the government's abstract claims about the importance of education, insisting instead that ''it was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.''[35]

Now, before turning to *Smith,* two points are worth noting about *Sherbert*, *Yoder*, and the line of religious-accommodation cases. First, the Court in both of these cases heard and rejected the suggestion that exemptions for religious believers from the burdens imposed by generally applicable laws amount to unconstitutional establishments of religion. In *Sherbert*, the Court said that ''the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.''[36] And in *Yoder*, the majority reasoned that accommodating the Amish religion ''can

[31] Wisconsin v. Yoder, 406 U.S. 205, 222 (1972).

[32] *Id.* at 214.

[33] *Id.*

[34] *Id.* at 219.

[35] *Id.* at 236.

[36] Sherbert v. Verner, 374 U.S. 399, 409 (1963).

hardly be characterized as sponsorship or active involvement. The purpose and effect of such an exemption are not to support, favor, advance, or assist the Amish, but to allow their centuries-old religious society . . . to survive free from the heavy impediment'' of the compulsory-attendance law.[37] Second, it is widely recognized that, in the years leading up to *Smith*, religious claimants' demands for free-exercise exemptions were usually rejected, notwithstanding the Court's professed adherence to the demanding *Sherbert* standard.[38] In some cases, the Court found ways to avoid applying the compelling interest test at all.[39]

The doctrinal landscape—if not the results for litigants in actual cases—changed markedly in 1990 with the decision in *Employment Division v. Smith*.[40] In something of a reprise of *Sherbert*, *Smith* involved two individuals who had been denied unemployment benefits after they were fired for using peyote—a hallucinogenic drug classified as a controlled substance under Oregon law—in a ceremony of the Native American Church. In *Smith*, however, the Court rejected the argument that this disqualification violated the Free Exercise Clause. Justice Scalia wrote, ''[i]t is a permissible reading of the text . . . to say that if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.''[41] Indeed, he continued, the Court had ''never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.''[42] But what about *Sherbert* and *Yoder*? Justice Scalia distinguished the latter as a case involving ''not the

[37] Yoder, 406 U.S. at 234 n.22.

[38] See, e.g., United States v. Lee, 455 U.S. 252 (1982); Bob Jones Univ. v. United States, 461 U.S. 574 (1983). See also Thomas C. Berg, What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act, 39 Vill. L. Rev. 1, 9 (1994) (''After *Yoder*, the Court never again upheld a free exercise claim on the merits against a general law (except for three unemployment benefits cases that were virtual reruns of *Sherbert*).'').

[39] See, e.g., Goldman v. Weinberger, 475 U.S. 503 (1986); Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378 (1990).

[40] 494 U.S. 872 (1990).

[41] *Id.* at 878.

[42] *Id.* at 878–79.

Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections.''[43] As for *Sherbert*, the Court emphasized that the case had involved a ''system of individual exemptions'' for secular reasons and purposes. The justices concluded that it stands for the rule that, in such a situation, an exemption that is available for other, non-religious reasons must also be extended in ''cases of 'religious hardship,''' unless there is a compelling reason not to afford similar treatment.[44]

Prominent scholars have defended the *Smith* rule—if not, perhaps, the Court's creation of an inelegant ''hybrid rights'' claim—with reference to the practices at the founding and the original understanding of the relevant constitutional provision.[45] Justice Scalia's arguments, however, focused more on what the majority clearly regarded as the unattractive prospect of subjecting policy after policy to compelling-interest review whenever an individual could identify or imagine a burden on his or her sincere ''religious'' convictions. It was, for the majority, ''horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.''[46] Far better, in the Court's view, to leave the matter of religious exemptions and accommodation to the politically accountable branches. True, the Court conceded, ''leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in.''[47] Still, ''that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.''[48] What's

[43] *Id.* at 881.

[44] *Id.* at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

[45] See, e.g., Bradley, *supra* note 22; Hamburger, *supra* note 22. In *Smith*, Justice Scalia had characterized *Yoder* and other exemption cases as presenting ''hybrid situation[],'' rather than ''a free exercise claim unconnected with any communicative activity or parental right.'' 494 U.S. at 882. The justices have done little to clarify how, exactly, a ''hybrid rights'' claim works or should be treated by courts. See generally, e.g., Stephen H. Aden & Lee J. Strang, When a ''Rule'' Doesn't Rule: The Failure of the Oregon Employment Div. v. Smith ''Hybrid Rights'' Exception, 108 Penn. St. L. Rev. 573 (2003).

