The other is that law reviews should continue to strive to provide constructive editorial revisions to the articles they accept, including assuring that citations accord with the edicts of the tyrannical *Bluebook*. Good editing is the key to the success of law reviews, and the key to its continued success in the future. If law reviews pursue their editorial functions with diligence and good faith, they will continue to flourish as the preferred medium for publication of legal scholarship.

To sum up, I would predict that sometime in the next 100 years, or perhaps when Dean Kearney is no longer dean, the *Marquette Law Review* will become an online publication. I also predict that it will continue to follow a multiple-submission policy, notwithstanding all the imperfections associated with this method of selecting content. But I also predict that the *Marquette Law Review* will be around to celebrate its 200th anniversary, even if Dean Kearney is not available to serve as toastmaster. Certainly, if future generations of students adhere to the standard of excellence that has prevailed over the first 100 years—including in the publication of volume 99, which we celebrate here tonight—it will have a very bright future, matching its proud past. ■

Joseph D. Kearney

The Supreme Court and Religious Liberty

Archbishop Jerome E. Listecki invited Marquette University Law School Dean Joseph D. Kearney to deliver the Archdiocese of Milwaukee's Pallium Lecture in the fall of 2015.

This is a great privilege. I never would have expected to be on this side of the podium for the Pallium Lecture.

Tonight's topic is the Supreme Court and religious liberty. It is along the lines of what Archbishop Listecki suggested (and we Chicago White Sox fans have to support one another). So let's get right into it. After all, we have only a little more than an hour together—or 50 minutes or so on my account, and as much time thereafter as the good judgment of the moderator, John Rothstein, supports.

We must start with the fact that the First Amendment to the United States Constitution provides for religious liberty. It is not the only guarantee of religious liberty, and the Supreme Court of the United States is not the only entity with authority on some questions of religious liberty. Those are related points. On the first point, almost every state has, in its own constitution, an analogue to the First Amendment, though sometimes speaking in notably different terms. For example, just to give you a local flavor, Article I, Section 18 of the Wisconsin Constitution begins as follows: "The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent. . . ." And it goes on from there. Thus, on my second point of a moment ago, *state* supreme courts have authority to protect against interferences with religious liberty by state and local governments. Additional complications arise because legislative bodies are capable of *granting* rights as well as interfering with rights. This is a point to which we shall have to return before we are finished.

Yet I think it quite justifiable to focus the bulk of our attention on the Supreme Court and the First Amendment. First, the Court has the final authority to interpret, where a case presents the question, the First Amendment. It has that authority because it *announced* as much in 1803 in *Marbury v. Madison*—

. . . it is striking to note that, for more than half our history, religious liberty was a matter that simply was not a notable portion of the Supreme Court's work.

surely the most important case that the Court ever decided. This was not, of course, a case involving religious liberty (Mr. Marbury had no claim of religious entitlement to receive the commission as justice of the peace that President Adams had signed at figuratively midnight before his departure from office). But the reference to *Marbury* is worthwhile not simply because, as Tom Shriner and I emphasize in our Federal Courts class, one referring to *Marbury v. Madison* feels important (as should one hearing the reference, by the way). It's worthwhile because, given *Marbury* and its use over the years, the Supreme Court's supremacy in constitutional pronouncements now is an established fact or convention. So while a state or Congress may provide additional liberty, the First Amendment as interpreted by the Court provides a baseline—a floor—below which no government entity may go. Second, in terms of justifying our focus, let us not forget that our primary identification as citizens is overwhelmingly with the national government, not the state. We are Americans. This was not always so, of course—consider our pre-Civil War forebears—but there is no doubt about it now. In short, when we think of religious liberty and legal rights, as with so many other things, we think especially of federal protections—which means that we think especially of the First Amendment and of the Supreme Court.

So on to the First Amendment, which says: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." What has the Supreme Court done with this? The Court and the Amendment have been with us for a while—225 years, give or take a year in the different instances—and it is useful to divide the Court's work into three eras. These are not of equal length (the first era would last into the 1960s) and are not watertight compartments. But the division is a useful framing device (he says hopefully).

To begin, for a long time—almost a century—the Court did very little with the First Amendment. How could that be? Well, recall that the amendment speaks in terms of *federal* power—*Congress* shall make no law. That limited reach meant that there was little for the United States Supreme Court to do. Yet there was one nineteenth-century case of note: *Reynolds v. United States*, decided in 1879. Reynolds had been convicted in a federal court of bigamy, which federal law proscribed in the Utah territory (Utah was not yet a state, hence the applicability of federal law). He contended that this violated his First Amendment rights. The contention did not get him far. The Court unanimously held that Reynolds had been subject to legal sanction not for his religious belief but for criminal activity; the First Amendment protected the former but not the latter. The Court said that "those who make polygamy a part of their religion" cannot be "excepted from the operation of the statute." Laws "cannot interfere with mere religious belief and opinions, [but] they may with practices," the Court went on, whether bigamy, human sacrifice, or suicide. The *Reynolds* case reflects the first era's reigning principle: specifically, that the First Amendment's Free Exercise Clause provides no exemption from laws of general applicability. The case is a touchstone to which we will return.

