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# Some Reflections on Modern Free Exercise Doctrine: A Review Essay

David Day, *University of South Dakota School of Law*

# SOME REFLECTIONS ON MODERN FREE EXERCISE DOCTRINE: A REVIEW ESSAY

DAVID S. DAY†

Professor Martha C. Nussbaum's new book, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*,[1] is a comprehensive and thought-provoking contribution to the literature on the Religion Clauses of the First Amendment to the federal constitution.[2] From the days of the Warren Court with "strict neutrality" for the judicial review standard under the Establishment Clause and "strict scrutiny" for the Free Exercise Clause, there has been a remarkable decline in the protection given to individuals under the Religion Clause doctrines.[3] Nussbaum traces part of that decline. Here, I am reviewing Nussbaum's book and some of its substantive positions. In addition to a review of the book's substance, I am taking this opportunity to express some thoughts about certain issues regarding Free Exercise doctrine that are, in my view, currently "unsettled" or controversial.

In Part I of this essay, I will review the various chapters and outline the themes that Nussbaum has presented. I will indicate aspects of Nussbaum's book that provided new information or that were persuasively presented. In Part II of this essay, I will comment on what, in some cases, seems to be an incomplete discussion of certain issues. While I generally agree with the various points Nussbaum makes, I shall note my areas of disagreement.

In this era where the doctrines regarding both Religion Clauses are in flux, it is important to have contributions like Nussbaum's. It is also important to work through the implications of the suggestions made in such literature,

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1. MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008).

2. Nussbaum describes *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* [hereinafter *Liberty of Conscience*] as "the book of a philosopher who has taught these issues as philosophical issues for some time." *Id.* at 365. Nussbaum is the author of many articles and books. *See, e.g.*, Martha C. Nussbaum, *Forward: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 60-61 (2007) (discussing the Free Exercise doctrine and "equality"). Although I have read a number of these materials over the years, I have never met her.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ." U.S. CONST. amend. I.

3. *Compare,* Lemon v. Kurtzman, 403 U.S. 602 (1971) *with,* Agostini v. Felton, 521 U.S. 203 (1997). *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1387-92 (6th ed. 2000) (decline in Free Exercise cases); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 1252-61 (3d ed. 2006) (reviewing Free Exercise decisions).

especially doctrinal or practical implications.[4]

## I. REVIEW AND THEMES OF *LIBERTY OF CONSCIENCE*

### A. OVERVIEW

In her introductory chapter titled "Introduction: A Tradition Under Threat," Nussbaum, a Professor of Law and Philosophy at the University of Chicago Law School, lays out in a direct fashion what she considers to be the tradition of American religious tolerance.[5] She identifies this general tradition with six "normative principles."[6] I appreciate that Nussbaum is stating them as a historical matter since they represent her "tradition under threat."[7] The six normative principles are:

(1) The Equality Principle
(2) The Respect—Conscience Principle
(3) The Liberty Principle
(4) The Accommodation Principle
(5) The Non-Establishment Principle
(6) The Separation Principle

The order in which these principles are stated reveals the primary thrust of Nussbaum's work. She believes that, above all else, the two Religion Clauses working together are primarily about *equality of religious liberty*.[8] Again, at least at this early juncture in the book, there has been little authority or discussion to substantiate *equality* as the most important principle, let alone the irreducible bedrock, of the Religion Clauses. Nussbaum develops the case for her principles in the remaining chapters.

### B. CHAPTER TWO: ROGER WILLIAMS

In Chapter Two, the historical background of the Religion Clauses is traced,

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4. *See* David S. Day, *Some Problems of Free Exercise Doctrine—Social Good, Social Harm, and Undue Burdens: An Essay*, 54 S.D. L. REV. 253 (2009). The *Some Problems* essay, in part, is a review of Professor Marci Hamilton's book, *God v. The Gavel: Religion and the Rule of Law*. Hamilton's book is mainly a defense of the results in *Employment Division v. Smith*, 494 U.S. 872 (1990). *See generally* MARCI A. HAMILTON, GOD V. THE GAVEL: RELIGION AND THE RULE OF LAW (2005). Since Nussbaum critiques and disagrees with the *Smith* decision, *Liberty of Conscience* is, at least regarding Free Exercise, almost a polar opposite of Hamilton's book. Professor Hamilton is one of the contributors to this Symposium.

