The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct

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Now we know that whatever the law says it speaks to those who are under the law, so that every mouth may be stopped, and the whole world may be held accountable to God. For no human being will be justified in his sight by works of the law, since through the law comes knowledge of sin.

But now the righteousness of God has been manifested apart from law, although the law and the prophets bear witness to it, the righteousness of God through faith in Jesus Christ for all who believe.

Romans 3:19-23**

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**All Biblical quotes have been taken from THE WRITINGS OF ST. PAUL (Wayne A. Meeks ed., 1972).

I. INTRODUCTION

The Supreme Court has not a definition but a vision of what constitutes religion. In that vision, there is communion with the divine within the mind of the individual. The believer neither moves nor speaks. No external hand can interfere with such communion. The moment the individual moves, the spell is broken, religion flees, and the backdrop of our shared secular community rolls down. For 115 years, the Court has used this vision as the lodestar for its free exercise jurisprudence. From within this vision, the Court has fashioned a paradigm for deciding its free exercise cases, which will be referred to in this Article as the belief/conduct paradigm.

Out of the roughly thirty-five free exercise cases the Court has decided in 115 years, the Court has found in favor of the religious adherent's free exercise claim only eleven times.[1] In a society as religiously diverse as ours where the multitude of governmental regulations invading every area of life is bound to conflict with religious interests, the number of free exercise cases seems quite low and the number of victories even lower. Given the Court's vision of religion as a wholly interior experience beyond the reach of man, however, the number of victories actually may be high. Within its vision of the relationship between religion and the state, diversity has no place of honor. Neither does tolerance or pluralism. Rather, the seat of honor is held by a single value: social cohesion. Focus upon the belief/conduct paradigm brings that insight to light.

The Court's free exercise jurisprudence has been subjected to a great deal of critical commentary, because the Court has shifted the level of scrutiny often, making the doctrine appear chaotic.[2] The view, however, that the Court's free exercise doctrine is in disarray is shortsighted. If one takes the

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[1] *See infra* notes 47–81, 220–67 and accompanying text (discussing cases); *see also* Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 B.Y.U. L. REV. 117, 121–22 (indicating that in free exercise case law at all levels plaintiffs win on average no more than twenty-five percent of cases brought).

[2] *See, e.g.*, PHILIP B. KURLAND, RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT 111 (1962) [hereinafter KURLAND, CHURCH AND STATE]; Ashby D. Boyle II, *Fear and Trembling at the Court: Dimensions of Understanding in the Supreme Court's Jurisprudence*, 3 CONST. L.J. 55, 61 (1993); J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV 327, 328–29 (1969); Philip B. Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U. L. REV 1, 16 (1984) [hereinafter Kurland, *Burger Court*]; Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV 1, 1 [hereinafter Laycock, *Remnants*]; Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 848 (1992) [hereinafter Laycock, *Summary*]; William P Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Free Expression*, 67 MINN. L. REV. 545, 548–53 (1983); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 685 (1992); Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299, 325; Janet V. Rugg & Andria A. Simone, *The Free Exercise Clause:* Employment Division v. Smith's *Inexplicable Departure from the Strict Scrutiny Standard*, 6 ST. JOHN'S J. LEGAL COMMENT. 117–18 n.2 (1990); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 596 & n.24 (1990).

The sense of chaos has not been limited to the case law but has extended to the commentary also. *See* McConnell, *supra*, at 685 ("For decades conflicts over the Religion Clauses of the First Amendment were mired in slogans and multipart tests that could be manipulated to reach almost any result.").

long view, a central decisionmaking framework, or paradigm[3] appears, which runs through all of the Court's free exercise cases.[4] The Court's threshold inquiry in the free exercise cases is whether the religious interest at issue is belief or conduct. Belief is to be accorded absolute protection but conduct is subordinate to the state's law

The belief/conduct paradigm is a manifestation of a world view which is decidedly Protestant in structure.[5] It is a legal paradigm that bears striking

[3] *See* GARRETT GREEN, IMAGINING GOD 49–50 (1989) ("The Greek word *paradeigma*, meaning a pattern or model, was used in several ways by ancient writers. Concretely, it referred to an architect's model or plan for a building . The common denominator in all these uses is a pattern after which something can be modeled or by which something can be recognized."); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 23, 178 (2d ed. 1970) (characterizing "paradigm" as an "accepted model or pattern [that is] . . . shared by the members of [a] group"); SALLIE MCFAGUE, METAPHORICAL THEOLOGY 81 (1982) ("[P]aradigms appear to be universal phenomena which provide total contexts for interpretation."); *see also* Thomas L. Haskell, *Deterministic Implications of Intellectual History, in* NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY 137 (John Higham & Paul K. Conkin eds., 1979) (stating that Kuhn's later notion of paradigms would apply even in "unscientific [fields] like art and philosophy").

[4] For a discussion of the durability of paradigms, see KUHN, *supra* note 3, at 64 ("novelty emerges only with difficulty, manifested by resistance, against a background provided by expectation"); MCFAGUE, *supra* note 3, at 81 (stating that paradigms are "highly resistant to change"); Haskell, *supra* note 3, at 140 ("[M]ankind's most fundamental assumptions—the 'paradigmatic' ones—are normally immune to the experiential evidence that might modify or falsify them."). Paradigms are not, however, incapable of changing. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1523 (1988) (discussing possibility of paradigmatic change) (citing THOMAS KUHN, THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND USAGE (1977)). The internal inconsistencies and the incompleteness of any human construct of experience contribute to the inevitable destruction or, more accurately, deterioration of our working paradigms. *See* KUHN, *supra* note 3, at 18 (stating that paradigm "need not, and in fact never does, explain all the facts with which it can be confronted"); MCFAGUE, *supra* note 3, at 81–82 ("If the issues or factors that do not fit the paradigm or are neglected by it become sufficiently anomalous, if the pressure they exert builds to the point that the paradigm appears to have major inadequacies, then a revolution occurs. In such a crisis, an alternative set of assumptions may become preferable or may appear more fruitful, better able to deal adequately with a wider range of phenomena, more suggestive for further discovery.").

[5] The strong influence of Protestant Christianity on the formation of the American culture has been chronicled elsewhere. *See, e.g.*, WILLIAM LEE MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC 247 (1986) ("America was born Protestant."). Professor Stephen Pepper argues that the Court's free exercise jurisprudence has moved away from a "'religious' world view" to a "rational, scientific, skeptical world view [which] has become the clearly predominant intellectual and cultural paradigm of the twentieth century." Stephen Pepper, Reynolds, Yoder, *and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV 309, 378. In contrast, the premise of this Article

similarity to one of our culture's most potent theological paradigms—the Protestant Pauline relationship between faith and works under the law. Within that paradigm, faith is the *sine qua non* of salvation; the accomplishment of works, no matter how laudable, without faith is insufficient for salvation. This Article argues that the Court defines belief and conduct and relates the two terms in distinctly Pauline ways. The use of these Pauline categories to protect solitary belief but not religious conduct compromises the Court's capacity to foster and protect the wide variety of religious experience in this country Indeed, at a theoretical level, the Court's secularized version of the Pauline relationship between faith and works under the law should protect no religious interest from regulation by the state. The larger Pauline vision, on the other hand, envisions the religious life following conversion as a dialectical relationship between faith and works of love and provides an example of a way of envisioning the heart of religion that could vitalize the Court's free exercise jurisprudence.

This Article offers a theological account of the Court's free exercise jurisprudence in the hope of "bring[ing] to light . . hidden meanings"[6] so that we may more fully apprehend the prejudgments implicit in our free exercise jurisprudence.[7] It proceeds from the assumption that we cannot fully understand or successfully critique the Court's jurisprudence in ignorance of its implicit world view.[8] The comparison between the law and theology is offered

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is that theological structures pervade our free exercise jurisprudence. *Cf.* Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782, 793 (1992) ("[T]heology inform[s] legal analysis.").

It is a contemporary truism that the Court (and Congress) is not a singular entity but rather a collection of individuals. Therefore, there is reason to be careful in talking about the Court's viewpoint. By world view, however, I do not merely mean a subjective perspective such as we would ascribe to an individual. Rather, a world view is the set of shared viewpoints and insights within a given community. What I seek to "understand . . is the manner in which a particular set of shared values interacts with the particular experiences shared by a community of specialists . . . ." KUHN, *supra* note 3, at 200 (postscript).

[6] Gordon S. Wood, *Intellectual History and the Social Sciences*, *in* NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY 36 (John Higham & Paul K. Conkin eds., 1979).

[7] *See* Haskell, *supra* note 3, at 141 (discussing intellectual history as the attempt to "'read between the lines,' to pick out those assumptions that seemed so fundamental to contemporaries that they were taken for granted and required little or no explicit comment").

[8] *See* Murray G. Murphey, *The Place of Beliefs in Modern Culture*, *in* NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY 153 (John Higham & Paul K. Conkin eds., 1979) ("[T]he construction of the world— . . . what there is and how it is—[is] a work of the human imagination operating collectively in societies.").

as a means of thinking afresh about the Court's free exercise jurisprudence.[9] The Court's use of the belief-conduct distinction has been dismissed out of hand by many as either indefensible or irrelevant.[10] This Article suggests, however, that we will not escape its spell until we have focused carefully upon it.

Section II of this Article canvasses the free exercise cases to show how the Court has used the belief/conduct paradigm to explain the results of the cases and to illustrate how the paradigm operates across the spectrum of free exercise cases. Section III elucidates what the Court means when it employs the terms "belief" and "conduct": belief, the Court maintains, is absolutely protected but untouchable by government regulation while conduct is by definition subordinate to the state's law. Taken to its logical conclusion, the Court's theory of the Free Exercise Clause would protect no religious interest. Section IV presents an overview of Pauline theology's two-tiered treatment of the relationship between faith and works. Section V identifies the parallels between the Court's free exercise paradigm and a particular paradigm in Pauline theology. Section VI argues that the Court's employment of the belief/conduct paradigm is a betrayal of its responsibility to ensure religious diversity through the Free Exercise Clause. Finally, this Article suggests how the larger vision of the relationship of faith and works painted by Pauline theology provides a means of thinking our way out of the belief/conduct paradigm and its incapacity to protect religious freedom.

II. THE PARADIGM OF THE FREE EXERCISE CASES

Students of the Free Exercise Clause[11] have maintained that there is no unifying thread running through the free exercise cases.[12] According to them, the results of cases involving similar facts have not been consistent and neither has the choice of standard to be applied.[13] A myriad of tests has been offered to "fix" the Court's jurisprudence.[14] At base, the commentators fault the Court's jurisprudence most for its lack of predictability.[15] If one examines only selected

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[9] *See generally* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Suzanne L. Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV L. REV. 813 (1993).

[10] *See* discussion *infra* note 30 and accompanying text.

[11] The Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

[12] *See supra* note 2 and accompanying text.

[13] *See supra* note 2.

[14] McConnell, *supra* note 2, at 685.

[15] *See* Clark, *supra* note 2, at 329; Marshall, *supra* note 2, at 546.

cases within the Court's free exercise jurisprudence, or even all of the cases from a particular era, for example the post-*Sherbert v. Verner*[16] era, there is what appears to be a disturbing lack of uniformity. Undoubtedly, the doctrinal commentary (taken from either an historical or policy perspective) has contributed positively to our thinking about religious liberty. An important piece of the free exercise puzzle, however, has been neglected.

The sense of chaos in the doctrine and the commentary is due to the commentators' search for a single rule or standard without reference to the paradigmatic approach taken by the Court.[17] From the short-range view, no pattern readily suggests itself. The long view, however, suggests that there is a deeper meaning and an identifiable pattern in the Supreme Court's free exercise jurisprudence. Although the rhetoric of the Supreme Court's free exercise cases arguably has changed from case to case, depending on the legal era or the particular Justice writing the opinion, the Court's framework for decision, or "paradigm" as it is called in this Article, has been remarkably, even rigidly consistent.[18]

Before turning to the task of delineating the structure of the belief/conduct paradigm, it is necessary to explain my choice of the term "paradigm" to characterize the Court's use of the belief-conduct distinction, which consists in their definition of belief, definition of conduct, and the relationship between the two terms. This analysis of the belief/conduct paradigm is not offered as a "description of the way in which the [Justices] discovered the 'right answer'" in the particular case but rather as a structure or language game within which

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[16] 374 U.S. 398 (1963).

[17] GREEN, *supra* note 3, at 53 ("Paradigms function heuristically by revealing the constitutive patterns in more complex aspects of our experience that might otherwise remain recalcitrant, incoherent, or bewildering."); *see* KUHN, *supra* note 3, at 198–204 (discussing incommensurability of paradigms); *id.* at 44 ("[I]f the coherence of the . . . tradition is to be understood in terms of rules, some specification of common ground in the corresponding area is needed. [Thus, failure to apprehend the operative paradigm makes] the search for a body of rules . . . a source of continual and deep frustration."); *cf. id.* ("Lack of a standard interpretation or of an agreed reduction to rules will not prevent a paradigm from guiding research.").

[18] That the Court has not drawn upon the text of the Free Exercise Clause is clear. The language of the clause does not admit of any degree of protection for belief or conduct: "Congress shall make no law . . . prohibiting the free exercise [of religion]," period. U.S. CONST. amend. I. Despite the fact that dictionaries at the time the clause was drafted defined "exercise" as conduct, and not mere belief, the Court has never held that such absolute (or even substantial) protection extends beyond belief to conduct. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1489 (1990); *see also* Pepper, *supra* note 2, at 300 ("The text of the free exercise clause is singularly absolute and indicates that 'action' is protected.").

the Court habitually has operated in the free exercise cases.[19] The paradigm operates to make some claims under the Free Exercise Clause more likely to be successful than others by framing threshold questions the Court asks in each case and thereby limiting certain horizons of inquiry.[20] I am treading an admittedly fine line between arguing that the paradigm is dispositive in each case and that it is no more than a rhetorical flourish. My choice of the term "paradigm" is intended to capture that important linguistic middle ground.

"Paradigm" is not a typical term in the legal literature. "Doctrine" would be a more typical term. I intentionally do not use the term "doctrine" to denote the Court's use of the belief-conduct distinction because "doctrine" connotes a consciously chosen and applied analytic designed to produce specific answers to particular legal problems. By "belief/conduct paradigm" I mean a decisionmaking framework which encompasses the decision to divide religious free exercise claims into two mutually exclusive categories, belief and conduct, the particular definitions of the terms "belief" and "conduct," the oppositional pairing of the terms, and the level of protection to be accorded to belief and to conduct. It is constitutive of a world view.[21] In the same way that a scientist employs reigning conventions and hypotheses to test the world around him, the Court tests each free exercise claim by employing the belief/conduct paradigm. Thus, by "belief/conduct paradigm," I mean much more than the term "belief-conduct distinction" which usually has been employed in the legal literature to refer to the Court's use of the two terms.[22]

"Paradigm" serves my purposes because it connotes a structure of thinking that has room for some play in the joints and that may contain unapprehended elements and be internally contradictory but remain capable of guiding analysis.[23] The Court's belief/conduct paradigm is a structure of thought which shapes and frames free exercise issues and arises out of unquestioned presuppositions about religion. The Court has been singularly unreflective on this persistent element of its free exercise jurisprudence. When it introduces the distinction between belief and conduct in *Reynolds v. United States*,[24] it does so

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[19] *See* Charles Yablon, *Are Judges Liars?: A Wittgensteinian Critique of* Law's Empire, CAN. J.L. & JURIS., July 1990, at 138.

[20] *See* MCFAGUE, *supra* note 3, at 81 ([A] "paradigm . . . may serve as a set of blinders, eliminating peripheral vision or disturbing anomalies."); *see also infra* notes 238–40 and accompanying text (explaining how belief/conduct paradigm tends to reduce the protection accorded religious conduct).

[21] *See* Stephen M. Feldman, *Exposing Sunstein's Naked Preferences*, 1989 DUKE L.J. 1335, 1341 ("[W]e all experience and perceive reality through various paradigms—world views—and those paradigms consist of structures that are socially constructed or created.").

[22] *See infra* note 30.

[23] *See supra* notes 3–8.

[24] 98 U.S. 145 (1878).

as though such a division of the religious universe is an undisputed matter of fact.[25] This point is substantiated in *Cantwell v. Connecticut*[26] where the Court allowed itself to justify the limitation of free exercise protection to belief on the ground that it is the "nature of things."[27] In *Employment Division, Department of Human Resources v. Smith*,[28] the Court was content to reiterate the *Reynolds* approach in *Reynolds*' own words with no further attempt to examine the assumptions on which the prior case was decided.[29] The Court's handling of the distinction between belief and conduct cannot be expressed as a discrete rule, standard, or doctrine, but rather is an interpretive key to a set of assumptions about religion which inform, and in fact permeate, the free exercise cases.

Although contemporary scholars have treated the Court's use of the belief-conduct distinction as the gnat of free exercise jurisprudence buzzing annoyingly on the periphery of more interesting doctrinal issues,[30] the Court has decided its free exercise jurisprudence by repeatedly employing the paradigm, which is highly reminiscent of a central Protestant Christian

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[25] *See id.* at 164. Early in the paradigm's existence, it appears to have been accepted as a matter of course, *see, e.g.*, THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 579–80 (1890).

[26] 310 U.S. 296 (1940).

[27] *Id.* at 303.

[28] 494 U.S. 872 (1990).

[29] *Id.* at 877–78.

[30] KURLAND, CHURCH AND STATE, *supra* note 2, at 22; Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 80 HARV. L. REV. 1381, 1387 (1967) (agreeing with Kurland that *Reynolds* "rests in the final analysis on the strict principle of neutrality, despite the Court's inartistic reliance on the dubious action-belief distinction"); *id.* at 1406 (belief-conduct distinction "generally discredited"); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 939 (1989) (referring to the "[c]ollapse of *Reynolds*" and the belief-action distinction); C. Peter Magrath, *Chief Justice Waite and the "Twin Relic": Reynolds v. United States*, 18 VAND. L. REV. 507, 531 (1965) ("Insofar as *Reynolds* distinguishes mere 'opinion' from 'action,' it is a weak analysis of free exercise problems."); *id.* ("Kurland has made the point—correctly—that the *Reynolds* doctrine, while basically sound, is 'tainted' by an untenable dichotomy between 'action' and 'belief.'"). Professor Douglas Laycock does say the distinction between belief and conduct is "crucial," but he assumes it is a "new principle" in *Smith*. Laycock, *Remnants*, *supra* note 2, at 4, 9. Others have made the argument that the belief/conduct distinction is now dead. Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 159 (1987); Stephen L. Pepper, *The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases*, 9 N. KY. L. REV. 265, 265 (1982) (belief/conduct "dichotomy remained the law from 1878 until 1940"); *id.* ("The present analytic framework for claims under the free exercise clause . . developed during the 1960s.").

theological structure.[31] The structure seems to have held the Court's free exercise jurisprudence captive.[32] In every free exercise case decided except *Wisconsin v. Yoder*,[33] the threshold inquiry has been whether or not the religious interest at issue should be classified as belief or conduct. The two terms denote "logic-tight compartments."[34] Belief has received absolute protection without consideration of the state's interest. Conduct, on the other hand, has been weighed against the interests of the government, which generally trump the adherent's claimed need to engage in the religious conduct.[35]

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[31] The use of theology to explain the Court's free exercise doctrine has not predominated free exercise commentary. *See* Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV 455, 458 (1991) ("[N]early exclusive reliance upon [a limited number of] sources has left first amendment jurisprudence theoretically impoverished."); David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV 769, 850 (1991) (suggesting that constitutional scholarship generally recognizes only three sources: "the language of the clauses, the history of their adoption, and the policies identified by the Court as underpinning them."). There is a large amount of literature, however, detailing the sources of and influences upon the drafting of the religion clauses. *See, e.g.*, John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 EMORY L.J. 41, 42 (1990) (analyzing constitutional ideas that the Puritans derived from their theological doctrines); John Witte, Jr., *The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay*, 40 EMORY L.J. 489, 491–92 nn.6–9 (1991) (listing sources).

This Article operates under the notion that "no (written) text can be read without reference to an (often unwritten) context." Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 4 (1984). Indeed, "[t]he only way we can intelligently analyze American culture is to become more, not less, familiar with the intellectual antecedents in Western culture so that we can recognize [its] unconscious influence upon us." Jeanne L. Schroeder, *The Taming of the Shrew*, 5 YALE J.L. & FEMINISM 123, 163 n.139 (1992).

[32] *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 115 (G.E.M. Anscombe trans., 1958) ("A picture held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably."); *see also* KARL MANNHEIM, IDEOLOGY AND UTOPIA 195–97 (Louis Wirth & Edward Shils trans., 1952) (discussing concepts that block the way to perspective of the whole and prevent awareness of wider reality beyond their horizons); *cf. id.* at 268 ("[A]ctual attitudes which underlie the theoretical ones are by no means merely of an individual nature . Rather, they arise out of the collective purposes of a group.").

[33] 406 U.S. 205 (1972).

[34] *Id.* at 220.

[35] *See* Magrath, *supra* note 30, at 530 (in the Court's first free exercise case, "[t]he framework was now erected and the categories—'mere opinion' versus 'subversive actions'—set; all that remained was to fit [the claimant's] behavior into the proper slot"). Magrath inexplicably departs from this view and asserts that *Reynolds* also protects conduct not in "conflict with *general* public regulations." *Id.* at 531. This claim is not borne out in

The Court has made two decisions in each case. First, it has categorized the religious interest at issue as either belief or conduct. Second, it has determined how much protection is to be afforded each category. The former decision has allowed the Court a great deal of flexibility, but the Court has permitted itself very little flexibility in the latter decision. Viewing the cases from a belief/conduct perspective divides the Supreme Court's free exercise cases into three categories. First, there is a small category of cases in which the Court has struck regulations it characterized as regulating belief. Second, the Court has upheld regulations that it characterized as impinging on religious conduct.[36] The latter category is the largest category. Finally, there is a small third category of cases where the Court has struck regulations of religious conduct because it increased the level of scrutiny for regulations affecting conduct.[37]

The preceding argument, of course, only makes the point that the *results* of the Court's free exercise cases are consistent.[38] Were the Court applying a series of different approaches, this consistency in result might be interesting or it might be merely coincidental. The Court's consistency, however, is more than a consistency in results; that consistency can be attributed at least in part to its use of the same simple dichotomy between belief and conduct in each case. Like a moth circling a flame, the Court's free exercise jurisprudence repeatedly returns to a single vision to capture the relation between an individual's religious experience and the state: Vital religious experience resides within the vault of the individual's soul while religious conduct occurs

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the later cases and certainly not by the result in *Reynolds*. Conduct is protected in only two cases, the first is where it is inseparable from belief. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). The second instance is where the Court explicitly increases the level of scrutiny to be applied to conduct. *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); McDaniel v. Paty, 435 U.S. 618 (1978) (plurality); Sherbert v. Verner, 374 U.S. 398 (1963); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993) (applying strict scrutiny to regulations that discriminate between religious and nonreligious conduct). Yet, even strict scrutiny has not regularly insured religious conduct will be protected. *See infra* notes 234–47

[36] For a discussion of how the Court identifies any claim as sounding in belief or conduct, see *infra* notes 42–44, 339 and accompanying text.

