SMITH, "NEUTRALITY OF REASONS," AND THE SEARCH FOR ANIMATING PRINCIPLES

GERARD V. BRADLEY
Professor of Law, University of Notre Dame Law School

Justice Antonin Scalia's death stirred a gratifying amount of praise for his life's work. Among the rose petals tossed his way were, however, some thorns, including renewed criticism of his opinion in *Employment Division v. Smith*. The *Smith* Court spent most of its time arguing against a particular interpretation of the Free Exercise Clause, one that authorized judges to grant exemptions to believers burdened by general laws. But without quite identifying it as such, and without argument based in historical source material, the Court came very close to expressing the meaning of the Free Exercise Clause as it was apprehended by its original ratifiers. Kathleen Brady's excellent book provides the opportunity for me to dissent from this criticism of *Smith*—and also from most of what Brady says about that case.

In an article written shortly after *Smith* came down, I maintained that the legal norm established by the founders in the Free Exercise Clause—more or less expressed in *Smith*—is a certain "neutrality of reasons."[8] That norm could best be stated as this: public authority may not pronounce a true or false (valid or invalid; sound or unsound) judgment on any religious doctrine, matter of church discipline, form of church polity, or mode of worship. The truth about all these matters is to be regarded as beyond the competence of the state. This norm, which could be abbreviated as "DDWP" (for *doctrine*, *discipline*, *worship*, and *polity*), is more a structural component or adjunct of church-state separation than it is an individual rights protection. It resonates very strongly with the substance and foundation of the "church autonomy" doctrine in a line of cases culminating most recently in *Hosanna-Tabor v. EEOC*. But *Sherbert v. Verner* stands for something quite different, something like: maximum feasible "neutrality of effect." It is mainly an individual rights protection. This is a step farther than DDWP.

Kathleen Brady does not say what she thinks the Free Exercise Clause originally meant, save that she agrees that the original meaning did *not* include the *Sherbert* rule of exemptions. She argues, nonetheless, that the Free Exercise Clause should now be read to authorize judges to grant exemptions, a sort of latter day *Sherbertism*. Her central supporting claim here is that liberty of conscience is the principle behind the Free Exercise Clause and that liberty of conscience requires exemptions. I agree that liberty of conscience does, indeed, require some exemptions. I do not think, however, that the truth about what liberty of conscience requires—even on the assumption that liberty of conscience was the principle behind the Free Exercise Clause—establishes that federal judges have the authority under the Free Exercise Clause to grant exemptions. Nor does that truth settle that the Establishment Clause or the No Religious Test Clause, both of which rest as much upon liberty of conscience as does the Free Exercise Clause, authorize judges to grant exemptions.

Some of Brady's secondary reasons for holding what she holds are unpersuasive. One rationale features the fact that the Free Exercise Clause was not "incorporated" until 1940 (162). Well, maybe not. But her point is jejune; Brady has not stated clearly what she thinks the original

8 Gerald V. Bradley, "Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism," *Hofstra Law Review* 20, no. 2 (1991): 245–319.

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meaning actually was, so it is hard to credit her claim that the original meaning is somehow superseded by another meaning *because* Free Exercise is going to be applied to the states as well as to the federal government. Besides, if the original, federal meaning is not suited to the states, that is much more an argument against incorporation than it is one in favor of constitutional amendment by the judiciary. In any event, DDWP works just as well when it is applied to the states as when its bite is limited to the federal government, even if it does not do the larger work of mandating exemptions from general laws.

Brady also says that the *Smith* majority "undervalues freedom of conscience, places too much faith in the willingness and ability of legislatures to protect conscience, and overstates the difficulty of providing more robust protections for conscience" (156). There is some basis in *Smith*'s language for these charges. But they do not make for a cogent criticism of a result that clearly did not depend upon observations or opinions about comparative institutional competences or basic value judgments. *Smith* rested upon an analysis of legal materials. Most of what Brady seems to have mind here were some brief and glib Scalia rejoinders to anticipated criticism. One could delete these sentences from *Smith* without substantially weakening the opinion, no matter how weak or strong one judges that opinion to be.

The heart of my criticism here is the trick at the heart of Brady's argument. She consistently argues by presenting a set of false alternatives: *either* one is wed to the "outcomes," "results," and "expectations" that were "envisioned" by the founders, *or* one has to mine the "principle[s]" behind the Free Exercise Clause for an exemptions regime today. Brady argues that we "cannot simply adopt the expectations of founding-era Americans about the operation of the Free Exercise Clause but should instead be guided by their principles and the insights and concerns that animated those principles" (165).