[46] Smith, 494 U.S. at 889 n.5.

[47] *Id.* at 890.

[48] *Id.*

more, Justice Scalia insisted, ''[v]alues that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.''[49] And, of course, the ''political process'' quickly produced the Religious Freedom Restoration Act.

II.

Again, the *O Centro* case involved the use of a hallucinogenic tea called hoasca in the religious ceremonies of the O Centro Espirita Beneficiente Uniao do Vegetal (UDV), a religious community that originated in Brazil. Hoasca is made by brewing two indigenous Brazilian plants. It contains dimethyltryptamine (DMT) and—here's the difficulty—is categorized as a schedule I controlled substance under the federal Controlled Substances Act (CSA).[50] A small American group of UDV believers imported hoasca for use in religious ceremonies and, in 1999, the U.S. Customs Service seized three drums of the illegal tea. And although the government only threatened prosecution, that threat was enough to induce the UDV to stop the ritual use of hoasca in the United States.

However, the UDV then sought an injuction in federal court, contending, among other things, that the Religious Freedom Restoration Act's ''compelling interest'' standard requires the government to exempt believers' use of hoasca from the CSA's burdensome prohibitions. In the district court, the United States conceded that the ''CSA imposes a substantial burden on [UDV believers'] sincere exercise of religion.''[51] It insisted, though, that it has a compelling interest in ''adhering to the 1971 Convention on psychotropic substances; . . . preventing the health and safety risks posed by hoasca; and . . . preventing the diversion of hoasca to non-religious use.''[52] After hearing evidence regarding the potential health risks associated with hoasca use and the possible diversion of hoasca into the

[49] *Id.*

[50] Controlled Substances Act, 21 U.S.C. §§ 801 et seq. Under the CSA, it is a crime to knowingly or intentionally ''manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.'' 21 U.S.C. § 841(a)(1).

[51] O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236, 1252 (D.N.M. 2002).

[52] *Id.* at 1252–53.

black market, the district court concluded that the evidence was "in equipoise"[53] and "virtually balanced."[54] And so, it ruled that the government had "failed to carry its heavy burden" of proving that its refusal to accommodate UDV's religiously motivated use cleared RFRA's high bar.[55] In the court's view, the government had not demonstrated "a compelling government interest in protecting the health of UDV members using hoasca or in preventing the diversion of hoasca to illicit use."[56] The United States Court of Appeals for the Tenth Circuit affirmed,[57] and the Supreme Court granted review.

Before the justices, the government pressed three arguments. First, it contended the district court's evidentiary "equipoise" was insufficient to authorize the injunction against the no-exemption enforcement of the CSA.[58] Next, it argued that the character of schedule I substances, and the government's strong interest in uniform application of the CSA, preclude individualized exemptions for particular religious groups.[59] Finally, the government insisted that its obligations under the 1971 Convention on Psychotropic Substances supply the compelling interest required by RFRA.[60] Writing for a unanimous Court, Chief Justice Roberts rejected each of these arguments.

First, with respect to the government's "equipoise" claim, the chief justice noted that "the UDV [had] effectively demonstrated"—indeed, the government had conceded—"that its sincere exercise of religion was substantially burdened."[61] Therefore, the burden of proof was "placed squarely on the Government by RFRA."[62] Indeed, the point of the act was precisely to protect religious exercise by

[53] *Id.* at 1262.

[54] *Id.* at 1266.

[55] *Id.* at 1269.

[56] *Id.*

[57] O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 342 F.3d 1170 (10th Cir. 2003); O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 389 F.3d 973 (10th Cir. 2004) (en banc).

[58] Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 126 S. Ct. 1211, 1218–19 (2006).

[59] *Id.* at 1220.

[60] *Id.* at 1224.

[61] *Id.* at 1219.

