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978-1-107-01650-7 - The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence

Kathleen A. Brady

Excerpt

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Introduction

America's tradition of religious freedom has long been a source of national pride. Since the founding of our country, it has shaped our identity and informed our understanding of the limits of government power and the requirements of human dignity. We look disapprovingly upon countries where religion and state are deeply interwoven, and we view infringements on the rights of persons to express and practice their faith as among the gravest of political evils.

But what, more precisely, is this tradition which we are proud of? Our national commitment to religious liberty is embodied at a constitutional level in the Free Exercise and Establishment Clauses of the First Amendment, but here we find much that is unsettled. Recent decades, in particular, have been a period of rapid and far-reaching change in how courts and scholars have understood our tradition and its requirements. Indeed, it is fair to say that this most basic aspect of American self-understanding has been undergoing a crisis of identity.

For years it was widely assumed that the purposes of the religion clauses were to protect religion and religious liberty from the dangers of state intrusion and the state and its institutions from the dangers of sectarian control. A related concern has been the protection of religious minorities from domination by majorities. These goals correlated with similar themes voiced by many in the founding era. Under this traditional view, religion is a unique human phenomenon requiring special treatment by the state. Religion is especially sensitive, especially important, especially powerful, especially threatening, or maybe all of these. Consistent with this understanding, the Supreme Court interpreted the Free Exercise Clause to provide robust protections for religious belief and practice that secular conscience and other deep commitments did not receive, and under the Establishment Clause, the Court imposed significant and unique disabilities on religion limiting its involvement with government. The familiar metaphor of a "wall of separation" between church and state was a hallmark of this era. Religious practice was strongly protected, but

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[More information](#)

financial support and other connections between religion and government were greatly restricted.

Over the past two and a half decades, a very different understanding of our tradition has quickly gained in influence in judicial opinions and among scholars interpreting the religion clauses. In this view, the central value served by the religion clauses is equality, not only among different religious denominations, which is noncontroversial, but also and most significantly between religion and nonreligion. Under this new paradigm, the Free Exercise Clause is not construed to afford religious individuals or groups special protections that nonreligious entities do not receive. Rather, its purpose is to protect religion from discriminatory laws or regulations that target religion or otherwise burden it to a greater degree than nonreligious commitments. Likewise, under this view, traditional Establishment Clause jurisprudence goes astray when it restricts the ability of religious individuals and entities to participate in benefits that serve public purposes and are afforded to religious and nonreligious entities in an evenhanded manner. A number of scholars have also argued that the First Amendment not only permits but demands such inclusion.

Equal treatment, not special treatment, is the fundamental norm in this new paradigm, and the underlying assumption is that religion and nonreligion are not different in ways that matter when assigning the burdens and benefits of government. Of course, religious and nonreligious belief systems and practices are not the same. Religious individuals embrace and act pursuant to beliefs about the divine and transcendent that nonreligious individuals do not share. However, these differences are not relevant to how religious individuals and groups should be treated in the political community. Nonreligious views can be just as important to persons who hold them as religious views, just as sensitive, just as powerful, and just as threatening to the social and political order. Thus, special benefits and burdens for religion are not fair. To be sure, equality of treatment between religion and nonreligion has always been present as a theme in the Supreme Court's religion clause jurisprudence. However, until recently it was very much a subsidiary or marginal value for the Court and was only controlling when it was consistent with more fundamental norms of noninvolvement and noninterference. Now, however, equality norms have taken center stage as concerns about fairness have increased and attention to the dangers associated with government involvement has diminished.

The rapid ascent of equality as a central norm in religion clause jurisprudence and scholarship is, however, only half the story in recent years. The other half is the incompleteness of this trend and the limits that the Court has placed on this development. While most members of the Court have expressed support for equal treatment of religion and nonreligion at one time or another, none has done so consistently and in all contexts. Moreover, while equality between religion and nonreligion has clearly become a major consideration in the Court's case law in recent years, particularly under the Establishment Clause, it has never come close

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to being the sole or overriding consideration that some scholars had predicted fifteen years ago.