We should do neither. The particular applications of free exercise that the founders "envisioned" are surely not binding upon us. But that does not mean that we must join Kathleen Brady's creative recourse to the "principle" assertedly behind the Free Exercise Clause. She has omitted what really matters—or should matter—to any court seeking the meaning of the Free Exercise Clause today, yesterday or any other day—namely, the operative legal norm that stands between "principles" and "results." What is missing is the concrete specification or determination of the principle (or principles) that animated the lawmakers. What is missing is DDWP, or something like it. For present purposes, I shall leave aside all other complications and criticisms that could be lodged against the move from "principles" to better "results" by substituting one operative legal norm for another. I shall here say just a bit about why I think that the move is a recipe for judicial legislation.

Principles typically stand behind and justify legal norms. The Fifth Amendment contains a norm having to do with the government's act of compelling one to be a witness against oneself—along with a directive: it is not to be done. This norm can be subsumed under one or more principles—that it is unfair to make one the instrument of one's own indictment or to make one choose from among contempt, perjury, or conviction. The Fourth Amendment says, in its legally operative part, that no warrant may issue, save upon certain particularized conditions. This norm is no doubt a concretization of the broader, justificatory principle we find preceding it in the text: no unreasonable searches or seizures. And perhaps *that* is a specification of a very broad principle or value, call it privacy.

The move from principle to norm is not deductive. It is infrequently a matter of compelling inference. The move is freer and more creative than that. The move from principle to norm is guided by reason. But a broad range of possible specifications—corresponding to the universe of act descriptions and to the menu of evaluative directives—can be more or less consistent with a given

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principle, or cluster of principles. A relatively small number of imaginable specifications will be ruled out as entirely unreasonable, as simply incompatible with the governing principle.

Now, one can get from liberty of conscience to DDPW. But one is not *compelled* to go there. In any event one cannot get there by feat of simple logic. Some countries do pretty well by liberty of conscience even where the government recognizes the truth (or the validity, soundness, or special appeal of one church. The United States did pretty well by liberty of conscience from the founding until 1963, and then again from 1990 until now, leaving exemptions from general laws to legislative bodies. We did pretty well, too, during the *Sherbert* interregnum. The range of adequate normative specifications and assigned institutional competences that do pretty well by liberty of conscience is large.

The important point is that one who moves from principle to norm is exercising a degree of creative choice about what the law shall be that is legislative, not judicial, in character. One who moves back from norm to principle, and stands there with norm production in mind, has (re)claimed a legislative prerogative. In constitutional cases, the stakes are very high. One who goes behind the text to embrace what are asserted to be its animating values or goals or to deal anew with the evils that called forth the textual response stands in the Framers' shoes; he or she is set to write the Constitution anew. And so we circle back to the heart of the Court's argument in *Smith*: even though exemptions are a good idea, they are good ideas for *legislators*, because the Free Exercise Clause does not authorize courts to engage in the lawmaking necessary to craft them.

FREE EXERCISE, CONSCIENCE, AND COMPROMISE

ANGELA CARMELLA
Professor of Law, Seton Hall Law School

In her book, *The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence*, Kathleen Brady has done a masterful job of defining the unique nature of religious exercise and developing a strong legal presumption in favor of its accommodation. Pointing to accommodations given the founding-era Quakers who refused to swear an oath and to bear arms, Brady observes how government yielded even in the face of refusals to perform civic duties that were central to its existence. As her argument develops throughout the book, the burden on the government to justify the denial of exemptions or accommodations gets progressively heavier. She writes, "America's tradition of religious freedom is not about living one's life free of the religious commitments of others. It is about living alongside those with different beliefs and practices and accommodating them whenever we can" (269).

Despite the proposal's heavy weighting in favor of religious exercise, Brady hopes that it encourages compromise—by both government and religious claimants. The claimant's risk of losing in litigation, even under such a protective model, creates incentives to offer compromise. She notes that the Quaker example is the product of compromise by the Quakers: they would affirm but not swear; they would provide a payment or a substitute, or would give alternative service—but they would not directly bear arms. I am reminded of other examples: the prisoner who must wear prayer beads but offers to keep them under his shirt to allay fears of gang symbolism; the Sikh who must wear his ceremonial knife but offers to sew it into its sheath to allay fears that it might be used in a violent act; the Muslim prisoner who offers to keep his beard trimmed to a half-inch in recognition of prison contraband concerns.

But as I reflect on free exercise claims most prevalent today, it seems to me that they often give no room for compromise. One might say that is the nature of much of religious practice and

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