BOOK REVIEW: THE PROTECTION OF FREE EXERCISE OF RELIGION FOR MINORITY FAITHS IN BRUCE LEDEWITZ'S *AMERICAN RELIGIOUS DEMOCRACY*

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Professor Bruce Ledewitz is never one to shy away from controversy, so it will come as no surprise that his recently published book *American Religious Democracy*[1] is destined—and no doubt designed—to provoke strong reactions. What is perhaps new is that at various junctures the work is likely to raise the hackles of political liberals as well as conservatives, atheists as well as worshipers of mainstream faiths, and judges and academics of every stripe of constitutional interpretation. Ledewitz draws from an impressive swath of religious and theological texts, the canons of political and legal theory, Supreme Court decisions, national and local print media, popular culture, and the political spam that finds its way to his e-mail inbox. While his analysis is destined to ignite passions on all sides of the political, religious, and jurisprudential spectrum, Ledewitz's goal is to pacify. He seeks to unify the religious right, liberal religionists of the left, and secularists in a quest to ensure their full participation in American political life.

Ledewitz's central thesis is that the significant role of religiously motivated voters in ensuring the 2004 re-election of President Bush, enlarging Republican majorities in both houses of Congress, and enacting state constitutional initiatives to ban gay marriage marks the death knell of the traditional conception of separation of church and state that had prevented religion from overtly influencing political life.[2] In its stead, Ledewitz posits that as a popular, cultural, political, theological and constitutional matter (and perhaps some day even as accepted academic dogma), the United States now is a democracy whose government both endorses religion and relies upon religious values in its decision-making. Among other things, Ledewitz articulates the changes in interpretation of the First Amendment to the United States Constitution necessary to accommodate the new American religious democracy.

Ledewitz quite properly acknowledges the perils of prognosticating a seismic shift based upon a single election. The Democratic Party gains in the midterm elections of 2006, the lesser currency of religious hot-button issues such as abortion, gay rights, and tuition vouchers in defining voting preferences, and President Bush's woeful approval ratings evidence the

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1. BRUCE LEDEWITZ, AMERICAN RELIGIOUS DEMOCRACY: COMING TO TERMS WITH THE END OF SECULAR POLITICS (2007).

2. Ledewitz does not suggest that religious voting patterns spontaneously erupted in 2004. Rather, he notes that the Bush campaign deliberately executed Karl Rove's strategy of directly appealing to religious voters, including motivating four million Evangelical voters to turn out at the polling booth. *Id.* at 4.

evanescence of the 2004 election returns. Ledewitz rightfully assesses these events in an Afterword. Recent polling for the 2008 presidential election, however, lends credence to Ledewitz's postulate that "[R]eligion is now a permanent part of the politician's calculus. In this sense, there are no longer any secular national politicians in America."[3] The September 6, 2007 Survey Report of the Pew Research Center for the People and the Press and the Pew Forum on Religion and Public Life concludes:

> Overall views of the presidential candidates are linked with views of their religiosity; those who perceive a candidate as being very religious tend to express the most favorable overall views of each candidate, followed by those who perceive the candidate as being somewhat religious. Those who view candidates as being not too or not at all religious, on the other hand, are much less likely to express favorable views.[4]

Ledewitz casts the 2004 election returns as the obituary of advocates of what he terms secular democracy, the intended targets of his book. Ultimately, Ledewitz seeks to convert not only their political philosophy, but their ostensible lack of religious leanings as well.[5] It is important to distinguish Ledewitz's definition of secular democracy from the prevailing constitutional theory underlying separation of church and state. The United States Supreme Court's current constitutional regime precludes government from endorsing religion, not only by prohibiting promotion of any particular faith, but also in barring government preference of religion over irreligion.[6] Although there are differing points of view as to the precise purpose and contours of neutrality,[7] it is generally accepted that separation of church and state was not designed to eradicate religion, but rather was meant to promote conditions under which government as well as religious institutions were permitted to flourish. Thus while the Establishment Clause demands

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3. LEDEWITZ, *supra* note 1, at 6.

4. PEW RESEARCH CTR., RELIGION IN CAMPAIGN '08, at 7 (2007), *available at* http://people-press.org/reports/print.php3?ageID=1184. Other findings of the survey offer a more finely tuned take on the extent to which American voters seek to mix religion and politics. The survey found that 69% of Americans want a President with strong religious beliefs and 58% believe it is proper for journalists to ask politicians how their religious beliefs affect their opinions on the issues of the day. *Id.* at 12-13. However, being perceived as somewhat religious, as opposed to being perceived as not too religious or not at all religious, is a more significant boost to the candidate than being perceived as highly religious. *Id.* at 12.