5. *See* NUSSBAUM, *supra* note 1, at 1-33.

6. *See id.* at 22-25. I shall repeat Nussbaum's six principles here even though I am going to comment about them below. While I agree with these principles in general, I have some disagreement about the relative priorities of the principles. I also have some trouble with the fact that I am not sure all of these so-called principles are in fact that well established that they can be stated up front as a matter of legal doctrine. It is important to recognize that Nussbaum offers these principles as normative. They represent her ideals. They are not offered, at this point in the book, as a descriptive proposition.

7. *Id.* at 1. *See also* Gene R. Nichol, *Establishing Inequality*, 107 MICH. L. REV. 913, 922-23 (2009); Abner S. Greene, *Three Theories of Religious Equality . . . And of Exemptions*, 87 TEX. L. REV. 963, 986 (2009).

8. *See* NUSSBAUM, at 18-19.

particularly by tracking the career and life of Roger Williams and the development of the colony and state of Rhode Island.[9] This historical overview sets the foundation for Nussbaum's analysis. I think there is a great deal more to the historical tradition of tolerance than just Roger Williams, but Roger Williams certainly illustrates the early American concern for religious liberty and liberty of conscience.[10] In general, this chapter demonstrates the historical roots of the book's analysis.

### C. CHAPTER THREE: RELIGION IN A NEW NATION

#### *1. The History of the Religion Clauses*

In Chapter Three, Nussbaum traces more generally the history of religious liberty in America and what she considers religious equality in early American history.[11] This includes a discussion of the experience in Virginia, particularly regarding James Madison. Madison's famous *Memorial and Remonstrance Against Religious Assessments* is a central feature of her historical treatment.[12] As part of this discussion, Nussbaum agrees with the Supreme Court's early consensus about Madison's *Memorial and Remonstrance* in *Everson*.[13]

#### *2. "Misleading" Competing Theories Are Critiqued*

In this chapter Nussbaum also deals with what she calls "Two Misleading Theories."[14] She has a critique of Justice Thomas who has advanced the theory that the First Amendment's Establishment Clause is not incorporated against the states.[15] Nussbaum also attacks the theory of non-preferentialism that former Justice Rehnquist advocated in his dissenting opinion in *Wallace v. Jaffree*; Nussbaum concludes that Justice Rehnquist in *Wallace* "is singularly unconvincing."[16]

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9. *See id.* at 34-71.

10. *See generally* René Reyes, *Conscience Reexamined: Liberty, Equality, and the Legacy of Rogers Williams*, 36 HASTINGS CONST. L.Q. 1 (2008).

11. *See* NUSSBAUM, *supra* note 1, at 72-114.

12. NUSSBAUM, *supra* note 1, at 90-96. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* 2 Writings of James Madison, 183-91 (1785), *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1, 63-72 (1947).

13. NUSSBAUM, *supra* note 1, at 113, 133 (discussing *Everson*, 330 U.S. 1). Of course, all lawyers and others in the area realize that, especially during the Reagan years, this understanding of the history and of the importance of the *Memorial and Remonstrance* has been harshly attacked. *See* Wallace v. Jaffree, 472 U.S. 38, 92-103 (1985) (Rehnquist, J., dissenting). Another part of Chapter Three is Nussbaum's discussion of the framing of the text of the Religion Clauses. This is certainly a helpful review, and it comes into play later in response to the attack on the heightened scrutiny used by the *Everson* Court.

14. NUSSBAUM, *supra* note 1, at 104.

15. *Id.* at 104-08.

16. *Id.* at 111. The main critique by Nussbaum of non-preferentialism is her belief that non-preferentialism would permit too much mixing of religion and civil government and that such mixing was a threat to the "equality of the standing in the public realm." *Id.* at 114. This part of Nussbaum's discussion is not new; as she recognized, it largely tracks earlier work by Professor Douglas Laycock. *Id.* at 109-10.

