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Book Review: State and Salvation: The Jehovah's Witnesses and Their Fight for Civil Rights. by William Kaplan.

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trines rested on—his fatalism, his vitality, his curiosity, his security. He could delight in trying to understand while acknowledging his profound uncertainty; he could struggle to contribute while admitting that he was not in control. He knew enough to know how limited he was, and in this he seems to me to have surpassed the American legal heritage that he personifies.

STATE AND SALVATION: THE JEHOVAH'S WITNESSES AND THEIR FIGHT FOR CIVIL RIGHTS. By William Kaplan.[1] Toronto, Ontario: University of Toronto Press. 1989. Pp. xii, 340. Cloth, $35.00.

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William Kaplan has written a valuable book, which is far more than a study of the Canadian response to the practices of the Jehovah's Witnesses. *State and Salvation* is an excellent brief history of the protection of civil liberties in modern Canada. It should be required reading for anyone seeking to understand the torturous progress of Canada toward a written bill of rights or the agonizing difficulties of integrating Quebec into the Canadian constitutional order.

But Kaplan's principal subject is the treatment of a disagreeable religious minority within Canada in the 1930s and 1940s, and the significance of this experience for the development of Canadian constitutionalism. South of the border, of course, we went through a roughly parallel experience with the same sect. Canadians, seized by the same animosities, annoyances, and patriotic enthusiasms as animated their brothers to the south in the same period, engaged in actual acts of suppression directed against the Witnesses. These were initially carried out in Quebec under that province's "Padlock Act" which provided for the closing down for twelve months of any building used for "the composition or dissemination of communist or Bolshevist propaganda." Later the federal War Measures Act, and the Defense of Canada Regulations adopted pursuant to it, resulted in a "ban" on the Jehovah's Witnesses. In fact, the Witnesses remained largely free to proselytize. But certain of their properties were "padlocked" and in some cases children were placed under state supervision or excluded from school for refusal to sing the national anthem and perform other "patriotic duties." Pressure from

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the provincial authorities in Quebec and from the Royal Canadian Mounted Police (with internal security responsibility) worked to persuade usually reluctant officials to take action against the "disloyal" and "seditious" Witnesses. There were ugly acts of mob violence, encouraged by the official measures, against members of the sect.

All of this tracked events in the United States. While there were no serious efforts at suppression in America under the Espionage Act, or the Smith Act, or state anti-radical laws, the decision of the Supreme Court in *Minersville School District v. Gobitis* had the effect of unleashing popular fury against the Witnesses. This "First Flag Salute Case," in 1940, saw the Supreme Court sustaining, against a generalized first amendment challenge, the expulsion from school of Witness children for refusing to salute the flag.

But in Canada, as in the United States after *West Virginia Board of Education v. Barnett*, the courts came to the aid of Witness children in the public schools and the bans and padlockings were eliminated as war hysteria eased. Kaplan concludes that the fractious Jehovah's Witnesses taught Canada a powerful lesson in maintaining civil liberties under stress. Similarly, one of the hoariest clichés of American constitutional history points to how much new civil liberties law was made by the Witnesses in the 1930s and 1940s.

It is well to remember that statements become clichés because they are basically true. Kaplan is right that the Witnesses, and their initially shabby treatment in Canada, provided an object lesson that ultimately led to the creation of the present Charter of Rights and Freedoms. And American teachers of constitutional history are right in stressing that this unpopular sect forced the Supreme Court to confront fundamental questions of free speech.

But it is not the case, I think, that the constitutional legacy of the Witnesses is an unalloyed blessing—at least not in the American context. Kaplan (who reviews the American story along with the Canadian one) fails to distinguish, as many American commentators do, between the free speech-political dissent claims of the Witnesses, and their claims for exemption by virtue of religious belief from otherwise valid laws. Put bluntly, it was one thing for the Canadians to attempt to ban the Witnesses and to exclude their children from the schools for refusal to sing "God Save the King" or for the school authorities of Minersville, Pennsylvania, to exclude children for refusal to pledge allegiance to the flag. To correct these mistakes was to affirm political freedom. But it is quite another thing to say that those whose motives are religious are enti-