The survey also demonstrates discrimination against candidates of certain faiths, with 45% of respondents indicating they had reservations about voting for a Muslim candidate and 25% expressing reservations about voting for a Mormon. *Id.* at 3. Yet the absence of religious belief inspires the strongest opposition, with 61% stating they would be less likely to vote for a candidate who does not believe in God. *Id.* Finally, the survey concludes that the Iraq War and domestic issues such as the economy, health care, and the environment are more significant to voters than social issues such as abortion and gay marriage. *Id.*

5. LEDEWITZ, *supra* note 1, at 167-75.

6. Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947).

7. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 14-2, 14-3 (2d ed. 1988).

government neutrality towards religion, the Free Exercise Clause of the First Amendment protects the rights of adherents of at least majority faiths to pursue religious convictions in their private lives.

Ledewitz's secular democrats, however, have a different ambition with respect to the institution of religion. Secular democrats view religion, founded in immutable truths and duty-bound to adhere to them, as incompatible with a democracy whose laws and policies are anchored in reason. Reason is deemed vastly superior to spiritual faith as a basis for decision-making, with the latter destined to disappear as the education and income of the populace increase. Religion is also considered inimical to democracy, for it is presumed that in keeping with their obligation to answer to a higher authority, believers will refuse to comply with laws that contradict the tenets of their faith. Consequently, secular democrats censor all attempted advocacy of public policies based upon religious dogma. They insist that all arguments in the political world be crafted purely in secular terms, relegating religious speech to a second-class form of expression, en route to its inevitable banishment from democratic life.

Ledewitz theorizes that American voters have repudiated the canons of secular democracy, not due to any abstract philosophy concerning the interface between religion and politics, but because individuals cannot segregate moral values emanating from their religious convictions from norms promoted by secular laws. Americans vote their religious consciences, argues Ledewitz, because the ultimate questions sought to be answered by religion and political philosophy are identical: What is the meaning of life? How should one live as an individual and as a community? Ledewitz also interjects a dose of determinism, averring that neither the individual nor collective citizenry has plenary autonomy in selecting policies because certain outcomes are "morally irresistible." As a consequence, Ledewitz offers, it is not surprising that five major themes in American political life parallel religious traditions and values: the existence of self-evident truths; the belief that all human beings are created equal; emphasis on the sinful nature of humankind; conviction that the world was made for man; and perception of the United States as the light to the world.[8]

Ledewitz does not limit his interpretation of the 2004 election returns to refutation of secular democracy. He contends that the American voters now endorse a new religious democracy in which government policy is a conscious and overt product of the religiously founded wishes of those who elected their representatives. In Ledewitz's religious democracy, government voices the religiously founded values of the majority voting populace, rather than remaining neutral between religion and irreligion.

Ledewitz finds no difficulty reconciling religious democracy with theology[9] and political theory.[10] He confesses, however, that religious democracy will require a "revolution in constitutional interpretation of the Establishment and

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8. LEDEWITZ, *supra* note 1, at 38-46.
9. *Id.* at 125-37.
10. *Id.* at 139-54.

Free Exercise Clauses" of the First Amendment to the United States Constitution.[11] He acknowledges that the Framers did not borrow language from then-existing state constitutions that referred to God or religion as a foundation of government; to the contrary, the lone reference to religion in the federal Charter precludes imposition of a religious test as a qualification for public office.[12] Ledewitz further accepts that the textual secularization was neither accidental nor animated by hostility to religion, but was deliberately designed to protect both general civil liberty and religious freedom by preventing any single faction from accruing political power.[13]

Ledewitz expounds an über-realist view of interpretation to find there is no constitutional bar to government adopting policies to reflect the spiritual commitments of its constituents in his religious democracy.[14] Ledewitz grants that judges, lawyers, and theorists argue that the Constitution is a foundational document designed to protect minorities against the whim and will of a potentially tyrannical majority unless amended by an extra-majoritarian consensus. Contrary to this view, Ledewitz contends that the majority in each generation is entitled to define anew its "fundamental arrangements."[15] Ledewitz submits that the true role of courts in interpreting the Constitution, borne out by history, is to affirm the extant democratic will, rather than attempt to discern objective constitutional truths. After the American people rebuffed the secular consensus in the 2004 election, the Court is permitted, even obliged, to amend its interpretation of the religion clauses of the First Amendment to ratify the new religious democracy endorsed by the voters. Ledewitz contends that the Court's recent Establishment Clause decisions have mirrored the people's desire for religious democracy by upholding arguments that government does not violate the Clause when it seeks to

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11. LEDEWITZ, *supra* note 1, at 11.