It is not unusual to find a critique of Justice Rehnquist's analysis. Nussbaum, however, seemed to add some information about the flaws in the non-preferentialism theory. She pointed out that the state of Virginia had a non-preferentialist religion clause proposed and that the state of Virginia had rejected it.[17] I think this is a helpful background.

Nussbaum also uses the misleading theory of non-preferentialism to discuss the use and interpretation of *post history*. She concludes that the Justices' use of post-drafting history is "not very useful."[18] In this regard she argues for her separation principle as part of her equality thesis since "[s]eparation . . . was a way of respecting human beings."[19]

### D. CHAPTER FOUR—THE STRUGGLE OVER ACCOMMODATION.

This Chapter provides a precedential analysis of both the modern Establishment Clause and Free Exercise doctrines.[20] In her review of the modern (*i.e.,* post-*Everson*) doctrine, she focuses on the terminology "accommodation."[21] For Nussbaum, this is a shorthand term for discussing the status of religious minorities in a world of majority law. Following Judge McConnell's early analysis, Nussbaum argues that even at the time of the founding, minorities could receive some degree of "accommodation" from the majority and its established churches.[22] This is the basis for considering her accommodation principle consistent with the Framers intent.[23]

In discussing the case law, Nussbaum moves on to the Free Exercise doctrine.[24] She first discusses *Sherbert v. Verner*.[25] It is her position that the *Sherbert* rule, which was basically strict scrutiny, protected religious minorities.[26] In particular, she argues that studies show that the *Sherbert* analysis better protects religious minorities than the doctrine under the *Smith* decision.[27]

Nussbaum, like all others reviewing Free Exercise doctrine, discusses the *Smith* decision.[28] She considers *Smith* to be the demise of the accommodation tradition and, thereby, concludes that *Smith* is inconsistent with the principles of the religious tradition.[29] She particularly scorns the notion of "hybrid" rights

17. *See id.* at 110.
18. *Id.* at 112.
19. *Id.* at 114.
20. *See id.* at 115-74.
21. *Id.* at 115.
22. *Id.* at 120-25.
23. *See id.* at 120. Again, accommodation is not the only theoretical construct available for analysis. It is a closer fit with the equality theory than the individual autonomy theory.
24. *Id.* at 135.
25. 374 U.S. 398 (1963); NUSSBAUM, *supra* note 1, at 135-47.
26. *Id.* at 139.
27. *Id.* at 146. *See* Employment Div. v. Smith, 494 U.S. 872 (1990). Nussbaum also includes a discussion of *Wisconsin v. Yoder*, 406 U.S. 205 (1972). NUSSBAUM, *supra* note 1, at 142-45.
28. *Id.* at 147-58.
29. *Id* at 155-56.

that Justice Scalia used in *Smith*.[30]

Since Nussbaum believes that *Smith* "put a dagger into the heart of minority religious freedom," she is highly critical of *Smith*.[31] She concedes that *Smith* has not been nearly as harmful to minority religions in practice as it appeared to be when the decision was first announced. Because of the Religious Freedom Restoration Act (RFRA),[32] the use of the "hybrid" analysis, and the use of the unemployment compensation approach from *Sherbert*, Nussbaum concludes that *Smith* hasn't been as bad in practice as one would have feared in 1990.