[62] *Id.* at 1220.

demanding more from the government than a tie-goes-to-the-regulator rule. Even if getting the district court to find the evidence in ''equipoise'' came close, it could not satisfy the standard imposed on the government by Congress. In the end, the government had failed to establish, as RFRA requires, that its refusal ''would, more likely than not, be justified by the asserted compelling interests.''[63]

Next, the justices were unmoved by the claim that the need for uniform application of the drug laws defeated UDV's claim for a religious exemption.[64] This claim, the Court seemed to believe, also missed the whole point of RFRA. After all, the law's purpose is to provide or prompt exemptions for religious believers and religiously motivated conduct in situations where officially imposed burdens on religion are not the ''least restrictive'' means of furthering compelling state interests.[65] To credit, let alone to accord conclusive weight to, a blanket assertion that there is ''no need to assess the particulars of the UDV's use or weigh the impact of an exemption for that specific use, because the Controlled Substances Act serves a compelling purpose and simply admits of no exception,''[66] would severely hamstring RFRA's operation.

What's more, the chief justice observed that Congress had quite explicitly incorporated into RFRA the compelling-interest standard as it was understood and applied in the *Sherbert* and *Yoder* cases.[67] After reviewing these decisions, he concluded that ''RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.''[68] And, because RFRA requires such a particularized inquiry, it is not enough for the government merely to ''invok[e] the general characteristics of Schedule I substances'' or

[63] *Id.* at 1219. It was irrelevant, the chief justice explained, that the ''equipoise'' determination was made at the preliminary injunction stage of the case. ''Congress' express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test, including at the preliminary injunction stage.'' *Id.* at 1220.

[64] *Id.* at 1220–24.

[65] *Id.* at 1220.

[66] *Id.*

[67] *Id.* at 1220–21.

[68] *Id.* at 1220.

''Congress' determination that DMT should be listed under Schedule I.''[69] The act requires consideration of ''the harms posed by the particular use at issue[.]''[70]

Chief Justice Roberts also noted that the ''Act itself contemplates . . . exempting certain people from its requirements''; that is, ''an exception has been made to the Schedule I ban for religious use'' for the use of peyote in Native American religious ceremonies.[71] So, not only had the government failed to consider carefully, in a particularized way, whether any harm to a ''compelling'' government interest would result from an exemption for UDV believers from the hoasca ban, its insistence that no such exemption was possible flew in the face of its earlier decision to provide a religious exemption for thousands of Native Americans from a similar ban on peyote.[72]

The Court recognized that ''the Government [could] demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.''[73] In other words, the public interest in the efficient enforcement of a program or prohibition could conceivably outweigh an individual's free-exercise interests, but only if granting the requested exemption would actually endanger the regulatory scheme. In *O Centro*, ''the Government's argument for uniformity . . . rest[ed] not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to *any* RFRA claim for an exception to a generally applicable law.''[74] The government had failed to explain why an exception for religious use of hoasca would be any more disruptive to the Controlled Substance Act's regulatory system than an exception for peyote. In the justices' view, the peyote exception reflected Congress' determination that the government did not, in fact, have a compelling interest

[69] *Id.* at 1221.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 1222 (''If such use is permitted in the face of the congressional findings . . . it is difficult to see how those same findings alone can preclude any consideration of a similar exception [for the UDV] . . . .'').

[73] *Id.* at 1223.

[74] *Id.* (emphasis added).

in unswerving adherence to a uniform, exceptionless prohibition on the religiously motivated use of controlled substances.[75]

Finally, the Court was unimpressed by the government's assertions relating to the 1971 Convention on Psychotropic Substances.[76] Although the justices agreed that the convention covers hoasca, they maintained that ''[t]he fact that *hoasca* is covered by the Convention . . . does not automatically mean that the Government has demonstrated a compelling interest in applying the Controlled Substances Act [to the UDV's use of hoasca].''[77] Indeed, ''[t]he Government did not even *submit* evidence addressing the international consequences of granting an exemption for the UDV.''[78] Again, the bottom line under RFRA is that the ''invocation of such general interests, standing alone, is not enough.''[79] So far as the Court is concerned, ''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.''[80]

III.

What is the significance of the *O Centro* decision and what are its implications, not only with respect to litigation under RFRA, but also more generally? As Professor Berg has observed, ''RFRA and its background . . . raise some distinctive and bothersome problems of interpretation.''[81] For thirteen years, though, the Supreme Court had little to say about them. From the beginning, some scholars wondered whether the act would, in application, have any real bite. Professor Paulsen, for example, wrote that he was willing to ''wager that the courts will apply RFRA pretty much the way they applied the *Sherbert* test prior to *Smith*: inconsistently, insensitively, and incoherently.''[82] *O Centro,* though, at the very least signals the Court's recognition that RFRA demands more of courts than a rubber-stamp

[75] *Id.* at 1224.