12. U.S. CONST. art. VI, cl. 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."). By contrast, the 1776 Pennsylvania Constitution protected the civil rights of citizens who specifically "acknowledge[ ] the being of God." PA. CONST. of 1776, ch1., art. 2. In addition, it required all members of the Pennsylvania House of Representatives to take an oath affirming, "I do believe in one God, the creator and governor of the Universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration." PA. CONST. of 1776, § 10. The current Pennsylvania Constitution provides, "No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office." PA. CONST. art. I, § 4. If challenged, the precondition that a candidate for state office acknowledge God likely would be held unconstitutional. *See* Torcaso v. Watkins, 367 U.S. 488, 496 (1961).

13. As James Madison wrote in Federalist No. 51, "In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects." THE FEDERALIST NO. 51, at 3-4 (James Madison) (Jacob E. Cooke ed., 1961).

14. Ledewitz also relies upon religious determinism to support his view. As a theological matter, Ledewitz asserts, only God and not man could decide to separate religion from the state by God's choosing not to intervene in the political dimension of existence. LEDEWITZ, *supra* note 1, at 60.

15. *Id.* at xv.

benefit religion. In the areas of (1) government aid to religious institutions,[16] (2) state actors invoking God and other religious themes,[17] (3) religion in public schools,[18] and (4) the increasing penetration of religious institutions and religious views in government, Ledewitz believes "constitutional doctrine already has blurred the line of separation between Church and State or is one additional vote away from doing so."[19]

One can expect Ledewitz to draw flak for his theory of democratically engineered constitutional re-interpretation.[20] However, if one were inclined to accept Ledewitz's theory, what changes in interpretation of the Free Exercise Clause of the United States Constitution are likely to ensue? While Ledewitz contends that the true outsiders in the post-2004 American religious democracy will be followers of the secular consensus who deny the possibility of the existence of God, what are the implications of his thesis for persons who are religious but do not share the tenets of majority faiths? Protection of non-mainstream sects is not only significant in the United States as a matter of principle, but is a genuine concern as the number of faith-based traditions

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16. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662-63 (2002) (governmental provision of vouchers to parents, that could be used to defray private school tuition does not violate Establishment Clause, even where over 90% of vouchers were used by parents to enroll children in religiously affiliated schools).

17. *See* Van Orden v. Perry, 545 U.S. 677, 681 (2005) (six-foot display of Ten Commandments, joined with other historical markers and monuments on grounds of state capital in Texas, does not violate Establishment Clause); *see also* Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (government-sponsored Christmas display that included not only crèche but also non-religious symbols complies with First Amendment). *But see* McCreary County v. Am. Civil Liberties Union, 545 U.S. 844 (2005) (display of Ten Commandments on walls of courthouse offends Establishment Clause where legislative history manifests governmental effort substantially to promote religion).

18. Ledewitz concedes case law consistently bars the government from encouraging religious belief in public schools, even when desired by a majority of the parents. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577 (1992). Ledewitz argues these Court decisions will serve as "a mere paper barrier" in thwarting the majority's desire for religious speech because school districts can and will permit private speech by student leaders without guidelines as to content. Students in turn will figure out that prayer is expected and elections of student leaders will then guarantee expression of the majority religion. LEDEWITZ, *supra* note 1, at 77.

19. LEDEWITZ, *supra* note 1, at 69. Ledewitz projects that the additional vote will be supplied by the confirmation of Justice Alito to replace Justice O'Connor and/or the retirement of Justice Stevens. *Id.* at 69-70. Evidence of the accuracy of his prediction may be found in Justice Alito's opinion announcing the judgment of five members of the Court in *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553, 2560 (2007) (taxpayers lack standing to challenge conferences organized by Director of White House Office of Faith-Based and Community Initiatives in which faith-based organizations were "singled out as being particularly worthy of federal funding . . . , and the belief in God [was] extolled as distinguishing the claimed effectiveness of faith-based social services.") (citation omitted).