With respect to what she calls the accommodations struggle, Nussbaum eventually indicates that she agrees with the approach taken by Justice O'Connor in the *Smith*.[33] She wants "judicially mandated exemptions," and this distinguishes her position from the preference for legislative resolutions taken by Justice Scalia for the majority in *Smith*.[34]

Nussbaum continues this line of analysis in chapter five by addressing one of the questions proposed most recently by Professor Hamilton: whether a judicial system and judicial review can be counted upon to protect religious liberty under the Free Exercise Clause.[35] Whereas Hamilton concludes that the judiciary cannot be trusted,[36] Nussbaum is more optimistic. She believes that there should be a *mixed approach* to this issue, where accommodations are created both by the judiciary and by the legislature.[37]

### E. CHAPTER FIVE—FEARING STRANGERS

In Chapter Five, the principles of equality and tolerance are further developed with historical information.[38] This chapter, as well as chapter six, is probably the core of the book as far as Nussbaum's equality theory. Nussbaum concludes that "[e]xperience had shown the colonists that establishment was never fully equal or equally free."[39] Since she concludes the Framers believed that the nation could not have both *established religion* and *equality*, Nussbaum argues, as a general proposition, that the Framers intended that equality was the central purpose of both Religion Clauses.

30. *Id.* at 153-55, 159.

31. *Id.* at 159. In this chapter, she also discusses *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *Gonzales v. O'Centro Espirita*, 546 U.S. 418 (2006). NUSSBAUM, *supra* note 1, at 159-64. Both of these recognize exceptions to the *Smith* rule. She does not seem to dwell sufficiently on *Hialeah;* it confirmed the purposefulness analysis in *Smith*.

32. 42 U.S.C. § 2000bb (2006).

33. NUSSBAUM, *supra* note 1, at 173.

34. *Id.* at 174.

35. *Id.* at 177.

36. HAMILTON, *supra* note 4, at 207.

37. NUSSBAUM, *supra* note 1, at 174.

38. *Id.* at 175-223.

39. *Id.* at 225.

## F. CHAPTER SIX—ESTABLISHMENT CLAUSE

Early in this chapter, Nussbaum shifts from the Free Exercise Clause to the Establishment Clause.[40] There is a fairly lengthy discussion in Chapter Six about the Establishment Clause decisions.[41] Nussbaum asserts that the Establishment Clause case law "looks like a mess."[42] Because it is a "mess," she believes it is important to analyze it and work through it.

Another part of her Establishment Clause chapter is Nussbaum's discussion of public schools and traditions of prayer in public schools.[43] Most of this is familiar ground. Nussbaum eventually concludes that, after *Lee v. Weisman*,[44] the Establishment Clause tradition concerning prayer in public schools is "not seriously at risk."[45]

## G. CHAPTER SEVEN—AID TO SECTARIAN SCHOOLS

The topic of aid to parochial schools has, ever since the seminal *Everson* decision, dominated much of the Establishment Clause litigation.[46] Even after the voucher case, aid to parochial schools remains a major dimension of the Establishment Clause doctrine.[47] In that regard, Nussbaum properly spends some time discussing this area.[48] I will comment on two aspects of her discussion.

### *1. The* Locke *Decision*

First, Nussbaum discusses *Locke v. Davey*.[49] *Locke* is important with respect to aid to parochial education.[50] At issue in *Locke* was the constitutionality of a restrictive provision in the Washington State Constitution.[51] The Court upheld the state constitutional provision against a

40. *See id.* at 224-72.

41. *Id.* at 225-32.

42. *Id.* at 227. I have problems characterizing the body of Establishment Clause decisions as a "mess." Although a number of scholars have taken this position, I have always thought that this was unfair hyper-criticism. At one level, every doctrine is a "mess." At least any doctrine that is worth anything has decisions that seem superficially inconsistent. The problem with using the "mess" approach to the Establishment Clause as your major premise is that people are tempted to come up with simplistic solutions as a minor premise. Then the "mess" theorists are able to reach the conclusion that the simplistic solutions are actually superior to the existing doctrine.

I do not believe the Establishment Clause decisions represent a "mess." I think the case law reflects changing and competing standards, as well as changing facts from case to case.

43. *Id.* at 232-52.

44. 505 U.S. 577 (1992).

45. NUSSBAUM, *supra* note 1, at 252.

46. *See* Everson v. Board of Educ., 330 U.S. 1 (1947); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES & POLICIES 1198 (2d ed. 2002).

47. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

48. *See* NUSSBAUM, *supra* note 1, at 273-305.