[76] *Id.* at 1224–25.

[77] *Id.* at 1225 (emphasis in original).

[78] *Id.* (emphasis in original).

[79] *Id.*

[80] *Id.*

[81] Berg, *supra* note 38, at 3.

[82] Michael Stokes Paulsen, A RFRA Runs Through It: Religious Freedom and the U.S. Code, 56 Mont. L. Rev. 249, 293 (1995).

endorsement of the government's stated reasons for refusing to exempt religious believers from regulatory burdens. At the same time, the opinion contains nothing to suggest that a repudiation of *Smith* is in the offing.

Again, it is clear that RFRA was designed to restore—in those contexts to which it applies—the compelling-interest standard that the Court at least purported to apply in the *Sherbert* and *Yoder* cases. At the same time, it is just as clear that the Court rarely applied that standard with the vigor it professed. It is one thing, after all, to invoke such a demanding standard and another to put it to work invalidating laws. The fact that the Court, during the years between *Sherbert* and *Smith,* had seemed to regard as ''compelling'' most of the asserted interests in free-exercise cases caused some to wonder whether, in practice, RFRA would ''restore'' much of anything.

The chief justice's opinion in *O Centro* could soothe, if not dispel, such concerns. He insisted, after all, that ''RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the . . . categorical approach''[83] that had often carried the day for the government in post-*Yoder* cases. In keeping with this ''more focused'' inquiry, it appears that, after *O Centro,* boilerplate findings and assertions by the government about a program's aims and importance are not enough to sustain its burden in RFRA cases. Instead, the Court's position and approach seem consonant with the approach offered more than a decade ago by Professor Laycock: ''It is not enough that the government's regulation or program as a whole serves a compelling interest. . . . [I]t is not enough that the repeal of the law would defeat the government's compelling interest. Rather, government must make the much more difficult showing that an exception for religious claimants would defeat its compelling interest.''[84] Indeed, Chief Justice Roberts echoed this interpretation in his opinion for the Court, reminding the government that it is not enough to ''repeatedly invoke[] Congress' findings and purposes underlying the Controlled Substances Act''; after all, ''Congress had a reason for enacting RFRA, too.''[85]

[83] O Centro, 126 S. Ct. at 1220.

[84] Douglas Laycock & Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act, 73 Tex. L. Rev. 209, 222 (1994).

[85] O Centro, 126 S. Ct. at 1225.

It is worth noting, though, that there is nothing glib or naïve in the chief justice's acceptance of the duty, assigned by Congress, of balancing the government's asserted interests in enforcement against those of religious believers in unburdened religious exercise. In *Smith*, remember, the difficulties, and even the dangers, associated with such balancing had, at the very least, confirmed the majority's view that, in most cases, the First Amendment neither requires nor authorizes it. There is no getting around the fact that these difficulties and dangers are real. As the Court acknowledged in *O Centro*, there was ''no cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one. 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.''[86] Nevertheless, the Court refused to allow the difficulty inherent in the compelling interest test deter them from striking the ''sensible balances'' called for by this duly enacted exercise of congressional power.[87]

In *Smith*, Justice Scalia had warned that ''it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.''[88] At least with respect to the smaller sphere of ''general laws'' that RFRA affects, though, none of the justices in *O Centro* expressed similar horror. In fact, the confidence Chief Justice Roberts expressed in judges' ability to find ''sensible balances'' evokes Justice O'Connor's *Smith* concurrence, where she insisted that ''courts have been quite capable of . . . strik[ing] sensible balances between religious liberty and competing state interests.''[89] It should be emphasized, though, that *O Centro* is, in this respect, entirely consistent with the majority's conclusion and premises in *Smith.* That is, it is not that Chief Justice

[86] *Id.*

[87] *Id.* (quoting 42 U.S.C. § 2000bb(a)(5)).

[88] Employment Div. v. Smith, 494 U.S. 872, 889 n.5 (1990).

[89] *Id.* at 902 (O'Connor, J., concurring). Compare this language with Chief Justice Roberts in *O Centro*: ''Congress determined that the legislated test 'is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.' . . . This determination finds support in our cases; in *Sherbert*, for example, we rejected a slippery-slope argument similar to the one offered in this case.'' O Centro, 126 S. Ct. at 1223.