Indeed, shortly after equality norms reached their zenith in the Court's opinions in the early 2000s, the justices drew important lines. For example, while the Court no longer construes the Free Exercise Clause to afford religious individuals special protection when neutral laws of general applicability impinge on religious practice, in 2005 the Court made clear that legislatures may choose to provide such protections, and if they do so, these protections need not come "packaged" with benefits for nonreligious individuals or groups.¹ Similarly, while the Court has significantly reduced its restrictions on the ability of religious individuals and groups to share in benefits generally available to religious and nonreligious entities alike, the Court made clear in 2004 that the religion clauses did not necessarily require such inclusion.² Indeed, the Court in that case expressly affirmed the distinctiveness of religion in our constitutional tradition.³ Moreover, the Court has always retained significant limitations on the ability of religious groups to participate in government benefit programs even when they are neutral between religion and nonreligion, and the Court has long applied especially strict limitations on religious expression by the government. Special rules apply in other areas as well. For example, the Court has long restricted judicial involvement in intrachurch disputes, and in 2012, the justices unanimously agreed that both religion clauses also bar government interference with a religious group's choice of minister even when the interference is the result of neutral, generally applicable laws.⁴

Likewise, while the equality paradigm has had great influence in the academy, many, if not most, scholars continue to embrace some version of special treatment for religion. Even among those scholars who have been the most forceful proponents of equal treatment, the embrace of equality has not been absolute. Nor could it ever be. An absolute equality between religion and nonreligion would permit a degree of government involvement in religious matters that would clearly be intolerable to most Americans. It would also likely result in severe burdens on religious practice that most would find inconsistent with our tradition of religious liberty.

The story for the future will not be the dominance of equality norms in the academy or on the Court, but renewed attention to the distinctiveness of religion and its implications for religion clause doctrine. The significant limits that the Court has recently placed on equality norms make this especially clear. However, the equality paradigm still grips us. It continues to be the subject of intense debate in scholarly literature, and a growing number of recent books by major scholars have

¹ *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (quoting *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987)).

² *Locke v. Davey*, 540 U.S. 712 (2004).

³ *Id.* at 721.

⁴ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

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[More information](#)

embraced it as foundational or as a very important component of our constitutional tradition.⁵

There are a number of reasons for the lasting power of the equality paradigm. One of the most important reasons is the force of its underlying assumptions in modern American society and among the judges and scholars who are part of this society. The growing secularism of American society has made special treatment for religion deeply problematic. As the number of Americans without religious commitments or with only vaguely spiritual beliefs grows, it is natural to ask why religious belief and practice should receive more protection from government interference than secular moral conscience or other convictions that are deeply held or central to personhood. Secular and religious conscience increasingly seem to be interchangeable as do religious convictions and other deeply held beliefs, and where this is the case, special privileges for religion seem unjust. Likewise, for religious individuals (and many other observers as well), the exclusion of religious entities from evenhanded public benefit programs such as funding for education, poverty relief, and social services seems unfair when the religious and nonreligious organizations involved serve similar functions. The exclusion of religion from other aspects of public life, such as the strict restrictions on religion in government speech and symbolism, has also been challenged as unfair. The equality paradigm is strongly entrenched in part because the trends that have helped produce it continue unabated.

Even more importantly, however, we have been unable to move beyond our preoccupation with equality because we have been unable to articulate a convincing account of why religion should be treated differently than nonreligion under the First Amendment. No one believes in absolute equality, and no one really could. Most judges and scholars do not come close, and we do not really want to live

⁵ For two of the first books in this trend, see CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007) and MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* (2008). See also RONALD DWORKIN, *RELIGION WITHOUT GOD* (2013) (construing religious liberty as a general right to ethical independence that extends to religious and nonreligious convictions about how to live one's life); 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* (2008) (recognizing equality as an important First Amendment principle); 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* (2006) (same); BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013) (arguing that religious liberty law should reflect the fact that there is nothing unique about religious conscience that gives special reasons for protecting religion qua religion or affording religious conscience more relief than nonreligious conscience); IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* (2014) (arguing that our constitutional tradition embraces both secular and religious equality and a recognition of religion's distinctiveness in some ways); cf. JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* 105–06 (2011) (arguing as a matter of political morality that “[t]here do not seem to be any principled reasons to isolate religion and place it in a class apart from the other conceptions of the world and of the good” and that the “state must treat with equal respect all core beliefs and commitments compatible with the requirements of fair social cooperation”). For an important recent article that demonstrates the appeal of the equal treatment paradigm, see Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

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[More information](#)

in a world where religious and nonreligious beliefs and practices are viewed as equivalents. The problem, however, is that we do not have an adequate account of why religion is different and how. In its recent decisions limiting the reach of equality norms, the Court has done little to explain why religion should receive the special treatment that it required or permitted. By contrast, scholars have wrestled hard with the question of the “specialness” of religion, and much of the literature addressing equality issues revisits this question again and again. However, the arguments that have been made do not seem convincing to many in the field.