[37] *See Frazee*, 489 U.S. at 829; *Hobbie*, 480 U.S. at 136; *Thomas*, 450 U.S. at 707; *McDaniel*, 435 U.S. at 618; *Sherbert*, 374 U.S. at 398.

[38] Proof of such consistency over the century-plus of free exercise cases probably comes as a surprise to most contemporary followers of the Court. Both *Sherbert* and *Smith* were greeted as sea changes in free exercise jurisprudence. Laycock, *Remnants*, *supra* note 2, at 1. *Sherbert* seemed to introduce a new approach, while *Smith* explicitly intended to undermine *Sherbert* and any of its progeny. *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 882–90 (1990).

externally, in a world dominated by the rule of law Except in *Yoder*, belief has not been depicted as animating religious conduct in the Court's free exercise jurisprudence.

The following discussion of the cases is descriptive. I redact the cases to highlight the single paradigm that haunts them all and to illustrate how the paradigm operates. Essentially, once the Court identifies the religious interest at issue as either belief or conduct the result of the case closely follows. If the Court identifies the religious interest as belief, it is protected without any consideration of the state's interest. If the interest is conduct, it is weighed against the state's interest and the need to engage in the conduct will be trumped by the state's interest. The only exceptions to the latter rule appear in the unemployment compensation cases,[39] *McDaniel v. Paty*,[40] and *.Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[41] where some conduct does receive some protection through the Court's use of heightened scrutiny for regulations affecting conduct. *Yoder* is the one case where the Court does not divide the religious universe into two mutually exclusive spheres.

What is described in the following is solely the Court's invocation of the belief/conduct paradigm in each of the free exercise cases. There is no question that an array of important and interesting doctrines hovers near the periphery of my belief/conduct focus, for example, unconstitutional conditions and issues of burden. In any given case, such doctrines may provide a cogent explanation of the result in that particular case. I do not intend to belittle the importance or value of those doctrines but rather bracket them off in an attempt to examine critically the one set of issues that the Court addresses in every case. The following descriptions of the cases, therefore, are oversimplified at one level, but they are rid of the clamor of competing doctrines in the service of this attempt to grasp that aspect of the free exercise cases which keeps slipping through the cracks.

Bracketing the Court's discussions of belief and conduct provides for interesting, if rather disturbing, reading. First, the Court's designation of any particular religious interest in each case is arbitrary It is arbitrary because in reality, religious belief may exist apart from conduct, but religious conduct is never divorced from religious belief. All of the cases except *United States v. Ballard*[42] involve some sort of conduct. Thus, the Court has had wide latitude within the paradigm (which asks whether the religious interest is belief *or* conduct) to identify the religious interest at issue as either belief or conduct. If the Court wants to find that the regulation violates the adherents' rights, it can

[39] *See Frazee*, 489 U.S. at 829; *Hobbie*, 480 U.S. at 136; *Thomas*, 450 U.S. at 707; *Sherbert*, 374 U.S. at 398.

[40] 435 U.S. 618 (1978).

[41] 113 S. Ct. 2217 (1993).

[42] 322 U.S. 78 (1944).

identify the interest as belief. Conversely, to save the regulation, it can identify the interest as conduct. Second, the scales are tipped against the religious adherent. As the Court decides whether to label the religious interest at issue as either belief or conduct, it engages in an incipient weighing of the value of the religious interest against the state's interest. Or, to state the matter more elegantly, "The very way in which a concept is defined and the nuance in which it is employed already embody to a certain degree a prejudgment concerning the outcome of the chain of the ideas built upon it."[43] The Court's prejudgment in these cases is that solitary belief is essential to the religious life but conduct is not. That paradigmatic presupposition informs the categorization of religious interests and skews the balancing toward the state's interest.[44]

Finally, the Court is engaging in a way of thinking that is fundamentally at war with religious reality. Because conduct is never divorced from belief in reality, the Court's sanguine acceptance of the regulation of religious conduct on the ground that the ruling will not affect religious belief is very hard to swallow.[45] As one stacks one case on top of another which calmly permits the regulation of religious "conduct" while simultaneously heralding religious freedom, one is tempted to think that the members of the Court cannot be serious. A more paternalistic reader might argue that they simply cannot mean what they are saying. Before taking that route, however, it is enlightening to take the Court's language seriously.[46] By doing so, three insights come to light. First, the Court's talk of belief and conduct rings of a deeply embedded Protestant perspective on religion. The paradigm is not a construct created by the Court out of whole cloth but rather an analytic which on its face appears to be completely natural, even common sensical. Second, the Court views itself as responsible for ensuring the stability of the larger social order, and the belief/conduct paradigm serves that role. Finally, the rhetoric of the paradigm—which speaks in terms of absolute protection and governmental needs—serves to paper over otherwise difficult and intractable problems of the inevitable clash between religion and society Thus, the paradigm is psychologically comforting as it serves the institutional ends of the Court. They probably do mean exactly what they say Ultimately, therefore, this Article, is both an apologetic and a critique of the Court's unreflective allegiance to the belief/conduct paradigm.

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[43] MANNHEIM, *supra* note 32, at 197

[44] *Cf.* Clark, *supra* note 2, at 329 (criticizing the Court for "administering an ad hoc balancing test . without some set of guidelines").

[45] *See infra* note 268 and accompanying text.

[46] Ruti G. Teitel, *Postmodernist Architectures in the Law of Religion*, 1993 B.Y.U. L. REV. 97, 99 ("Religion Clause jurisprudence is illuminated by analysis of the words in context and, in particular, by analysis of . . . pervasive oppositional pairs . .").

A. *Cases Striking Regulations the Court Characterized as Affecting Belief*

The Court has never upheld a government regulation that it characterized as impinging on belief.[47] In the 115 years of free exercise case law, the Court steadfastly has asserted that belief receives absolute protection, which is to say no legislative justification could support such a regulation. Although this sounds like broad protection, the Court has found only four cases where a regulation regulated belief itself.

As it works through the paradigm, the Court asks as a threshold matter whether the religious interest at issue is belief; if it is, the Court strikes the regulation on free exercise grounds without assessing the strength of the government's interest in the regulation. If the answer to that threshold question is no, there is no inquiry into whether the interest is conduct or not; rather, it is automatically designated religious conduct if it is not belief.[48] If the religious interest at issue is characterized as conduct, the Court weighs the value of the religious conduct against the government's asserted interest.[49] Religious conduct rarely wins. Thus the belief/conduct paradigm has divided the entirety of the religious universe.

The Court has decided roughly thirty-five cases explicitly under the Free Exercise Clause. The first free exercise case, *Reynolds v. United States*,[50] succinctly articulated the belief/conduct paradigm that would dominate the Court's free exercise jurisprudence. Even though the term "free exercise" in the First Amendment plainly indicates that protection of religion should extend to both belief and conduct, the Court readily rejected that notion.[51] In

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[47] Depending on the case, the Court enumerates belief, conscience, thought, expression of belief, and worship as falling under the category of belief and therefore deserving of absolute protection. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 603 (1961). The cases, however, do not support such a broad reading of the term. *See* Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 757 (1992) (asserting that the regulation upheld in *Smith* directly affected worship); Laycock, *Summary*, *supra* note 2, at 849 (same). Expression has been protected under the Free Speech Clause, not the Free Exercise Clause. *See also* discussion *infra* text accompanying notes 121-67 Later cases explicitly have categorized worship as conduct. *See infra* notes 272 and 321 and accompanying text.

[48] *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990); Reynolds v. United States, 98 U.S. 145 (1878).

[49] In the majority of cases, the level of scrutiny has been deferential to the legislature, but was changed in a handful of cases to strict scrutiny. *See infra* notes 220–44 and accompanying text.

[50] 98 U.S. 145 (1878).

[51] *See* McConnell, *supra* note 18, at 1488.

Reynolds, the Court addressed the question whether a polygamist could raise his Mormon beliefs as a defense to a polygamy statute. It relied upon the Virginia Bill for Religious Liberty drafted by Jefferson, which stated that "religious freedom" prohibits the "civil magistrate [from] intrud[ing] his powers into the field of opinion" but that the "officers [of civil government may] interfere when principles break out into overt acts against peace and good order."[52] In other words, regulation of conduct was necessary to prevent anarchy. Asserting that Jefferson had expressed the "true distinction between what properly belongs to the church and what to the State,"[53] the Court refused to carve an exemption from the generally applicable criminal law on the ground that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[54]

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[52] *Reynolds*, 98 U.S. at 163. The Court further relied upon Jefferson's letter to the Danbury Baptist Association in which he stated that he believed that "'religion is a matter which lies solely between man and his God; that he owes account to none other [for] his faith or his worship; that the legislative powers of the government reach actions only, and not opinions.'" *Id.* at 164 (citing 8 JEFF. WORKS 113). The Court in *Everson v. Board of Education* quoted at greater length Jefferson's Bill for Religious Liberty, to the same effect as in *Reynolds*: "no man shall . . . suffer on account of his religious opinions or belief." Everson v. Board of Educ., 330 U.S. 1, 13 (1947) (quoting 12 Hening, Statutes of Virginia 84 (1823)). Stephen Pepper has credited Jefferson with originating the belief/conduct distinction. *See* Pepper, *supra* note 2, at 307. Douglas Laycock cites Oliver Cromwell as the source of the distinction. Laycock, *Remnants*, *supra* note 2, at 22.

This Article argues that the belief/conduct paradigm echoes back to a time that precedes Jefferson (and Cromwell). As Mark DeWolfe Howe has said, "Happily . . [e]ach of us is entirely free to find his history in other places than the pages of the *United States Reports*." MARK D. HOWE, THE GARDEN AND THE WILDERNESS 5 (1965).

[53] *Reynolds*, 98 U.S. at 163.

[54] *Id.* at 166; *see also* Davis v. Beason, 133 U.S. 333, 342–43 (1890). With good reason, the Court relies on Jefferson to draw the belief/conduct distinction. Yet, Jefferson did not seem to hold the extreme view of the belief/conduct paradigm (absolute protection of belief and no protection of conduct) that developed in the cases. *See also* Hall, *supra* note 31, at 500 (asserting that Jefferson would have protected a small "penumbra of religious acts"). *Compare* The Statute of Virginia for Religious Freedom, VA. CODE ANN. § 57-1 (Michie 1986) (enacted Jan. 1786) *reprinted in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND THE CONSEQUENCES IN AMERICAN HISTORY xvii–xviii (Merrill D. Peterson & Robert C. Vaughan eds., 1988) (stating that religious freedom includes protection of belief, worship, and profession) *and* 15 THE WRITINGS OF THOMAS JEFFERSON 244 (Albert E. Bergh ed., 1907) ("I am a Materialist; [Jesus] takes the side of Spiritualism; he preaches the efficacy of repentance towards forgiveness of sin; I require a counterpoise of good works to redeem it.") *with Reynolds*, 98 U.S. at 164 (quoting 8 JEFF. WORKS 113) (religious belief is a "'matter which lies solely between man and his God'"). Although this is pure speculation, perhaps the *Reynolds* Court's failure to cite to Jefferson's

Only belief would be wholly protected while conduct necessarily was subject to the state's law.[55] That reasoning paved the way for the free exercise discussions in the four cases in which the Court characterized the religious interest affected as "belief": *West Virginia State Board of Education v. Barnette*,[56] *Wooley v. Maynard*,[57] *United States v. Ballard*,[58] and *Torcaso v. Watkins*.[59]

Both *Barnette* and *Wooley* implicate the Court's free exercise as well as its speech doctrines. As I argue in my discussion of the freedom of expression cases, the Court has engaged in a two-tiered analysis in such cases, calling upon its free exercise doctrines and then its speech doctrines. *Torcaso* also implicates speech interests, but confines its discussion to the religion clauses. As my project here is solely to highlight the Court's continuing dialogue about religious belief and conduct, the following discussion extracts the belief/conduct discussions from the mix of First Amendment interests in the cases.

In *Barnette*, the Court struck an ordinance mandating that public school students salute the American flag each school day.[60] The case reversed *Minersville School District v. Gobitis*,[61] decided three years earlier, in which

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statement about the requirement of good works (or to take it into account) is partially responsible for the vitality of the extreme version of the belief/conduct paradigm.

[55] Clark, *supra* note 2, at 327; Giannella, *supra* note 30, at 1387 ("The rule adopted by [*Reynolds*] was that the free exercise clause in effect protected only religious belief."); Pepper, *supra* note 2, at 307 (asserting same interpretation of *Reynolds*).

To the typical American, this may seem like such a natural state of affairs that it is hard to imagine that the Court *chose* this doctrine. There are, however, many models for church-state relations. *See, e.g.*, Michael W. McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191 (1992). One simply need look to the history of societies that have attempted to regulate religious conviction to know that the belief/conduct paradigm is a choice and not an inevitability. Other cultures have attempted to regulate belief as well as conduct. *See, e.g.*, 2 CHRISTIAN SPIRITUALITY: HIGH MIDDLE AGES AND REFORMATION 341–45 (Jill Raitt et al., eds., 1987) (describing martyrdom of Anabaptists for beliefs). Indeed the Court could have held that belief (as well as conduct) should be weighed against the state's interest. Or it could have said, as did Thomas Jefferson, that freedom of religion encompasses the rights to believe, "worship," "profess [and] maintain" one's religion. *See supra* note 54. Or it could have said that all religious interests are protected by the free exercise clause but those which endanger society are not protected. Obviously, this list could go on ad infinitum.

[56] 319 U.S. 624 (1943).

[57] 430 U.S. 705 (1977).

[58] 322 U.S. 78 (1944).

[59] 367 U.S. 488 (1961).

[60] *Barnette*, 319 U.S. at 642.

[61] 310 U.S. 586 (1940), *overruled by* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

the Court had decided that such an ordinance passed free exercise muster.[62] In *Barnette*, the Court's holding explicitly rested on both freedom of religious belief and freedom of speech.[63] The key to the former aspect of the decision lay in the Court's perception of the ordinance as one coercing belief.[64] The Court claimed that the ordinance affected belief by "invad[ing] the sphere of intellect and spirit."[65] This was not a mere regulation of conduct, but a threat to "free minds."[66] Because the ordinance coerced religious belief, there was no need to weigh the state's interest against the invasion of the spirit. Such coercion of belief constituted a per se violation of the Constitution.[67]

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[62] *Id.* at 599; *see* discussion *infra* notes 168–76 and accompanying text.

[63] *Barnette*, 319 U.S. at 630. Some would reduce the decision to a free speech decision. *See* Marshall, *supra* note 2; *cf.* DAVID R. MANWARING, RENDER UNTO CAESAR 227 (1962) (arguing that the Court in *Barnette* "excluded questions of religious freedom"). The Court does not do so, however. Rather, the Court seems to be saying that the freedom to believe spans both the free exercise and speech clauses. *See Ballard*, 322 U.S. at 86 ("Freedom of thought . . . includes freedom of religious belief ").

[64] *Barnette*, 319 U.S. at 641 (discussing compulsion of belief and "coerce[d] consent").

[65] *Id.* at 642.

[66] *Id.* at 637, 641; *see also id.* at 644 (Black, J., concurring).

[67] *Id.* at 642 ("[T]he purpose of the First Amendment to our Constitution [is] to reserve . . . the sphere of intellect and spirit . . from *all* official control.") (emphasis added); *id.* at 641 ("[T]he Bill of Rights denies those in power any legal opportunity to coerce . . . consent."). Only belief receives per se protection. "[F]reedoms of speech and of press, of assembly, and of worship are susceptible of restriction . . . to prevent grave and immediate danger to interests which the State may lawfully protect." *Id.* at 639.

That the crux of the decision lay in the characterization of the religious interest as either belief or conduct is also evident if one analyzes the concurring and dissenting opinions in *Barnette*. Justices Black and Douglas in concurrence in *Barnette* justified their vote with the majority in *Gobitis* by invoking the belief/conduct paradigm and referring to the *Gobitis* decision as one addressing conduct. *See id.* at 643 (Black & Douglas, JJ., concurring) ("Reluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought inimical to the public welfare was the controlling influence which moved us to consent to the *Gobitis* decision. Long reflection convinced us that although the principle is sound, its application in the particular case was wrong."). Justice Murphy wrote a concurring opinion to emphasize that the case involved the "right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters." *Id.* at 645 (Murphy, J., concurring). Conversely, Justice Frankfurter dissented in *Barnette* on the ground that the religious interest at issue "suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it." *Id.* at 664 (Frankfurter, J., dissenting). Justice Frankfurter elegantly restates the belief/conduct paradigm: "Law is concerned with external behavior and not with the inner life of man." *Id.* at 655; *see also id.* at 655–56 ("The individual conscience may profess what faith it chooses. It may affirm

The Court's decision in *Wooley v. Maynard* forbade New Hampshire from requiring its citizens to carry the slogan "Live Free or Die" on their license plates.[68] Members of the Jehovah's Witnesses brought the challenge to the statute after they were convicted for covering the motto. The *Wooley* Court took the discussion of belief from *Barnette* and elaborated upon it.[69] According to the Court, the statute threatened "freedom of thought."[70] Two First Amendment interests were at stake: the right to hold any point of view one chooses and the right to refuse to foster ideas the individual finds objectionable.[71] The first half of the opinion addressed the First Amendment interest in belief by invoking *Barnette*'s per se rule that a regulation may not "'invade the sphere of intellect and spirit which . [is] reserve[d] from all official control.'"[72] The second half addressed the speech interests by weighing the state's interest against the speech.

The third case declaring a violation of belief did not involve a regulation or ordinance but rather a jury charge. In *United States v. Ballard*,[73] the Court upheld a trial court's jury charge that forbade the jury to consider the truth or falsity of the defendant's religious beliefs.[74] The Court plainly analyzed the issue through the belief/conduct paradigm. First, it divided the universe of the Free Exercise Clause into the "'freedom to believe and [the] freedom to act.'"[75] Then it stated that the first was "absolute" while the second could not be,[76] and identified the religious interest at issue as belief.[77] The Court

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and promote that faith—in the language of the Constitution, it may 'exercise' it freely—but it cannot thereby restrict community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way either openly or by stealth."). For him, a mandatory flag salute simply did not reach that inner life.

[68] Wooley v. Maynard, 430 U.S. 705, 707 (1977).

[69] *Id.* at 714 (quoting West Va. State Bd. of Educ. v. Barnette, 319 U.S. 637 (1974)); *id.* at 715 (quoting *Barnette*, 319 U.S. at 642).

[70] *Id.* at 714.

[71] *Id.*

[72] *Id.* at 715. That per se rule should have been sufficient to decide the case (as it was in *Barnette*), but the Court then weighed the state's asserted interests against the forced communication and found the state's asserted interests wanting. There is no section of the opinion that weighs the right to hold one's own beliefs against the interests of the state. The Court weighs the state's asserted interests only against the forced communication. This two-tiered consideration of free exercise interests and speech interests is not uncommon. *See infra* notes 121–67 and accompanying text (discussing freedom of expression cases).

[73] 322 U.S. 78 (1944).

[74] *Id.* at 88. The district court had charged the jury that they were "not to be concerned with the religious belief of the defendant."

[75] *Id.* at 86.

[76] *Id.*

concluded, without consideration of any interests of the State, that it was "beyond the ken of mortals" to determine the truth or falsity of religious beliefs and therefore the jury charge would have violated the defendant's free exercise rights.[78]

Finally, in *Torcaso v. Watkins*,[79] the Court struck a Maryland requirement that candidates for public office declare a belief in the existence of God as a test for office. Relying upon *Reynolds* and the statement in *Cantwell v. Connecticut* that the "[freedom to believe] is absolute but, in the nature of things, the [freedom to act] cannot be,"[80] the Court repeatedly identified the evil in the oath requirement as an invasion of belief.[81]

B. *Cases Upholding Regulations the Court Characterized as Affecting Conduct*

1. *The Polygamy Cases*

The Court's first free exercise case—*Reynolds v. United States*—adopted the belief/conduct paradigm that is still in use today to uphold a statute outlawing polygamy.[82] The Court reasoned that the polygamy statute was a law governing practices, Reynolds had engaged in the practice, and no belief could make those practices immune to state control (even if belief was immune to regulation).[83]

Three years later, in *Davis v. Beason*[84] the Court upheld a statute that prohibited bigamists, polygamists, and members of organizations encouraging polygamy from voting or holding public office. Appellant Davis argued that "[r]eligious liberty is a right embracing more than mere opinion, sentiment, faith, or belief. It includes all "'human conduct' that gives expression to the relation between man and God . ."[85] The Court rejected this reading of the Free Exercise Clause. Rather, belief could not be regulated by the state but conduct was subject to legislative control.[86] Accordingly, the Court weighed the value of the conduct (advising bigamy and polygamy or being a member of

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[77] *Id.* at 87.

[78] *Id.* at 87–88.

[79] 367 U.S. 488 (1961).

[80] *Torcaso*, 367 U.S. at 492.

[81] *Id.* at 494, 495, 496. For further discussion of the belief cases, see *infra* notes 268–317 and accompanying text (discussing Court's definition of belief).

[82] Reynolds v. United States, 98 U.S. 145 (1878).

[83] *Id.* at 166–67.

[84] 133 U.S. 333 (1890).

[85] *Id.* at 338 (citing *Reynolds*, 98 U.S. at 145).

[86] *Id.* at 342.

the Church of Jesus Christ of Latter-Day Saints which taught and counseled its members to commit bigamy and polygamy) against the government's interest in moral rectitude and easily ruled in favor of the latter.[87]

Davis is important because it provides the first clue to the broad definition the Court ultimately would give to the term "conduct." Membership in a church is not far removed from simply believing the tenets of the church but it is to be categorized as conduct and not belief according to the Court in *Davis*. As discussed in more detail in Section III, the Court typically designates as conduct any religious interest that is not bare belief.

2. *The Military Service Cases*

The Court has decided four free exercise cases involving the inevitable conflict between religious belief and military service.[88] None of the believers in these cases were exempted by the Court from the required military activity The Court has been careful in these cases to state that beliefs are preserved from regulation while conduct, such as refusal to serve, is not, but it has never found that a religious belief was infringed by any military rule. The religious conduct in these cases automatically falls when weighed against the "well-nigh limitless extent of the war powers."[89]

In *Hamilton v. Regents of the University of California*, the Court upheld the suspension of enrolled students at the University of California who refused, on the ground of their religious beliefs, to take the required course on military science and tactics.[90] The students argued that they believed "that all war,

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[87] *Id.* at 341–43. The religious adherents in the polygamy cases had no chance once the Court determined that the religious interest at issue was conduct and not belief and, therefore, had to be weighed against the government's interest. The weight the Court accorded the government's interest was so heavy, no religious conduct could have prevailed. *See* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 48–50 (1890) (denigrating bigamy and polygamy as "abhorrent," a "blot on civilization"); Murphy v. Pratt, 114 U.S. 15, 45 (1885) (identifying bigamy and polygamy as threat to "the idea of the family" which is "the sure foundation of all that is stable and noble in our civilization").