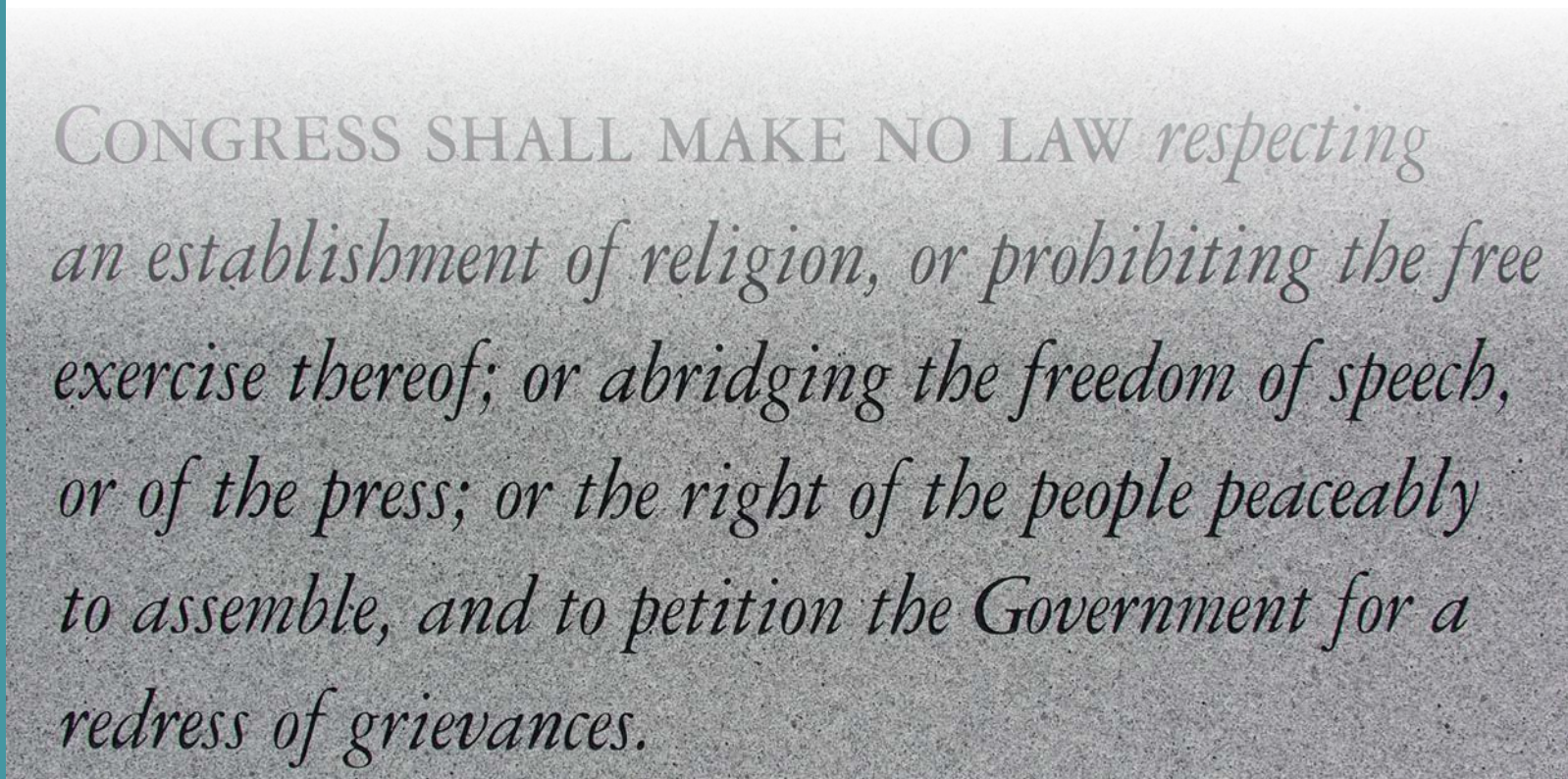
What happened to end this first era? Well, an awful lot had to occur, as the era did not end for more than another 80 years. So there is a lot for us to unpack in the era itself. For a most important, threshold matter, the Civil War happened. Or, more precisely, after the war, in 1868, the people of the

United States adopted the Fourteenth Amendment to the Constitution. Or, more precisely yet, that amendment eventually was held to apply, against the states, most of the same restrictions applied under the Bill of Rights to the federal government. This is the so-called incorporation doctrine, well known to any lawyers and a number of others here, I am sure. The Fourteenth Amendment's protections were held to include the First Amendment's guarantees, and it therefore no longer mattered that the earlier amendment spoke in terms of things that *Congress* might not do. The First Amendment's prohibitions now applied to the states as well.