For example, arguments that religious belief and practice are especially important to religious believers or integral to self-identity or beneficial for democratic self-government, or especially likely to generate civil strife and division when linked with government, do not seem to adequately distinguish religious commitments from strong secular commitments. The convictions of secular moral conscience seem just as deep, just as central to self-identity, just as beneficial to civil society, and just as likely to generate conflict when vying with competitors for state approval or control. Other arguments that rest on controversial religious premises or theological ideas seem impermissibly sectarian. Thus, for example, James Madison’s famous argument that religion involves a “duty towards the Creator” that is “precedent, both in order of time or in degree of obligation, to the claims of Civil Society”⁶ seems unpersuasive today to those who do not believe in God or in the kind of God Madison envisioned. Other versions of the claim that religion is an especially important or valuable human activity, or at least that most Americans view religion this way, also face similar objections in an increasingly secular society.

Thus, we continuously stumble in our efforts to generate an understanding of religious difference that can move us beyond equality. We keep talking about equality because we are not yet comfortable with difference. We cannot yet imagine religion in a way that is distinct in a constitutionally relevant way, and without such an understanding, we cannot begin to construct a reasoned and coherent alternative to modern doctrine. We lack the foundation to develop new principles that will tell us how and when religion should be treated in unique ways in the cases that come before the courts.

One of the purposes of this book is to provide a convincing account of religion’s distinctiveness. For insight, I will begin by turning to founding era views about religion and its priority in the lives of believers and in their relationship with the state. Madison’s statement that religion involves a duty to the Creator that has precedence over the claims of civil society is familiar, and I will also be discussing the views of other individuals and groups who were active in founding era debates regarding the proper relationship between religion and government. For many, this may seem like an especially problematic starting point. A number of scholars have

⁶ JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland & William M.E. Rachal eds., 1973).

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[More information](#)

drawn from Madison's statement, in particular, a defense of special protection for religious belief and practice under the Free Exercise Clause, but the difficulty is that founding era views rest upon controversial religious premises that seem to lack persuasive force for the growing number of Americans who do not believe in God or in the kind of God eighteenth-century Americans believed in. Founding era statements like Madison's are "sectarian," and it seems to make little sense to try to revive an appreciation of religion's uniqueness with views that are themselves incapable of wider appeal in an environment that is increasingly religiously diverse and increasingly secular. Indeed, a number of prominent scholars would reject any account of religion's distinctiveness that rests on religious premises because these premises cannot be shared by all Americans.

When I draw upon founding era views about religion and its proper relationship to the state, I will not be simply repeating their arguments. My goal is to draw upon founding era statements in order to develop a broadly compelling account of religion's uniqueness and why it matters for constitutional purposes today. The founders' views reflect and illuminate something about religious belief and practice that is very different from nonreligious commitments, even those that are deeply held and central in the lives of those who hold them. For the founders, and for believers generally, there is something much more at stake, and this something more makes a difference for how religion should be treated by government. One of the problems with the debates about equality today is that proponents of special treatment keep missing what is fundamentally at stake. They do not engage what religion is really about.

In order to explain what was at stake for the founders and what is at stake today, I will need to articulate the founders' views in general terms that can be understood and appreciated by all readers, religious and nonreligious, Christian and non-Christian alike. I will also seek to show that religion is not something that matters only to believers. Religion grows out of common human experience, and everyone shares in this experience. Everyone is made with an openness to the divine-human encounter that is at the heart of religion. This openness may be ignored, the divine may be distrusted, rejected, or denied, but religious faith can make sense to all. It can also be respected by all as something that makes uniquely compelling claims on individuals and requires unique treatment by the state. As I move from founding era statements to a more general discussion of what lies at the heart of religion and how this core is connected to common human experience, I hope to convey to the secular reader a sense of the religious and a recognition of the connection between religious faith and her own experience. We are not all religious, but we can all understand what religion is about and we can appreciate what it is about. We can see the worth of religion or, if not its worth, the worth of protecting it.

My discussion will contain ideas that are religious or theological in nature, but they will not be sectarian. I will describe something about religion that all can understand and appreciate, persons of all faiths and no faith at all. As I do so, I am

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[More information](#)

mindful that it is commonly believed in today's academy that there is nothing which unites all religions, no core that is shared by all. As I develop my account of religion and its uniqueness, I will challenge aspects of this common view with a discussion that is informed by a study of comparative religion and philosophy of religion. My views will be original, but I hope that the reader will find them persuasive and enlightening.