[88] Goldman v. Weinberger, 475 U.S. 503 (1986); Gillette v. United States, 401 U.S. 437 (1971); *In re* Summers, 325 U.S. 561 (1945); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934).

[89] *Hamilton*, 293 U.S. at 264; *see Goldman*, 475 U.S. at 507 ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."); *see also* Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 7 (1986) (referring to "extraordinary judicial deference 'to the professional judgment of military authorities'").

[90] *Hamilton*, 293 U.S. at 250–54.

preparation for war, and the training required by the university, are repugnant to the tenets and discipline of their church, to their religion and to their consciences."[91] The Court responded that "'liberty' . . . [u]ndoubtedly . include[s] the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training."[92] But the required course did not infringe belief, but rather conduct. The Court weighed the religious conduct against the power of the government to wage war and to enlist its citizens and concluded there was no violation of the Free Exercise Clause.[93] *Hamilton* was the dispositive case in *In re Summers*.[94]

In *Gillette v. United States*,[95] the Court affirmed the government's denial of a request for exemption from military service brought by conscientious objectors to the Vietnam War. The Selective Service Law provided an exemption from service for conscientious objectors to all wars but no exemption for objections to any particular war. The free exercise discussion typified the Court's usual belief/conduct paradigm: belief was protected, but the government had an overriding power to regulate conduct, including compelling individuals to serve in the military [96]

Finally, in *Goldman v. Weinberger*,[97] the Court sustained the Air Force's order, challenged by an Orthodox Jew and rabbi, not to wear a yarmulke indoors on the basis of its prohibition of any headgear indoors. The Court determined that that which was being regulated was "religiously motivated conduct"[98] (as opposed to belief),[99] which could not prevail when weighed

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[91] *Id.* at 261.

[92] *Id.* at 262.

[93] *Id.* at 265. Justice Cardozo, in concurrence, further underscored that the decision was made within the belief/conduct paradigm by citing the portion of Davis v. Beason, 133 U.S. 333, 342 (1890), which explicitly laid out the distinction. *Hamilton*, 293 U.S. at 265 (Cardozo, J., concurring).

[94] 325 U.S. 561, 572 (1945) (upholding Illinois bar's refusal to admit conscientious objector).

[95] 401 U.S. 437 (1971).

[96] *Id.* at 462 ("To be sure, the Free Exercise Clause bars 'governmental regulation of religious beliefs as such,' or interference with the dissemination of religious ideas.") (citations omitted).

[97] 475 U.S. 503 (1986).

[98] *Id.* at 506; *see also id.* at 510 (referring to "such practices").

[99] Justice Rehnquist provided almost no free exercise analysis but rather focused on the doctrine of deference to the military. His citation of free exercise cases is limited to a description of Goldman's claims. *Id.* at 506-07 He repeats this approach in the case of *O'Lone v. Estate of Shabazz*, in which he cited not a single free exercise case and focused only on cases that stand for the proposition that prison regulations receive decreased constitutional scrutiny. O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (considering

against the government's strongly justified interest in discretion over military decisions.[100]

3. *The Tax Cases*

Like the military service cases, the Court has decided free exercise claims brought against the levying of taxes consistently. In short, no religious adherent bringing a free exercise challenge to the payment of taxes has prevailed. In some sense, the tax cases are like the military service cases in that the Court is highly deferential to the needs of a well-run tax bureaucracy[101] and therefore the religious conduct at issue does not have a chance of being vindicated.

In *Bob Jones University v. United States*,[102] the Court upheld the federal government's decision to deny tax benefits to Bob Jones University on the grounds that it discriminated on the basis of race. Bob Jones claimed its racial policies were based in religious belief and therefore the denial of tax benefits violated the Free Exercise Clause. Consistent with the belief/conduct paradigm, the Court stated that the clause is "an absolute prohibition against governmental regulation of religious beliefs."[103] But the Court found that the tax regulation did not "prevent those schools from observing their religious tenets."[104] The government's overriding interest in eradicating racial discrimination easily outweighed the burden on petitioner's religious conduct.[105]

In *United States v. Lee*,[106] the Court affirmed the government's collection of social security taxes from an Amish farmer employing other Amish workers

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Muslim prisoners challenge, on free exercise grounds, to prison regulation prohibiting attendance at Friday worship service).

[100] *See Goldman*, 475 U.S. at 506–10. The Court acknowledged that it was bound to apply heightened scrutiny under *Sherbert* but adjusted the level of scrutiny downward because "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Id.* at 506–07.

[101] *See, e.g.*, United States v. Lee, 455 U.S. 252, 260 (1982) ("Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.").

[102] 461 U.S. 574 (1983).

[103] *Id.* at 603.

[104] *Id.* at 603–04; *see also* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 24 (1989) (relying on and quoting same language).

[105] *Bob Jones*, 461 U.S. at 603–05. The Court suggested that the belief/conduct grid should be placed such that it affords "substantial protection for lawful conduct grounded in religious belief." *Id.* at 603 (citing Thomas v. Review Bd., 450 U.S. 707 (1981)); *see* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963). This intermediate form of scrutiny did not tip the scales in favor of the University.

[106] 455 U.S. 252 (1982).

who challenged the tax on religious grounds.[107] Early in the opinion, the Court seemed to vacillate between identifying the adherent's claim as a claim based in belief or conduct.[108] When it summarized the case, however, it was evident that the refusal to pay social security taxes sounded in religiously motivated conduct rather than belief itself.[109] The government's interest in an efficient tax bureaucracy easily outweighed the burden on respondent's religiously motivated conduct.[110]

Finally, two tax cases contain (identical) language, which appears to muddy the belief-conduct distinction. The scant free exercise discussion in both indicates that the odd language is more the result of compact, careless paraphrasing of earlier cases than any change in direction. In *Hernandez v. Commissioner*,[111] the Court denied a challenge by a Scientologist to the IRS' disallowance of claimed deductions for funds paid to a church because it found no unconstitutional burden on the "Scientologists' practices."[112] The Court stated that "[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious *belief or practice* and, if so, whether a compelling governmental interest justifies the burden."[113]

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[107] *Id.* at 257 ("The Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system.").

[108] *Compare id.* at 257 (noting that there was a "conflict between the Amish faith and the obligations imposed by the social security system") *with id.* at 259 ("To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.'") (citation omitted).

[109] Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

Id. at 261.

[110] *Id.* at 256–61; *see also* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 19 (1989) (emphasizing the "state's interest in the uniform collection of . . taxes").

[111] 490 U.S. 680 (1989).

[112] *Id.* at 699. The Scientologists claimed that the disallowance of certain deductions for tax purposes "deter[red] adherents from engaging in auditing and training sessions [and] interfere[d] with observance" of certain religious doctrines. *Id.* at 698.

[113] *Id.* at 699 (emphasis added).

The Court quoted this phrase in *Jimmy Swaggart Ministries v. Board of Equalization.*[114]

Taking this language on its face, *Hernandez* and *Swaggart* would have reduced the absolute protection accorded belief in the earlier (and later) cases by subjecting claims based on belief to the compelling interest test. The Court in these cases, however, explicitly drew on *Sherbert v. Verner* and its progeny, which reaffirmed the essentials of the belief/conduct paradigm.[115] Given *Sherbert*, the language in *Hernandez* and *Swaggart* simply illustrated a lack of attention to detail. *Sherbert* explicitly stated that belief per se receives absolute protection while religiously motivated conduct would be protected unless the government demonstrates a compelling interest.[116]

In any event, assuming that *Hernandez* and *Swaggart* were not intended to introduce a standard different from *Sherbert*, they played into the belief/conduct paradigm. Belief remained sacrosanct in *Hernandez* where the Court refused to inquire into the "centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds"[117] and in *Swaggart* where the "[a]ppellant . . . never alleged that the mere act of paying the tax, by itself, violate[d] its sincere religious beliefs."[118] The religiously motivated conduct at issue in *Hernandez* (investment) was, according to the Court, outweighed by the government's interest in "'maintaining a sound tax system.'"[119] The Court in *Swaggart* did not even need to reach the weighing of petitioner's interest in his religiously motivated conduct (sale of religious items) because there was no evidence of any burden on religious practices or beliefs.[120]

4. *Freedom of Expression Cases*

Much has been made of the free exercise cases that have also implicated free speech interests.[121] Professor William Marshall has argued that because

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[114] 493 U.S. 378, 384–85 (1990) (quoting *Hernandez*, 490 U.S. at 699). In *Swaggart*, a religious organization challenged the collection of sales and use taxes on its sale of religious materials.

[115] *See infra* notes 225–26, 259 and accompanying text.

[116] *See infra* note 225 and accompanying text.

[117] *Hernandez*, 490 U.S. at 699.

[118] *Swaggart*, 493 U.S. at 392.

[119] *Hernandez*, 490 U.S. at 699 (quoting United States v. Lee, 455 U.S. 252, 260 (1982)).

[120] *Swaggart*, 493 U.S. at 394–95; *see also* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 18 (1989) (finding no burden on religious practice or beliefs).

[121] *See generally* Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 713–19 (1986).

free exercise interests have only been recognized when a speech interest was present, the Free Speech Clause encompasses all of the constitutionally cognizable values of the Free Exercise Clause.[122] His initial insight is correct: There are more cases involving religious speech that receive protection under the speech clause than under the Free Exercise Clause. Marshall, however, has merely posed the dilemma—that the Free Exercise Clause appears to be gutless—without explaining it or justifying it. He is correct to the extent that he asserts that the Court has not protected much under the Free Exercise Clause per se while it has consistently protected speech that is religious. He makes two mistakes, however.

First, he assumes that the Free Speech Clause protects belief in the same way that the Free Exercise Clause does. He reasons, therefore, that the free exercise religious belief cases are species of free speech law. The free exercise religious belief cases, however, long precede the secular belief cases which invoke the Free Speech Clause but do not involve religious speech. The first secular belief case explicitly relies on the free exercise religious belief cases to justify protecting secular belief[123] and does not appear until 1950, over seventy years after *Reynolds* first announced that the Free Exercise Clause protected religious belief absolutely.[124] All of which is to say that the Free Exercise Clause cases may have done more to shape the free speech cases than vice versa. More importantly, however, the Court's treatment of belief in the secular belief cases is not identical to its treatment of belief in the free exercise cases. From *Reynolds* through *Barnette* and *Smith*, the Court has repeatedly spoken of the absolute protection of religious belief, which entails that no state interest can justify belief regulation. In the first secular belief case, *Douds*, however, the Court rejected Justice Jackson's argument in dissent that it should adopt the free exercise belief/conduct paradigm, which protects belief absolutely.[125] Rather, the Court weighed the state's interest against the intrusion into the asserted belief.[126] The Court consistently has followed this approach.[127] There is no discussion in the secular speech cases of the absolute

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[122] Marshall, *supra* note 2, at 575–94. Marshall's theory has been dubbed the "reduction principle." Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 241 (1989).

[123] American Communications Ass'n v. Douds, 339 U.S. 382, 399–404 (1950) (citing West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

[124] Reynolds v. United States, 98 U.S. 145, 162 (1878).

[125] *Douds*, 339 U.S. at 409–10 (referring to belief/conduct distinction as creating a "fetish of beliefs"); *id.* at 446 (Black, J., dissenting) (asserting that the Court rejects notion that "beliefs are inviolate").

[126] *Id.* at 399–400, 409–10.

[127] *See* Keller v. State Bar, 496 U.S. 1, 13–14 (1990); Branti v. Finkel, 445 U.S. 507, 515–17 (1980); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222–25 (1977); Elrod v.

protection of secular belief. Thus, the free speech cases do not capture all of the free exercise values in the Court's jurisprudence.[128]

Second, Marshall fails to apprehend the two separate modes of inquiry in those cases in which the Court addresses a regulation affecting religious speech.[129] There is no single, hybrid approach for cases implicating both religious and speech interests.[130] Rather, there are two distinct approaches: the belief/conduct paradigm, which dictates that religious belief cannot be regulated but religious conduct such as preaching or proselytization can be, and the speech doctrine, which prohibits prior restraints and content regulation.[131] The Court is not particularly careful about separating its discussion of the protections under the two clauses, but the elements of each paradigm are readily identifiable.[132]

In the first such case, *Cantwell v. Connecticut*, the Court held that Jehovah's Witnesses traveling door-to-door with books for sale and a portable phonograph, which played records introducing the books, could not be required to get a certificate as a prerequisite to distributing their message.[133] The Court employed both the belief/conduct paradigm called for by the free exercise aspect of the claim and the prior restraint doctrine called for by the free speech aspect of the claim. The regulation did not fail under the

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Burns, 427 U.S. 347, 366 (1976); *see also* Schneiderman v. United States, 320 U.S. 118, 120 (1943) (describing United States as a "free world in which men are privileged to think and act and speak according to their convictions, without fear of punishment or further exile so long as they keep the peace and obey the law"); *cf.* Stanley v. Georgia, 394 U.S. 557, 565–66 (1969) (considering the state's interests in seriatim, the Court stated that the state "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.").

[128] For a discussion of the differences between secular belief and religious belief in the Court's First Amendment jurisprudence, see *infra* notes 311–17 and accompanying text.

[129] Marshall, *supra* note 2, at 557 ("two clauses may be inextricably bound").

[130] Scalia coined the unfortunate term "hybrid situation" to refer to cases invoking both free exercise and free speech interests. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 881–82 (1990).

[131] Moreover, Marshall's grouping of the free exercise cases under the free speech moniker fails to account for United States v. Ballard, 322 U.S. 78 (1944), which did not implicate speech interests but involved only religious belief. The belief/conduct paradigm does a much better job of making sense of *Ballard*.

[132] Grosjean v. American Press Co., 297 U.S. 233 (1936), and Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931), are cited as the original precedents for the rule against prior restraints, which are analogized to censorship. *See also* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990); Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981).

The origin of the prior restraint doctrine rests clearly in the Court's free speech and press cases and not its free exercise cases.

[133] Cantwell v. Connecticut, 310 U.S. 296 (1940).

belief/conduct paradigm: the religious interest at issue was conduct, not belief.[134] It did fail, however, under the Court's free speech prior restraint doctrine; the Court held that the certificate requirement was a prior restraint in violation of the First Amendment.[135]

The Court stated that the

> Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection.[136]

Conduct such as "preach[ing] or . . . disseminat[ing] religious views," therefore, could be weighed against the state's interest.[137] Thus, the statute would pass muster under the belief/conduct paradigm.

The licensing scheme, however, implicated the Court's prior restraint doctrine, which prohibited a state from "wholly deny[ing] the right to preach or to disseminate religious views."[138] Because the licensing scheme in *Cantwell* amounted to a "prior restraint," it was tantamount to such a full-scale denial, and the Court struck the scheme as applied to the Jehovah's Witnesses.[139]

Two years later, the Court employed the same decisionmaking framework when it decided *Jones v. Opelika*.[140] *Jones* questioned whether an itinerant distributor of religious books could be required to obtain a license to be a "book agent." Justice Reed articulated a rather eloquent explanation of the belief/conduct paradigm:

> Courts, no more than Constitutions, can intrude into the consciences of men or compel them to believe contrary to their faith or think contrary to their convictions; but courts are competent to adjudge the acts men do under color of a constitutional right, such as that of freedom of speech or of the press or the free exercise of religion, and to determine whether the claimed right is limited by other recognized powers, equally precious to mankind. So the mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows.[141]

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[134] *Id.* at 303–04.

[135] *Id.* at 306–07.

[136] *Id.* at 303–04 (footnotes omitted).

[137] *Id.* at 304.

[138] *Id.*

[139] *Id.* at 306–07.

[140] 316 U.S. 584 (1942), *overruled by* Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[141] *Id.* at 593–94 (footnote omitted).

He later added that "thought itself" received "illimitable privileges."[142] Thought itself was not at issue in the case, however. Rather, "*expression* of religion or opinion"[143] was burdened by the regulation. Although the "freedoms of worship and expression are closely akin to the illimitable privileges of thought itself . . legislation affecting those freedoms" would be permitted if the "interferences allowed are only those appropriate to the maintenance of a civilized society "[144] In short, belief could not be subject to regulation, but conduct such as worship or expression could.[145] This was a conduct case and therefore the regulation was permissible under the Free Exercise Clause.[146] To strike the regulation, the Court turned to its prior restraint doctrine.[147] The scheme was upheld on the ground that it was a time, place, and manner regulation, which is a permissible regulation of speech under the Court's prior restraint doctrine.[148]

In its next term, the Court granted the petition to rehear *Jones* at the same time that it granted certiorari in *Murdock v. Pennsylvania*.[149] The Court once again addressed whether itinerant preachers could be required to pay a license tax for the privilege of proselytizing. The Court answered in the negative in *Murdock* and vacated its original decision in *Jones*.[150]

Despite the change in the result, however, there was no change in the approach taken under the Free Exercise Clause's belief/conduct paradigm. The scheme was not struck because the Court upon further reflection determined that it impermissibly burdened "thought itself." The Court characterized the religious interest at issue in *Murdock* as conduct just as it had in *Jones*.[151] Rather, the change occurred in the Court's characterization of the free speech elements of the claim.[152] The Court altered its characterization of the license

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[142] *Id.* at 595.

[143] *Id.* at 594 (emphasis added).

[144] *Id.* at 595.

[145] *See supra* note 47 and *infra* notes 272 and 321 and accompanying text (discussing Court's classification of worship as conduct).

[146] *Jones*, 316 U.S. at 594–95.

[147] *See supra* notes 138–39 and accompanying text.

[148] *Jones*, 316 U.S. at 594–96.

[149] 319 U.S. 105, 107 (1943).

[150] *Id.* at 117.

[151] *Id.* at 109.

[152] The Court makes clear that it is addressing both free exercise and free speech and press claims. *See Murdock*, 319 U.S. at 109 ("This form of religious activity [hand distribution of religious tracts] occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.").

tax from a permissible time, place, and manner restriction in *Jones* to a prior restraint in *Murdock*.[153] Because it was a prior restraint, the regulation was struck. The Court followed the same reasoning in a similar case in *Follett v. Town of McCormick*.[154]

In *Widmar v. Vincent*,[155] the Court invalidated a campus regulation that prohibited the use of state university buildings for "worship or religious teaching"[156] on free speech grounds as content-based.[157] Even though the regulation targeted religious activities, commentators have been wrong in their presumption that the case was "crying out for free exercise treatment."[158] There is no doctrinal surprise or omission in *Widmar* The commentators' error lies in their mistaken notion that the Free Exercise Clause has offered a refuge for distinctly religious conduct such as worship or religious teaching.[159] Within the belief/conduct paradigm, the campus regulation was a regulation of conduct and therefore highly unlikely to be afforded protection under the Free Exercise Clause. Any protection that was to be afforded conduct would have to arise under another clause of the First Amendment, namely the Free Speech Clause. The Court's free speech analysis in *Widmar*, as in its other religious speech cases, was unremarkable, which is to say that religious speech was treated as any other type of speech would have been.[160]

It is tempting to argue, as Justice Scalia does in *Smith*, that *Cantwell*, *Murdock*, and *Follett* were decided in favor of the petitioner because each involved freedom of religion plus freedom of expression.[161] On this theory, the

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[153] *Id.* at 114 (The tax "restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise."); *see also id.* at 113 (analogizing license tax to "censorship").

[154] 321 U.S. 573, 577 (1944); *see also* Martin v. City of Struthers, 319 U.S. 141 (1943) (striking regulation prohibiting canvassers from ringing doorbells on speech and press grounds).

[155] 454 U.S. 263 (1981).

[156] *Id.* at 265.

[157] *Id.* at 277.

[158] Ingber, *supra* note 122, at 242 n.49; Tushnet, *supra* note 121, at 715; *see also* Marshall, *supra* note 2, at 559 (referring to Court's use of free speech doctrine as opposed to free exercise doctrine in *Widmar* as "intriguing").

[159] *See supra* note 47, 129-39 and *infra* notes 272 and 321 and accompanying text (discussing Court's classification of worship as conduct which is to be weighed against the interest of the state and proselytization as speech.).

[160] *See* Marshall, *supra* note 2, at 558 (referring to regulation in *Widmar* as "classic example of a content based regulation of freedom of speech").

[161] Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 881-82 (1990).

additional constitutional interest creates a "hybrid situation,"[162] which signals a higher level of scrutiny [163]

The cases cannot be explained so simply, however. The so-called hybrid situation does not raise the level of protection accorded regulations of religious interests. Religious speech receives the same level of protection under the speech clause as does secular speech.[164] The Court either operates within paradigms of the Free Speech Clause and the Free Exercise Clause in seriatim,[165] or it only considers the case through one or the other.[166] In other words, the Court in *Cantwell*, *Murdock*, and *Follett* does not intensify the level of scrutiny, but rather operates within the belief/conduct paradigm and then operates within the speech clause's prior restraint doctrine.[167]

5. *Miscellaneous Cases*

The final, miscellaneous category of cases in which the Court has upheld regulations burdening religiously motivated conduct are the most interesting. Although they also present scenarios where the government has shown some legitimate interest in the regulation at issue, they do not share with the military service and tax cases as clear a need for extreme deference to the particular governmental activity. They also do not share the moral outrage that served as the backdrop for the polygamy cases. Rather, they most directly call upon the

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[162] *Id.* at 882.

[163] *Id.* at 881 & n.1.

[164] Marshall, *supra* note 2, at 560 ("religious speech is speech—no more, no less").

[165] *See* Cox v. New Hampshire, 312 U.S. 569, 576–78 (1941) (upholding parade permit requirement on time, place, and manner, *i.e.*, free speech, grounds and determining that there was no interference with religious conduct).

[166] *See* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654–55 (1981) (regulating peripatetic religious solicitation under Free Speech Clause); Saia v. New York, 334 U.S. 558, 559–60 (1948) (invalidating permit requirement applied to Jehovah's Witnesses as prior restraint); United States v. Ballard, 322 U.S. 78, 86–88 (1944) (applying only free exercise); Follett v. Town of McCormick, 321 U.S. 573, 577 (1944) (applying only free exercise); Martin v. City of Struthers, 319 U.S. 141, 146–47 (1943) (overturning conviction for distributing religious tracts on free speech grounds); *see also* Marshall, *supra* note 2, at 562 ("vast majority of these cases were decided on grounds of free speech rather than freedom of religion").