Before we discuss some of the cases in and around the time of incorporation, let's be clear that we understand the late eighteenth and early nineteenth centuries. I make no suggestion that nothing happened during this time affecting religious liberty. Indeed, it was a rich era. If you stretch its time boundaries a little bit, it included Virginia's Statute for Religious Freedom (written by Thomas Jefferson) and James Madison's Memorial and Remonstrance Against Religious Assessments—in fact, these 1770s and 1780s matters preceded the First Amendment by a few years. The time period also saw the disestablishment of various Protestant churches—that is, their separation from the state governments that had supported them—with the last of these occurring in Massachusetts in 1833. And, much later (in the 1870s), it saw the so-called Blaine Amendments, which changed various state constitutions to ban government support of seminaries or church schools.

But the salient point for us is that the Supreme Court had little to do with developments around religious freedom. This may seem a long time ago, and in many respects it was, but it is striking to note that, for more than half our history, religious liberty was a matter that simply was not a notable portion of the Supreme Court's work.

Nor did even incorporation end the first era—or at least not right away. Yet in the same general time frame as incorporation—let us call it 1925 to 1950—there were hints, however incomplete, of things to come. In this regard, we must discuss *Pierce v. Society of Sisters*, an important case. *Pierce* was a 1925 decision involving a challenge to an Oregon law requiring children between 8 and 16 years old to attend school—*public* school. As a treatise coauthored by one of my colleagues, Professor Scott Idleman, has described it, "[t]his public school monopoly law was narrowly enacted by an electoral initiative led by an ignoble crew of nativists, Ku Klux Klanners, Scottish Rite Masons, and anti-Catholics . . . ." But this crew proved no match for the sisters—the Society of Sisters of the Holy Names of Jesus and Mary, to be precise.



The Supreme Court struck down Oregon's law. It did *not* invoke the First Amendment. It relied on something rather more vague: the Fourteenth Amendment's Due Process Clause—which prohibits states from depriving persons of life, liberty, or property without due process of law. The Court indicated that there was a *liberty* interest in a parent's or guardian's right to decide how his or her children were to be educated. Let's listen to its words:

> Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act . . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.

The Court went on to say that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

So it was *liberty* that formed the basis for the Court's ruling in *Pierce*, but not specifically religious liberty; indeed, the key precedent had nothing to do with religious liberty. In *Meyer v. Nebraska* (1923), a couple of years before *Pierce*, the Court had struck down a 1919 state law requiring all grade-school education—public or private, including parochial—to be in the English language. It was not enough to have won World War I, apparently; even afterward, Nebraska's statute, like laws elsewhere at the time, targeted German-language instruction. In the brief opinion striking down that statute as unconstitutional, the Court invoked "liberty" under the Fourteenth Amendment.

So these were Fourteenth Amendment concepts, but application of the First Amendment—that is, incorporation—was near at hand. This was part of a gradual process, with different parts of the Bill of Rights being held to be incorporated in a series of cases over the years. But within about two decades of *Pierce*—that is, by the time of *Everson v. Board of Education*, in 1947—the Court would say that the religion clauses of the First Amendment apply to the states.

The cases in between are interesting and deserve discussion. They include *Cantwell v. Connecticut*, a 1940 decision invalidating the conviction of three Jehovah's Witnesses for distributing religious literature on the streets of New Haven (aggravating the Catholics in the neighborhood, by the way) and, in the process, soliciting contributions. This violated a law requiring solicitors of such funds to obtain a certificate of "approv[al]" from a state official. *Murdock v. Pennsylvania* in 1943 struck down an ordinance that required solicitors to purchase a license from the local borough—at least striking it down as applied to one asking for contributions in exchange for religious books and pamphlets. And that same year, the famous case of *West Virginia State Board of Education v. Barnette* held that children in a public school could not be required to salute the flag and say the Pledge of Allegiance.

These cases all share an important characteristic. It is not that they all involved Jehovah's Witnesses, although that is true and even interesting. The *important* point is that these were at least as much—indeed, they seem to have been more—free-speech cases as (or than) free-exercise-of-religion cases. This need not have been the case. That is, under some conceptions, the First Amendment's Free Exercise Clause could have provided a sufficient basis for striking down laws whose effect was to prohibit distribution of religious literature or to require one to proceed against the dictates of one's conscience by (for example) saluting the flag. But the Court did not go that route.

I have focused on free exercise cases because they go plainly to religious liberty. That is, they typically involve some citizen's defending himself *against* state action by claiming a First Amendment right. Yet I should note that there were some important Establishment Clause cases along the way. For example, in *Everson*, our 1947 case, the Court rejected a challenge to a New Jersey law whose effect was to reimburse parents variously providing public-bus transportation of their children to both public and private schools, including religious ones. The case may have seemed a victory for Catholics, but it came at a cost. The entire Court—even those justices in the majority, which *rejected* the Establishment Clause challenge—thought especially significant in interpreting the First Amendment the controversies in 1770s and 1780s Virginia that had prompted Jefferson to draft Virginia's

statute for religious freedom and Madison to write his remonstrance against religious assessments. This has seemed unfortunate to many, not least because it enabled the Court to observe in the process that "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" Indeed, it described that wall as "high and impregnable." Much criticism has been directed at this reasoning, especially as it has subsequently been used to *sustain* various Establishment Clause challenges—e.g., to the government display of various crèches or menorahs or the Ten Commandments (even as the Court has *rejected* some such challenges and thus upheld certain other displays). Yet I am not spending much time on Establishment Clause cases because they generally involve the citizen's complaining not about the government's direct interference with his religious liberty but rather about its lack of neutrality or its support of religion. Those can be important complaints, but they are outside my focus here.