20. Ledewitz concedes that while validated by the work of political scientist Robert Dahl, the "notion of an organic constitutionalism has little support, however, in either the academy of American law professors or among judges." LEDEWITZ, *supra* note 1, at 87. Ledewitz finds authority for the view that the role of the judge in interpreting the Constitution is to embrace the majority's will in Justice Harlan's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting). Of course, Justice Harlan was not offering a template for construction of enumerated rights, but rather proposed a means for giving content to the substantive constraints of the Due Process Clause.

broadens[21] and members of organized religions increasingly move towards individualized interpretations of the obligations of their faiths.[22]

Before 1990, the Supreme Court's construction of the Free Exercise Clause maximized the ability of congregants of minority faiths to pursue the tenets of their religion. When the sincerely held demands of their religions conflicted with obligations of a secular law, the Court exempted the religious observers from compliance unless the government could prove that the law served a compelling interest and there was no alternative way to satisfy that interest without burdening religion. The principal beneficiaries of strict scrutiny of secular regulations were non-mainstream faiths. The Old Order Amish secured an exemption from a Wisconsin criminal law mandating school attendance until the age of sixteen, which conflicted with the Amish conviction to remove their children from school after the eighth grade to prepare them for life in their separated agrarian community.[23] The Court overrode denial of unemployment compensation to members of the Seventh-Day Adventist Church who refused to work on Saturdays, the Sabbath of their faith.[24] A Native American of the Abenaki tribe who sincerely believed providing a social security number for his two-year-old daughter, Little Bird of the Snow, would deprive her of spiritual purity was exempted from the requirement that he supply the number as a condition of obtaining public benefits.[25]

In *Employment Division v. Smith*,[26] the Supreme Court unilaterally withdrew Free Exercise shelter for non-mainstream faiths. The State of Oregon in *Smith* did not ask the Court to reduce the degree of judicial scrutiny of laws that invade an individual's religion. Yet the Court held that laws of general applicability whose effect is to burden an individual's religious practice or belief no longer need be justified by proof that the law served a compelling interest that could not be attained by means less restrictive of religion.[27] Instead, religion would be sacrificed to the secular needs of government whenever there was a rational basis for the law.[28] The *Smith* Court was well

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21. *See* DALE E. JONES ET AL., RELIGIOUS CONGREGATIONS AND MEMBERSHIPS IN THE UNITED STATES 2000, at xvii (2002) (identifying 265 distinct religious bodies claiming congregations in the United States); *see also* BARRY A. KOSMIN ET AL., AMERICAN RELIGIOUS IDENTIFICATION SURVEY 12-13 (Dec. 19, 2001), *available at* http://www.gc.cuny.edu/faculty/research_briefs/aris.pdf [hereinafter ARIS Survey] (identifying thirty-five independent Christian faiths and more than twenty non-Christian sects claiming close to eight million members).

22. ARIS Survey, *supra* note 21, at 14-16.

23. Wisconsin v. Yoder, 406 U.S. 205, 234-35 (1972)

24. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 138, 146 (1987); *see also* Sherbert v. Verner, 374 U.S. 398, 401, 409 (1963).

25. Bowen v. Roy, 476 U.S. 693, 712 (1986).

26. 494 U.S. 872 (1990).

27. *Id.* at 883-89.

28. The Court would continue to apply strict scrutiny if (1) the purpose of the law was to burden religion; (2) the law had a means for affording exemptions from the generally applicable rule but refused to countenance religious exemptions; or (3) the law not only

aware that because members of minority sects do not have the political clout to defeat legislation that, in effect, burdens their religious practices, abandonment of strict scrutiny under the Free Exercise Clause "will place at a relative disadvantage those religious practices that are not widely engaged in."[29]

While he views the Supreme Court's recent Establishment Clause jurisprudence as ratifying the voters' desire for religious democracy, Ledewitz suggests the *Smith* Court's re-engineering of the Free Exercise Clause aligns with the popularly discredited secular democracy by permitting government to disfavor religion.[30] Although Ledewitz finds the *Smith* Court's abrogation of strict scrutiny to represent the "high point of achievement of the secular consensus,"[31] it may be argued that *Smith* is entirely consonant with the American religious democracy that Ledewitz envisions. In a religious democracy, Ledewitz concedes, "the attitudes of believers on particular issues will simply become the subject of electoral competition."[32] The faith whose beliefs emerge victorious has no incentive to exempt worshipers of different religions from the vision of the good life that the majority, drawing upon its biblical foundations, has succeeded in enacting. Justice Scalia, writing for the majority in *Smith*, viewed the inevitable disadvantaging of non-mainstream worshipers as an "unavoidable consequence of democratic government [that] must be preferred to system in which each conscience is a law unto itself."[33] The *Smith* Court's elevation of democracy over protection of minority faiths, then, is entirely consistent with the operation of religious democracy. Rather than represent the zenith of secular democracy, the *Smith* Court may have presaged the very religious democracy that Ledewitz ascribes to the voters in the 2004 election.