[167] *See supra* notes 131–32 and accompanying text. Of course, for the believer, it makes little difference whether a religious interest is protected under the Free Exercise or the Free Speech Clause so long as it is protected. My point here is theoretical. The Court has designated as its underlying theory of religion two mutually exclusive categories of religious interest: belief or conduct. By forcing claims into one or the other, religious speech, which does not neatly fit either one but plainly should be protected, has been shunted to clauses other than the religion clauses for protection.

belief/conduct paradigm. They also starkly reveal how slippery the designation of a particular religious interest such as belief or conduct can be.

Minersville School District v. Gobitis was overruled when the Court recharacterized as belief that which it had previously identified as conduct.[168] In *Gobitis*, the Court upheld a school board's decision to expel two children who refused to salute the flag for religious reasons.[169] They, and their parents, were Jehovah's Witnesses who believed "that such a gesture of respect for the flag was forbidden by command of Scripture."[170] Justice Frankfurter immediately set to the side whether religious belief or ideas could be regulated: "Certainly the affirmative pursuit of one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law Government may not interfere with organized or individual expression of belief or disbelief."[171] Indeed, the state could regulate the actions of religious adherents only when the "right to believe as they please, to win others to their way of belief, and their right to assemble in their chosen places of worship for the devotional ceremonies of their faith, are all fully respected."[172] The question for decision in *Gobitis*, then, was "whether school children, like the Gobitis children, must be excused from *conduct* required of all the other children in the promotion of national cohesion."[173] In short, the Court weighed the value of the refusal to salute the flag against the value of the state's asserted interest in national unity, which was characterized as one "inferior to none."[174] As one would expect within the belief/conduct paradigm, the Court permitted the government's interest to trump the religious conduct.[175] When the Court overturned *Gobitis* in *Barnette*, it transformed the description of the religious interest at issue from conduct to belief.[176]

The fact that characterization of the claim as either belief or conduct drives the result of the case is underscored in the case of *Prince v. Massachusetts*.[177]

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[168] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 630–31 (1943).

[169] *Gobitis*, 310 U.S. at 599–600.

[170] *Id.* at 592.

[171] *Id.* at 593.

[172] *Id.* at 600.

[173] *Id.* at 595 (emphasis added).

[174] *Id.*

[175] *Id.* at 599–600.

[176] *See supra* notes 60–67 and accompanying text. The operation of the belief/conduct paradigm is also evident in Justice Stone's dissent in *Gobitis*. He would have overturned the school board's expulsion of the students on the ground that the mandatory flag salute "violate[d] their deepest religious convictions." *Gobitis*, 310 U.S. at 601 (Stone, J., dissenting). According to Justice Stone, "[The Constitution] . . command[s] that freedom of mind and spirit must be preserved . . ." *Id.* at 606.

[177] 321 U.S. 158 (1944).

In that case, a woman permitted her niece to join her in handing out religious literature in public in violation of Massachusetts' child labor laws.[178] The majority upheld the statute prohibiting the child from working against a free exercise attack.[179] The bulk of the discussion was directed to the issue whether the state could regulate more heavily the activities of children than of adults in the face of constitutional guarantees. In the single paragraph about "religious liberty," however, the Court cited *Reynolds* and *Davis*, and characterized the religious interest at issue as the "child's course of conduct."[180] This reading of the case, as decided according to the belief/conduct paradigm, is later confirmed by the Court in *Braunfeld v. Brown*.[181]

In *Braunfeld*, the Court upheld Pennsylvania's blue laws through application of the belief/conduct paradigm:

> [T]he statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets.
>
> However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions.[182]

The Court characterized the burden created by the blue laws as a burden on "secular activity,"[183] which was only an "indirect" burden on religiously motivated conduct.[184] In other words, the burden was even a step removed from a "direct" burden on religious conduct, which was already subordinate to secular law under the reasoning of *Reynolds* and its progeny The state's interest in a day of rest for its citizenry as well as its interest in not carving out exceptions to such a rule outweighed any harm created by the indirect burden placed on the religious adherents.[185] Thus, the blue laws survived.[186]

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[178] *Id.* at 159-60.

[179] *Id.* at 168-70.

[180] *Id.* at 166.

[181] 366 U.S. 599, 605 (1961) (plurality opinion) (characterizing *Prince* as involving a regulation that affected a "religious *duty* to perform work" and "religious practices" as opposed to belief).

[182] *Id.* at 603; *see also id.* ("The freedom to hold religious beliefs and opinions is absolute."); *id.* at 603-04 ("[L]egislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion."); *id.* at 604 ("'*the legislative powers of government reach actions only, and not opinions*'") (emphasis added by *Braunfeld* Court from original) (quoting 8 WORKS OF THOMAS JEFFERSON 113).

[183] *Id.* at 605.

[184] *Id.* at 606.

[185] *Id.* at 607-09.

In *Bowen v. Roy*,[187] the Court upheld the government's use of a social security number for a Native American child whose parents challenged the use on religious grounds. The Court confirmed its commitment to the belief/conduct paradigm: "Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute. This case implicates only the latter concern."[188] In *Braunfeld*, the Court had attempted to justify its rejection of the free exercise claim on the ground that not only was conduct the religious interest at issue, but also that the government's regulation affected it only indirectly [189] In *Bowen*, the Court found a different extenuating circumstance: the religious adherents were attempting, through their preferred religious conduct, to affect the conduct of the government's bureaucracy. "The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures."[190] That distinction, however, did not ultimately decide the case. The Court found that the statute did not affect the adherents' religious beliefs[191] and did not directly affect their religiously motivated conduct.[192] Using a relatively low level of scrutiny, Chief Justice Burger concluded that the government's interest in preventing fraud in benefit programs outweighed the indirect burden on the adherents' religious conduct.[193]

The Court relied heavily upon *Bowen* in deciding *Lyng v. Northwest Indian Cemetery Protective Ass'n*.[194] In that case, the Court rejected a challenge brought by Native Americans to the federal government's decision to construct a road through government-owned land that had been used for religious purposes. The Court cited at length the discussion in *Bowen* stating that the government need not order its "internal affairs" according to the religious beliefs of individual citizens.[195] Explicitly relying upon its belief/conduct

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[186] The Court in *Braunfeld* did take pains to state that it would be a "gross oversimplification" to conclude that all regulations that effect only "indirect burden[s]" will be "unassailable." *Id.* at 607. The Court was not repudiating the belief/conduct paradigm, however. It explained its concern in the next sentence: laws with the purpose of oppressing religion or discriminating between religions will not be upheld despite the fact that the burden created is indirect. *Id.*

[187] 476 U.S. 693 (1986).

[188] *Id.* at 699.

[189] *Braunfeld*, 366 U.S. at 606.

[190] *Bowen*, 476 U.S. at 700.

[191] *Id.* at 699.

[192] *Id.* at 703 (opinion of Burger, C.J., joined by Powell & Rehnquist, JJ.).

[193] *Id.* at 708–10.

[194] 485 U.S. 439 (1988).

[195] *Id.* at 448.

paradigm, the Court refused to extend protection under the Free Exercise Clause to prohibit "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs."[196] Typical of the belief/conduct paradigm, even an "extremely grave"[197] threat to religious practices was not sufficient to outweigh the government's interest, which in this case was "its right to use . . *its* [own] land."[198]

Over a hundred years after its decision in *Reynolds*, the Court was still explicitly relying upon the belief/conduct paradigm which had been set out in that opinion.[199] In *Smith*, the free exercise claim arose circuitously.[200] Alfred Smith and Galen Black, employees of a private drug rehabilitation organization, were fired for ingesting peyote during religious ceremonies.[201] They were denied unemployment benefits on the ground that they had engaged in "work-related 'misconduct.'"[202] The ingestion of peyote violated Oregon's general controlled substance law. The Court, per Justice Scalia, held that the denial of employment benefits did not violate the Free Exercise Clause.[203]

The Court provided a seemingly expansive listing of protection accorded by the Free Exercise Clause. It included, however, a series of rights that have been vindicated not through the Free Exercise Clause alone but also through the Free Speech and the Establishment Clauses.[204] In any event, having listed those instances where religious adherents have won against the government (on some First Amendment ground), the Court immediately resorted to the belief-conduct distinction, saying that the "'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts"[205] and explicitly embraced *Reynolds'* formulation of the belief/conduct paradigm as though the sitting Court and the *Reynolds* Court were one: "'Laws,' we said, 'are made for the government of actions, and while they

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[196] *Id.* at 450.

[197] *Id.* at 451.

[198] *Id.* at 453.

[199] *See* Reynolds v. United States, 98 U.S. 145 (1878).

[200] Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

[201] *Smith*, 494 U.S. at 874. For a discussion of the religious significance of peyote, see People v. Woody, 394 P.2d 813, 817 (Cal. 1964), which describes the ceremonial use of "peyote . . as a sacramental symbol similar to bread and wine in certain Christian churches." *See also* HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 18 (Christopher Vecsey ed., 1991) (describing Peyotism as a "belief in a spiritual realm that possesses power, and a human world that needs it . . Peyote . is the means through which God and humans can communicate . . . ."); Laycock, *Remnants*, *supra* note 2, at 7–8.

[202] *Smith*, 494 U.S. at 874.

[203] *Id.* at 890.

[204] *Id.* at 877.

[205] *Id.*

cannot interfere with mere religious belief and opinions, they may with practices . . .'"[206] Justice Scalia asserted that Black and Smith wanted the Court "to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation."[207] He responded in the negative by saying that the Court had "never held that . . There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls."[208] The *Reynolds* rule to which he referred is the most extreme form of the belief/conduct paradigm: Belief is absolutely protected; conduct is automatically trumped by the state's interest. Therefore, the unemployment benefits could be denied under the belief/conduct paradigm without consideration of the state's interest.

The statute also might have fallen into disfavor according to Justice Scalia on two other grounds, but it did not. He advocated a three-part decisionmaking process in *Smith*. First, a court should determine whether the religious interest

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[206] *Id.* at 879 (quoting Reynolds v. United States, 98 U.S. 145 (1878)).

[207] *Id.* at 882.

[208] *Id.* Professor Douglas Laycock reads into this language the notion that the Court intends the Free Exercise Clause to protect a broad category of belief. *See* Laycock, *Remnants*, *supra* note 2, at 9. The cases do not bear out this reading, however. *See supra* note 47 and *infra* notes 272 and 321. He also refers to the belief/conduct distinction in *Smith* as a "dramatic new rule." Laycock, *Remnants*, *supra* note 2, at 2; *see also id.* at 9 (describing the distinction as a "new principle"). The premise of this Article is that the belief/conduct paradigm was not new in 1990 by any means.

The distinction between belief and conduct in *Smith* is coupled with the doctrine that laws which are generally applicable—which is to say laws that do not obviously target a religious belief or practice—are presumptively constitutional. Thus, a statute will pass free exercise muster as long as it does not target a particular religion and regulates conduct only. The supposed value to be served by this scheme is neutrality. *See* Williams & Williams, *supra* note 31, at 843 ("Scalia implicitly relied on a notion of equal treatment to defend the holding in *Smith*."). Such equal protection values play a large role throughout Justice Scalia's jurisprudence.

One case has been left out of this section of cases because, although it is a free exercise case, it contains no discussion of free exercise doctrine. O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), does relate to the thesis of this Article, however, in its result. In that case, Muslim prisoners challenged a prison rule which prevented them from attending Friday religious services. The Court upheld the regulation, basing its decision on the extreme deference owed to prison authorities. Given that the religious interest at issue—travel to and attendance at a service—is conduct, the result is consistent with a decision arising out of the belief/conduct paradigm.

regulated is belief or conduct.[209] Regulation of belief is absolutely prohibited and therefore identification of the interest affected as belief would preclude any further examination of the statute.[210] Regulation of conduct is permitted if the regulation governs that which the "State is free to regulate."[211] In other words, if the State has the power to regulate in a particular area, it may do so even though it affects religious conduct, which is to say that the state's interest will be accorded completely deferential review.[212] Second, a court should determine whether the statute violates equal protection principles by singling out a particular faith, a longstanding principle explicitly affirmed in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[213] *Smith* left it unclear whether

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[209] Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 877 (1990).

[210] *Id.* at 879 ("'Laws' . . cannot interfere with mere religious belief and opinions . . . ") (Scalia, J., majority opinion) (quoting *Reynolds*); *see also id.* at 894 ("Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute.") (O'Connor, J., concurring in the judgment).

[211] *Id.* at 879.

[212] *Id.* at 882–90 & n.3.

[213] 113 S. Ct. 2217, 2229–31 (1993). *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226, 248 (1990) (plurality opinion) (stating antidiscrimination principle under Establishment Clause principles); Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 384 (1990) (stating antidiscrimination principle in free exercise dictum); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in the judgment) (stating Free Exercise Clause "protect[s] religious observers against unequal treatment"); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 389 (1985) (stating antidiscrimination principle under Establishment Clause principles); Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (stating antidiscrimination principle under Establishment Clause principles); Thomas v. Review Bd., 450 U.S. 707, 717 (1981) (stating antidiscrimination principle in free exercise dictum); McDaniel v. Paty, 435 U.S. 618, 644 (1978) (White, J., concurring in the judgment) (arguing that statute forbidding ministers from serving as state legislators did not implicate Free Exercise Clause but rather equal protection principles); *id.* at 627–29 (plurality opinion) (implying antidiscrimination principle under Free Exercise Clause); Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792–93 (1973) (stating antidiscrimination principle under both Free Exercise and Establishment Clauses); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (implying antidiscrimination principle under Free Exercise Clause); Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (opinion of Harlan, J.) ("Neutrality in its application requires an equal protection mode of analysis."); Epperson v. Arkansas, 393 U.S. 97, 106–07 (1968) (stating antidiscrimination principle under Establishment Clause principles); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963) (stating antidiscrimination principle under both Free Exercise and Establishment Clauses); Torcaso v. Watkins, 367 U.S. 488, 492–93 (1961) (stating antidiscrimination principle under Establishment Clause principles); Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (plurality opinion) (implying antidiscrimination principle under

discriminatory legislation would be invalid per se or subject to strict scrutiny.[214] Seven members of the Court in *Lukumi* chose the latter alternative.[215] Third, a court should determine whether the case implicates other constitutional interests and is thus a "hybrid" case.[216] As discussed above,[217] the third and last analysis is nugatory; the hybrid cases do not present hybrid claims in any literal sense. Rather, they present cases in which the Court addresses facts that implicate more than one of the Court's constitutional paradigms or doctrines, each of which the Court applies independently

. Despite cries in the literature that it dramatically changed free exercise jurisprudence,[218] *Smith* reiterated the Court's entrenched use of the belief/conduct paradigm and its longstanding doctrine against singling out any particular religion. Hence, *Smith* is not radically different from its forerunners; the single change made is a downward adjustment of the level of scrutiny to be applied to regulations of conduct within the belief/conduct paradigm. Given the way in which the paradigm normally tends to devalue conduct and elevates the interest of the state, such a change is not as startling as early readings of *Smith* declared.[219]

Free Exercise Clause); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) (Frankfurter, J., concurring) (stating preference by state of one religion over another should be violation of equal protection); Niemotko v. Maryland, 340 U.S. 268, 272–73 (1951) (holding that arbitrary discrimination against Jehovah's Witnesses in granting of permit to speak in park violates Equal Protection Clause); Everson v. Board of Educ., 330 U.S. 1, 15–16 (1946) (stating antidiscrimination principle under Establishment Clause principles).

Some commentators have criticized *Smith* for reducing the Free Exercise Clause to an antidiscrimination principle. *See* Laycock, *Remnants*, *supra* note 2, at 4 ("The Free Exercise Clause is now principally a special case of equal protection . "); McConnell, *supra* note 2, at 691 (criticizing Scalia's "formal neutrality" which "treats the Religion Clauses as specialized equal protection provisions"); *cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2242 (1993) (Souter, J., concurring in part and concurring in the judgment) ("[L]aws that satisfy formal neutrality, *Smith* would subject to no free-exercise scrutiny at all . . . ."). This reading misses the Court's explicit reaffirmation of the belief/conduct distinction which adds the absolute protection of belief to the antidiscrimination principle.

[214] Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 888 (1990).

[215] *Lukumi*, 113 S. Ct. at 2233.

[216] *Smith*, 494 U.S. at 881–82.

[217] *See supra* notes 121–67 and accompanying text.

[218] *See, e.g.*, Laycock, *Remnants*, *supra* note 2, at 1, 9 (claiming *Smith* "sharply changed" free exercise jurisprudence; that it introduced a "new principle").

[219] *See also* Tushnet, *supra* note 1, at 122 ("*Smith* essentially changes the probability of the [religious adherent's] argument's success from low to nothing at all"); *id.* at 123 ("[A]lthough *Smith* dictates a marginal shift in the bargaining context, that shift is too small

C. *Cases Striking Regulations the Court Characterized as Affecting Conduct*

The Court has struck regulations affecting what it characterizes as conduct in only six cases. Four involve unemployment compensation. The first case—*Sherbert v. Verner*—attempted to provide for the protection of some conduct by increasing the level of scrutiny of regulations affecting conduct;[220] the other three cases were decided according to stare decisis.[221] The fifth case—*McDaniel v. Paty*, in which only a plurality relied on *Sherbert*'s compelling interest test—reveals how slippery the characterization of belief and conduct can be.[222] The sixth case—*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*—employed *Smith*'s antidiscrimination principle in the context of the belief/conduct paradigm.[223]

In *Sherbert v. Verner*, the Court overturned the state's refusal to pay unemployment compensation when a member of the Seventh-Day Adventist Church was fired for her refusal to work on Saturday, her Sabbath.[224] The Court introduced a modification in the belief/conduct paradigm. The religious universe was still divided between two separate spheres, belief and conduct. Belief would continue to receive absolute protection and conduct could still be regulated, but conduct could be regulated only if the state proved a compelling interest and that it had used the least restrictive means to achieve its stated goals.[225] In other words, the Court retained the essential elements of the belief/conduct paradigm (absolute protection of belief coupled with the weighing of the value of the conduct against the interest of the state) but purportedly made it harder for the state to prove its need for the regulation. In effect, this should have meant that more conduct would be protected in the succeeding cases.[226] In *Sherbert*, it did. The Court characterized the claim as

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to justify the strong claims found in anti-*Smith* rhetoric as to just how terrible *Smith*'s effects are.").

[220] Sherbert v. Verner, 374 U.S. 398, 406–07 (1963).

[221] Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 831–32 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 139–41 (1987); Thomas v. Review Bd., 450 U.S. 707, 719–20 (1981).

[222] McDaniel v. Paty, 435 U.S. 618 (1978).

[223] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993).

[224] *Sherbert*, 374 U.S. at 409–10.

[225] *Id.* at 402–03, 407.

[226] For a discussion of the precedential effect of *Sherbert*, see *infra* notes 234–36, 240 and accompanying text.

one sounding in conduct and determined that the state had not met its burden of proving a compelling interest.[227]

In *McDaniel v. Paty*, the Court invalidated a provision in a state constitution which prohibited "[m]inister[s] of the Gospel, or priest[s] of any denomination whatever" from serving as legislators.[228] A plurality of the Court adopted the *Sherbert* Court's modification of the belief/conduct paradigm. It explicitly rejected the argument that the religious interest at issue was one sounding in belief and identified the interest as one "defined in terms of conduct and activity."[229] The plurality then applied the compelling interest standard and concluded that the state had failed to meet its burden of proof.[230] Interestingly, Justice Stewart, in concurrence, invoked the belief/conduct paradigm, characterized the claim as one affecting belief, and concluded without reference to *Sherbert* that the provision was unconstitutional.[231]

Sherbert understandably was hailed as a radical shift in free exercise jurisprudence.[232] Commentators have read into the case the collapse of *Reynolds* and the retreat of the belief-conduct distinction.[233] History, however, has taught us that *Sherbert* barely made a dent in the Court's near-perfect

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[227] *Sherbert*, 374 U.S. at 404, 406–09. Consistent with the belief/conduct paradigm, Justice Douglas, who also believed that the state's action violated the clause, articulated Sherbert's claim as a claim grounded in belief. *Id.* at 411–12 (Douglas, J., concurring) ("The harm [by the State] is the interference with the individual's scruples or conscience . . ."). Conversely, Justice Harlan, in dissent, argued that the denial of benefits should be upheld and characterized the claim as one sounding in conduct. *Id.* at 422 (referring to "behavior [that] is religiously motivated").

[228] McDaniel v. Paty, 435 U.S. 618, 621 n.1 (1978) (plurality opinion).

[229] *Id.* at 626–27 (plurality opinion) (Burger, C.J., Powell, Rehnquist & Stevens, JJ.).

[230] *Id.* at 628–29.

[231] *Id.* at 642–43 (Stewart, J., concurring in the judgment). Justice Brennan wrote a concurring opinion in which he argued that the religious interest should be identified as belief. *Id.* at 631 (Brennan & Marshall, JJ., concurring in the judgment).

Justice White concurred in the judgment on equal protection grounds. *Id.* at 643. Justice Blackmun took no part in the decision of the case. *Id.* at 629.

[232] *See* Clark, *supra* note 2, at 328 ("In . . . *Sherbert v. Verner* . the Supreme Court rejected [the belief/conduct distinction]."); Ingber, *supra* note 122, at 291 (*Sherbert* "radically undercut the belief/action distinction."); Pepper, *supra* note 30, at 266 (*Sherbert* "commenced a revolution in the understanding and impact of the freedom of religion clause.").

[233] Ingber, *supra* note 122, at 254–55; Lupu, *supra* note 30, at 939; Pepper, *supra* note 30, at 266; Leo Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115, 1139 (1973). *But see* Giannella, *supra* note 30, at 1393 ("It is doubtful . . . that the courts will compel such deference, the sweeping dictum of *Sherbert* notwithstanding.").

record of upholding regulations affecting religious conduct.[234] Setting aside *Lukumi*, which protected religious conduct as a result of the application of the Court's longstanding antidiscrimination principle,[235] the unemployment compensation cases, and the plurality in *McDaniel*, the cases decided since *Sherbert* have followed the tendency of the belief/conduct paradigm to provide no protection for religious conduct: the Court has either protected the religious interest at issue as belief or refused to protect the interest because it was conduct and the needs of the state trumped the needs of the religious adherent.[236] In other words, the only change *Sherbert* made was in the level of scrutiny to be applied to conduct and such an adjustment within the belief/conduct paradigm did not have the capacity to change much. Despite its dramatic heightening of the level of scrutiny in *Sherbert*, the Court did not forsake its fundamental vision of religion as centered in the experience of solitary belief.[237] Conduct continued to be viewed as unnecessary to religious experience. Thus, belief remained in need of absolute protection while conduct could be regulated away.