So let us return to the Free Exercise Clause—secure in the knowledge from *Everson* that the religion clauses were incorporated and not even concerned that, despite the press of time this evening, we are still in the first era. In these mid-twentieth-century circumstances, although we were living fully in an era of incorporation of the First Amendment, there was little basis for thinking that anything substantively had changed otherwise from the *Reynolds* era. Indeed, as late as 1961, in *Braunfeld v. Brown*, the Court held that a Sunday-closing law did not violate the rights of Orthodox Jewish merchants who wanted to be closed on Saturday but open on Sunday. It said that the law imposed only an indirect burden on the exercise of religion—that is, it did not make unlawful any religious practice itself. Essentially, the approach of *Reynolds* (which the Court cited) prevailed in *Braunfeld*, and there was no meaningful scrutiny of this generally applicable law.

One of the dissenters in *Braunfeld* was Justice William Brennan. And only two years later Justice Brennan would command a majority of the Court for his views. The case was *Sherbert v. Verner* (1963), and it brings us—at last—to the second era of the Supreme Court's free exercise jurisprudence. The underlying circumstances were hard to distinguish from *Braunfeld*. Sherbert, a Seventh-day Adventist, was fired from her job after she refused to work on Saturday, the Sabbath Day in her religion. The South Carolina Employment Security Commission denied her benefits, finding unacceptable her religious justification for refusing Saturday work. In finding a violation of Sherbert's First Amendment rights, the Court engaged in a balancing of interests: It held that the state's eligibility restrictions for unemployment compensation imposed a significant burden on Sherbert's ability to freely exercise her faith and that there was no compelling state interest that justified this.

Justice John Marshall Harlan II dissented in *Sherbert*. He noted that the state law was one that the state supreme court had "uniformly applied." He even was concerned that allowing an exception for Sherbert based on her religion amounted to a violation of the Establishment Clause. And he noted the incompatibility of the decision with *Braunfeld*, which only two years earlier had upheld the right of a state to prohibit businesses from being open and to provide for a day of rest on Sunday—without any balancing of the costs imposed on an individual citizen. Justice Harlan was joined in dissent by Justice Byron White. It might be interesting to note that the former would be gone a decade later when the Court decided *Roe v. Wade* (1973), but the latter would find himself in dissent there as well.

Let us leave aside any path from the restrictions on the government in *Sherbert* to such restrictions in *Roe* (it is an understatement that the cases are distinguishable, but I am right to be provocative here).

> *The* Reynolds *case reflects the first era's reigning principle: specifically, that the First Amendment's Free Exercise Clause provides no exemption from laws of general applicability.*

> *The important point emerging from* Sherbert *is that the Court might require an exception based on religion to a law or government rule, even where that law or rule was neutral and of general application.*

The important point emerging from *Sherbert* is that the Court might require an exception based on religion to a law or government rule, even where that law or rule was neutral and of general application. That the First Amendment could require such an exception would become the hallmark of the Court's second era of free exercise jurisprudence.

And while it did not last nearly as long as the first, it was, unquestionably, an era. *Sherbert* led to such decisions as *Wisconsin v. Yoder*. In defending against a criminal action, Amish parents challenged the Wisconsin compulsory-education law. In 1972, the Court held that the First Amendment, as incorporated, prevented the state from requiring that Amish children remain in school past the eighth grade, until age 16. The Court was most sympathetic, ruling that Wisconsin's law violated the Amish parents' free exercise rights.

Let me return to being provocative. It should not go unremarked that the timeframe that we have thus far discussed in this second era—the 1960s and early 1970s—was one in which the Court was rather willing to recognize rights well beyond free exercise of religion. Some of this involved other First Amendment rights—such as *Cohen v. California*, a 1971 decision involving the defendant's wearing a shirt with an obscenity concerning the Vietnam War draft. But some of it also was less tied to the text of the Constitution, including such famous (and to some infamous) cases as *Griswold v. Connecticut*, which in 1965 found a constitutional right on the part of married couples to use birth control products, and *Roe v. Wade*, recognizing a constitutional right to abortion in 1973. These rights were found not so much in the specific text of the Constitution as in a right of privacy emerging from the Constitution's "emanations" and "penumbras" (to use words from *Griswold*). The key precedents in these decisions? Well, it would be far afield to dig deeply into them, but it may be noted that in *Griswold* the Court could say, "[W]e reaffirm the principle of the *Pierce* and the *Meyer* cases." You will recall those as our 1920s cases invalidating a state ban on German-language instruction (*Meyer*) and a state requirement of public as opposed to religious education (*Pierce*). It is a jurisprudential challenge to applaud the one set of cases while booing the other—not an impossible one, no doubt, but a challenge.