49. 540 U.S. 712 (2004). *See* NUSSBAUM, *supra* note 1, at 302.

50. *See Locke*, 540 U.S. 712.

51. *Id.* at 715-16.

Free Exercise attack.[52] Nussbaum disagrees with *Locke*'s result and reasoning.[53] Nussbaum recognizes that *Locke* is a Free Exercise case and not analyzed as an Establishment Clause case.[54] Nevertheless, Nussbaum essentially treats *Locke* as an Establishment Clause decision.[55] For this reason, Nussbaum's criticism of *Locke* seems doctrinally hard to follow. It seems to me that the claim in *Locke* was based on the *equality* theory of Free Exercise favored by Nussbaum. The rejection of an *equality* claim in *Locke* appears to be a rejection of one of the premises of Nussbaum's book.

### 2. *The Political Conflict Theory*

In Chapters six and seven, Nussbaum also discusses the *conflict theory* of Establishment Clause doctrine that was recently revived by Justice Breyer in the Ten Commandments Cases.[56] The issue here is whether the potential for *political conflict* should be considered in Establishment Clause analysis.[57] Before *Lynch v. Donnelly*[58] in 1984, potential for political conflict was considered as part of the *Lemon* standard. In *Lynch*, however, Chief Justice Burger's majority opinion said that the potential for political conflict should not be considered.[59] The *Lynch* rationale was that political conflict was too easy to manipulate.

In 2005, Justice Breyer's concurring opinions revived the notion of considering the potential for political conflict as part of an Establishment Clause analysis.[60] Nussbaum apparently disagrees with Justice Breyer, even though Justice Breyer's approach is more consistent with *Everson,* and, in my view, more consistent with the "tradition" Nussbaum otherwise favors.[61] As with Nussbaum's disagreement with the *Locke* decision,[62] the doctrinal inconsistency here is hard to understand.

## H. CHAPTER EIGHT—CONTEMPORARY CONTROVERSIES

This is somewhat of a miscellaneous chapter. In it, Nussbaum further develops her equality principle.[63] As far as the "under God" controversy in the

52. *Id.* at 715, 725.

53. NUSSBAUM, *supra* note 1, at 302-03. My concern here is I think Nussbaum's description of what is at issue is mistaken. First, *Locke* was not an Establishment Clause decision; it was only Free Exercise. *See Locke*, 540 U.S. 712. Second, I believe she is wrong about *Locke* because she was wrong generally about the post-*Smith* doctrine.

54. NUSSBAUM, *supra* note 1, at 303.

55. NUSSBAUM, *supra* note 1, at 303-04.

56. NUSSBAUM, *supra* note 1, at 263. *See* McCreary County, Ky. v. ACLU of Kentucky, 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677, 698-706 (2005) (Breyer, J., concurring).

57. NUSSBAUM, *supra* note 1, at 276.

58. 465 U.S. 668 (1984).

59. *See id.* at 684-85. *See also id.* at 689 (O'Connor, J., concurring).

60. *Van Orden*, 545 U.S. at 698-706 (Breyer , J., concurring).

61. NUSSBAUM, *supra* note 1, at 271.

62. *Id.* at 302. *See supra* Part I.G.1.

63. NUSSBAUM, *supra* note 1, at 306-53.

pledge of allegiance, Nussbaum notes that the legislative process has also been working on this issue.[64] She notes that in 2006 the House of Representatives voted to remove jurisdiction from the federal courts and the Supreme Court of any case contesting the constitutionality of the use of the words "Under God" in the pledge.[65] The United States Senate never passed the bill.[66]

Nussbaum also discusses, as a matter of the Religious Clauses, the same sex marriage controversy.[67] It is, on the one hand, obvious that the opposition to same sex marriage is based upon the principles of certain religious groups. Nussbaum regrets this use of the Religion Clauses by the opponents of same sex marriage.[68] In fact, she ultimately asserts that "[s]ame-sex marriage is not, as such, a religion clause issue."[69] Her attempt to sidestep the issue as a matter of the Religion Clauses is not persuasive.