Strict scrutiny never operates in isolation to provide a high level of protection. In the equal protection context, legislation that disadvantages racial minorities consistently has received strict scrutiny [238] But the scrutiny is only as strict (despite the invocation of the standard) as the particular court's (or

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[234] *See* Ralph C. Hancock, *Monistic and Dualistic Paths to Radical Secularism: Comments on Tushnet*, 1993 B.Y.U. L. REV. 141, 141 ("[R]eligious claims were more often denied than honored under the Supreme Court's 'compelling state interest doctrine . . . .'"); Robert D. Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 CONST. COMM. 147, 154 (1987) (stating that the "Supreme Court has shown little enthusiasm for strict review in post-*Sherbert* and *Yoder* decisions"); William P Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 367–69 (1989–90).

[235] *See infra* notes 241–47 and accompanying text.

[236] *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 888–90 (1990) (upholding regulation characterized as affecting conduct); Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 384–85 (1990); Hernandez v. Commissioner, 490 U.S. 680, 703 (1989); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988); Bowen v. Roy, 476 U.S. 693, 699–700 (1986); Goldman v. Weinberger, 475 U.S. 503, 509–10 (1986); Bob Jones Univ. v. United States, 461 U.S. 574, 602–04 (1983); United States v. Lee, 455 U.S. 252, 260–61 (1982); Gillette v. United States, 401 U.S. 437 (1971); *see also* Wooley v. Maynard, 430 U.S. 705, 713 (1977) (striking regulation affecting belief); Wisconsin v. Yoder, 406 U.S. 205, 219 (1972); Mark Tushnet, *supra* note 1, at 118 (stating "pre-*Smith* law was not all that protective of religious exercise").

[237] *See infra* notes 268-302 and accompanying text.

[238] *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429 (1984); Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214 (1944).

society's) larger vision permits. It just so happens in the race cases that the world view underpinning the application of the standard has reinforced its intended rigorousness and that the courts have not found (or apparently searched for) multiple reasons to depart from the standard.

In contrast, the belief/conduct paradigm (and the world view it connotes) has created an unfriendly environment for the rigorous use of strict scrutiny in the free exercise cases. Since the standard was announced in *Sherbert*, cases employing it have not regularly or predictably proved protective of religious freedom,[239] and the Court frequently has found reason to depart from the standard altogether.[240] There has been no fundamental commitment to protect

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[239] *See supra* note 234, 236.

[240] Despite the Court's invocation of strict scrutiny in *Sherbert*, it has applied a wide range of levels of scrutiny in the post-*Sherbert* cases. *See* Stephen Pepper, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 B.Y.U. L. REV 7, 32 ("The *Sherbert-Yoder* doctrine was not applied consistently by the Supreme Court."). *Compare* Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) (applying strict scrutiny); Bob Jones Univ. v. United States, 461 U.S. 574, 603 (1983); United States v. Lee, 455 U.S. 252, 257–58 (1982); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) *with* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 882–90 & n.3 (1990) (employing highly deferential scrutiny); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 447–48 (1988); O'Lone v. Estate of Shabazz, 482 U.S. 342, 349–53 (1987) (exercising extreme deference to prison authorities without reference to *Sherbert*); Goldman v. Weinberger, 475 U.S. 503, 506–07 (1986) (explicitly using level of scrutiny below *Sherbert* standard); Bowen v. Roy, 476 U.S. 693, 707–08 (1986); Gillette v. United States, 401 U.S. 437, 462 (1971) (utilizing substantial interest test); *and* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2233–34 (1993) (impliedly endorsing *Smith* test of highly deferential scrutiny for neutral regulations while applying strict scrutiny to discriminatory regulation of conduct).

Members of Congress, as well as the commentators, have failed to apprehend that *Sherbert* has not had strong precedential value. *See* 139 CONG. REC. S2822 (daily ed. Mar. 11, 1993) (remarks of Sen. Kennedy on Religious Freedom Restoration Act of 1993, S. 578, 103d Cong., 1st Sess. (1993)) ("The Supreme Court's 1990 decision in Oregon Employment Division versus Smith sharply limited the first amendment's guarantee of freedom of religion. Until then, Government actions that interfered with individuals' ability to practice their religion were prohibited, unless the restriction met a strict two-part test. It must be necessary to achieve a compelling governmental interest, and there must be no less burdensome way to achieve the goal. The compelling interest test had been the constitutional standard for nearly 30 years."); 139 CONG. REC. H2357 (daily ed. May 11, 1993) (remarks of Rep. Don Edwards (D-Cal.) on Religious Freedom Restoration Act of 1993 (RFRA), H.R. 1308, 103d Cong., 1st Sess. (1993) ("[S]ince the Supreme Court's 1963 decision in Sherbert versus Verner, the courts have protected religious exercise unless the Government could articulate a compelling reason to do otherwise. It was not until the Supreme Court's April 1990 decision in Oregon versus Smith, that the first amendment's guarantee of free exercise of religion was seriously threatened.") Ironically, Rep. Hyde

religious conduct that could anchor the level of scrutiny at a strict level. Thus, even after *Sherbert*'s invocation of strict scrutiny, the state's interest has been likely to trump the need for the religious conduct.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court struck a series of ordinances affecting religious conduct on the ground that they violated the antidiscrimination principle emphasized in *Smith*.[241] The *Smith* decision made it sound as though any regulation singling out a religious sect would be invalid per se. The Court in *Lukumi* did not, however, accord absolute protection against the discriminatory regulation of religious interests. To the contrary, the Court articulated the antidiscrimination principle it had frequently evoked in its religion cases against the backdrop of the belief/conduct paradigm. Taking a familiar tack, the Court stated that "a law targeting religious beliefs as such is never permissible," while a law targeting

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advocated both the "compelling state interest test" and the "Supreme Court's free exercise jurisprudence prior to Smith." *Id.* at H2357-58; *see also* 137 CONG. REC. E2422 (1991) (remarks of Rep. Solarz) (RFRA "will simply restore the legal standard for protecting religious freedom that worked so well for more than a generation").

The proposed Religious Freedom Restoration Act of 1993 attempts to "restore" the *Sherbert* test to preeminence. *See* H.R. 1308, 103d Cong., 1st Sess. (1993); S. 578, 103d Cong., 1st Sess. (1993). Section 2(b) of the House version states that the purpose of the Act is "to restore the compelling interest test as set forth in Federal court cases before Employment Division of Oregon v. Smith and to guarantee its application in all cases where free exercise of religion is burdened." If one has read the cases since *Sherbert*, this is a plainly self-contradictory statement, which would cause nothing but confusion in the federal courts and far less protection for religious interests than the Congress seems to be intending.

The House version even goes so far as to institute the belief/conduct distinction, which, as this Article shows, bodes especially ill for religious claimants. It provides that belief shall be protected absolutely. *See* H.R. 1308, 103d Cong., 1st Sess. § 6(c) (1993) ("Nothing in this Act shall be construed to authorize any government to burden any religious belief."). But it provides no explicit protection for religious conduct. Thus, the House version of RFRA would codify the belief/conduct distinction and direct courts to apply pre-*Smith* levels of scrutiny (without realizing that many levels of scrutiny have been used since *Sherbert*). It would be hard to imagine a bill more likely to harm religious interests in the guise of protecting them. *See* Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 B.Y.U. L. REV 259, 271-72 ("Because the 'federal court cases' leading up to *Smith* had so eviscerated *Sherbert* and *Yoder* . . . [the House version of RFRA is likely to prove] nominally favorable but operationally hostile to religious freedom."). The House approved the version of RFRA discussed above on May 11, 1993. *See* 139 CONG. REC. H2356-63 (daily ed. May 11, 1993). A similar version was approved by the Senate on October 27, 1993. *See* 139 CONG. REC. S14461 (daily ed. Oct. 27, 1993).

[241] *Lukumi*, 113 S. Ct. 2217 (1993). The regulations at issue in *Lukumi* set out penalties for the unnecessary or cruel killing of any animal and the ritual sacrifice of animals as it exempted the slaughtering of animals for food purposes. *See supra* notes 213-15 and accompanying text (discussing *Smith*).

religious conduct must be weighed against the government's interest.[242] Because it found that the regulation was discriminatory, it accorded the "most rigorous of scrutiny"[243] to conclude that the ordinances impermissibly burdened the Santerians' religious conduct. Thus, the Court did not find that the ordinances were invalid because they discriminated between religious beliefs and nonreligious beliefs. That would have been invalid per se. Rather, it held that the ordinances fell because they discriminated between religious conduct and nonreligious conduct and because the city had failed to prove a compelling interest.[244]

Unlike *Sherbert*, which would have applied the compelling interest test to all regulations burdening religious conduct, *Lukumi* limited the compelling interest test to discriminatory regulations. With respect to all regulation of religious conduct that does not discriminate between religions, the strong version of the belief/conduct paradigm is likely to remain intact after *Lukumi*. Lurking behind the Court's forceful and self-righteous antidiscrimination language stands the structure of its seemingly ever-present belief/conduct paradigm, which protects belief absolutely and conduct hardly at all.[245] As in *Smith*, there was a presumption of validity assigned to nondiscriminatory regulation of religious *conduct*. The Court even broadly hinted at means by which Hialeah could regulate the Santerians' religious practices constitutionally.[246]

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[242] *Lukumi*, 113 S. Ct. at 2227.

[243] *Id.* at 2233.

[244] *Id.* at 2229, 2233-34.

[245] The Court explicitly reaffirms the belief/conduct distinction. *See id.* at 2227 (stating "a law targeting religious beliefs as such is never permissible" but conduct may be regulated).

[246] *See id.* at 2229-30 ("[T]he city could have imposed a general regulation on the disposal of organic garbage."); *id.* at 2230 ("If the city has a real concern that other methods are less humane, however, the subject of the regulation should be the method of slaughter itself...."); *id.* at 2234 ("Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular."); *id.* at 2251 (Blackmun and O'Connor, JJ., concurring in the judgment) ("The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals.").

Justice Souter attempts to limit the effect of these none too subtle statements. *See id.* at 2243 ("The question whether 'there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability,' is not before the Court in this case, and, again, suggestions on that score are dicta.") (citation omitted) (quoting Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)).

Lukumi illustrates how inured the Court is to the belief/conduct paradigm and its illusion of protection. The Court begins the opinion with the following statement: "The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions."[247] To the contrary, few violations are recorded because the Court has generally failed to protect religious conduct. The Court's willing acceptance of the routine regulation of religious conduct, combined with its conviction that there has been very little suppression of religious interests in this country, vividly illustrates one of the central themes of this Article, which is that the Court has permitted itself to be stuck (consciously or unconsciously) in a particular way of thinking about the free exercise of religion which appears on its surface to be highly protective of religious interests but is in fact unprotective.

D. Wisconsin v. Yoder: *Belief and Conduct Intertwined*

Wisconsin v. Yoder is the single free exercise case that attempts to break through the belief/conduct paradigm.[248] Decided nine years after *Sherbert*,[249] *Yoder* often has been read as a case simply applying *Sherbert*'s higher level of scrutiny.[250] Although there is undeniable reliance on *Sherbert* throughout *Yoder*,[251] the success of the religious adherents in *Yoder* was as much a product of the Court's transformation of the belief/conduct paradigm as it was of *Sherbert*'s higher level of scrutiny.

In *Yoder*, the Court invalidated the convictions of Amish parents accused of violating the state's law requiring children to attend school until the age of sixteen. The parents argued that education in school beyond the eighth grade undermined their "fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith."[252] Unlike the members of the Court in *McDaniel*, who spent a good deal of effort attempting to identify the religious interest as either belief or conduct as *Sherbert* required, the Court in *Yoder* did not attempt to fit the asserted

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[247] *Lukumi*, 113 S. Ct. at 2222.

[248] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[249] *See supra* notes 224–27 and accompanying text.

[250] *See generally* Donald L. Beschle, *Paradigms Lost: The Second Circuit Faces the New Era of Religion Clause Jurisprudence*, 57 BROOK. L. REV 547 (1991); Pepper, *supra* note 27, at 266.

[251] *Yoder*, 406 U.S. at 220–21, 230.

[252] *Id.* at 210.

religious interest into "logic-tight compartments."[253] Rather, the Court repeatedly made the point that in the Amish community, the relevant belief and religious conduct were "inseparable."[254] The Court flatly rejected the state's argument that the religious interest at issue was merely conduct and therefore subject to regulation. For the Amish, the Court responded, "religion is not simply a matter of theocratic belief."[255] "[T]he Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community "[256] Or, to state the issue as its converse, the Amish community would be forced to "abandon belief" if it were forced to abandon its way of life.[257] Belief and conduct were viewed by the Court in *Yoder* as integral parts of a unitary whole.

Given its prior case law, this was an unexpected move by the Court. *Sherbert* did not impose a burden of proving inseparability of faith and conduct in order for religious conduct to be protected.[258] Rather, *Sherbert* accepted the distinction between belief and conduct and altered only the level of scrutiny appropriate for religious conduct.[259] If the Court were inclined to invalidate a statute under *Sherbert*, it simply needed to recognize the claim as one involving conduct and to declare that the statute failed to satisfy strict scrutiny. Instead, the Court in *Yoder* adjusted both sides of the balance, making conduct more weighty and the state's interest more difficult to prove.

The Court conceded that the state's interest was highly important, even compelling.[260] For the Amish to prevail, therefore, the Court either had to determine that the State had not satisfied the least restrictive means test or it had to find a way for religious conduct to trump a state's compelling interest. The *Yoder* Court did both. First, the Court determined that the state's requirement that all children attend school until age sixteen was not the least restrictive means of achieving its goal of compulsory education.[261] That apparently was not enough, however, to tip the balance. The Court also adjusted the side of the scale weighing religiously motivated conduct.

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[253] *Id.* at 220; *see also* Boyle, *supra* note 2, at 63 (abandoning belief/conduct distinction in *Yoder*).

[254] *Yoder*, 406 U.S. at 215, 216, 218, 219, 235.

[255] *Id.* at 216.

[256] *Id.*

[257] *Id.* at 218.

[258] *Id.* at 215, 234–35 n.22.

[259] *See* Sherbert v. Verner, 374 U.S. 398, 402–03, 407 (1963); *see also supra* note 228 and accompanying text.

[260] *Yoder*, 406 U.S. at 221, 236; *id.* at 238 (Brennan, J., concurring) ("The importance of the state interest asserted here cannot be denigrated.").

[261] *Id.* at 236.

Within the Court's prevailing world view, religious conduct generally has been insubstantial,[262] but in *Yoder* the Court combined conduct with belief, which as we know is absolutely protected, to create an amalgam that would weigh more heavily than the state's compelling interest. Although some have argued that *Yoder* left the belief-conduct distinction "far behind,"[263] the source of the Court's conscientious argument for inseparability of the two spheres paradoxically lay within the belief/conduct paradigm itself. The Court needed only to ensure that faith and conduct were inseparable if different consequences flow from protecting faith or conduct. By treating conduct as inseparable from and interdependent upon faith, the Court could legitimately (within the contours of the paradigm) give it the full protection accorded faith. Essentially, the Court moved conduct into the belief field. Or, to state the matter somewhat differently, only by enrobing conduct in belief could the Court find a way for conduct, which it has treated generally as unnecessary to religion, to trump the state's compelling interest in universal education. The Court in *Yoder* did not succeed in shifting the paradigm—the paradigm had explicit force in the opinion[264] and in later free exercise decisions[265]—but its novel use of the paradigm planted the seeds for future revolution.[266]

Even if driven by the entrenchment of the belief/conduct paradigm, the breakdown of the hard distinction between belief and conduct in *Yoder* was a breakthrough, providing a fleeting glimpse of an entirely different way of envisioning religious claims. As I will discuss in Section VI, if we discard the Court's distinction between belief and conduct, we open up the possibility of

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[262] *See supra* notes 82–120 and accompanying text.

[263] Pepper, *supra* note 5, at 345; Pfeffer, *supra* note 233, at 1122.

[264] *Yoder*, 406 U.S. at 219–20.

[265] *See supra* note 236 (listing decisions since *Sherbert*). Free exercise scholars have recognized *Yoder* as a "paper tiger." *See* Beschle, *supra* note 250, at 564; *see also* Marshall, *supra* note 234, at 367 (stating *Yoder* "is so tied to its facts that it is without strong precedential value"); Pepper, *supra* note 5, at 333 (indicating *Yoder* likely to be limited to its facts).

[266] *See* KUHN, *supra* note 3, at 200 ("One central aspect of any revolution is . . . that some of the similarity relations change. Objects that were grouped in the same set before are grouped in different ones afterward and vice versa.").

Other indications of a potential revolution are evident in Justice Brennan's implicit criticism of the belief/conduct distinction in his concurrence in *Yoder*: "'[R]eligious freedom—the freedom to believe and to practice strange and, it may be, foreign creeds—has classically been one of the highest values of our society.'" *Yoder*, 406 U.S. at 238 (Brennan, J., concurring and dissenting) (quoting Braunfeld v. Brown, 366 U.S. 599, 612 (1961)); *see also* McDaniel v. Paty, 435 U.S. 618, 631 (1977) (Brennan, J., concurring in judgment) ("Clearly freedom of belief protected by the Free Exercise Clause embraces freedom to profess or practice that belief . . . .").

protecting a wider range of religious experience than can be protected within the belief/conduct paradigm.

As *McDaniel* and *Barnette* make clear, despite the apparent straightforwardness of the belief/conduct paradigm, the designation of the religious interest at issue provides a great deal of opportunity for what appears to be ad hoc decisionmaking. The most important question faced by the Court as it has operated within the belief/conduct paradigm has been whether the religious interest at issue is either belief or conduct. Despite the Court's introduction of strict scrutiny in *Sherbert*, once the interest has been identified, full protection or no protection generally has followed.[267] Thus, one of the important keys to understanding the Court's free exercise decisions lies in its handling of the terms "belief" and "conduct." The definitions of those terms and their relationship are highly reminiscent, if not identical to, the terms "faith" and "works under the law" in the Pauline theological tradition. Section III delineates the definition of "belief" and "conduct" in the Court's free exercise jurisprudence. Section IV then lays out the faith-works paradigms in Pauline theology.

III. THE MEANING OF "BELIEF" AND "CONDUCT" IN THE COURT'S JURISPRUDENCE

A. *Belief*

As a matter of psychological and spiritual reality, the terms "belief" and "conduct" denote shared aspects of the lived experience of religion. No religious conduct is wholly divorced from belief. Thus, it seems patently ridiculous for the Court to say, as it has, that regulation which affects religious conduct does not affect belief.[268] Yet, the Court has insisted on separating free

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[267] *See supra* notes 236–38 and accompanying text (discussing *Sherbert*).

[268] *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 699 (1986) ("Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute. This case implicates only the latter concern."); Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983) ([T]ax regulation did not "prevent . . . schools from observing their religious tenets."); Braunfeld v. Brown, 366 U.S. 599, 604 (1961) ("'*legislative powers of government reach actions only, and not opinions*'") (quoting 8 WORKS OF THOMAS JEFFERSON 113 (emphasis added by Court)); Reynolds v. United States, 98 U.S. 145, 164 (1878) ("'the legislative powers of the government reach actions only, and not opinions'") (citing 8 JEFF. WORKS 113); *cf.* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 882 (1990) (rejecting argument that "when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but *the conduct itself* must be free from governmental regulation") (emphasis added); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485

exercise claims into two mutually exclusive categories: belief *or* conduct[269] and on providing different protection for a religious interest depending on whether it is classified as one or the other. The very way in which the Court refers to religious conduct as "religiously motivated conduct," which envisions inner belief *causing* exterior conduct, indicates that the Court envisions the two terms as mutually exclusive. To understand more fully how the Court labels a particular interest as belief or conduct, one must search for their implicit definitions in the cases.

The belief the Court envisions is a very narrow conception of belief.[270] For the Court, protection of belief under the Free Exercise Clause is only protection against mind control,[271] or to state the proposition in positive terms, protection of belief preserves the individual's private, isolated, interior spiritual life, but no more.[272] Hence, burdens on belief in any full sense are not

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U.S. 439, 450 (1988) ("[I]ncidental effects of government programs . . . may make it more difficult to practice certain religions but . . . have no tendency to coerce individuals into acting contrary to their religious beliefs.").

[269] *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 699 (1986) ("Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute. This case implicates *only* the latter concern.") (emphasis added). The opposition of belief and conduct in the free exercise cases is just one example of the "[d]ualisms [that] pervade the constitutional jurisprudence of the Religion Clauses." Teitel, *supra* note 46, at 99.

The Court has been consistent in using the term "belief" throughout the cases. In fact, the usage is so consistent that when one encounters the phrase "theological position" in *Gillette* it seems out of place. Gillette v. United States, 401 U.S. 437, 462 (1971).

[270] For the sake of comparison, a broader definition of belief is intimated in Williams & Williams, *supra* note 31, at 847 ("[T]he government may burden an individual's belief by altering the natural world, the behavior of other persons, or its own behavior.").

[271] *See* McDaniel v. Paty, 435 U.S. 618, 643 n.* (1978) (Stewart, J., concurring in the judgment) ("[G]overnment has no business prying into people's minds . . . ."); Davis v. Beason, 133 U.S. 333, 342 (1890) (stating religious oppression making First Amendment necessary revealed "folly of attempting . . . to control the mental operations of persons"); *cf.* American Communications Ass'n v. Douds, 339 U.S. 382, 444 (1950) (Black, J., concurring and dissenting) (discussing right to "let [one's] mind alone.").

[272] There are times when the Court intimates that the Free Exercise Clause would protect worship as well as speech under the category of belief. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 603 (1961). Although this broader reading of belief appears elsewhere as well, see, for example, Giannella, *supra* note 30, at 1387, the *Smith* case makes clear that belief is that which goes on within the mind of the believer and not conduct such as worship. *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 882–90 (1990). The peyote use in that case was strictly for use during worship services and an integral part of such services. The Court's recent decision in *Lukumi* also makes clear that worship is categorized as conduct and not belief. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2225–34 (1993). The free speech

outlawed, but rather only interference with the individual's inner spiritual world.

The Court never self-consciously expands on its concept of belief, although it is the fundamental term in applying the belief/conduct paradigm. Whatever is not belief is automatically classified as conduct.[273] In other words, the Court poses for itself an either/or question. The question remains what this "belief" is. The Court's linguistic handling of the term leaves a trail of clues.

The first clue lies in the Court's use of the term "mere" to modify belief. In *Reynolds v. United States*, the Court introduced the belief-conduct distinction.[274] In its first, fateful elaboration of the distinction, it identified belief as "mere religious belief and opinions."[275] *Employment Division Department of Human Resources v. Smith* quoted that language;[276] reference to "mere opinion" appeared in *Braunfeld v. Brown*,[277] and the "mere possession of religious convictions" appeared in *Minersville School District v. Gobitis*.[278]

"Mere" means "[p]ure, unmixed . absolute, entire, sheer, perfect."[279] Thus, the Court's vision of belief is that of pure, perfect belief. It is unsullied by and unalloyed with other properties. In short, it is distinguishable from conduct. And it is "entire," a whole unto itself. It needs nothing beyond itself.[280] The modification of "belief" by "mere" implies that belief is capable of being isolated by itself in its perfect state.