In all events, given this, it should not come as a large surprise that the emergence of a different Supreme Court in the 1980s and beyond, with some (though never yet most) of its members intent on undoing *Roe v. Wade*, also brought with it less interest in maintaining the approach of *Sherbert* and *Yoder*. This is not to suggest that *Sherbert* and *Yoder* were the entirety of the second era. For example, in *Thomas v. Review Board*, the Court in 1981 validated the free exercise rights of a Jehovah's Witness who had quit his job after a transfer to a position that required that he build military equipment in violation of his religious tenets. In overturning Indiana's refusal to accord unemployment benefits, the Court said that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." Once again, the Court employed a balancing test that permitted exceptions to laws of general applicability for the individual religious needs of citizens. It would still be doing so as late as 1989—in *Frazee v. Illinois Department of Employment Security*, a unanimous unemployment benefits case and a generation after *Sherbert* by conventional measures (although Justice Brennan was still on the Court).

The era would soon end. A year later, we entered into what can reasonably be termed a third era, although some would characterize it as a return to the first.

The key decision is *Employment Division v. Smith*, from 1990. It involved two Native Americans who worked as counselors for a private drug

rehabilitation organization. They ingested peyote—a drug that was hallucinogenic—as part of their religious ceremonies and were consequently fired. The state denied their claim for unemployment compensation because the reason for their dismissal was considered work-related "misconduct." The state supreme court concluded that this denial of benefits violated the First Amendment's Free Exercise Clause. The United States Supreme Court reversed: Justice Antonin Scalia spoke for the Court in ruling against the free exercise claim. "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. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." Scalia invoked *Reynolds v. United States*—you will recall that 1879 case upholding the conviction of a Mormon for bigamy.

And he noted that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . ." Hybrid situations, as Justice Scalia would term them—and let us pause for a moment to note that, on this front, he cited *Cantwell* and *Murdock*, some of our Jehovah's Witnesses cases. "[O]r," the Court continued, cases that involved "the right of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children," and for this it invoked *Yoder*.

Let us leave aside the other cases that Justice Scalia cited (for he certainly had to engage with *Sherbert*) and return to his language in *Smith*—the Court's language, which concludes with a quotation of a 1971 precedent:

> Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls. "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government."

Smith was decided in Justice Brennan's final months on the Court, concluding some 34 years of service, and it would find him in dissent, together with Justices Thurgood Marshall and Harry Blackmun.

We continue to be in this third era of constitutional law that *Smith* ushered in. The constitutional decisions that follow *Smith*, even where they have ruled for the citizen's free exercise rights, have not involved some balancing test. For example, in 1993, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court ruled for the Santerian religious claimant, but that was a case of pretty well overt discrimination. Local ordinances aimed at the church's practice of ritual animal sacrifice. The problem was that the ordinances contained so many exemptions for all sorts of animal killings that the only conduct to come within the scope of the law was *this church's* ritual sacrifice. Here we had a law that was neither neutral nor generally applicable, so *Smith* did not apply, and the city could not meet the compelling state interest requirement.

There is little else by way of constitutional law in this third era. How can this be? And should I therefore declare my remarks concluded with respect to my topic and open it up to questions—or, better yet, simply sit down? Well, it is not yet time to yield the floor. For we have finished the story of the Supreme

"It is a jurisprudential challenge to applaud the one set of cases while booing the other—not an impossible one, no doubt, but a challenge."

Court's engagement with the First Amendment's Free Exercise Clause but not that of its grappling with religious freedom. The reason is that, shortly after *Smith*, the United States Congress got into the act and gave to citizens broader free exercise rights and to the courts the responsibility of protecting them. Specifically, in 1993, Congress, with the concurrence of President Bill Clinton, enacted the Religious Freedom Restoration Act (or RFRA). There is no doubt as to its purpose: It was to vindicate Justice Brennan over Justice Scalia. Well, that is to personalize it a little too much, I admit, but it *was* to reject *Smith* (Scalia's opinion) and to enshrine *Sherbert* (Brennan's). That is what the *Restoration* portion of the Act's title meant. To put it in doctrinal terms (legal doctrine, not church doctrine), RFRA reinstated the strict scrutiny standard even for neutral and generally applicable laws.

Let's discuss that a bit. RFRA lays down a general rule that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ." Then it provides for the possibility of exceptions—that is, circumstances in which the government *can* impose a substantial burden. An exception will apply if the burden—the government obligation or regulation, say—"(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." That's quite the different standard from *Smith*; in fact, it's *Sherbert.* It's also unconstitutional, the Court said in 1997, insofar as its scope included (as Congress intended) actions of state and local governments within this standard. But let us not get lost in that 1997 decision, *City of Boerne v. Flores*, interesting as it was for other constitutional reasons (involving Congress's ability, or inability, to go beyond the Supreme Court's recognition of rights in enforcing the Constitution).