tled to disobey otherwise valid laws, or to claim that religious speech is entitled to greater protection than other speech. The issues presented by the Canadian acts of suppression, and by our Supreme Court's decision in the First Flag Salute Case, were very different from the issues presented in cases such as *Jones v. City of Opelika (Opelika I)* which posed the question whether religious speakers were entitled to exemption from an ordinance regulating door-to-door solicitation that secular speakers were constrained to obey. Kaplan makes the serious mistake of characterizing *Opelika I*, like the first flag salute decision, as a case of "suppression of a religious minority." But when *Jones v. Opelika*[3] (*Opelika II*) was reheard and decided the other way (granting the exemption) it affected American constitutional development for the worse rather than the better. The legacy of the Witnesses, at least in the United States, is thus a mixed one, and Kaplan would have done well to remember that the most eloquent dissenting voice on the Supreme Court against the reasoning of *Opelika II* was Robert H. Jackson, who later wrote the opinion for the Court in the Second Flag Salute Case.

I

The first amendment tells us that Congress (and, by interpretation, that means "government") shall not prohibit the "free exercise" of religion. What happens, however, when as a matter of religious conscience a person refuses to obey some otherwise proper legal restriction or command? To what extent does the Constitution require us to make exceptions to the law for religiously motivated non-conformists?

Once upon a time, in the middle years of our constitutional development, American constitutional law had a fairly clear, principled answer to this question. In outraged Victorian cadences Chief Justice Morrison Waite, in *Reynolds v. United States*,[4] established that while the free exercise clause forbade government attempts to interfere with *belief*, a person's *actions* (such as Reynolds's taking multiple wives in violation of law in the Utah Territory), even though religiously motivated, are subject to otherwise valid regulations. This "secular regulation rule,"[5] as it came to be known, generally controlled questions of religious non-conformism and the law from the late nineteenth through the middle of the twentieth century.

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3. 319 U.S. 103 (1943).
4. 98 U.S. 145 (1878).
5. *See* D. MANWARING, RENDER UNTO CAESAR 119 (1962).

Beginning in the late 1930s, however, with Justice Roberts's opinion in *Cantwell v. Connecticut*, and gaining momentum through other Jehovah's Witness cases of the early 1940s (especially *Opelika II*), individual Justices, and then Court majorities, began to perceive the established approach as insufficiently liberal. This process of undermining *Reynolds* culminated in 1963 in *Sherbert v. Verner*, where Justice Brennan was able, in effect, to turn his minority position of two years before, in *Braunfeld v. Brown*, into an Opinion of the Court. *Sherbert* was not a Jehovah's Witness case, but its roots were deep in "Witness Jurisprudence." The new doctrine held that non-conforming action, as well as belief, was protected up to the point where the countervailing interests were very important indeed.

Since *Sherbert*, the Court has employed an *ad hoc* balancing approach weighing each imposition on religious conscience against the importance of the governmental objective served by the law. Sometimes the non-conforming religious interest prevails[6] and sometimes the law prevails.[7] It is easy to see this balancing but not easy to discern principles that guide it. Sometimes the free exercise exemption for religious non-conformism seems to be broadening—in 1989 the Court held that the religious scruple on the basis of which exemption was claimed did not have to be a tenet of any organized religion but could be altogether individual.[8] Sometimes the exemption seems to be narrowing—in the spring of 1990 the Court seemed to suggest that *Sherbert* did not apply at all when the law in question was an across-the-board *criminal* prohibition.[9] In this area of constitutional law relative turbulence has replaced relative stability. This is interesting and troubling, but it is certainly familiar. To the secret delight of all who teach American constitutional law, turbulence has become its hallmark.

What is unusual about the issue of free exercise exemptions is the way it cuts across the usual political spectrum in constitutional politics. The breakout from the old secular regulation rule was, at least after *Cantwell*, the work of judicial liberals—Douglas and Black in the 1940s and, most famously, Brennan in 1963. But conservatives also have been among its most enthusiastic supporters. Warren Burger, after all, wrote the opinion in *Wisconsin v. Yoder*.[10] William Bentley Ball, who has argued many of the free exercise ex-

6. Thomas v. Board, 450 U.S. 707 (1981).
7. Goldman v. Weinberger, 475 U.S. 503 (1986).
8. Frazee v. Illinois Department of Employment, 489 U.S. 829 (1989).
9. Employment Division, Department of Human Resources of Oregon v. Smith, 110 S. Ct. 1595 (1990).
10. 406 U.S. 205 (1972).

emptions cases, is otherwise among the more conservative members of what might be called the active Supreme Court bar. Laurence Tribe worked shoulder to shoulder with James McClellan on the *Sun Myung Moon Case*.[11] And Professor Michael W. McConnell of the University of Chicago, one of the few conservatives teaching constitutional law in an American law school, has recently published a major article arguing for the constitutional authenticity of even broader exemptions than anything that has thus far issued from *Sherbert*.[12] Who could dissent from such a mighty consensus?