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cases such as *Murdock* and *Follett* also reveal that the *expression* of belief is to be treated under the Free Speech Clause, not the Free Exercise Clause. *See supra* notes 121–167 and accompanying text.

[273] *See infra* notes 318–21 and accompanying text.

[274] Reynolds v. United States, 98 U.S. 145, 161–67 (1878).

[275] *Id.* at 166.

[276] Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 879 (1990).

[277] 366 U.S. 599, 603 (1961) ("The freedom to hold religious beliefs and opinions is absolute.").

[278] 310 U.S. 586, 594 (1940), *overruled by* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[279] 9 OXFORD ENGLISH DICTIONARY 628 (2d ed. 1989); *see also* WEBSTER'S NEW COLLEGIATE DICTIONARY 719 (1975) (defining "mere" as "pure, unmixed absolute, undiminished").

[280] The Oxford English Dictionary also defines "mere" as meaning "[h]aving no greater extent, range, value, power, or importance than the designation implies." *See* OXFORD ENGLISH DICTIONARY, *supra* note 279; *see also* WEBSTER'S NEW COLLEGIATE DICTIONARY, *supra* note 279, at 719 (defining "mere" as "exclusive of or considered apart from anything else: nothing more than: bare"). In short, belief is what it is and no more.

There is also an antique usage of "mere" which means a "boundary; also, an object indicating a boundary, [or] landmark." OXFORD ENGLISH DICTIONARY, *supra* note 279, at

A second set of clues tells us where this perfect, isolated belief resides: Within the interior recesses of the individual mind and spirit.[281] According to the Court, the very purpose of the Free Exercise Clause is to protect that inward space. The First Amendment was enacted to prevent government from attempting to "control the mental operations of persons"[282] or the "sphere of intellect and spirit."[283] Religious belief "'may justly be regarded as a response of the individual to an inward mentor, call it conscience or God.'"[284] In short, belief resides within the "inner life of man."[285]

Third, the play of belief within its inner sanctum is "illimitable,"[286] which means literally that it "cannot be limited."[287] What the Court seeks to protect is

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627. Given that "belief" is the landmark for free exercise cases, the choice of "mere" to modify it is intriguing.

[281] Jones v. Opelika, 316 U.S. 584, 594 (1942) *overruled by* Murdock v. Pennsylvania, 319 U.S. 105 (1943) ("[T]he mind and spirit of man remain forever free."); Hamilton v. Regents of the Univ., 293 U.S. 245, 268 (1934) (referring to the "right of private judgment"); Giannella, *supra* note 30, at 1386 ("[R]espect for the inviolability of conscience lies at the heart of the free exercise clause of the first amendment."); Kurland, *Burger Court*, *supra* note 2, at 3 ("Religious freedom must mean that one's obligations to his Creator is a matter between him and his God; it requires no man's leave."); *id.* at 17–18 ("[r]eligious affairs, . . . are the concern only of each individual and his church and his God."); *see also* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) (referring to "attitude of mind") (quoted in Braunfeld v. Brown, 366 U.S. 599, 605 (1961)); *id.* at 641–42 (referring to "intellectual individualism").

This emphasis on the individual believer was prevalent during the *Reynolds* era. *See* 1 BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (6th ed. 1893), *quoted in* MAGRATH, *supra* note 30, at 527 ("The temporal power might punish the evil deed, but not punish or even search after the thought of the mind."); EDWIN S. GAUSTAD, A RELIGIOUS HISTORY OF AMERICA 193, 199 (new rev. ed. 1990) (stating the role of Christianity was to provide for the "personal, private needs of the individual"; prevailing belief was "that changing the individual heart was sufficient cure for all troubles . . Salvation of souls had been the traditional business of much American religion.").

[282] Davis v. Beason, 133 U.S. 333, 342 (1890).

[283] West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (quoted in Wooley v. Maynard, 430 U.S. 705, 715 (1977)).

[284] *Id.* at 659 (Frankfurter, J., dissenting) (quoting United States v. Kauten, 133 F.2d 703, 708 (1943)).

[285] *Id.* at 655 (Frankfurter, J., dissenting); *see also id.* at 655–56 ("The individual conscience may profess what faith it chooses."); *cf.* John Locke, *A Letter Concerning Toleration*, *in* TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 173 (C. Sherman ed., 1965) ("All the life and power of true religion consist in the inward and full persuasion of the mind . . .").

[286] Jones v. Opelika, 316 U.S. 584, 595 (1942), *overruled by* Murdock v. Pennsylvania, 319 U.S. 105 (1943); *cf.* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–

the "free mind."[288] "Any person may . . . believe or disbelieve what he pleases."[289] In other words, within the solitary spaces of the inner soul there is freedom.[290]

Finally, belief is not a matter of shared experience. It is a solitary state.[291] It is a "'matter which lies solely between man and his God.'"[292] No one "'owes account'" of their belief to any other;[293] indeed, such an account may be impossible because belief can be inexpressible or illogical.[294] For "what is one man's comfort and inspiration is another's jest and scorn."[295] Belief concerns "mystery," not verifiable fact.[296] Courts are not even capable of penetrating the content of an individual's inner sanctum; it is beyond their

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35 (1977) ("[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will . . .").

287 OXFORD ENGLISH DICTIONARY, *supra* note 279, at 654.

288 West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

289 *Barnette*, 319 U.S. at 654 (Frankfurter, J., dissenting).

290 This last factor is what tugs the Court away from labeling religious interests as "belief." For a belief to be illimitable, incapable of limit, is tantamount to saying that it is inviolable. Yet, these are not perfect synonyms. The Court has, in the rare case, found instances where the illimitable play of belief was violated by outside factors. *See* discussion *infra* notes 303–10.

291 *See supra* note 271-72.

292 Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting 8 JEFF. WORKS 113).

293 *Id.*; *see also* United States v. Ballard, 322 U.S. 78, 86 (1944), *cert. granted*, 327 U.S. 773 (1946), *rev'd*, 329 U.S. 187 (1946). (One "may not be put to the proof of [one's] religious doctrines or beliefs."); *id.* at 87 (Free Exercise Clause "grant[s] the right to . . . answer to no man for the verity of [one's] religious views.").

The "any other" to whom no account of belief is owed includes the government and the courts. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988) ("This Court cannot determine the truth of the underlying beliefs that led to the religious objections here . . .") (citing Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 n.9 (1987)); *Ballard*, 322 U.S. at 86 ("[T]he First Amendment precludes" submission to the jury of "the truth or verity of respondents' religious doctrine or beliefs.").

294 *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.") (quoted in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2225 (1993)); *Ballard*, 322 U.S. at 86–87 ("Men may believe what they cannot prove . . . . Religious experiences which are as real as life to some may be incomprehensible to others . . [and] may be beyond the ken of mortals . . . .").

295 West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943).

296 Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 593 (1940), *overruled by Barnette*, 319 U.S. at 624; *see also Ballard*, 322 U.S. at 93–94 (Jackson, J., dissenting) ("James points out that 'Faith means belief in something concerning which doubt is still theoretically possible.' Belief in what one may demonstrate to the senses is not faith.") (footnote omitted).

"ken"[297] and "beyond the reach of law."[298] Nor can legislatures reach this inner sanctum.[299] The Court's vision of belief and therefore the believer brings to mind Søren Kierkegaard's description of the knight of religious faith:

> As was said, I have not found any such person, but I can well think him. Here he is. Acquaintance made, I am introduced to him. The moment I set eyes on him I instantly push him from me, I myself leap backwards, I clasp my hands and say half aloud, "Good Lord, is this the man? Is it really he? Why, he looks like a tax-collector!"[300]

In sum, the Court has accorded absolute protection to isolated, pure, perfect, solitary, illimitable belief. Which is to say, that it has accorded the highest protection to that which is the most difficult to reach by regulation. To say, therefore, as the Court does in *Sherbert v. Verner*, that "[t]he door of the

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[297] *See* Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices of a faith, or the validity of particular litigants' interpretations of those creeds."); Thomas v. Review Bd., 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); *see also* United States v. Ballard, 322 U.S. 78, 86–87 (1944), *cert. granted*, 327 U.S. 773 (1946), *rev'd*, 329 U.S. 187 (1946) (stating that "[r]eligious experiences may be beyond the ken of mortals"); *Lyng*, 485 U.S. at 449–50 (refusing to compare the "adverse effects" of statutes on religious adherents in two cases because the "Court cannot determine the truth of the underlying beliefs"); Braunfeld v. Brown, 366 U.S. 599, 609 (1961) ("[A] state-conducted inquiry into the sincerity of the individual's religious beliefs [is] a practice which a State might believe would itself run afoul of the spirit of constitutionally protected religious guarantees.") (footnotes omitted).

[298] *Gobitis*, 310 U.S. at 593; Jones v. Opelika, 316 U.S. 584, 593–94 (1942), *overruled by* Murdock v. Pennsylvania, 319 U.S. 105 (1943) ("Courts, no more than Constitutions, can intrude into the consciences of men or compel them to believe contrary to their faith . . . "); *see Jones*, 316 U.S. at 593 ("There are personal liberties which are beyond the power of government to impair. . . [They] belong to the mental and spiritual realm . . . where the judgments and decrees of mundane courts are ineffective to direct the course of man."); J. Brett Pritchard, Note, *Conduct and Belief in the Free Exercise Clause: Developments and Deviations in* Lyng v. Northwest Indian Cemetery Protective Ass'n, 76 CORNELL L. REV. 268, 270 (1990) ("[M]ost commentators recognize that a state can never successfully regulate belief per se."); *cf.* American Communications Ass'n v. Douds, 339 U.S. 382, 445 (1950) (Black, J., dissenting) ("[T]he most tyrannical government is powerless to control the inward workings of the mind.").

[299] *See* Reynolds v. United States, 98 U.S. 145, 164 (1878) ("'the legislative powers of the government reach actions only, and not opinions'") (citing 8 JEFF WORKS 113)).

[300] SØREN KIERKEGAARD, FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH 49 (Walter Lowrie trans., 1954).

Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such" is to say very little.[301] Opening that door would make little difference because that which is on the other side is largely inaccessible.[302] Once one has focused upon the Court's definition of belief, one's surprise that there are so few cases invalidating burdens on religious conduct is displaced by wonder that there are any cases at all finding unconstitutional burdens on religious belief.

There are four such cases, however.[303] The question remains, therefore, how they fit into the Court's larger belief/conduct paradigm. First, *Ballard* is consistent with the Court's vision of belief as unreachable. In that case, the Court held that a jury charge could not direct jurors to determine the truth or falsity of religious belief because proof of belief is "beyond the ken of mortals."[304] Second, the three remaining belief cases carve out a narrow exception to the presumption that belief is beyond the reach of the state. Each of those cases stands for a single proposition: forced profession (through a salute, a license plate, or an oath) of a belief conflicting with one's religious beliefs unconstitutionally infringes upon the absolute right to religious belief. They undeniably involve speech interests which (in *Barnette* and *Wooley*) were weighed against the state's interest,[305] but the rhetoric and the reasoning of the three opinions also reveal a Court fundamentally concerned with the absolute right to believe.[306] In the speech cases involving prohibited religious speech, the Court has identified speech as conduct rather than belief and weighed the interests of the state against the right to the speech,[307] but in the belief cases, *compelled* expression finds a pipeline into private belief which triggers absolute protection. Breaking through its usually rigid dichotomy between what is external and what is internal, the Court recognized that a narrow category of

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[301] Sherbert v. Verner, 374 U.S. 398, 402 (1963).

[302] This is attested to by the fact that the Court has only found five instances in 115 years where regulation reached belief. *See supra* notes 40–58, 198–208 (discussing regulations affecting belief and *Yoder*). On this score, the Court seems to have taken a page from Spinoza. *See* BENEDICT DE SPINOZA, A THEOLOGICO-POLITICAL TREATISE AND A POLITICAL TREATISE 118–19 (R.H.M. Elwes trans., Dover Publications, Inc. 1951) (1883) ("religion . . stands outside the sphere of law"; "the supreme right of free thinking, even on religion, is in every man's power, and . . . it is inconceivable that such power could be alienated").

[303] *See supra* Section II.A.

[304] United States v. Ballard, 322 U.S. 78, 87 (1944) *cert. granted*, 327 U.S. 773 (1946), *rev'd*, 329 U.S. 187 (1946).

[305] *See supra* notes 63 and 72 and accompanying text.

[306] *See supra* Section II.A.

[307] *See supra* Section II.B.4.

external regulation could "invade[] the sphere of intellect and spirit."[308] In other words, the Court's artificial distinction between internal and external spheres disintegrated with the Court's explicit recognition that when individuals are forced to speak in conflict with their beliefs, their beliefs could be undermined.[309] Such a move introduces tension into the belief/conduct paradigm, which in turn can provide impetus for change.[310]

The Court's definition of religious belief should not be confused with its references to secular belief in its free speech jurisprudence. The belief which receives absolute protection under the Court's free exercise jurisprudence is nonverifiable belief which is preserved for nonutilitarian reasons. The soul is a special preserve wherein one may or may not take the leap of faith. It is both difficult for government to interfere in these inner recesses and in some sense evil. Government is prohibited from interfering with these inward worlds regardless of its reasons.

Secular beliefs, on the other hand, are not sacrosanct jewels within the vault of the individual human soul. Rather, they are commodities for exchange in the marketplace of ideas which exist to test ideas for truth.[311] They are protected under the speech clause for the utilitarian purpose of ensuring that the "'debate on public issues [will] be uninhibited, robust, and wide open.'"[312] Secular ideas are presumed to be capable of being tested[313] and therefore can

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[308] West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *see* Wooley v. Maynard, 430 U.S. 705, 715 (1977) (quoting *Barnette*, 391 U.S. at 642). The very use of the term "invade" reveals the Court's usual mindset which assumes that the external world lies in a camp distinct from interior belief.

[309] *See Wooley*, 430 U.S. at 715 ("Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'") (quoting *Barnette*, 319 U.S. at 642)); Torcaso v. Watkins, 367 U.S. 488, 496 (1961) (invalidating Maryland constitution's test oath requirement because it "invades the appellant's freedom of belief").

[310] *See supra* note 4.

[311] *See* Elrod v. Burns, 427 U.S. 347, 357 (1976).

[312] *Id.* at 357 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)); *cf.* Jones v. Opelika, 316 U.S. 584, 594 (1942) (referring to the "principal bases of democracy [as] knowledge and discussion").

[313] There are two means of testing ideas in the free speech and free press cases. Secular ideas can either be tested to determine if they are factually true (and false facts have little value) or they can be tested in the Darwinian sense through competition in the marketplace of ideas. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974).

be proved (or disproved) in the marketplace.[314] Unlike religious belief, which is a purely personal and private matter, secular belief is properly public and should be exposed so that "falsehoods" can be ferreted out.[315] Government may interfere with such beliefs, if its reasons are good enough, as long as the market is not seriously undermined. There is no "fetish of beliefs"[316] per se in the speech context.[317]

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[314] *Elrod*, 427 U.S. at 357 (referring to the "fundamental understanding that '[c]ompetition in ideas and governmental policies is at the core of our electoral process'") (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968)).

[315] American Communications Ass'n v. Douds, 339 U.S. 382, 396 (1950) ("Falsehoods and fallacies must be exposed . . ").

[316] *Id.* at 410.

[317] Which is not to say that secular beliefs should *not* receive the same level of protection as religious beliefs. My interest in this section is to describe the Court's definition of religious belief. The Court's definition of secular belief is offered by way of contrast.

This subtle difference in the treatment of the types of belief does not appear to have been consciously contemplated at the time of the earliest belief case, *Barnette*, in which the Court stated that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). On its face, this language arguably equates secular and religious beliefs. Justice Douglas argued for similar treatment in his dissent in *Gillette*. *See* Gillette v. United States, 401 U.S. 437, 469 (1971) (Douglas, J., dissenting) (arguing for invalidation of disparate treatment of religious and secular beliefs on equal protection grounds). But the secular belief cases do not bear out this implication.

The Court's distinction between religious and secular belief is most obvious when one compares its belief/conduct paradigm against its predominant free speech clause paradigm, the marketplace of ideas. Others have argued for an understanding of the protection of secular belief, however, that would bring the two lines of belief cases into more congruence. They characterize expression as valuable because it engenders and secures self-actualization. *See, e.g.*, MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 9 (1984) (asserting that one of the "values served by the first amendment's freedom of expression [is] 'assuring individual self-fulfillment'"); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) ("Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual. The liberty theory justifies protection because of the way the protected conduct fosters individual self-realization and self-determination."). On that theory, secular belief is important in its interior existence and not just because it might contribute to the external exchange of ideas.

B. *Conduct*

Within the Court's belief/conduct paradigm, every religious interest that is not belief is conduct. Even the slightest action, for example, bare membership in an organization, can qualify as conduct regulable by the state.[318] As a rhetorical flourish in the free exercise cases, the Court has at times included in its list of religious interests to be protected belief, conscience, thought, expression of belief, and worship.[319] But belief is the only religious interest that has been accorded absolute protection. Religious expression has been subject to weighing against the state's interest and has been protected exclusively under the free speech clause.[320] Acts of worship also have been characterized as conduct and weighed against the state's interest.[321]

Although the Court in later cases refers to "religiously motivated conduct," the conduct in the free exercise cases is defined through its relationship to the law rather than its relationship to belief. Two examples from the cases are well known: "Laws are made for the govern[ance] of actions . . . "[322] "Law is concerned with external behavior and not with the inner life of man."[323] Conduct is the peculiar provenance of the law Actions are properly judged, not by an internal relationship with the divine, but rather by the law. Thus,

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[318] *See supra* notes 84–87 and accompanying text (discussing Davis v. Beason, 133 U.S. 333 (1890)).

[319] *See supra* note 47, 272, and 321.

[320] *See supra* notes 121–67 and accompanying text; Pfeffer, *supra* note 233, at 1125 (stating expression is a form of action).

[321] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2225–34 (1993) (classifying animal sacrifices central to worship services as conduct and stating that ordinance targeting such conduct could be justified by state's compelling interest, while ordinance targeting belief would be absolutely prohibited); Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 876–90 (1990) (peyotists' use of peyote during worship service classified as conduct and therefore subject to regulation); Widmar v. Vincent, 454 U.S. 263, 269 (1981) (treating regulation of "worship" solely as regulation of speech); Prince v. Massachusetts, 321 U.S. 158, 171–76 (1944) (Murphy, J., dissenting) (failing to protect "worship"); *see also* Laycock, *Remnants*, *supra* note 2, at 1–4; Lupu, *supra* note 47, at 757 (asserting that regulation upheld in *Smith* directly affected worship). That acts of worship would not be absolutely protected was foreshadowed in *Barnette*, where the Court said that "freedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction." *Barnette*, 319 U.S. at 639.

[322] Reynolds v. United States, 98 U.S. 145, 166 (1878).

[323] West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 655 (1943) (Frankfurter, J., dissenting). This is reminiscent of St. Thomas Aquinas' statement that, "[L]aw is a certain rule and measure of acts whereby man is induced to act or is restrained from acting." SAINT THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS 12 (William P. Baumgarth & Richard J. Regan, S.J. eds., 1988).

conduct can conflict with the law and be judged by the law.[324] Only religious conduct that happens to be consistent with the state's law is protected.

One aspect of conduct is certain. Belief is internal while conduct is "external,"[325] of the world.[326] Belief is an inward feeling; conduct is outward action. Governmental regulation virtually cannot reach the inward universe of belief,[327] but it can and should "interfere when principles break out into overt acts"[328] in the external, earthly arena.[329] "[T]he mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows."[330] One never sees reference in the free exercise cases to conflict between belief and the common good, but the cases are rife with the pitting of religiously motivated conduct against the needs of the society.[331]

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[324] *See* Davis v. Beason, 133 U.S. 333, 342–43 (1890) ("[R]eligion . . must be subordinate to the criminal laws of the country . . . .").

[325] *Barnette*, 319 U.S. at 655 (Frankfurter, J., dissenting).

[326] Jones v. Opelika, 316 U.S. 584, 594 (1942), *overruled by* Murdock v. Pennsylvania, 319 U.S. 105 (1943) (stating one's "actions rest subject to necessary accommodation to the competing needs of his fellows").

[327] *See supra* note 299 and accompanying text.

[328] Reynolds v. United States, 98 U.S. 145, 163 (1878).

[329] *Jones*, 316 U.S. at 593 ("[R]ights of which our Constitution speaks have a[n] . . earthly quality.").

[330] *Id.* at 594.

[331] *See, e.g.*, Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 888 (1990) ("Any society adopting [the compelling interest test and therefore protecting religiously motivated conduct from regulation] would be courting anarchy."); Bowen v. Roy, 476 U.S. 693, 707 n.17 (1986) (stating "anarchists will no doubt applaud" forcing the government to defend every rule under strict scrutiny); United States v. Lee, 455 U.S. 252, 259 (1982) ("To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."); Sherbert v. Verner, 374 U.S. 398, 403 (1963) ("The conduct or actions [that may be] regulated have invariably posed some substantial threat to public safety, peace or order."); Braunfeld v. Brown, 366 U.S. 599, 605 (1961) (referring to "religious practices [which] conflicted with the public interest"); *Jones*, 316 U.S. at 593 (referring to state's "right to employ the sovereign power explicitly reserved to the State by the Tenth Amendment to ensure orderly living without which constitutional guarantees of civil liberties would be a mockery"); *see also Reynolds*, 98 U.S. at 166–67; Magrath, *supra* note 30, at 532 ("Any other alternative [than the belief/conduct distinction] would produce chaos."); *cf.* Laycock, *Remnants*, *supra* note 2, at 68 (Court views free exercise challenges as a "threat to orderly government.").

C. *The Relationship Between Belief and Conduct*

The Court treats belief and conduct not only as mutually exclusive terms, but also as a static dualism. Within the Court's paradigm, belief receives absolute protection while conduct receives little or no protection.[332] The Court has limited protection of conduct on the ground that "Government [w]ould exist only in name" where every law could be riddled with exceptions for religious practices.[333] On this view, the Court can only protect religion to the extent that such protection does not undermine social cohesion.[334] The corollary to the Court's focus on social cohesion is that religious conduct must be subordinate to the state's law:

> To permit [a man to excuse his practices because of his religious belief] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[335]

Accordingly, the Court has protected government by limiting the reach of the Free Exercise Clause to belief and defining belief as beyond the reach of government exertion.