I say that for two reasons: One is that RFRA itself continues to restrict or control the actions of the *federal* government. That portion was not struck down in 1997, and its continued viability has subsequently been made clear by the Court. This is a big deal because the federal government is a big deal: The federal government of today has become rather more a government of general jurisdiction than ever previously. It is involved in protecting lands, issuing mandates about water and air, governing housing, and regulating employment, just to scratch the surface. So there is a lot of federal government action for which federal law now requires accommodations based on religious liberty. The other reason not to get lost in the 1997 decision striking down RFRA with respect to the states is that in 2000 Congress passed the Religious Land Use and Institutionalized Persons Act (or RLUIPA), which contains the same substantive standard for religious liberty as RFRA and applies to state and local governments but avoids the constitutional problem (largely by tying Congress's restriction of state and local governments to those governments' acceptance of federal funds). And the result of this—i.e., the combination of RFRA and RLUIPA—is that in the lower courts there has been a veritable explosion of successful religious liberty claims in the past decade and a half, well beyond (in my estimation) anything that we saw in the second era of First Amendment free exercise law, which *Sherbert* ushered in and *Smith* then sent packing.

Something else has been at work also—a point that I have thus far avoided but that bears comment, even emphasis: One aspect of the Free Exercise Clause that the Court has expanded and maintained in its expanded version, and that seems to have made its way into the new statutes, is the meaning of the term *religion*. Over the past 140 or so years (so roughly *Reynolds* forward), the Court has moved from a largely monotheistic view to a more broadly theistic view to an essentially spiritual, non-theistic (though not necessarily atheistic) approach to religion. In 1981 (in *Thomas*), for example, the Court had the following to say:

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task . . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

The matter is complex, and I wish to bottom-line it: Even today, the reach of the Free Exercise Clause is broad, in terms of the range of beliefs covered under the rubric "religion," even if post-

> *. . . it will be interesting to see how we as a society proceed with both a broad definition of religion (as we have had for a while) and broad protection (as with RFRA and RLUIPA we have had for only a short time so far). In fact, the early returns are already interesting.*

Smith the punch that the clause packs typically is ineffectual, in the sense that it is much harder to use the clause to obtain heightened scrutiny than it was during the second era. It is possible that this breadth of availability (again, tied to a broad conception of religion) may—ironically but logically—have been one of the reasons for *Smith*. The clause may be manageable with either a broad definition of religion or a low bar for heightened scrutiny, but not with both.

Let me postulate this as well of the Court's expansive approach to what "religion" means: Much like *Sherbert* and *Yoder*, it has less to do with a principled and robust theory of religious freedom, and more to do with concerns about inclusiveness and autonomy, coupled with a modernist or post-modernist crisis in epistemology. This is a huge problem for a robust theory of religious liberty independent of other liberties. If the judiciary is no longer protecting practices because they stem from obligations arising from one's creator, discerned from scripture and supported by the teachings of church leaders and theologians, but instead because a claimant simply feels a higher power or inner calling (perhaps as much conscience as religion), then the judiciary is not operating with a coherent theory of religious freedom but rather just deferring to individuals' idiosyncratic senses of self-realization, autonomy, etc. (Or, as worded in the *Planned Parenthood v. Casey* joint opinion in 1992, the Court is actualizing "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.") This may all seem very cynical, but viewed across multiple lines of cases, inferences or conclusions such as these are difficult to avoid. But this is to begin to get far afield.

To return to the state of the law, it will be interesting to see how we as a society proceed with both a broad definition of religion (as we have had for a while) and broad protection (as with RFRA and RLUIPA we have had for only a short time so far). In fact, the early returns are already interesting. For example, in the case underlying *Cutter v. Wilkinson*, a 2005 Supreme Court decision, inmates of an Ohio prison—including adherents of Asatru, a minister of the white-supremacist Church of Jesus Christ Christian, a Wiccan, and a Satanist—challenged the state's failure to make certain accommodations of their non-mainstream religions. The question before the Supreme Court was not the merits of the accommodations sought but the state's argument that, insofar as it required such accommodations, RLUIPA violated the Establishment Clause—an argument that the Court rejected. I mentioned something about the case's facts or parties more so that you get a flavor of the sort of challenges that are now possible.

The important doctrinal point under RFRA is the difference from *Smith*, and the Court's decision in 2006 in a case called *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* lays plain that difference. The federal government seized a sacramental tea, containing an illegal hallucinogenic substance, from a New Mexico branch of a Brazilian church. The church challenged this in court, and the United States Supreme Court ruled for the church. Unanimously adopting a strong reading of RFRA, the Court invalidated the government's application of the federal Controlled Substances Act to the hallucinogen at issue. It refused to accept a *generalized* compelling interest in drug law enforcement and instead required an explanation of why enforcement of the *specific* prohibition against the *specific* religious group would be compelling. There being no such explanation, the church prevailed.