As I develop my account of religion's uniqueness, I will also return to the arguments others have made in defense of special treatment for religion under the First Amendment. Most of these arguments do, in fact, have much merit. Religion is distinctive in many of the ways that judges and scholars have recently argued, but appreciating these differences requires a fuller understanding of religion than these judges and scholars have given. Examining founding era views about religion will help me provide this fuller picture.

I will also look to founding era views for the implications that flow from religion's uniqueness. For founding era Americans, religion was unique in a way that made it a supremely important human concern, essentially voluntary, necessary to the functioning of American democracy, and especially vulnerable to internal corruption and external divisiveness when linked too closely with government. Certain principles followed. These included liberty of conscience in matters of religious belief and practice, separation of church and state, equality among religious sects, the inevitability and desirability of religious diversity, and some space for government acknowledgments of religion that do not amount to impermissible support or promotion. While there was disagreement over how these principles were understood and how far to take them, all of the major factions in the founding era embraced them as general values. Behind their disagreements lay common purposes and concerns linked to a shared understanding of religion's uniqueness and the basic implications of this uniqueness for church-state relations. Neutrality between religion and non-religion was a value, but it was not a central or foundational one. It was, rather, a derivative aspect of these more fundamental shared principles.

In this book, I recommend these principles as the basis for religion clause decision making today. My purpose in this book is not just to explain how religion differs from nonreligion in a way that is relevant for First Amendment purposes. It is also to move from this account of religion's uniqueness to the construction of a new framework for decision making under the religion clauses. This broader project is important and timely for a number of reasons. First, the preoccupation of scholars with equality issues over the past two decades and the growing importance of equality in the Court's decisions have undermined traditional categories and required us to think anew about what type of special treatment religion should receive. Secondly, over the past decade, the composition of the Court has changed dramatically. Justice Roberts has replaced Justice Rehnquist as Chief Justice, Justice Alito has replaced Justice O'Connor, Justice Sotomayor has replaced Justice Souter, and Justice Kagan has replaced Justice Stevens. Those who have left the Court were

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[More information](#)

leading spokespersons for some of the most influential tests and approaches the Court and its members have used recently, including the endorsement test, separationism, and accommodationism in the area of religious speech and symbolism by the government. They have also at different times been leading spokespersons for equal treatment of religion and nonreligion. With these changes in membership, there will almost certainly be significant changes in doctrine, and, indeed, the most recent decisions of the Court point to such shifts. The future of the Court's doctrine in many areas is wide open. Now is the time to offer a new framework based on a deeper understanding of religion and its uniqueness and the values that flow from this uniqueness.

The approach I propose is to use the general principles widely agreed on in the founding era as guides for the development of more specific doctrines for particular categories of cases. In other words, these principles should inform the construction of subsidiary rules or tests that would then shape decision making in specific areas. When defining and applying founding era principles, the focus should be on the shared purposes and concerns that animated them viewed in light of the conditions and circumstances of contemporary society. The resolution of some issues will require balancing multiple principles in situations where they point in different directions. This is especially the case when questions arise under the Establishment Clause. The specific proposals that I make necessarily involve exercises of judgment. Some of their features could have been designed in different ways. I offer my proposals as my best effort to apply the founders' insights to contemporary questions, but they are really meant to start a conversation rather than to end it.

In the second part of this book, I will illustrate my approach in the context of current issues related to the protection of individual religious conscience. I will begin by examining an issue that has long been at the heart of free exercise jurisprudence. The First Amendment certainly affords protection when the government intentionally interferes with individual religious practice, but does it afford relief where burdens are the result of neutral, generally applicable laws? My answer to this question will be "yes," but I acknowledge that there are challenges to constructing a right of exemption that is strongly protective but also workable and fair. I will address these challenges as I propose a robust right of exemption that is targeted to the types of conflicts where relief is needed most and an additional minimally protective right that applies anytime the government substantially burdens practices rooted in religion. My discussion in this book will also examine the role of legislatures and administrators in accommodating religious exercise. Accommodations by the political branches of government are critical for the protection of conscience. A well-constructed right of exemption will encourage government officials and religious believers to resolve conflicts extrajudicially whenever possible, and there should be generous room for protection even in cases where relief is not mandatory. However, as the Supreme Court has recognized, the Establishment Clause places some limits on what legislatures and administrators can do to accommodate religious exercise,

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Excerpt

[More information](#)

and I will elaborate on these limits in light of the values defended in this book. The conclusion of this volume will revisit protections for secular moral conscience, now in light of religion's distinctiveness, and the results, for many, will be surprising.