The implicit reasoning in the belief/conduct cases is that religion is adequately protected where belief is protected and not unacceptably damaged where conduct is not.[336] If we are to take seriously that the Court intends to protect the greatest amount of religion possible while keeping the fabric of society from unraveling,[337] then it must mean that religion is most essentially

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[332] *See* discussion of cases in Section II.

[333] *Reynolds*, 98 U.S. at 167.

[334] *See* United States v. Lee, 455 U.S. 252, 259 (1982) ("To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."); McDaniel v. Paty, 435 U.S. 618, 643 n.* (1978) (Stewart, J., concurring in the judgment) ("This distinction reflects the judgment that, on the one hand, government has no business prying into people's minds or dispensing benefits according to people's religious beliefs, and, on the other, that acts harmful to society should not be immune from proscription simply because the actor claims to be religiously inspired.").

[335] *Reynolds*, 98 U.S. at 167; *see Jones*, 316 U.S. at 595 (Legislation affecting First Amendment concerns "is scrutinized to see that the interferences allowed are only those appropriate to the maintenance of a civilized society.").

[336] *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 699 (1986); Wisconsin v. Yoder, 406 U.S. 205, 219-20 (1972).

[337] *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 595 (1940) ("In a number of situations the exertion of political authority has been sustained, while basic considerations of religious freedom have been left inviolate.").

belief. Conduct may be important but it is not central to the achievement of religious being.[338] Moreover, the belief that must be protected (*i.e.*, absolutely protected) is only pure belief unmixed with conduct. The Court never expresses concern about the harm to belief that could arise from the regulation of conduct. To the contrary, its frequent justification for permitting the regulation of conduct is that the regulation does not reach belief, which is protected absolutely. In sum, the Court envisions vital religion as a solitary event occurring within the soul of man. Whatever else religion might require need be permitted only if it is not inconvenient to the society.

Finally, despite the Court's mutually exclusive definitions of the terms "belief" and "conduct," their designation in the cases is ad hoc. Because burden on belief exists as a matter of fact in every free exercise case (whether the Court designates the religious interest as belief or conduct), which is to say that religious conduct is never divorced from religious belief, the Court has a good deal of discretion when identifying whether the affected interest is belief or conduct. This paves the way for the Court to reverse itself when presented with identical facts, even as the paradigm frames its decision in each case.[339] Having laid out the Court's use of the belief/conduct paradigm and its definitions of "belief" and "conduct," we are ready to turn to a discussion of Pauline theology. Comparison of the Court's belief/conduct paradigm with Paul's preconversion paradigm brings some interesting truths to light.

IV. PAULINE THEOLOGY

With minor variations, the Court has resorted to the belief/conduct paradigm throughout its free exercise jurisprudence. As I have discussed in more detail in Section III, at the core of its world view is a particular vision of religious life. It is composed of vital, necessary belief and inconsequential conduct. The question remains why the Court would choose to remain true to a distinction that is so at odds with religious reality wherein religious conduct is

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Such thinking was characteristic of Enlightenment thinking about religion. *See* Martin E. Marty, *On a Medial Moraine: Religious Dimensions of American Constitutionalism*, 39 EMORY L.J. 9, 12 (1990) ("Enlightenment-grounded religion did not refer much to salvation, to religion as practice, experience, or emotion. The characteristic terms were 'opinion,' 'belief,' 'mind,' 'truth,' 'reason,' 'modes of thinking,' 'sentiments,' and 'principles.'"); *cf.* Pepper, *supra* note 2, at 304–05 (questioning Enlightenment effect on Bill of Rights).

338 *See also* SPINOZA, *supra* note 302, at 118 (noting religion "consists not so much in outward actions as in simplicity and truth of character [which] are not produced by the constraint of laws").

339 *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); *Gobitis*, 310 U.S. at 586.

permeated with religious belief and highly important to the religious life. Their depiction of religious "reality" seems unreal. There are two answers to this quandary. First, the distinction nicely serves at least some of the Court's purposes despite its lack of authenticity. The Court has repeatedly justified its hard distinction between belief and conduct on the ground that the alternative is anarchy [340] If the Court's role is to ensure social order and the distinction clearly serves that role, then its failure to capture religious reality is unfortunate as an intellectual matter, but is no reason to drop the distinction.

Second, the Court is drawing upon ingrained and embedded social presuppositions. At least some portion of its allegiance to the belief/conduct paradigm probably arises from the force of Protestant theological concepts, especially Pauline concepts, in our society. The Court is understandably drawing upon familiar theological doctrines to formulate its own answers to difficult freedom of religion questions. Unfortunately for religious freedom, when the Court adapts the Protestant Pauline relationship between faith and works to its more secular purposes, it fails to accommodate a wide variety of religious experience. The following is an exegesis of the Protestant Pauline relationship between faith and works which is offered in the hope of illuminating the Court's repeated use of the belief/conduct paradigm.

The writings of Paul laid the groundwork for much of Christian and especially Protestant theology [341] Paul's vision caused a "religious revolution" which introduced a new paradigm into the Christian tradition.[342] The relationship between faith and works was a pivotal theme in his writings[343] and became central to Christian theology [344] Rudolf Bultmann, and more recently,

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[340] Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 879 (1990); Reynolds v. United States, 98 U.S. 145, 161–67 (1878). The flip side of the fear of anarchy in *Reynolds* is the drive to "extend the values of a dominant group to the larger society." Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF L. REV 297, 300 (1988).

[341] ERNST KASEMANN, PERSPECTIVES ON PAUL 138 (1971) (referring to Paul as "the most important reflective theologian in the New Testament").

[342] *See* MCFAGUE, *supra* note 3, at 82; *see also* GREEN, *supra* note 3, at 49 ("[L]ike the natural sciences, theology employs paradigms in thinking about its object.").

[343] *See* Rudolf Bultmann, *Paul, in* INTERPRETING FAITH FOR THE MODERN ERA 202, 226 (Roger A. Johnson ed., 1987) ("However much Paul's doctrine of the law is polemic in character, it is by no means something occasional and secondary, but rather contains his central thoughts."); H.J. SCHOEPS, PAUL. THE THEOLOGY OF THE APOSTLE IN THE LIGHT OF JEWISH RELIGIOUS HISTORY 168–69 (1961) (referring to "Pauline understanding of the law [as] the most intricate doctrinal issue in his theology").

[344] *See* W.D. DAVIES, JEWISH AND PAULINE STUDIES 91 (1984) [hereinafter DAVIES, PAULINE STUDIES] ("[T]he treatment of the Law by Paul has been and is one of the most discussed subjects in Christian theology and particularly in [New Testament] studies."); *id.* at 94 ("[D]octrine of justification by faith alone, with its corollary of the inadequacy of the

E.P. Sanders, have made it clear that Paul did not envision a single relationship between faith and works.[345] Rather, Paul articulated two paradigms of the relationship of faith and works.[346]

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law, has been taken within Protestantism as the clue to Paulinism."); *see also* LUCIEN CERFAUX, THE SPIRITUAL JOURNEY OF SAINT PAUL 189 (John C. Guiness trans., 1968) (asserting that Christian theology is derived "from the whole historical experience of the calling and apostolate of Paul").

This is not to say, however, that the *dualistic* pairing of faith and works forms the heart of Paul's work. The "centre of [his] thought" was not the old law, but rather the arrival of the messiah in Christ, which is apparent in the dialectical relationship between faith and works of love. W.D. DAVIES, PAUL AND RABBINIC JUDAISM: SOME RABBINIC ELEMENTS IN PAULINE THEOLOGY 223 (4th ed. 1980) [hereinafter DAVIES, RABBINIC JUDAISM].

Joseph Fitzmyer concedes that Paul's teaching about the Law has preoccupied much of Christian theology since the Reformation but also argues that it was not central to his theology. *See* Joseph A. Fitzmyer, S.J., *Paul and the Law, in* A COMPANION TO PAUL 73, 73 (Michael J. Taylor, S.J. ed., 1975).

Some have argued that the pairing of belief and works is essentially a critique of Judaism. *See, e.g.*, BAUR, NEW TESTAMENT THEOLOGY 181 (n.d.) (quoted in 1 OTTO PFLEIDERER, PAULINISM: A CONTRIBUTION TO THE HISTORY OF PRIMITIVE CHRISTIAN THEOLOGY 78 n.1 (Edward Peters trans., London, Williams & Norgate 1877)); J. CHRISTIAAN BEKER, PAUL THE APOSTLE 268 (1980) ("Paul's antithesis of faith and works constitutes a radical polemic against Judaism."). This view, which Paul may or may not have shared, is based on the mistaken notion that within Judaism salvation can be achieved through works alone. *See* E.P. SANDERS, PAUL, THE LAW, AND THE JEWISH PEOPLE 20 (1983) ("A study of Jewish material does not reveal such a position."); *see also infra* note 393 and accompanying text (discussing role of grace and works in Jewish life). That theme is not relevant to this Article. Rather, the sole focus here is on the structural relationship of the concepts of belief and works per se.

[345] *See* Bultmann, *supra* note 343, at 218–35; SANDERS, *supra* note 344, at 114 ("[W]hen Paul opposed 'faith' to 'law,' the question was what is required to be a member of the group that would be saved. [W]hen the topic was how people in that group should behave, he saw no opposition between faith and law."); *see also id.* at 145.

[346] *See* Bultmann, *supra* note 343, at 218–35; *see also* Charles H. Cosgrove, *Justification in Paul: A Linguistic and Theological Reflection*, 106 J. BIBLICAL LITERATURE 653, 660 (1987) ("[T]wo different ways of relating justification to 'works' are in evidence.") (emphasis omitted); SØREN KIERKEGAARD, WORKS OF LOVE 112 (Howard Hong & Edna Hong trans., 1962) (discussing *Romans* 13:10).

One author, Bultmann, divides analysis of Paul's notion of the relation between faith and works into the pre-Christian life and the Christian life. *See* Bultmann, *supra* note 343, at 218. Another author has drawn the same conclusion from a slightly different stance. Keller states that Paul conceived of "two laws in man's nature [that] operate on different levels." EDMUND B. KELLER, SOME PARADOXES OF PAUL 138 (1974). In other words, there is the law which exists for the pre-Christian as a barrier to salvation and there is Christ's law.

Paul had one vision of the relationship between faith and works in a human life prior to an identity-changing encounter with Christ and another vision of their relationship in the Christian life. As W.D. Davies points out, Paul divided his own life clearly into two parts, his life under the law when he was a Jew and his life in Christ.[347] Each life-segment is characterized by a different view of the law in relationship to justification and a corresponding difference in the relationship of faith and works.

In the first paradigm, Paul pitted faith against works performed under the law. For the nonbeliever, the two terms are paired opposites,[348] dualistic,[349] antithetical.[350] They pose an either/or question[351] which is crucial to an individual's salvation. The individual can choose to attempt salvation through faith in Jesus Christ or by performing works under the law For Paul, the true path to salvation requires the individual to reject the latter and to embrace the former.

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[347] DAVIES, PAULINE STUDIES, *supra* note 344, at 110 ("He divided his own life clearly into two parts: first, his life under the law when he was a Jew, and second, his life in Christ.").

[348] *See* Bultmann, *supra* note 343, at 230 ("[F]aith is the exact opposite of a 'work.'"); SCHOEPS, *supra* note 343, at 202 (referring to "absolute opposition between faith . . and the law"); *see also* LUCIEN CERFAUX, THE CHRISTIAN IN THE THEOLOGY OF ST. PAUL 389 (1967) (referring to "opposition between Christian justice, which is derived from faith, and justice derived from works"). Bultmann also notes that faith is the condition for grace (while the law is not) and that "[t]hat is the reason why 'grace' as well as 'faith' can likewise be named as the opposite of 'works' to designate the basis for rightwising." 1 RUDOLF BULTMANN, THEOLOGY OF THE NEW TESTAMENT 319 (Kendrick Grobel trans., 1951).

[349] *See* Leo Baeck, *Romantic Religion, in* JUDAISM AND CHRISTIANITY 189, 246 (Walter Kaufman ed., 1958) ("Sin [derived from works under the law] and justice [derived from faith] thus confront each other in a harsh dualism . . . ."); *id.* at 249 ("However one chooses to put it, it is always the same opposition that defines the essence of religion, first for the apostle [Paul] and then for the reformer [Luther]."); SCHOEPS, *supra* note 343, at 200 (referring to Paul's "fundamental dualistic position: the aeon of the law—the aeon of Christ").

[350] *See* BEKER, *supra* note 344, at 268 (referring to "antithesis of faith and works"); PFLEIDERER, *supra* note 344, at 78 (characterizing relationship of faith and works as an "antinomy"); *id.* at 88 (referring to "exclusive disjunction of these two ideas").

[351] *See Galatians* 3:23 ("Now before faith came, we were confined under the law, kept under restraint until faith should be revealed. So that the law was our custodian until Christ came, that we might be justified by faith. But now that faith has come, we are no longer under a custodian . . ."); BULTMANN, *supra* note 348, at 266; Bultmann, *supra* note 343, at 205; PFLEIDERER, *supra* note 344, at 74; SCHOEPS, *supra* note 343, at 168, 178; *cf.* Bultmann, *supra* note 343, at 218 ("It must be noted, however, that the being of man prior to faith first becomes visible in its true lineaments only from the standpoint of faith itself and that it is from this perspective alone that it can be understood.").

This is not to say that the law, and therefore works under the law, in and of themselves are bad, even in the preconversion life.[352] Rather, such works cannot single-handedly ensure salvation. "Paul does not criticize the law from the standpoint of its *content*, but with respect to its *significance* for man . . ."[353] Our incapacity to fulfill the letter of the law teaches us that we are sinful and therefore in need of salvation and thereby serves as the door to true salvation. Thus, the law is both the dispensation of death and condemnation[354] and "holy . . . just and good."[355]

In his second paradigm, faith and works of love are united. For the believer, belief and works of love relate to one another as two poles of a dialectic which compose the Christian life. In other words, the one (faith) feeds into the other (works of love) and vice versa, which is to say the one energizes the other.[356] This aspect of Paul's thought is often buried beneath the attention afforded the first paradigm which is characterized as a dualistic relationship between the two terms in the life of the nonbeliever.[357]

The Court, ironically enough, has adopted the first paradigm, which poses an either/or question for *nonbelievers*, to assess whether the state may burden the religious interests of *believers*. By envisioning the religious life as embodied most essentially within belief and not necessarily conduct, the Court judges the religious life under a matrix only relevant to Protestant conversion.

A. *The Dualistic Pairing of Faith and Works Under the Law in the Preconversion Paradigm*

Paul envisioned two routes to salvation: the true route through belief and the false route through works of the law [358] Belief in Christ, without more, can lead to salvation.[359] But the accomplishment of works under the law without

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[352] *See Romans* 3:19–20.

[353] Bultmann, supra note 343, at 225.

[354] See Romans 7: 9–11; 2 Corinthians 3:7, 9.

[355] *Romans* 7:12; *see also Galatians* 3:21 ("Is the law then against the promises of God? Certainly not!").

[356] Fitzmyer, *supra* note 344, at 85 ("Love . . . is itself a dynamic force impelling man to seek the good of others, energizing his faith in Christ Jesus.").

[357] For example, one scholar confuses the two spheres by arguing that the Christian life is not antithetical to the law. *See* DAVIES, PAULINE STUDIES, *supra* note 344, at 96 (arguing that "Pauline Christianity is not primarily an antithesis to law").

[358] *Galations* 3:2 ("Did you receive the Spirit by works of the law or by hearing with faith?"); *see also* Bultmann, *supra* note 343, at 226 ("The way of the law, when it is understood as a means of earning righteousness, is false.").

[359] "[S]alvation is available to all on the same basis, faith." SANDERS, *supra* note 344, at 48.

belief will not.[360] "Either 'law' or 'redemption,' this was the choice."[361] The relationship between faith and works under the law within Pauline theology is dualistic, antithetical. "[T]he relation between law and faith . . . presented itself to [Paul] in theory . . as a purely exclusive and negative relation."[362]

In his paradigm of the preconversion dualistic opposition of faith and works, Paul implied an opposition between internal and external realms. Faith is envisioned as an inward state[363] of the individual soul[364] while works under the law are purely external.[365] Works of the law are worldly,[366] or, as

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[360] *Galatians* 3:10–11 ("For all who rely on works of the law are under a curse . . . . Now it is evident that no man is justified before God by the law . . . .").

[361] Leo Baeck, *The Faith of Paul*, *in* JUDAISM AND CHRISTIANITY 137, 163 (Walter Kaufmann ed., 1958); *see also* PFLEIDERER, *supra* note 344, at 74.

[362] PFLEIDERER, *supra* note 344, at 72 (emphasis omitted).

[363] *See Romans* 14:22 ("The faith that you have, keep between yourself and God . ."); *see also Galatians* 5:22 ("[F]ruit of the Spirit is love, joy, peace, patience, kindness, goodness, faithfulness, gentleness, self-control "). Theologian Otto Pfleiderer, writing at the time *Reynolds* was decided, is typical on this score. *See* PFLEIDERER, *supra* note 344, at 164 ("[F]aith must be the inward recognition of Christ as the Lord . . ."); *id.* at 167 ("[F]aith is . in the human heart . . "); *id.* at 170 ("[F]aith is the subjective taking into our inmost self of the principle of salvation . "); *see also* DAVIES, RABBINIC JUDAISM, *supra* note 344, at 225; *cf.* KRISTER STENDAHL, PAUL AMONG JEWS AND GENTILES 78, 83 (1976) ("Paul has been hailed as a hero of the introspective conscience . . . [but] Augustine may well have been one of the first to express the dilemma of the introspective conscience."). Baeck unflatteringly refers to this notion of faith as "religious egoism." BAECK, *supra* note 349, at 211. *See also* BULTMANN, *supra* note 348, at 259 (describing the "true will of man" as the "'inward man'"); Bultmann, *supra* note 343, at 231 (characterizing faith as a "new self-understanding"). Caution is necessary on this point—that faith is an inward, individualized occurrence—because faith is not merely "self-understanding," as Kasemann has taken pains to stress, but rather a relationship to God. KASEMANN, *supra* note 341, at 77

[364] *See* Bultmann, *supra* note 343, at 231 ("God's revelation in Christ is not the communication of knowledge as such, but rather an occurrence for man and in man . . . ."); CERFAUX, *supra* note 348, at 442 (Upon "[t]he repeal of the old law . . . man found himself, in all his weakness, *alone* before God."); ROBERT JEWETT, CHRISTIAN TOLERANCE 52 (1982) (discussing Paul's "insistence upon the autonomy of the individual conscience"); KASEMANN, *supra* note 341, at 74 ("The church can take the burden of faith from no one; each must hazard for himself."); KIERKEGAARD, *supra* note 346, at 117 ("Everyone as an individual . must first relate himself to God and the God-demand.").

[365] Baeck, *supra* note 349, at 205 ("the life of man has its law and its content only outside itself"); PFLEIDERER, *supra* note 344, at 70 (works of the law are "unspiritual, purely external"); *id.* at 76 (characterizing works under the law as "external acts"); Fitzmyer, *supra* note 344, at 77 ("Paul describes the *negative role* of the Law: its inability to give life, because it is nothing more than an external norm."); *id.* at 76 (describing negative role of law).

Kierkegaard refers to them, "busyness."[367] Belief that achievement through works under the law will lead to salvation "fetters" the individual with "the goods, customs, and the usages of this world."[368]

Within the preconversion paradigm, faith need not be logical.[369] It "*depends on no human conduct whatever.*"[370] Rather, the "Christian submits himself . . . to the grace and action of God . . . ."[371] The "aim is not doing at all, but receiving."[372] Thus, belief, or faith, is the "antithesis of all formal concrete fulfilling of the law, for it is rooted solely in the heart's confident trust in God's grace; it is in no way a human achievement or ability."[373]

Works under the law are superfluous to salvation. They are "relegated to the civil sphere" and part of the "sphere of the police,"[374] both of which are external.[375] Before Christ appeared, the only route to salvation was through fear of God and obedience to Jewish law, the Torah.[376] Paul, who was a Jew,

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366 *Galatians* 5:19 ("works of the flesh").

367 KIERKEGAARD, *supra* note 346, at 105 (discussing *Romans* 13:10, authored by Paul).

368 SCHOEPS, *supra* note 343, at 211.

369 PFLEIDERER, *supra* note 344, at 161–62.

370 SCHOEPS, *supra* note 343, at 212 (emphasis added).

371 CERFAUX, *supra* note 348, at 398.

372 PFLEIDERER, *supra* note 344, at 165. *See* Bultmann, *supra* note 343, at 206 (characterizing faith as a "resolution to surrender"); *id.* at 228 ("righteousness . . . is utterly the gift of God"); *see also* PFLEIDERER, *supra* note 344, at 182 ("Pauline justification has its ground, as we have seen, not in man at all, in no corresponding righteousness or good moral character, and so forth, but it is groundless as far as man is concerned, and has its ground in the favour of God . . ."); SCHOEPS, *supra* note 343, at 205 ("True righteousness which discloses itself as the righteousness of Christ in the act of faith can be bestowed only by God, and then makes man righteous too. This is what Paul understood by justification by faith. Paul had already fought against faith in one's own righteousness . . . "); CERFAUX, *supra* note 348, at 389 ("Christian justice . [is] a gift from God. All it asks from man is faith; from it he receives everything."); WILLIAM N. CLARKE, AN OUTLINE OF CHRISTIAN THEOLOGY 408, 412 (1954).

Of course, receiving is in some sense an action. Bultmann characterizes faith as an "act of obedience." BULTMANN, *supra* note 348, at 314. But it is an internal action, as opposed to an external action, a "'work.'" *Id.* at 315. In other words, it is not an "accomplishment." Bultmann, *supra* note 343, at 230.

373 SCHOEPS, *supra* note 343, at 212 (citation omitted); *see* BULTMANN, *supra* note 348, at 317 (stating faith is the "waiver of any accomplishment whatever"); *see also id.* at 315 ("As true obedience, 'faith' is freed from the suspicion of being an accomplishment, a 'work.'") (citation omitted).

374 Baeck, *supra* note 349, at 251.

375 *See supra* note 365 and accompanying text.