Ledewitz is not oblivious to the dangers religious democracy potentially poses to non-mainstream religions.[34] Ledewitz admits that religious democracy will outlaw individual autonomy to engage in acts deemed either to harm others (abortion, for example) or to imperil religious construction of essential human meaning (such as the asserted right to die).[35] He offers the hope that instead of flexing newly-minted constitutional power to impose their orthodoxy on other faiths, religions that are the victors of electoral spoils

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burdened religion but also violated a second fundamental right. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993); *Smith*, 494 U.S. at 881-84.

29. *Smith*, 494 U.S. at 890. As Justice O'Connor wrote in her concurring opinion in *Smith*, "[t]he history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish." *Id.* at 902 (O'Connor, J., concurring).

30. LEDEWITZ, *supra* note 1, at 31.

31. *Id.* at 70. Ledewitz seeks to minimize the impact of *Smith* by noting that the absence of constitutionally mandated exemptions from secular laws is relevant only where the political process has failed to prescribe religious accommodation of different believers. *Id.* at 31. As Justice Scalia observed in *Smith*, however, it is followers of minority faiths who are most likely to lack the power to inform or affect the legislative will.

32. *Id.* at 139.

33. *Smith*, 494 U.S. at 890.

34. LEDEWITZ, *supra* note 1, at 124. Ledewitz asserts it is possible that, like *Smith*, the Court's recent Establishment Clause cases protect only majoritarian religion. *Id.* at 77-78.

35. *Id.* at 144.

instead will adopt a spirit of toleration towards competing sects.[36] Ledewitz invokes authority in Christianity, Judaism, and Islam accepting that religious conversion may not be achieved by compulsion.[37] Ledewitz further assumes that majority faiths will voluntarily refrain from imposing their tenets upon different believers in order to establish a precedent that in turn will protect the majority should they fall from political grace.[38] Thus, Ledewitz proposes that religions whose fundamental tenets proscribe homosexuality nonetheless will not necessarily oppose the rights of gays in society.[39] He predicts that once government is permitted to invoke religion at public events, it will not seek to endorse a particular God or even promote monotheism over polytheism.[40] Rather, political leaders will strive to be inclusive and will adopt common "public, transcendent expressions that do not divide religious believers."[41]

It is no criticism of Ledewitz that if his optimism proves unfounded, the religiously democratic constitution he proposes may have untoward costs to certain believers. His motive is not to sacrifice adherents of non-mainstream faiths, or for that matter, the worshipers of the secular consensus that he personally opposes. To the contrary, Ledewitz rues the cost of the current political reality to secular voters, who have been left to snipe at religion from the sidelines. The political marginalization of secularists, Ledewitz contends, has yielded a decidedly Republican and conservative bent to religious democracy, precluding any coalition of progressive believers and non-believers. In his final chapters, Ledewitz unveils his provocative solution: conversion of atheistic secularists to "biblically oriented secularis[m]."[42] This proposed faith neither requires belief in a separate entity harboring a divine plan nor insists upon rejection of scientific accounts of reality.[43] The lone mandate is acceptance that the universe is governed by transcendent truths giving a moral shape to life and history.[44] Only through this conversion, Ledewitz submits, can non-believers overcome the disenfranchisement caused by their "disdain of religion" as a set of doctrines that "only narrow-minded fools could believe," and return to full participation in the shaping of political life in America.[45]

Ledewitz is to be commended for a well researched, scholarly and thoughtful work in which he bares his personal odyssey as well. He joins the pantheon of scholars of multiple persuasions offering a template for accommodating the competing and often irreconcilable demands of a

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36. LEDEWITZ, *supra* note 1, at 110.
37. *Id.*
38. *Id.* at 110-11.
39. *Id.* at 144-45.
40. *Id.* at 121-24.
41. *Id.* at 124.
42. LEDEWITZ, *supra* note 1, at 169.
43. *Id.*
44. *Id.*
45. *Id.* at 156.

religiously pluralistic community in a constitutionally limited democracy.[46] Ledewitz may well be correct that to avoid political marginalization, there is a pressing need for secularists to find common ground with those who cannot separate their religious convictions from moral norms embodied in the nation's laws, and that our Constitution is one of the forces that can be unleashed either to unite or to divide those factions. However, as the polarized views of commentators and the Supreme Court's disparate judgments evidence, it may be impossible to find an interpretation of the Establishment Clause capable of an objective and satisfactory application across the terrain of factual situations that will satisfy both camps.