## I. CHAPTER NINE—CONCLUSION

The conclusion is relatively succinct.[70] Nussbaum has discussed the attack on the "tradition" of religious liberty and liberty of conscience. In addition, she has pointed out some positive developments. She suggests that the constitutional tradition, although presently sound, must not lapse into over-confidence.[71]

Ultimately Nussbaum concludes that the "attack on America's tradition of religious equality . . . is ongoing."[72] In light of the ongoing attack, she argues that it is necessary to have continued vigilance in protecting the principles that underlie the tradition of religious freedom and liberty of conscience.[73]

## II. ISSUES RAISED BY *LIBERTY OF CONSCIENCE*

In summarizing Nussbaum's work, I have inevitably generalized, and this consequentially overlooks many of the nuances in her argument. I find that I agree with much of her analysis and many of her conclusions. However, I have some reservations and disagreements. I shall discuss below several issues: Nussbaum's treatment of the *social harm* caused by the exercise of religious rights; whether the Free Exercise guarantee is merely an assurance of equal treatment or a substantive individual liberty; and the controversy over the proper

64. *Id.* at 307.

65. *Id.* at 315.

66. *See id.* at 314-15. Another part of this chapter is devoted to the "intelligent design" evolution controversy. To some extent she is returning, of course, to the discussion of some of the more interesting cases in the Establishment Clause line of cases.

67. *Id.* at 334-46.

68. *Id.* at 335.

69. *Id.* at 346.

70. *Id.* at 354-64.

71. *Id.* at 356. The conclusions reached by Nussbaum include the notions that, as a result of the Fourteenth Amendment, the Free Exercise Clause guaranteed liberty and equal liberty. She also concludes that the Establishment Clause, in light of the Fourteenth Amendment, should be read as Madison wanted the Establishment Clause to originally be read.

72. *Id.* at 359.

73. *See id.* at 362-63.

standard of review for Free Exercise claims.

### A. HARM CAUSED BY RELIGIOUS EXERCISE

One aspect of the Religion Clause doctrines overlooked or neglected by Nussbaum is the undeniable harm done to society in the name of free exercise. Religion has been, of course, an enormous source of good in American life; but the harm visited upon members of American society cannot be ignored.[74]

As a doctrinal matter, recognition of the harm caused by religious exercise allows an understanding of the *Smith/Hialeah* purposefulness regime.[75] Unlike the *Smith* Court's prevention-of-anarchy theory, *Smith* is better understood as a prevention-of-harm rationale.[76] When the government pursues a legitimate goal of preventing harm and uses facially neutral, generally applicable means, the government does not need to satisfy a degree of heightened scrutiny.[77] At least, that is the current state of Free Exercise doctrine.

### B. FREE EXERCISE RIGHTS AS A SUBSTANTIVE LIBERTY—NOT JUST A RIGHT TO EQUALITY

Nussbaum argues that the Free Exercise guarantee is primarily a guarantee of religious equality.[78] In my view, however, history and precedent show us that religious equality is not enough. The text adopted by the Framers, and the demands of modern social life, require more. While *equality* is a necessary feature of the Religion Clauses (separately or conjunctively), I believe these Clauses represent a broader constitutional principle of individual autonomy.[79] The Court's pre–*Smith* precedent seems inconsistent with Nussbaum's position. The *Sherbert* Court, for example, did not recognize the protection of free exercise as an interpretive means of protecting *equal religious exercise*; the *Sherbert* Court held that free exercise is a fundamental right so that individual religious autonomy would be protected by strict judicial scrutiny.[80]

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74. *See* Day, *supra* note 4, at 254-55. The term "harm" does not even appear in the index to *Liberty of Conscience.* NUSSBAUM, *supra* note 1, at 395-404.

75. *See* Day, *supra* note 4, at 257.

76. *See* HAMILTON, *supra* note 4, at 302-05.

77. *See* Employment Div. v. Smith, 494 U.S. 872 (1990).

78. *See* NUSSBAUM, *supra* note 1, at 104.