II

I do. From the very beginning of the new dispensation, the arguments for staying with the secular regulation rule were better than those for abandoning it. The mischief was really done in a set of Jehovah's Witness solicitation cases dealt with by the Court in 1942-1943. The first of these was *Opelika I*. The city had enacted a system of license fees for vendors of books. The fees were significant but not obviously onerous, and the scheme was apparently nondiscriminatory. Jones, who was offering books and pamphlets for sale on the street, did not seek a license. When arrested, he challenged the ordinance on the ground, *inter alia*, that the requirement of a license fee, *per se*, abridged his free exercise.[13]

Justice Reed spoke for the majority and sustained Jones's conviction. Reed's opinion was a straightforward statement of the traditional, secular regulation approach. "The mind and spirit of man," he wrote, "remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows." Opelika was *not* attempting to proscribe the dissemination of arguments or religious opinions. The licensing scheme was nondiscriminatory, and it was not argued that the fees were so high that they amounted to a prohibition. Whether speech is religious or not, "proponents of ideas cannot determine entirely for themselves the time, and the place and the manner of the diffusion of knowledge or for their evangelism . . . ." Reed concluded that "the ordinary requirements of civilized life compel this adjustment of interest."

There was powerful resistance. Chief Justice Stone along with

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11. *See* exchange of correspondence between the two in *Benchmark*, Spring, 1990, at 102-04.

12. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990).

13. It is interesting that the Court has recently decided in another context (and quite properly) that religious speech need not be exempted from an otherwise reasonable, nondiscriminatory tax burden. Jimmy Swaggart Ministries v. Board of Equalization of California, 110 S. Ct. 688 (1990).

Justices Black, Douglas, and Murphy dissented. While their principal objection to the Opelika arrangement was that it unconstitutionally burdened the right of free speech, Black's dissenting opinion warned of future oppression of religion, glibly equating sidewalk proselytizing with ordinary worship services: "the mind rebels at the thought of the minister of any of the old established churches could be made to pay fees to the community before entering the pulpit." Black saw the fees, in effect, as taxes on the petitioners' efforts to "worship the deity in their own fashion and spread the Gospel as they understand it."

In May of 1943 the Court decided four cases the effect of which was to undermine the secular regulation rule. One was a rehearing of *Opelika* in which the previous year's decision was reversed. Two others involved an ordinance of the city of Jeannette, Pennsylvania, which required that hawkers of newspapers and books pay a license fee (again, not prohibitively high) as a condition for engaging in canvassing door to door or soliciting on the streets. *Murdock v. Pennsylvania* challenged the conviction of persons under the ordinance, and *Douglas v. City of Jeannette* (1943), was a suit seeking an injunction prohibiting Jeannette from enforcing its ordinance against Witnesses. The fourth case, *Martin v. City of Struthers*, involved a conviction under a municipal ordinance forbidding persons to knock on doors, ring doorbells, or otherwise summon to the door occupants of houses for the purpose of distributing literature. Witnesses were convicted for distributing advertisements for a religious meeting. Both the Jeannette and Struthers ordinances were declared unconstitutional (as now was Opelika's), and in the light of this Chief Justice Stone, speaking for the Court, found unnecessary the equitable relief sought in *Douglas*.

These cases are best treated as a unit. From the central result (the unconstitutionality of the three ordinances) there were three dissenters: Reed (the author of the short-lived *Opelika I* opinion), Frankfurter, and Jackson. Jackson's views, which took the form of a concurrence in *Douglas* and dissents from *Murdock v. Pennsylvania* and *Martin v. Struthers*, are most impressive. Reed and Frankfurter offered outraged restatements of the secular regulation approach, but Jackson probed the issue to a depth which gives his writing continuing and painful relevance.