Roberts is more dashing and headstrong in the face of what Justice Scalia regarded as a horrible prospect. The point, instead, is that—consistent with Justice Scalia's invitation—the politically accountable legislative branch subjected itself to an exemption-friendly balancing regime and, of course, retains the power to change course, or bail itself out, should the need arise.[90] As Professor Berg has observed, under RFRA, ''[t]he authorization for protecting religious freedom at the expense of other societal values now comes from legislation by the political branches, rather than interpretations of open-ended constitutional language by unelected judges.''[91]

Besides affirming, in a general way, the ''toothiness'' of RFRA's compelling-interest standard, the *O Centro* case also suggests an important consideration for litigants and judges working out its application. It seems safe to say that the justices agree with Professor Paulsen's view that, under RFRA, a ''lack of systematic pursuit [of an interest by the government] belies the [government's] assertion of [the interest's] compelling importance.''[92] The chief justice wrote that ''[t]he fact that the Act itself contemplates that exempting certain people from its requirements . . . indicates that congressional findings with respect to Schedule I substances should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them.''[93] In addition, a refusal to provide relief from the burdens imposed by a general law on religious exercise is unlikely to be, as RFRA requires it to be, the ''least restrictive means'' to accomplish a compelling government objective when the legislature has already decided that *other* exemptions are consistent with its accomplishment.[94]

[90] Cf. Eugene Volokh, A Common Law Model for Religious Exemptions, 46 UCLA L. Rev. 1465 (1999) (describing and defending a ''common-law exemption model'' in which decisions about religious exemptions are initially made by courts but are revisable by legislatures).

[91] Berg, *supra* note 38, at 28.

[92] Paulsen, *supra* note 82, at 264.

[93] O Centro, 126 S. Ct. at 1221.

[94] Even in the free exercise context, as the Court in *Smith* recognized, it remains the case that when the government ''has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'' Smith, 494 U.S. at 884. For an interesting—and, perhaps, telling—decision applying this rule, see the opinion of now-Justice Alito in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark,* 170 F.3d 359 (3d Cir. 1999).

O Centro is instructive, and might provide something of a RFRA-roadmap, in another way, too. The decision indicates the justices' willingness to provide meaningful content to Congress' accommodation in the face of slippery-slope predictions. Responding colorfully to the government's contention that the Controlled Substances Act established a closed regulatory system that permits no RFRA-inspired exemptions, the chief justice observed that ''[t]he Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions.''[95] The chief justice's point was not, of course, that exemptions cannot have a cumulative effect, one that erodes or undermines the efficiency and efficacy of an important regulatory program. It was, instead, that the government's ''general interest in uniformity,'' standing alone, is not enough under RFRA to excuse a ''substantial burden on religious exercise.''[96] As he emphasized, RFRA mandates ''consideration, under the compelling-interest test, of exceptions to 'rule[s] of general applicability.'''[97] True, ''there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA,''[98] but to see this possibility is not to give conclusive weight to those ''slippery-slope concerns that could be invoked in response to any RFRA claim.''[99]

The *O Centro* decision is noteworthy not only for the clues and guidance it provides concerning future litigation under RFRA and application of its compelling-interest standard.[100] Although, again, the case was not really an Establishment or Free Exercise Clause case, the Court's unanimous opinion nonetheless spoke—or did not speak—in important ways about the First Amendment's religious-freedom provisions. More than a few scholars[101]—and also one jus-

[95] O Centro, 126 S. Ct. at 1223.

[96] *Id.*

[97] *Id.* (quoting 42 U.S.C. § 2000bb-1(a)) (alteration in original).

[98] *Id.* at 1224.

[99] *Id.* at 1223.

[100] It is worth noting the possibility that *O Centro* will influence the understanding and application not only of the federal Religious Land Use and Institutionalized Persons Act, but also the states' own RFRA-type laws and even the states' own stricter-than-*Smith* constitutional standards.