But you likely have some sense that we are a long way from *Smith*. For, more recently and more famously, the Court in 2014 decided the *Hobby Lobby* case. There the question was whether RFRA enabled closely held private corporations (including

Hobby Lobby) to claim an exemption from federal regulations that implemented the Affordable Care Act by requiring employers to provide health insurance coverage for various contraceptive methods. There was no unanimity here. It was a 5-to-4 decision, reflecting a split precisely aligned with the parties of the presidents who appointed the members of the Court: the five Republican appointees forming the majority and the four Democratic appointees in dissent.

The Court in *Hobby Lobby* held that RFRA required the government to accommodate the interests of a private corporation as employer in not providing such insurance coverage. To listen to the dissent by Justice Ruth Bader Ginsburg, this was "startling": "[T]he Court holds that commercial enterprises . . . can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs." We need not decide whether the dissent's characterization of the Court's opinion was exactly correct. The point to emphasize for us is that the decision was based on *RFRA*. That was a good thing for the claimants, by the way: Given *Smith*, it would have been much harder to prevail under the Free Exercise Clause—to understate the point.

Hobby Lobby is not the Supreme Court's latest word on religious freedom. Within the past year, under RLUIPA, the Court decided *Holt v. Hobbs* (2015). There it ruled that an Arkansas prison policy preventing a Muslim prisoner from growing a half-inch beard in accordance with his religious beliefs was unlawful—not unconstitutional, but a violation of RLUIPA. Here the Court was unanimous.

So where are we? Well, some things suggest themselves immediately from the recent cases—or from *Hobby Lobby*, at any rate. One is that the extent of religious freedom provided by the federal government is scarcely a settled matter. As with any 5-to-4 decision, we can say that a change in one member of the Court might well bring with it a different result. Another is that things are becoming more intense as a political matter. This involves different forms. They will include the phenomenon of Supreme Court appointments. But they also include traditional politics: the contents of legislation. The consensus that existed in Congress and in the larger public about RFRA is gone. Earlier this year, for example, the ACLU announced that, while it had supported RFRA at the time of its passage, "we can no longer support the law in its current form." It maintains that RFRA has become not just a shield for protecting people "whose religious expression does not harm anyone else" but also "a sword to discriminate against women, gay and transgender people and others." This will especially be the case, the ACLU's spokesperson maintained, in a world where same-sex marriage is a right—and we Americans now live in that world. The reaction earlier this year to Indiana's mini-RFRA—a state law largely tracking the language of the federal law—can give you some sense of this.

To conclude (or to begin to do so), we have established that the Supreme Court's affirmative contribution to the tradition of religious freedom in the United States has been modest under the First Amendment's religion clauses. That is a carefully worded statement. There *is* a robust tradition of religious freedom in this country, and the First Amendment has had much to do with it. But much of that much has been the result of not decisions by the Court but rather the good judgment of government actors in generally not trying to marry together state and church, at least outside the context of public education. And other parts of the robust tradition have come either from state courts and the state constitutions or from the United States Supreme Court but in its reading of other provisions of the Constitution. Sometimes those provisions have been more general—for example, the Due Process Clause in *Pierce v. Society of Sisters* and its antecedent, *Meyer v. Nebraska*—and other times they have included other parts of the First Amendment (as in the Jehovah's Witnesses cases in the 1940s, such as *Cantwell*, *Murdock*, and *Barnette*). Only for about three decades—the second era, from *Sherbert* through *Yoder* and up until *Smith*—did the Court apply the Free Exercise Clause in a way independently to compel government actors to make exceptions to rules of general applicability such as compulsory-education laws.

And when that happened, it came from individuals, such as Justice Brennan, who were also hard at work using some of the same concepts to recognize other constitutional rights, such as those in *Griswold* and *Roe*. And the First Amendment developments would be met with the opposition of individuals such as Justice Harlan and Justice Scalia. All of these

> *. . . things are becoming more intense as a political matter. . . . The consensus that existed in Congress and in the larger public about RFRA is gone.*

are careful statements, I hope. So, for example, Justice Scalia was with the majority in *Hobby Lobby*—but there the issue was one of statutory interpretation (RFRA) and not a First Amendment matter. One would have to imagine that, if the Court had had to get to the First Amendment claims in the case, the principles of *Smith* would have led Justice Scalia in the other direction.

In short, I think us to have entered into a new era of the law of religious freedom in this country—a fourth era. On the one hand, it resembles the second era in terms of its willingness to carve out exceptions based on religious grounds to neutral and generally applicable government policies. On the other hand, it is proceeding with a much broader conception of religion than that with which the second era began (the Seventh-day Adventists in *Sherbert* and even the Amish a decade later in *Yoder* were reasonably traditional religions by standards of what now falls within the courts' conception of religion).