Justice Douglas, in his opinion for the court in *Murdock*, had made good on Black's suggestion of the previous year, and equated sidewalk solicitation and door-to-door canvassing with religious worship on private premises. "This form of religious activity," he wrote, "occupies the same high estate under the First Amendment

as do worship in the churches and preaching from the pulpit." Jackson, employing a literary technique that was to become his trademark, explored in gritty detail precisely what "this form of religious activity" was, which the majority now equated with worship in churches.

In *Jeannette*, Jackson reminded his brethren that the conflict there had begun with a campaign by Witnesses early in 1939 in which each home was visited, each doorbell rung, and each householder asked to buy literature for a price or a contribution. Numerous complaints from offended householders led to the arrest of several of the Witnesses. A meeting followed between the mayor and the "zone servant" in charge of the proselytizing effort in the city. The Mayor asked whether it might be possible for the Witnesses to come on some day other than Sunday and to distribute their literature without selling it. This would have removed them from the reach of the Jeannette ordinance. The Witness leader replied that this was contrary to that group's method of "doing business." He also told the mayor "that he would bring enough Witnesses to the city of Jeannette to get the job done whether the mayor liked it or not." Jackson continued:

> On Palm Sunday of 1939, the threat was made good. Over one hundred of the Witnesses appeared. They were strangers to the city and arrived in upwards of twenty-five automobiles. The automobiles were parked outside the city limits, and headquarters were set up in a gasoline station with telephone facilities through which the director of the campaign could be notified when trouble occurred. He furnished bonds for the Witnesses as they were arrested. As they began their work, at around nine o'clock in the morning, telephone calls began to come into police headquarters, and complaints in large volume were made all through the day. They exceeded the number which the police could handle and the fire department was called out to assist. The Witnesses called at homes singly, and in groups, and some of the homes complained that they were called upon several times. Twenty-one Witnesses were arrested. Only those were arrested where definite proof was attainable that the literature was offered for sale or a sale had been made for a price.

Jackson proceeded to quote "Judge" Rutherford, the long-time leader of the Witnesses, on the sect's tactics of door-to-door solicitation:

> God's faithful servants go house to house to bring the message of the kingdom to those who reside there, omitting none, not even the houses of the Roman Catholic hierarchy, and there they give witness to the kingdom because they are commanded by the Most High to do so. "They shall enter in at the window like a thief!" [Revelation 16:15] They do not loot or break into houses, but they set up their phonographs before the door and windows and send the message of the kingdom right into the houses into the ears of those who might wish to hear; and while those desiring to hear are hearing, some of the "sourpusses" are compelled to hear. Locusts invade the homes of the people and even eat the varnish off the wood, and eat the wood to some extent. Likewise God's faithful Witnesses, likened unto locusts, get the kingdom message right into the house . . . .

"Such is the activity," Jackson wrote, which the Witnesses claim that "public authority can neither regulate nor tax."

Responding to language in Douglas's opinion which seemed to imply that a registration system for policing house-to-house solicitation, and a fee tailored strictly to defray the expenses of such a system, would be valid, Jackson pointed out, "there is not a syllable of evidence" that the amount actually charged by Jeannette "exceeds the cost . . . of policing this activity." The logic of the holding, then, seemed to put the Witnesses' activities effectively beyond regulation. The fate of the Struthers ordinance at the hands of Justice Black strengthened this conclusion. That ordinance *was* narrowly drawn. Struthers had "decided merely that one with no more business at a home than the delivery of advertisement material should not obtrude himself further by announcing the fact of delivery." Thus the Witnesses were free to distribute their material if they left the "householder undisturbed, to take it in at his own time." Many of the householders of Struthers worked night shifts at local plants, and the interest protected by the exercise of the police power was simply the peace and privacy of people in their dwellings. "If the local authorities must draw closer aim at evils than in these cases," Jackson concluded, "I doubt that they can ever hit them."

Jackson then turned to the underlying theoretical question: Are persons engaging in religiously motivated actions entitled to greater constitutional protection than people with non-religious motives for the same behavior? "In my view," he wrote:

> The first amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes but for political, economic, scientific, news, or informational ends as well. When limits are reached which such communication must observe, can one go further under the cloak of religious evangelism? Does what is obscene, or commercial, or abusive, or inciting become less so if employed to promote a religious ideology? *I had not supposed that the rights of secular and non-religious communications were more narrow or in any way inferior to those of avowed religious groups.* (Emphasis added.)