[101] See, e.g., Marci A. Hamilton, The Religious Freedom Restoration Act Is Unconstitutional, Period, 1 U. Pa. J. Const. L. 1 (1998); Christopher L. Eisgruber & Lawrence

tice[102]—have suggested that RFRA crosses a line between permissible accommodation and unconstitutional establishment of religion. Or, as Professor Berg has put it, ''some courts and commentators in the U.S. have not only rejected constitutionally mandated exemptions for religion; they have flirted with the idea that religious exemptions (or at least a fair number of them) are constitutionally forbidden.''[103] In *O Centro*, though, it was enough for the chief justice to report, without dissent or recorded objection, that ''[i]n *Cutter v. Wilkinson*, . . . we held that the Religious Land Use and Institutionalized Persons Act of 2000, which allows federal and state prisoners to seek religious accommodations *pursuant to the same standard as set forth in RFRA*, does not violate the Establishment Clause.''[104]

Again, the compatibility of religious accommodations with the Establishment Clause was discussed in *Sherbert*,[105] *Smith*,[106] and *Boerne*.[107] In *Sherbert*, Justice Brennan wrote that religious exemptions do not violate the Establishment Clause because they reflect ''nothing more than the governmental obligation of neutrality in the face of religious differences.''[108] Similarly, although Justice Scalia concluded in *Smith* that religious accommodations are rarely mandated by the Free Exercise Clause, he indicated no unease the constitutionality of accommodations by the politically accountable branches.[109] Justice Stevens, on the other hand, contended in his *Boerne* concurrence that RFRA amounts to a ''governmental preference for religion, as opposed to irreligion, . . . forbidden by the First Amendment.''[110]

G. Sager, Why the Religious Freedom Restoration Act Is Unconstitutional, 69 N.Y.U. L. Rev. 437 (1994).

[102] City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (Stevens, J., concurring) (''In my opinion, [RFRA] is a 'law respecting an establishment of religion' that violates the First Amendment to the Constitution.'').

[103] Thomas C. Berg, The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the United States, 19 Emory Int'l L. Rev. 1277, 1306 (2005).

[104] O Centro, 126 S. Ct. at 1223–24 (emphasis added).

[105] Sherbert v. Verner, 374 U.S. 398 (1963).

[106] Employment Div. v. Smith, 494 U.S. 872 (1990).

[107] City of Boerne v. Flores , 521 U.S. 507 (1997).

[108] Sherbert, 374 U.S. at 409.

[109] Smith, 494 U.S. at 890 (noting that the political community ''can be expected to be solicitous of that value in its legislation'').

[110] Boerne, 521 U.S. at 537 (Stevens, J., concurring).

O Centro rejects this view, and adopts instead the reasoning set out last year in Justice Ginsburg's opinion for the Court in *Cutter*.[111] In that case, as was noted earlier, the Court rejected an Establishment Clause challenge to another legislative accommodation, the Religious Land Use and Institutionalized Persons Act, which employs the same compelling-interest standard as does RFRA. The justices determined that ''RLUIPA's institutionalized-persons provision [is] compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise.''[112] That is, the Establishment Clause does not forbid Congress from choosing to remove the burdens that it imposes upon religious practitioners through generally-applicable laws. Furthermore, the Court noted that the compelling interest test of RLUIPA—and therefore RFRA—requires the courts to ''take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries'' and satisfy themselves ''that the Act's prescriptions are and will be administered neutrally among different faiths.''[113] This aspect of the compelling-interest test ensures that accommodations will not violate the Establishment Clause by punishing non-religious individuals or endorsing a specific religion.

IV.

An important component of the legacy of the former chief justice, William H. Rehnquist, is the Court's move in Religion Clauses cases toward ''neutrality'' and equal treatment as the constitutional touchstones.[114] In the school-vouchers context, for example, Rehnquist gradually steered his colleagues away from a strict version of no-aid separationism to an approach that focuses on the religion-neutral criteria employed in school-voucher programs and the role of parents' private choices in directing public funds to religious schools.[115]

[111] Cutter v. Wilkinson, 544 U.S. 709 (2005).

[112] *Id.* at 720.

[113] *Id.*

[114] See generally, e.g., Daniel O. Conkle, Indirect Funding and the Establishment Clause: Rehnquist's Triumphant Vision of Neutrality and Private Choice, in The Rehnquist Legacy (Craig M. Bradley ed., 2006).

[115] See, e.g., Zelman v. Simmons-Harris, 536 U.S. 639 (2002). See generally, e.g., Nicole Stelle Garnett & Richard W. Garnett, School Choice, The First Amendment, and Social Justice, 4 Tex. Rev. L. & Pol. 301 (2000).