This is going to be a dynamic era. To give you a sense of it, a discussion has recently begun among some intellectuals whether there is—under RFRA-type laws—an ability of people to claim an exception to anti-assisted-suicide laws on the grounds that it violates their religious beliefs to be forbidden to help a patient or a spouse or anyone else to escape pain (or what the person feels to be indignity) by helping him end his life if he so wants. For Catholics, this might be an astonishing thing, and such an argument was rejected by a court a number of years ago—*but*, as one fair-minded and prominent commentator, Eugene Volokh, has pointed out, "only because it was brought under the free exercise clause, which [under *Smith*] doesn't mandate religious objections from generally applicable laws."

"But what," this sober commentator asks, "of the more than half the states that either have state [RFRAs], or have state constitutional religious freedom guarantees that state courts have interpreted as generally providing religious exemptions?" Rather than analyze a possible RFRA right to help with assisted suicide, let me conclude this point with the commentator's observation: "A complicated question, which I expect that courts might well be turning to soon, especially given the extra publicity and credibility given to religious objection claims by recent cases such as *Hobby Lobby*."

Let me take a few minutes to conclude more broadly as well. To do this, let me note something about what judges do. Yes, in the context of specific cases, they interpret the Constitution and statutes, but in doing this they never get away from their education in the common law, which involves grappling with concepts such as "reasonableness." And what does this involve—or, at any rate, where do judges get the notions and precepts underlying this grappling? They get it, Oliver Wendell Holmes, Jr., instructed us in the late nineteenth century, not so much from "logic" as from "experience." This is relevant here because there will be much common-law reasoning in applying RFRA, as judges determine whether a government obligation "*substantially* burden[s] a person's exercise of religion" and, if so, whether it is in "furtherance of a *compelling* governmental interest." There will, in other words, be much occasion for exercising *judgment*. That is what judges do, for better or for worse, and they will be influenced, as judges with discretion always have been, less by the "syllogism" (or logic) and more by "experience"—or, to complete the quote from Holmes, by "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or

unconscious, even the prejudices which judges share with their fellow-men [and women, we might add]."

So, without doubt, we must hope for good judgment. At the same time, the last word here should not be from Holmes or RFRA but from a source both less and more authoritative. Consider that a broad theme of my lecture has been that people are wrong to think that the Supreme Court has protected religious liberty for the past two centuries. In fact, it has done rather little in that regard—and even less by way of protecting *religious* liberty separate and apart from "liberty" more generally. And so, in closing this Pallium Lecture, I am reminded of the wisdom of Psalm 146: "Put not your trust in princes . . . ."

"Put not your trust in princes." I confess that the admonition is taken out of context, but is this not the right attitude for citizens of a democracy to cultivate? Princes in black robes are no more to be trusted to protect our freedoms than are any others. In the end, it is only the hard work of influencing elected representatives to pass laws (such as RFRA, perhaps) and of electing executives who truly cherish religious liberty themselves that will give its proponents a fighting chance.

I thank Archbishop Listecki for his confidence in inviting me to deliver this year's Pallium Lecture. And I thank all of you for your kind attention to the lecture. I hope that you have found something of value in it. ■

Nicola Lacey

Barrock Lecture: Criminal Responsibility and the Purposes of Criminalization

Nicola Lacey is School Professor of Law, Gender and Social Policy at the London School of Economics. Lacey delivered Marquette Law School's annual George and Margaret Barrock Lecture on Criminal Law this past academic year. Her Barrock Lecture was published as an article in the spring 2016 issue of the *Marquette Law Review*: "Socializing the Subject of Criminal Law? Criminal Responsibility and the Purposes of Criminalization." This excerpt is from the introduction to that article.

Most accounts of criminal responsibility depend on the claim—in somewhat different guises—that the paradigm subject of criminal law is an individual with rational agency. In other words, she is a subject whose conscious acts, or whose actions expressing her constitutive psychology or settled traits, attitudes, or dispositions, in some sense express her rational self. Moreover, these standard accounts of what it is to be a subject of criminal law assume that these features of agency can be clearly distinguished from features of a subject's situation, environment, history, or circumstances. Circumstances of poverty or of wealth; our experiences of privilege or of disadvantages such as racism, violence, or sexual abuse; the quality of our parenting and education: all of these undoubtedly shape our lives in fundamental ways. But, while operating causally on us in various ways, these external factors do not, it is argued, define us as agents—as subjects of criminal law.

In this article, I will argue that this distinction between environment and agency is in fact more problematic than it first appears. Cases in which environment or socialization fundamentally affects the judgment and reasoning of the individual subject pose, I shall argue, a real challenge to the basis for the practices of responsibility attribution on which legal judgment depends. Such cases also put in question the standard assumption that questions of responsibility can be analytically separated from questions of criminalization. The clue to meeting this challenge, I will argue, is to recognize that the criteria for criminal responsibility must be articulated with an understanding of the role and functions of criminal law. And this in turn, I shall suggest, underlines an important