But what of the point that the first amendment explicitly protects the free exercise of religion in addition to freedom of speech? Does this not imply some special protection for religious speech beyond that given to ordinary speech? Jackson met the question head on, writing that "the history of religious persecution gives the answer." In his view, "religion needed specific protection because it was subject to attack from a *separate quarter*." The fear was that otherwise protected speech could be characterized as heretical or blasphemous because it flew in the face of religious orthodoxy. "It was to assure religious teaching *as much* freedom as secular discus-

sion, rather than to assure it greater license, that led to its separate statement." (Emphasis added.)

III

The Jackson position had firm historical grounding.[14] Let a few examples suffice. The Virginia Declaration of Rights, adopted as part of that State's new constitution in 1776, contained a clause on religious liberty. The language proposed to the legislature in May of 1776 by George Mason provided that "all men should enjoy the fullest toleration in exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless under color of religion any man disturb the peace, happiness, or the safety of society . . . ." Now Mason had begun his submission by declaring that "religion, or the duty we owe to our creator, and the manner of discharging it, can be directed only by reason and conviction not by force or violence . . . ." what emerges from this, pretty clearly, is a distinction between religious belief, which is completely protected against interference by the state, and religiously motivated actions, which may be restrained in the course of protecting "the peace, happiness, or the safety of society."

For the young James Madison, however, this did not go far enough. He offered a substitute clause which provided that no state regulation of religiously motivated actions could be constitutional "unless under color of religion the preservation of equal liberty and the existence of the state be manifestly endangered." This standard, though inexact, would have required many exceptions, in the name of religious liberty, to otherwise valid laws. Cooler heads prevailed, and the Virginia convention defeated Madison's language; as Michael Malbin has remarked, such a notion was "never to reappear in any proposal made in Virginia or anywhere else until the 20th century."[15] And indeed Madison appears to have moderated

14. For a contrary view, see McConnell, *supra* note 12. To attempt to catalogue my agreements and disagreements with McConnell in a footnote would insult his work. Suffice it to say that I think him wrong on the historical meaning of free-exercise, but right on establishment. His most effective marshalling of evidence demonstrates a pervasive sympathy toward *legislated* religious exemptions which negatives any notion that these were to be proscribed by the establishment clause.

15. Michael J. Malbin, "The Supreme Court and the Definition of Religion," unpublished doctoral dissertation, Cornell University, 1973. McConnell attempts to neutralize this episode by pointing out that neither the Madison formulation nor the original Mason formulation was ultimately adopted; the legislature settled for a simple affirmation of religious liberty and therefore must have intended some "state interest limitation" *in between* Madison's proposal and Mason's. McConnell, *supra* note 12, at 1463. This strikes me as strained. Reviewing all the evidence McConnell reviews, it seems to me clear that most of those involved in shaping the religious freedom guarantees of the American constitutions took for granted that belief and worship (public profession) were protected but that generally applicable laws

his view later in life.

To the extent that one can speak of an early American consensus it was perhaps best summed up by Justice Story in his *Commentaries* on the Constitution when he wrote of "the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one's conscience."[16] Belief, understood to include *public profession*, was what was protected—precisely the approach taken by the Supreme Court in its first encounters with religiously motivated lawbreakers, the polygamous Mormons in *Reynolds*.

IV

Today, of course, Waite's *Reynolds* opinion is held in low esteem. The Mormons were, after all, a small sect who were harshly set upon and they have since risen to a position of secure respectability. Then too, Waite wrote in the orotund, Victorian style that grates on modern ears. But as is so often the case, when the rhetoric is stripped away and the underlying reasoning examined, the Victorian had it right. Was the congressional initiative aimed at Mormon belief *per se*—at suppressing an unpopular belief? Or was it, rather, in aid of a valid secular purpose with which Congress was properly concerned? Waite had no difficulty in finding valid secular purpose, nor, on reflection, should we. After all, monogamous marriage was an important form of civil contract and an important social interest was implicated in any threat to it:

> Upon it society may be said to be built, and out of its fruits sprang social relations and social obligations and duties with which government is necessarily required to deal.

Indeed, the Chief Justice resorted to some "social scientific evidence:"

> Professor [Francis] Lieber says, polygamy leads to patriarchal principle which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.

Perhaps the most eloquent statement of the traditional approach came from the pen of Justice Cardozo in his concurring opinion in *Hamilton v. Regents* in 1934.[17] The case involved an objection by a religiously motivated pacifist to the requirement of

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should be obeyed (with the further understanding that legislatures were free to craft exceptions and accommodations as matters of policy). If this is correct, then Virginia's failure to settle on any particular "state interest limitation" language appears in a very different light.