Public holiday displays or depictions of religious symbols may now be permitted, notwithstanding the Establishment Clause, if they do not communicate a message of ''endorsement'' of or favoritism toward religion.[116] According to the Court's line of public-forum cases, religious expression is permitted in the public square—indeed, it may not be singled out for exclusion—because and to the extent it represents a ''viewpoint,'' or perspective, like any other, against which the government is not allowed to discriminate.[117] And, as has already been discussed, the rule in Free Exercise Clause cases, after *Smith,* is that exemptions for religious believers or religiously motivated conduct are rarely required when the allegedly burdensome law is generally applicable and religion-neutral. Under current doctrine, then, religion is not, for the most part, constitutionally entitled to privilege or special accommodation, nor must its expression be carefully policed or confined to private life.[118] Religion is protected, permitted, and welcome, it appears, because and to the extent of its same-ness.

A detailed analysis and evaluation of this thoroughgoing shift[119] in Religion Clauses cases' outcomes and animating premises is, as they say, well beyond the scope of this paper. Even if one believes—as we do—that an entirely wise commitment to the institutional separation of religion and government does not require judicially enforced public secularism,[120] or a ''religion as a hobby''-style privatization of religious faith and activism,[121] one might still wonder about the merits, and even the coherence, of the Court's neutrality- and equality-centered approach to the freedom of religion.[122] And, even

[116] See, e.g., Van Orden v. Perry, 125 S. Ct. 2854 (2005).

[117] See, e.g., Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995).

[118] For a very different understanding, see, e.g., Abner S. Greene, The Political Balance of the Religion Clauses, 102 Yale L.J. 1611 (1993).

[119] But see Locke v. Davey, 540 U.S. 712 (2004).

[120] On the other hand, Professor Sullivan has argued that ''[t]he bar against an establishment of religion entails the establishment of a civil order—the culture of liberal democracy—for resolving public moral disputes.'' Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. Chi. L. Rev. 195, 198 (1992).

[121] See generally, e.g., Stephen L. Carter, The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion (1994).

[122] See generally, e.g., Steven D. Smith, Getting Over Equality: A Critical Diagnosis of Religious Freedom in America (2001); Alan Brownstein, Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality, 18 J.L. & Pol 119 (2002).

if one concludes, with Justice Scalia, that *Smith* represents the better understanding both of the relevant text's original public meaning and the nature and consequences of democratic government,[123] one might still insist that a meaningful commitment to religious liberty under law should translate into more than "religion blindness" as an overriding constitutional principle.[124]

Just last year, in one of the Ten Commandments cases, the Court re-affirmed what the justices have been saying for (at least) fifty years: When the government "respects the religious nature of our people and accommodates the public service to their needs," "it follows the best of our traditions."[125] True, religious believers and leaders are no less capable than others of venality and self-interest, and so not every exemption for religion that emerges from the political process will be a responsible accommodation rather than spoils for powerful interests.[126] True, just governments and worthy political leaders will use law's coercive and expressive powers to protect the vulnerable from serious harms, and should not turn a blind eye to such harms simply because they are inflicted in the name or because of religious faith. Nevertheless, it is a prominent and attractive theme in our political and constitutional traditions that governments not only may, but should, respect religious faith and protect religious freedom through legislative accommodations and by, at times, "singling out" religion.[127]

[123] Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (stating that it is an "unavoidable consequence of democratic government" that "leaving accommodation to the process will place at a relative disadvantage those religious practices that are not widely engaged in").

[124] McConnell, The Problem of Singling Out Religion, *supra* note 19, at 3 (contending that "religion-blindness" "should not be treated as a general, or controlling, interpretation of the First Amendment.").

[125] Van Orden v. Perry, 125 S. Ct. 2854, 2859 (2005) (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

[126] For a passionate critique of exemptions for religion from generally applicable laws, and an argument that religious institutions and believers are powerful, sometimes self-interested players in our political process, see, e.g., Marci A. Hamilton, God v. the Gavel: Religion and the Rule of Law (2005).

[127] The "singling out" of religion through exemptions is, according to prominent scholars, best regarded not as a "privilege" for religion but as a way of reducing government interference with religion or state-sponsored skewing of religion-related decisions. See generally, e.g., McConnell, *supra* note 19; Laycock, *supra* note 22.