If the more modest goal is effective political re-engagement, rather than erecting an unassailable political, constitutional, theological, or ontological theory, perhaps non-believers and religionists can coalesce around a more robust interpretation of the Free Exercise Clause. Secularists advocate that the excision of reference to God and the inclusion of the prohibition of establishment of religion in the United States Constitution support their view that religion is inherently incompatible with reason. Without compromising that position, secularists could affirm that the First Amendment's protection of the free exercise of religion (partnered with its guarantees of free speech) safeguards both their right to repudiate faith and the liberty of all believers to pursue their relation with the Creator and to advocate the moral norms dictated by their faith. Many deeply religious persons believe the wall of separation erected by the Establishment Clause fences out only imposition of a national religion. Yet as Ledewitz suggests, it is in the long-term interest of all citizens of faith to endorse a generous and inclusive interpretation of free exercise extended to all systems of belief or disbelief.

This consensus is evidenced by the response to the *Smith* Court's repudiation of strict scrutiny for invasions of religion by across-the-board governmental regulations. An almost unanimous Congress enacted the Religious Freedom Restoration Act (RFRA), whose purpose was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[47] The Supreme Court quickly declared RFRA to lie beyond Congress's Section V power to enforce the Fourteenth Amendment against the states in *City of Boerne v. Flores*.[48] Soon after, however, at least twenty-one states instated strict scrutiny of governmental burdens on religion

46. For another intriguing recent entry into the field, see Steven Douglas Smith, *Our Agnostic Constitution*, 83 N.Y.U. L. REV. (forthcoming 2008), *available at* http://ssrn.com/abstract=1008919.

47. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b)(1) (1994) (citations omitted).

48. 521 U.S. 507, 536 (1997). In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), the Court continued to apply the compelling interest/no less restrictive alternatives test re-instated by RFRA to exempt a religious group from the *federal* law banning the use of a hallucinogenic plant the sect used in its religious ceremony. *Id.* at 429-30.

by amendment or interpretation of state constitutions, or via enactment of state religious freedom legislation.[49]

Of course, diverting attention to the Free Exercise Clause simply begs the difficult theoretical and jurisprudential line-drawing between the spheres of church and state, which Ledewitz's book ambitiously undertakes. Yet restoring strict scrutiny under the Free Exercise Clause does not challenge the secular consensus; at the same time, it returns religious liberty to parity with other fundamental rights and rejects the Scalian notion that sacrifice of non-mainstream religious practices is an unavoidable product of democracy. By acknowledging constitutional shelter afforded individual faith without any necessity of government imprimatur, a muscular interpretation of the Free Exercise Clause may minimize widespread pressure to seek governmental promotion of religion. In the Pew Survey validating the popular preference for presidents who hold religious beliefs, 43% of respondents indicated that they are uncomfortable when politicians talk about how religious they are, and 63% oppose endorsement of candidates by churches.[50] A small number of individuals and organized evangelical sects are not likely to be assuaged and will continue to saddle the courts with the elusive task of discerning an unimpeachable rationale, or in its absence, "exercis[ing] legal judgment"[51] on a case-by-case basis, to adjudicate the constitutionality of limitations on governmental endorsement of religion. In the meantime, the vast majority of both secularists and persons of faith, respectful of their differences, may fully participate in the day-to-day making of policy for the collective by sharing Roger Williams's understanding that the wall of separation of church and state may help to both tame the Wilderness of the World and, for believers, nourish the Garden of the Church as well.[52]

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49. The United States Congress also re-entered the fray, relying upon its Commerce and Spending Powers to reinstate the compelling interest/no less restrictive alternatives test for burdens on religion, a) imposed on persons confined in institutions governed by the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997(a) (2000), or b) lodged by land use regulations in programs receiving federal financial assistance. Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc (2000). In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Supreme Court held that RLUIPA did not, on its face, offend the Establishment Clause by its accommodation of religious practices of institutionalized persons. *Id.* at 719-20. However, the Court expressly declined to consider whether RLUIPA exceeded Congress' power under the Spending and Commerce Clauses. *Id.* at 718 n.7.

50. PEW RESEARCH CTR., *supra* note 4, at 12.

51. Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J., concurring).

52. *See* ROGER WILLIAMS, THE BLOUDY TENENT OF PERSECUTION, FOR CAUSE OF CONSCIENCE (1644).