16. J. STORY, COMMENTARIES ON THE CONSTITUTION 722 (1833).

17. 293 U.S. 245 (1934).

the University of California that all able-bodied male students take two years of military science. To require his participation, Hamilton argued, would involve a denial of free exercise. Cardozo wrote that he could not "find in the [California] ordinance an obstruction by the state to 'the free exercise' of religion as the phrase was understood by the founders of the nation, and by the generations that have followed." Cardozo went on to note that from the beginnings of our history Quakers and other sorts of conscientious objectors had been exempted from military service as an act of grace by legislatures. Hamilton was suggesting not only that the policy of exemption be constitutionalized, but that it be broadened to protect against required participation, not just in military service, but in *any* activity supported or connected with military service. Cardozo responded that:

> [Such a] doctrine would carry us to lengths never yet dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance for any other end condemned by his conscience as irreligious or immoral. The right of private judgement has never yet been so exalted above the powers and the compulsion of the agencies of government.

V

History aside, Cardozo's position makes sense. First, there is every reason to fear a further slide toward subjectivity by the Court in which idiosyncratic claims of conscience, without any colorable religious foundation, are held entitled to preferential treatment because of the free exercise clause. Recall the selective service cases of the Vietnam era. A majority of the Justices proved incapable of sustaining a distinction between claims of religious conscience and conscientious claims generally—see *United States v. Seeger*,[18] and *Welsh v. United States*.[19] Although these were statutory rather than constitutional cases, the problem recurs in the constitutional context. True, the Court did establish an outer limit to the exemption from the draft when it held that selective objectors (those who reserve the right to pick and choose their wars) were not entitled to conscientious objector status under the statute.[20] But this was not because the claims before the Court lacked religious quality; it was because they were not sufficiently principled to be conscientious at all. Typically, conservative defenders of constitutional religious exemptions rely on text and history to protect against the danger that free-exercise exemptions will be expanded by judges to encompass

18. 380 U.S. 163 (1965).
19. 398 U.S. 333 (1970).
20. Gillette v. United States, 401 U.S. 437 (1971).

claims of conscience generally.[21] But faith in text and history is rarely vindicated in modern public law litigation. Faced with a distinction which many judges will respond to reflexively as unfair (between conscientious claims based on religious scruple on the one hand and those based on some secular principle on the other), few will respect an argument that the distinction is binding just because the Constitution says so. And once conscientious exemptions are generally available it will be Katey Bar the Courthouse Door. I take it we all would like to be exempted from certain laws which violate principles we hold dear.

Second, we live in a period of increasing politicization of religious bodies. One has only to recall the "nuclear freeze" movement of the late 1970s and the "sanctuary" movement of the late 1980s. Abortion is an even more obvious example: shall pro-life militants have free-exercise defenses available when they violate otherwise valid municipal ordinances in attempting to make life difficult for abortion clinics? (Come to think of it, these people *remind* me a little of Jehovah's Witnesses.)

Third, we live in a period of proliferation of religious bodies, and persuasions, and "life styles" that can plausibly claim to be religious. Many of the new forms (or old forms now asserting themselves) do not at all fit the familiar Judeo-Christian model.[22] Are their claims any less authentically "religious"? If they are, this must be because the Supreme Court has explicitly or implicitly established (and I choose the word with care) criteria for what counts as "real" religion. The constant temptation will be to give the break to the respectable and familiar—Warren Burger's approach in *Yoder*. Right now, for instance, Christian Scientists are gathering themselves to mount what will surely be a sophisticated campaign of free-exercise defense against prosecutions of parents whose children died from medically treatable diseases.[23] Many of us will be sympathetic. For these are good, responsible, highly educated, coat-and-tie-wearing folk, *like us*. We don't know any abortion clinic protesters, let alone snake handlers, or Native American ancestor worshippers, or (to take the fastest growing cult in my neck of the woods) Satanists. (Indeed, as I look around me, some of the

21. McConnell, *supra* note 12, at 1491.

22. *See* Pulley, *The Constitutional and Religious Pluralism Today*, in LIBERTY AND LAW 143-55 (R.A. Wells & T.A. Askew eds. 1987). *See also* Robbins, *New Religious Movements on the Frontier of Church and State*, in CULTS, CULTURE, AND THE LAW 8-10 (T. Robbins, W. Shepard & L. McBride eds. 1985). The point is made well by West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS AND PUB. POL. 591, 600-13 (1990).