But how ''attractive,'' really, is this theme? Given that almost any regulation will burden or inconvenience someone, *why* should the political authorities in a pluralistic community take *particular* care that the measures they adopt in order to promote the common good, as they understand it, do not interfere with or constrain religiously motivated conduct?[128] Putting aside, for now, the question whether current constitutional doctrine permits religious accommodations—again, it does—and putting aside the fact the text of the First Amendment speaks specifically to ''religion,'' how can such accommodations be justified? What good reasons do we have for worrying more about laws' effects on religious believers' practices and incentives than on those of others? Yes, religion is important to many people, but so are many other things. It has been argued that forcing people to violate *religious* norms and obligations imposes ''special mental torment,'' given the way that religious believers perceive these norms and obligations and the results of violating them. In addition, it has been suggested that exemptions for religion reflect a recognition that people ought not to be put by the government in the position of having to violate a conflicting duty. And, perhaps it is enough to justify such exemptions that the civil-disobedience or political-stability costs of refusing them are particularly high.[129] In the end, though, none of these arguments or observations seems to mark ''religion''—as opposed to autonomy, conscience, etc.—as unusually deserving of special solicitude by regulators.

Perhaps this is because, in fact, there *are no good reasons* for secular governments, accountable to communities that are diverse and divided, to single out religion for special accommodation? Perhaps, as Professor Leiter contends in a recent paper, there are no ''credible principled argument[s] . . . that explain why, as a matter of moral

[128] See, e.g., Steven D. Smith, The Rise and Fall of Religious Freedom in Constitutional Discourse, 140 U. Pa. L. Rev. 149 (1991).

[129] These arguments have been presented and discussed by, for example, Dean John Garvey. See generally, e.g., John H. Garvey, Free Exercise and the Values of Religious Liberty, 18 Conn. L. Rev. 779 (1986). Garvey's own view is that what makes religious claimants distinct, and religion special, is, in the end, that ''religion is a lot like insanity'' and that ''[w]e protect [religious believers'] freedom . . . because they are not free.'' *Id.* at 801.

or other principle, we ought to accord special legal and moral treatment to religious practices''?[130] If, as Leiter insists, the ''distinctive features of religious belief'' are, as Leiter argues, the ''categoricity of its commands and its insulation from evidence,'' the case for specially accommodating religiously motivated practices would seem quite weak.[131] After all, why would we want the state to ''carve out special protections that encourage individuals to structure their lives around categorical demands that are insulated from the standards of evidence and reasoning we everywhere else expect to constitute constraints on judgment and action''?[132]

Now, lawyers and judges probably can and will continue deploying and applying First Amendment doctrine, and litigating and deciding First Amendment cases, with or without the help (or hindrance) of a deep religious-freedom theory that justifies their enterprise. The Constitution's text—''Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof''—requires us to come up with a usable, if not principled, body of rules, presumptions, and tests, and so, of course, we will. That said, the questions remain, and remain important: Why is religion special? Why should government accommodate religious believers and practices, even if constitutional doctrines do not require it? Human freedom is a good, we can all agree, but what is distinctively good about *religious* freedom?

It was widely believed, before and at our Nation's founding, and for many years thereafter, that the reasons for protecting religious liberty were *religious* reasons.[133] It was, for example, James Madison's view that a legal right to religious freedom followed from a truth about human beings and the world, namely, that ''religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.''[134] Consistent with this view, we might say that religious freedom under and through law is best explained by the fact that

[130] Brian Leiter, Why Tolerate Religion?, at 1, available at http://ssrn.com/abstract=904640.

[131] *Id.* at 23, 24.

[132] *Id.* at 27.

[133] See generally, e.g., Smith, *supra* note 128, at 154–66.

[134] James Madison, Memorial and Remonstrance Against Religious Assessments (1785).

"the law thinks religion is a good thing"[135] and is correct in so thinking. We might affirm that human beings are made to seek the truth, are obligated to pursue truth and to cling to it when it is found, and that this obligation cannot meaningfully be discharged unless persons are protected against coercion in religious matters.[136] And, we might say that secular governments have a moral duty—even if, under *Smith,* it is not a legally enforceable duty—to promote the ability of persons to meet this obligation and flourish in the ordered enjoyment of religious freedom, and should therefore take affirmative steps to remove the obstacles to religion that even well meaning regulations can create. We could say this, but do we believe it?

[135] John H. Garvey, An Anti-Liberal Argument for Religious Freedom, 7 J. Contemp. Legal Issues 275, 291 (1996).

[136] See, e.g., Second Vatican Ecumenical Council, Declaration on Religious Freedom ¶¶ 2, 3.