79. *See, e.g.,* Ronald J. Krotoscynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189 (2008); Christopher C. Lund, *Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, 353-55 (2010). Professor Lund is one of the other participants in this Symposium. To promote such autonomy, I believe that the disestablishment principles must have a higher priority than Nussbaum provides. The constraints of this essay format limit the chance to develop this point, but I wanted to note my disagreement with Nussbaum's priorities.

80. *See* Sherbert v. Verner, 374 U.S. 398, 401, 403 (1963); *id.* at 413 (Stewart, J., concurring in result). There is a discussion of "the religious discrimination which South Carolina's general statutory scheme necessarily effects" in Justice Brennan's opinion. *See id.* at 406. I read this part of Justice Brennan's argument as supplementing the basic holding that the Sabbatarian challenger was asserting her fundamental rights.

The purposefulness requirement of *Smith*, it seems clear, was borrowed from equal protection doctrine. *See* Employment Div. v. Smith, 494 U.S. 872, 886 n.3 (1990). Time and space prevent a more

As I earlier indicated, Professor Nussbaum has provided an extensive historical analysis, bolstered by her precedential analysis.[81] There is much valuable information, even for those, like myself, who do not agree with her emphasis on equality as the dominant interpretive principle for the Free Exercise Clause.[82] As I mentioned above, equality is undeniably important, but it is not sufficient as an interpretive approach for the Free Exercise Clause.

### C. THE CONSEQUENCES OF SMITH'S ADOPTION OF THE PURPOSEFULNESS REQUIREMENT IN FREE EXERCISE DOCTRINE

We are now twenty years into the *Smith/Hialeah* regime. Nussbaum properly recognizes that there is a considerable debate within the legal community as to whether the consequences of the *Smith* and *Hialeah* decisions have put free exercise rights, especially of minority religions, into a position worse than where such rights would have been under the *Sherbert/Yoder* regime.[83]

There have been recent studies that support both sides of this argument.[84] Critics of the *Smith/Hialeah* regime contend that its imposition of purposefulness and rational basis review on free exercise claims results in fewer victories for free exercise claimants. Supporters of *Smith/Hialeah* contend that free exercise rights have not been significantly disadvantaged.

These studies are helpful but hardly determinative. The doctrinal question is actually not a close call: the *Smith/Hialeah* regime is clearly a lower level of judicial protection than the *Sherbert/Yoder* regime. The *Smith* Court explicitly adopted the purposefulness regime to reduce the judicial role in the protection of free exercise rights.[85] Legislative exemptions, even over time, will not elevate the level of *judicial protection.*

### D. THE STATUS OF JUDICIAL REVIEW FOR FREE EXERCISE CLAIMS

Although Nussbaum's historical and precedential analysis did not focus on the doctrinal status, it is clear that the *Smith/Hialeah* regime is a two step

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complete analysis here.

81. *See supra* Part I.B.

82. *See* NUSSBAUM, supra note 1, at 21.

83. *See id.* at 145-57.

84. *See id.* at 146. *See, e.g.,* Amy Adamczyk, John Wybraniec & Roger Finke, *Religious Regulation & the Courts: Documenting the Effects of* Smith *& RFRA*, 46 J. CHURCH & STATE 237, 262 (2004); Christopher C. Lund, *Religious Liberty After* Gonzalez: *A Look at State RFRAs*, 55 S.D. L. REV. (2010).

85. *See Smith*, 494 U.S. at 890 (stating that the "unavoidable consequence of democratic government [that minority religions will be disfavored] must be preferred to a system in which each conscience is a law unto itself *or in which judges weigh the social importance of all laws against the centrality of all religious beliefs*")(emphasis added). *See generally* Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith, Sherbert, *Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1190 (2005); Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J. L. & PUB POL'Y 627, 635 (2003). Professors Duncan and Lund were both participants in this Symposium.

analysis.[86] First, the challenger needs to establish that the government's "prohibition" is a *purposeful* regulation.[87] If yes, then the second step is the judicial review standard of strict scrutiny.[88] In the *Smith/Hialeah* regime, free exercise interests receive either strict scrutiny (if the purposefulness threshold would be satisfied) or only rational basis.[89]