The focus in this book is on the relationship between the individual religious believer and the state. An analysis of this relationship is essential for addressing other pressing issues in religion clause jurisprudence today. These issues include the extent of permissible aid to religious institutions performing public functions, the proper limitations on religion in government speech and symbolism, and the limits of government interference with the internal affairs of religious groups. Most of these issues have arisen under the Establishment Clause, but some involve both Free Exercise and Establishment Clause questions. I will address these issues in a later book that focuses on government involvement with religion. Understanding why we protect individual conscience and what individual free exercise demands will inform my discussions there. Faith has important communal dimensions; it is not a purely individual phenomenon. However, it is the individual who believes, worships, loves, yields, or surrenders to the divine. We must begin with the individual, and, indeed, we must end there as well.

It is important to emphasize that I do not offer my approach on originalist grounds, and this book is not intended to be an originalist analysis of religion clause theory, although it is generally consistent with some versions of originalism. There are several reasons for this. First, such an approach would not, by itself, be sufficient to convince scholars whose method of constitutional interpretation is not closely tied to history but, rather, draws more on normative analysis. These scholars demand an account of religion's distinctiveness that is persuasive today and principles for decision making that are compelling in their own right. Moreover, there are competing accounts of founding era history, and some scholars have interpreted religion clause history in accord with equality principles. These interpretations have been very weak, but the fact that they have been offered and repeated demonstrates that what we need are persuasive arguments, not merely historical ones. I do, in fact, believe that history is an important source of meaning for religion clause decision making; indeed, I regard it as foundational. The Constitution's text and history should be where we begin and, in most cases, end. However, where matters are controversial, unless we can show that founding era history contains insights for the present, it will be dismissed out of hand or by sleight of hand.

Thus, I draw on founding era views because these ideas still have power today. When I recommend the use of founding era principles as the basis for religion clause decision making today, I do so because I believe that these principles have enduring value, and part of the project in this book will be to demonstrate their value and the value of an approach informed by them.

Another reason that I do not intend my book as an originalist analysis is that the unique history of the religion clauses makes any conventional form of originalist interpretation impossible. As is frequently observed, when the religion clauses were

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Excerpt

[More information](#)

drafted by the first Congress and ratified by the states, no one thought that the federal government had any power to interfere in religious matters.⁷ The federal government was one of limited powers, and power over religious matters was not among them. The religion clauses were added to the Constitution to assuage the concerns of those who believed that extra protection was needed against overweening federal power. The First Amendment's Free Exercise provision was in line with similar guarantees in state constitutions adopted during the revolutionary and postrevolutionary eras, and there was widespread support for protecting liberty of conscience and a fair amount of agreement on what this entailed. When it came to disestablishment, however, there were deep divisions in the early republic. Many in New England and in Southern states such as Maryland and Virginia favored continued government support for religion as long as it was generally available at least to Christian denominations, and such support continued in New England well into the nineteenth century. Others, including some of the strongest advocates of religious liberty such as James Madison, Thomas Jefferson, and leaders of the growing Baptist movement, favored strict separation between church and state. The First Amendment's Establishment Clause was not designed to resolve these debates. Indeed, it is doubtful that any agreement could have been reached on disestablishment issues at a federal level.

Some scholars argue that the Establishment Clause was designed solely as a jurisdictional provision whose purpose was to clarify that the federal government lacked authority in religious matters, not to adopt any substantive principle or guarantee for church-state relations.⁸ Others argue, I believe more accurately, that the Establishment Clause also had a substantive dimension that was intended to reinforce these limitations on federal power.⁹ However, the problem for the originalist is that even assuming that the Establishment Clause had a substantive dimension, there was no clear agreement in the founding era on what its substantive content was. Certainly, the federal government was prohibited from establishing a national church; James Madison described the purpose of the Establishment Clause this way in the debates in the House during the drafting process, and no one disagreed that a national church was prohibited.¹⁰ However, whether the Establishment Clause also

⁷ THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 208 (1986). As James Madison argued, there is "not a shadow of right in the general government to intermeddle with religion." ³ *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 330 (J. Elliot 2d ed. 1836) (June 12, 1788).

⁸ *E.g.*, AKHIL REED AMAR, *THE BILL OF RIGHTS* 32–42 (1998); STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 17–34 (1995).

⁹ *E.g.*, ² GREENAWALT, *supra* note 5, at 26–33; Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 *HARV. L. REV.* 155, 241–42 (2004).

¹⁰ ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* 17–18 (1990); JOHN WITTE JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* 66–67 (2000).