23. Margolick, In Child Deaths, a Test for Christian Science, N.Y. Times, Aug. 6, 1990 at A1, col. 2.

imaginary horribles of Chief Justice Waite's *Reynolds* opinion do not seem as farfetched as they once did.) But many of us count Christian Scientists among our friends, colleagues, or at least acquaintances. Since I would not trust myself to decide the Christian Scientist case in a principled fashion, applying the criteria supplied by the Court's post-*Sherbert* jurisprudence, I resist empowering others to do so.

VI

A final word. I should not like to be understood as opposing all religious exemptions from general legal requirements. It is eminently civilized, as a matter of policy, decided upon by the appropriate legislative body, to provide for the special needs of religious minorities. It would not violate the establishment clause, properly construed, for South Carolina to accommodate the special case of Sabbatarians in its unemployment compensation scheme (the *Sherbert* problem), and it is certainly wise for state education departments to be flexible in fitting their requirements to religious dissidents of various stripes (the *Yoder* problem). I think cases such as *Thornton v. Caldor*, in which the state of Connecticut's employment laws commanded employers to release an employee on any day that that employee designated as his Sabbath and the Supreme Court found an establishment-clause violation, were wrongly decided.[24]

It is the propagation of a *constitutional doctrine of exemption* which appears to me fraught with risk. What I object to is a judicially crafted policy, beyond the reach of political majorities to control (at least easily). And given the strongly secular and egalitarian mind set of most judges, any such doctrine will tend to expand. The line between common, well-established core tenets of religion, on the one hand, and idiosyncratic, individual interpretation, on the other, has already been breached; membership in a religious association is no longer required; and there is little reason to hope that the bulkhead between religious scruple and purely secular conscience will hold.

The cost of this in a society as richly pluralistic as America today will be nothing less than a challenge to the rule of law as

24. In my youth I was a believer in the "neutrality approach" to the religion clauses. R. MORGAN, THE SUPREME COURT AND RELIGION 144-210 (1973). In recent years I have been troubled that rigid versions of neutrality deny legislatures flexibility to make exceptions for conscientious claims when these have a religious foundation. But for a version of neutrality which seems largely to avoid this danger see DeWolf, *State Action Under the Religion Clauses: Neutral in Result or Neutral in Treatment?* 24 RICH. L. REV. 253 (1990).

judges struggle to decide which claims of conscience merit special treatment and which do not. Here is the bitter irony toward which the squinty-eyed, bandy-legged little error born in *Opelika II* has been leading us. A doctrinal departure undertaken in the mistaken hope of facilitating pluralism leads to the distinctly counter-pluralistic result of favoring some believers over others as unelected judges confer constitutional immunities which are beyond the power of ordinary legislative majorities to correct. Justice Jackson had it right:

> The First Amendment grew out of an experience which taught that society cannot trust the conscience of a majority to keep its religious zeal in the limits that a free society can tolerate. I do not think it any more intended to leave the conscience of a minority to fix its own limits.

Insofar as their constitutional advocacy has persuaded us otherwise, the Jehovah's Witnesses have led us astray.

A GOVERNMENT OF LAWS: POLITICAL THEORY, RELIGION, AND THE AMERICAN FOUNDING. By Ellis Sandoz.[1] Louisiana State University Press. 1990. Pp. xiv, 240. Cloth, $37.50.

Steven D. Smith[2]

At least to a nonspecialist like me, recent scholarship about the founding generation looks like a virtual deluge. Why then do we need another book on this subject? The question is especially appropriate in the case of Professor Ellis Sandoz's study because his book is hardly as elegant or readable as, say, Bernard Bailyn's work. Professor Sandoz's organization is not tight, and his diction is often irksome: the book is filled with references to such things as "Metaxy," "horizons" (as in the founders' "horizon" or the "horizon of philosophy"), and the "tensional dimension of participatory reality."

Despite these shortcomings, *A Government of Laws* adds an essential dimension to the "liberalism versus civic republicanism" histories that are now so familiar to constitutional scholars. Indeed, if Sandoz is right, those histories have largely missed the most important points. In addition, by comparison to much of the recent legal-

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