Nussbaum does not appropriately address the continuing debate on whether there are other alternatives to the *Smith/Hialeah* regime than a return to the *Sherbert/Yoder* regime (and strict scrutiny). Several thoughtful proposals have been advanced. In particular, Professor Rodney Smolla has suggested replacing the post-*Smith* purposefulness/strict scrutiny regime with a form of intermediate scrutiny.[90] Another alternative would be the undue burden standard.[91]

Nussbaum's nostalgic call for a return to the *Sherbert/Yoder* regime seems to be an unlikely outcome. The scope of the exemption created by strict scrutiny seems too broad, especially when considering the need to regulate socially harmful conduct. As in the case of abortion regulation, the Court may resolve the current doctrinal tension by moving to a form of intermediate scrutiny.[92] Intermediate scrutiny will require some careful tailoring of means while providing judicial protection against majoritarian zealousness.

## III. CONCLUSION

Professor Nussbaum has provided a valuable contribution to the legal literature on the Religion Clauses of the First Amendment. Although it is not really a doctrinal analysis, *Liberty of Conscience* has a wealth of historical and policy information.

As mentioned above, I have substantial agreement with Nussbaum's six normative principles. However, Professor Nussbaum, in my view, has not fully demonstrated that her principles have been adopted by the Court. I also have two reservations about her normative principles. First, I think Nussbaum undervalues the constitutional role of "separation"—the independence of religious belief and religious entities from government control. She considers the separation principle as subordinate to the equality principle. Nussbaum

86. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); *Smith*, 494 U.S. 872.

87. *See Smith*, 494 U.S. at 877-79.

88. *See Hialeah*, 508 U.S. at 546.

89. *See id.*; *Smith*, 494 U.S. 872.

90. *See* Rodney Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925, 937 (1998). *See also* Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 359 (proposing "that a law may be validly applied 'only if it is the least restrictive means for (a) protecting the private rights of others, or (b) ensuring that the benefits and burdens of public life are equitably shared'").

91. *See* Day, *supra* note 4, at 264. *See also* Adriana S. Cooper, *Free Exercise Claims In Custody Battles: Is Heightened Scrutiny Required Post-*Smith*?*, 108 COLUM. L. REV. 716, 724 (2008).

92. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion); Stenberg v. Carhart, 530 U.S. 914, 938 (2000); Gonzales v. Carhart, 550 U.S. 124, 146-48 (2007). *See also* Lund, *supra* note 85, at 638 (discussing the burden of persuasion in Free Exercise under the *Smith/Hialeah* regime).

accomplishes this by interpreting the Framers' separation concerns as really just a concern for equality. Here, in my view, her argument is trumped by both text and history, as well as a precedential argument.

My second disagreement is related to Nussbaum's thesis that the primary (and shared) purpose of the Religion Clauses is equality. Again, the textual and historical evidence is not very strong for her theory. I doubt that her policy analysis is persuasive. Nussbaum's approach leads her to argue, in essence, that the Free Exercise Clause created a *duty* for the government to accommodate minority religious practices.[93] This concept of duty was not, however, adopted by the Framers or by the modern Court.

Moreover, as discussed above, interpreting the Free Exercise Clause as essentially just another equal protection provision actually adopts the approach used in *Smith*.[94] Given Nussbaum's profound disagreement with the *Smith* decision (and its consequences), it is unfortunate that she adopts her equality-above-all-else theory. Perhaps her disagreement with *Smith* and its "equality" progeny should have caused her to reexamine her equality theory of the Religion Clauses.

With these caveats, I recommend careful consideration of Professor's Nussbaum's *Liberty of Conscience*. I have adopted it for my course and believe it will make a substantial contribution to the continuing debate in legal circles and otherwise.

93. *See* NUSSBAUM, *supra* note 1, at 353.

94. *See* Krotoscynski, *supra* note 79, at 1204. *See also* Lund, *supra* note 79.