376 *See generally* SCHOEPS, *supra* note 343. Some commentators have made reference to the supposed Jewish belief that one gains salvation purely by one's own efforts. FRANCIS

believed in the holiness, in other words the God-givenness, of that law.[377] The law took primacy in the life of the nonbeliever because it was the ultimate standard of judgment. Yet, the individual came to know that she could never live up to the standards of the law. The law was a "schoolmaster" teaching the nonbeliever that salvation could never be achieved through human activity alone.[378] Paul used the metaphor of the law as a pedagogue to teach that man is sinful and in need of redemption. Rejection of the law as a means to salvation and the confession of faith are the first steps toward redemption. Once the individual has forsworn the law and accepted God's grace, she is freed from the bonds of the law

Writing in angry response to indulgence abuses in the Roman Catholic Church, which represented an externalization of the religious life parallel to the legalism against which Paul railed in his letter to the Galatians, reformation theologians embraced Paul's insights[379] and emphasized the focus in his preconversion paradigm on the necessity of individual faith: "[F]aith is everything. . Faith is grace, faith is salvation, faith is life, faith is truth; faith is being, the ground and the goal, the beginning and the end; commencement and vocation meet in it. Faith is valid for faith's sake."[380] Luther enthusiastically embraced Paul's notion of the self-sufficiency of faith and expressed it in the "motto, *sola fide*, through faith alone."[381] This vision of faith as a solitary event permeated much of reformation writing. In fact, there is some controversy whether Paul or others interpreting Paul introduced the inward character of faith into the stream of Christian theology.[382] Whenever

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WATSON, PAUL, JUDAISM, AND THE GENTILES 129 (1986). Such a view, however, has been discredited. *See id.* at 129–30; SCHOEPS, *supra* note 343, at 212. For the Jew, God's grace is as relevant as works under the law. Thus, I do not mean to equate at any level, the works term in the dualism with Judaism per se.

377 PFLEIDERER, *supra* note 344, at 75, 77 n.2; *see also* ALAN F SEGAL, PAUL THE CONVERT 169, 178, 210, 283 (1990).

378 *Galatians* 3:24 ("[T]he law was our schoolmaster to bring us unto Christ, that we might be justified by faith.").

379 *See* Baeck, *supra* note 349, at 204–05; SCHOEPS, *supra* note 343, at 276 (describing Paul as the "'saint' of the Reformation"); STENDAHL, *supra* note 363, at 82 (referring to Luther as "the great hero of what has been called 'Pauline Christianity'").

380 Baeck, *supra* note 349, at 204 (describing "faith" to Paul, as understood through Augustine and Luther).

381 *Id.* at 205, 243 (The concept of *sola fide* "means entirely and only one thing: . . . you are nothing by virtue of your deeds or achievements.").

382 *Compare* DAVIES, RABBINIC JUDAISM, *supra* note 344, at 225 ("This mark of 'inwardness' in the New Covenant . . . does not seem to have been very influential in Rabbinic Judaism. . . . [I]t is at this point that Paul goes beyond anything that can be found in Rabbinic Judaism.") *with* DAVIES, PAULINE STUDIES, *supra* note 344, at 95 ("[T]he opposition of law to grace which has marked so much of Protestantism, grounded as it is in

and by whomever it was introduced into Pauline studies, however, it remains a fixture in the Protestant vision.[383] The Pauline vision of belief, as interpreted through the Reformation, emphasized its interiority to the degree that one scholar has asserted that "Protestantism . . . cease[s] to be Pauline and Lutheran as soon as it would truly enter the social sphere."[384] On one interpretation of the reformation's retrieval of Paul, therefore, it would be possible to argue that he believed that salvation could be achieved without works of any kind and despite the commission of bad acts.[385] Luther's

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individualism, that is, in the emphasis on the sinner standing alone before the awful demands of God, in terrible isolation, is a distortion of Paul.").

[383] *See* DAVIES, PAULINE STUDIES, *supra* note 344, at 95.

[384] Baeck, *supra* note 349, at 215.

[385] That is the error of antinomianism, a derivative of anti-nomos, which literally means opposed to the law. *See* DAVIES, RABBINIC JUDAISM, *supra* note 344, at 222 (stating antithesis of faith and works "has always to be hedged about so as not to lead to antinomianism, a plague that Paul dreaded"); JOHN KNOX, THE ETHIC OF JESUS IN THE TEACHING OF THE CHURCH 75–76 (1961) ("[T]he only places in the New Testament where the antinomian question is explicitly raised are in Paul's letters. Paul quotes his opponents as raising it and, of course, vigorously and with indubitable sincerity, repudiates the ascription of antinomian implications to his doctrine . . . .").

Some accuse Paul of falling into the trap of antinomianism. Leo Baeck has dubbed antinomianism the "logical conclusion of [Paul's] own ideas." Baeck, *supra* note 349, at 254. SCHOEPS, *supra* note 343, at 184, argues that Paul's writing in *Romans* is in response to the "danger [that] sprang from a moderate antinomism which he had to resist," but then calls Paul a type of antinomian. *Id.* at 193. Others, such as Davies, argue more persuasively, however, that Paul was opposed to an antinomian interpretation of his thought. DAVIES, PAULINE STUDIES, *supra* note 344, at 101 ("[T]he immorality and antinomianism of many of the enthusiasts in his churches constituted an embarrassment."); *id.* at 121 ("Paul was no antinomian."); Fitzmyer, *supra* note 344, at 82 ("[T]he freedom [Paul] preached did not mean a throwing off of all restraint, an invitation to license."); *see also* Fitzmyer, *supra* note 344, at 81, 86.

The antinomian strain of Pauline thought found its way to the early colonies in the person of Anne Hutchinson. Hutchinson was a Puritan who settled the Massachusetts Bay Commonwealth in 1629 and a righteous woman who held weekly prayer sessions in her home during which she would elucidate that week's sermon. She was a compelling and thoughtful speaker, and attendance was heavy. Indeed, the most important and powerful members of the Puritan society regularly attended. *See* NATHANIEL HAWTHORNE, TALES AND SKETCHES 18–24 (Roy H. Pearce ed., 1982). Over the course of time, however, she came to believe, that the "leaders of the church . . had fallen into a covenant of works. 'Legalists' all, they mistakenly took sanctification—the successful struggle of the saint against sin—as evidence of election, failing to understand that works and redemption bear no necessary connection. In essence Hutchinson spoke for a doctrine of free grace, characterized by the [new] inefficacy of works and the absolute assurance of the saint." AMY S. LANG, PROPHETIC WOMAN: ANNE HUTCHINSON AND THE PROBLEM OF DISSENT IN THE LITERATURE OF NEW ENGLAND 4–5 (1987).

emphasis on *sola fide* certainly plays into such an interpretation. Such an interpretation, however, is a perversion of both Paul[386] and reformation thinkers such as Luther.[387] Unlike the nonbeliever who experiences faith and works under the law as an either/or choice, the authentic believer experiences the belief/conduct dichotomy as false. Faith and the concomitant relationship with Jesus Christ create the necessity and the need to engage in works of love. Freedom from the yoke of the law does not give the believer unbounded license to do as he pleases:

> For you were called to freedom, brethren; only do not use your freedom as an opportunity for the flesh, but through love be servants of one another. For the whole law is fulfilled in one word, "You shall love your neighbor as yourself." But if you bite and devour one another take heed that you are not consumed by one another.[388]

Thus, the dualistic pairing of faith and works under the law in both Paul's and the reformation theologians' writings is properly understood as an existential choice for the nonbeliever. The paradigm envisions the individual standing at the crossroads to salvation and choosing between faith *or* works under the law.

B. *The Dialectic of Faith and Works of Love in the Paradigm of the Christian Life*

The preconversion paradigm deconstructs with the appearance of Christ.[389] That appearance poses the either/or question: faith or works under the law. The law is "finished"[390] at that moment in the sense that obedience to it is utterly insufficient to achieve salvation.[391] What looked to the believer as a viable

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Hutchinson's religious vision was radical: she did not even concede that grace ineffably led to good works. Rather, justification and sanctification were "witnessed and sealed by the spirit and [could not] be tested by outward means." *Id.* at 7 Her antinomian views were considered dangerous enough to cause her to be expelled from the Puritan community.

386 *See infra* note 389-94.

387 *See* MARTIN LUTHER, COMMENTARY ON ST. PAUL'S EPISTLE TO THE GALATIANS (1535), *in* THE PROTESTANT REFORMATION 91-92 (Hans J. Hillerbrand ed., 1968) ("no one may suppose that we reject or prohibit good works").

388 *Galatians* 5:13-15.

389 C.E.B. CRANFIELD, 1 A CRITICAL AND EXEGETICAL COMMENTARY ON THE EPISTLE TO THE ROMANS 199-200 (J.A. Emerton & C.E.B. Cranfield eds., 6th ed. 1975) ("[T]he heart of the gospel preached by Paul is a series of events in the past (not just the crucifixion of Christ . . but the crucifixion together with the resurrection and exaltation of the Crucified) a series of events which is *the* Event of history ").

390 SCHOEPS, *supra* note 343, at 171.

391 *Id.* at 187.

choice in the preconversion paradigm, now in the presence of Christ appears to be a mere "matter of indifference."[392] Allegiance to the law is no longer a necessary prerequisite to salvation.[393] Rather, belief in Christ alone can lead to salvation. Far from being a means to salvation, works under the law become "an obstacle to faith in Jesus Christ."[394]

Although some commentators would disagree,[395] there is little evidence that Paul suggests that Christians should ignore moral duties, that is, throw away the law altogether, once they have professed belief.[396] Rather, the law which is opposed to faith by Paul is mere "legalism" or "the letter of the law in isolation from the Spirit."[397] Works take on a new significance in the life of the believer that is evidenced by a changed relationship between faith and works.

Contrary to the stark either/or relationship of belief and conduct in the preconversion paradigm, belief and conduct are integrated into a vital dialectical relationship within the paradigm envisioning the Christian life.[398] Belief in Christ is the mediating force that sets the dialectic between faith and

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[392] *Id.* at 198; *see Galatians* 5:18 ("[I]f you are led by the Spirit you are not under the law.").

[393] The dualism that Paul poses is not, as some would believe, an antithesis between the Christian religion and the Jewish religion depicted as solely a striving under the law. In fact, the Jewish religion stresses the importance of faith in God alongside service to God through works under the law. *See* DAVIES, RABBINIC JUDAISM, *supra* note 344, at 221. Rather, Paul recreates the Jewish formula for redemption. Christ transforms everything. Redemption still requires faith and works, but the works are not justified by the law but rather grow out of faith.

This Article also leaves to one side the interesting question whether the law as defined by Paul is the entirety of Torah or only a portion or whether Paul has failed to come to terms with the reality of the law. *See, e.g.*, SCHOEPS, *supra* note 343, at 213.

[394] KELLER, *supra* note 346, at 121.

[395] *See, e.g.*, BAECK, *supra* note 349, at 242 ("Hence the Law had to be finished and annulled."); *see also id.* at 248 ("The Pauline faith deprives ethics itself of its basis."); *id.* at 249 ("Either faith or ethics! That is the innermost meaning of the fight which Paul and Luther waged against the 'Law.' They did not merely oppose something ceremonial; 'Law' is for them any valuation of human activity, even the most moral. Man becomes good only through the miracle which has been accomplished."); *id.* at 250 ("Paul himself was still too deeply rooted in Judaism and hence made moral demands time and again. These demands are genuine insofar as they proceeded from his honest and deeply ethical personality and from his living past from which he could never disentangle himself entirely. But they are not genuine insofar as they did not proceed from his romantic religion which he proclaimed as that which was most truly his own: they are merely mounted on it as something extraneous and essentially different.").

[396] *See supra* note 385 (discussing antinomianism).

[397] *See* CRANFIELD, *supra* note 389, at 339–40.

[398] *See* BEKER, *supra* note 344, at 235.

works in motion.[399] "Works of love" is the Pauline term to describe the conduct residing in this dialectical relationship.[400] Faith animates works of love and vice versa.[401] Thus, two principles govern human conduct: the old law per se governs conduct for nonbelievers who fail to choose correctly and love governs conduct for the believer.[402]

Yet, how does conduct re-enter the picture after the works of the law have ceased to have force? The believer is saved through faith and thereby released from the demands of the law [403] Logically, therefore, action would not seem necessary That is the antinomian fallacy [404] As Kierkegaard has pointed out, the opposite of works of the law is not "inaction" but rather love.[405] Moreover, to say that action is not necessary is to assume that the believer remains isolated, apart from community. At the moment of decision, the nonbeliever stands utterly alone before God.[406] But if the decision is faith in Christ, the individual is not left to pure egoism, contrary to Leo Baeck's suggestion,[407] but rather "utterly looks away from himself and completely surrenders himself to God."[408] His faith "is no self-contained condition of man's soul, but points toward the future."[409] He is no longer alone but has

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[399] *Id.* at 268; KASEMANN, *supra* note 341, at 73 ("Paul's doctrine of justification, with the doctrine of the law that belongs to it, is ultimately his interpretation of Christology."); PFLEIDERER, *supra* note 344, at 78 n.1 ("[T]he doctrine of the insufficiency of [works] is founded upon their antithesis to justification by faith, and . this abstract opposition of [works] and [belief] allows of and even requires a higher synthesis, which indeed it has found in the writings of Paul himself, in his doctrine of living in the spirit.").

[400] *See*, Fitzmyer, *supra* note 344, at 87 (referring to "dynamic principle of love"); BULTMANN, *supra* note 343, at 235 (referring to "works of love of the faithful"); *see also* KIERKEGAARD, *supra* note 346, at 106.

[401] *Galatians* 5:6 (referring to "faith working through love"); Fitzmyer, *supra* note 344, at 85.

[402] *See* CERFAUX, *supra* note 344, at 465; DAVIES, PAULINE STUDIES, *supra* note 344, at 115.

[403] *Galatians* 5:1 ("For freedom Christ has set us free; stand fast therefore, and do not submit again to a yoke of slavery.").

[404] *See supra* note 385 and accompanying text.

[405] KIERKEGAARD, *supra* note 346, at 106; *Romans* 13:8–10 ("Owe no one anything, except to love one another . . love is the fulfilling of the law."). Paul "rejects the possibility of justification by means of works of the law, without disputing justification on the basis of works." Cosgrove, *supra* note 346, at 663 (emphasis omitted).

[406] *See* CERFAUX, *supra* note 344, at 442.

[407] *See generally* BAECK, *supra* notes 349 and 361.

[408] Bultmann, *supra* note 343, at 230 (citation omitted); BULTMANN, *Supra* note 348, at 319 ("The attention of the believer does not turn reflectively inward upon himself, but is turned toward the object of his faith.").

[409] BULTMANN, *supra* note 348, at 319.

entered the body of Christ.[410] What the Christian does "now really matters."[411] For, even though works under the law are not sufficient by themselves to achieve salvation, works divorced from faith could invalidate salvation.

Within the paradigm of Christian life, love is the "new law,"[412] the "law of Christ."[413] It is not a codified law but rather an active living through Christ.[414] "[T]here is no need of a legal system . . . [because the believer's] norms for individual conduct are now subsumed all under one notion: [love] . . . ."[415] Thus, no "special practices" are required;[416] rather, each Christian is intended to take action as his "gifts" dictate.[417] And works of love are not examples of "meritorious accomplishment" but rather "deed[s] done in freedom."[418]

There is no moment within the dialectical relationship where faith stands apart from works or works apart from faith. "[F]aith work[s] through love."[419] Or, in other words, "'faith' both as to degree and to kind realizes itself in concrete living: in the individual acts of the man of faith."[420] Faith leads to

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[410] 1 *Corinthians* 12:12–14 ("For just as the body is one and has many members, and all the members of the body, though many, are one body, so it is with Christ. For by one Spirit we were all baptized into one body—Jews or Greeks, slaves or free—and all were made to drink of one Spirit. For the body does not consist of one member but of many."); *see also* DAVIES, PAULINE STUDIES, *supra* note 344, at 95 (emphasizing community of believers); KASEMANN, *supra* note 341, at 74 ("The Pauline doctrine of justification . . does not merely talk about the gift of God to the individual. [Rather, it] depict[s] God's righteousness as a power which reaches out towards our lives in order to make them obedient."); KNOX, *supra* note 385, at 92 (love "belongs essentially within the Christian community").

[411] BULTMANN, *supra* note 348, at 321; Cosgrove, *supra* note 346, at 661 ("The expectation of the believer is that judgment according to works will mean *justification*.").

For the believer, grace does not guarantee salvation. 1 *Corinthians* 4:4 ("I am not aware of anything against myself, but I am not thereby acquitted. It is the Lord who judges me.").

[412] *Romans* 8:2 (referring to "the Law of the Spirit of life"); SANDERS, *supra* note 344, at 114 ("faith should be expressed in love"); SCHOEPS, *supra* note 343, at 172.

[413] *Galatians* 6:2; BULTMANN, *supra* note 348, at 344.

[414] Fitzmyer, *supra* note 344, at 84.

[415] *Id.* at 85.

[416] BULTMANN, *supra* note 348, at 324.

[417] *Id.* at 325, 329 ("All sorts of conduct" are implicated.).

[418] *Id.* at 344; *see also* CERFAUX, *supra* note 348, at 462 ("[T]heir Christian freedom binds them to love . .").

[419] *Galatians* 5:6.

[420] BULTMANN, *supra* note 348, at 324; *see also* CERFAUX, *supra* note 348, at 394 ("[W]orks must be quickened by faith . . ").

freedom, which leads to service, which leads to faith.[421] The life of the Christian is to be fulfilled through the "work of faith" and the "labor of love."[422]

V. THE BELIEF/CONDUCT PARADIGM AND PAULINE THEOLOGY

The striking similarities between the Court's doctrine and the Pauline approach to nonbelievers should be apparent by now. First, the descriptions of belief and faith are virtually indistinguishable: each is individual, interior, private.[423] Within that private sphere, the individual finds both free choice and freedom itself.[424] And in both the Court's and the Pauline vision, belief is neither susceptible nor vulnerable to logic.[425]

Second, within both structures of thought, conduct is worldly, which is to say unnecessary to salvation. Conduct is external, in contrast to the interiority of belief.[426] For both structures, conduct resides in the sphere governed by the law and is judged by law.[427]

Third, the relationship between the two terms is identical in the cases and Pauline theology. Belief and conduct in the Court's free exercise cases relate as do faith and works of the law· in absolute opposition.[428] They both pose an either/or question.[429] And the two terms of the relation exist independently.[430] In short, the two either/or questions are strongly analogous: faith is to works as belief is to conduct.[431]

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421 *See* BEKER, *supra* note 344, at 271.

422 1 *Thessalonians* 1:3 ("The Holy Spirit is planted in us like a seed and the seed brings forth fruit, but this does not take place without man's labour."); CERFAUX, *supra* note 348, at 447

423 *See supra* notes 281–85 and 363–64 and accompanying text.

424 *See supra* notes 288–90 and 361 and accompanying text.

425 *See supra* notes 294 and 369 and accompanying text.

426 *See supra* notes 326–27 and 363–66 and accompanying text.

427 *See supra* notes 322–24 and 374 and accompanying text.

428 *See* PFLEIDERER, *supra* note 344, at 74 ("[T]he death of Christ (i.e. faith in it) . . . and the law of Moses . . have as little to do with one another as believing and doing . . . .").

Paul himself may well have found it "inconceivable" that his notion of the Jewish law, which governs day-to-day conduct with extreme attention to detail, and its relation to faith could be transported into a secular system of laws. *See* DAVIES, PAULINE STUDIES, *supra* note 344, at 117. That, however, does not prevent the Court from employing Pauline structures of thought for their own purposes in their religion clause jurisprudence.

429 *See supra* notes 269 and 348–51 and accompanying text.

430 *See supra* notes 325–36 and 348–50 and accompanying text.

431 PFLEIDERER, *supra* note 344, at 74.

Finally, within both schemes, the two terms of the dualism are defined according to their relation to the law For both paradigms, conduct is judged strictly according to the law while belief is free of the law. For the Protestant interpretation of Paul, faith is that which sets the believer free from the bondage of the law. For the Court, conduct must conform to the law while belief is free from all such restraints. The Court permits interior belief to thrive because law itself is not touched by such an inward, isolated state, but when religion "break[s] out into overt acts,"[432] the law steps in and trumps the conduct. The Free Exercise Clause has been a mirage of protection,[433] hiding the Court's real venture: ensuring the supremacy of the law over religion. By adopting the faith-works antithesis, the Court has had its thumb firmly on the law side of the scale.

There is a further irony in the Court's paradigmatic approach. It says that it is protecting belief "absolutely" but it simultaneously depicts belief as incapable of being regulated, which is to say it is protecting a nil set in the belief category. Then it generally leaves conduct open to any form of regulation, criminal, civil, or bureaucratic. Under this vision, the Court's talk of absolute protection is mere patter which hides the fact that its underlying theory of the Free Exercise Clause would protect nothing.

There is also much to be learned by examining the differences between these two structures of thought. In the Protestant version of Pauline theology, the terms faith and works form the essential question for salvation. Paul is mapping the right way (and the wrong way) to salvation. These are existential structures. He is not attempting to define faith and works per se.[434]

The Court, on the other hand, has turned what is an antithesis of belief and conduct in the Pauline world view into mutually exclusive categories. Within the belief/conduct paradigm, the Court is describing the universe of religious experience by forcing it into two separate pigeonholes. The attempt to fit each free exercise claim into one or the other category has become the Court's raison d'etre in these cases and has led the Court away from facing the much

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[432] Reynolds v. United States, 98 U.S. 145, 163 (1878).

[433] *See* Pfeffer, *supra* note 233, at 1122 (arguing that the belief/conduct distinction makes Free Exercise Clause meaningless). Which is not to say that the clause has "had no existence at all." *Id.* at 1130. Rather, it has had a vital existence, but one that makes most free exercise claims losers by elevating social cohesion over religious pluralism. *Cf.* ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 65–67 (1975) (discussing pre-Civil War courts' failure to act on vision of inclusion by elevating public policy over nomos of insular communities).

[434] "The contrast [in Paul's approach] is between the works of the law and faith of Jesus Christ as soteriological instruments of justification, not between 'works' and 'faith' per se." Cosgrove, *supra* note 346, at 661.

more difficult task at hand: principled accommodation of the wide variety of religious experience.

The Court makes one crucial change in the faith/works paradigm which bodes ill for religious claimants. For the non-Christian, according to the Pauline framework, the choice exists between belief in Christ and conduct dictated by the *religious* law Either way, the individual is living within his own religious framework (despite the different consequences for salvation under Paul's scheme). And either choice places the modern religious individual in the position of being potentially opposed to the *state's* law. When the Court adapts the Pauline preconversion paradigm to its purposes, the religious adherent's religious conduct is judged not in terms of faith nor in terms of religious law but rather in terms of modern positive law. The individual whose religious conduct is now judged by positive law, however, does not automatically live within his religion by obeying the positive law. The Court's implicit presumption that regulating conduct through positive law will not unacceptably harm the religious life[435] hides this sleight of hand by which positive law preempts religious law and makes it possible for the positive law to take primacy over all religious conduct.[436] The Court's secularization of the law in the Pauline framework would have been alien to Paul.[437]

The Court's use of the belief/conduct paradigm also makes a mockery of the goal of religious tolerance[438] as well as the Court's ostensible interest in neutrality.[439] The paradigm places no restrictions on the Protestant Christian's

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[435] *See supra* note 336 and accompanying text.

[436] Such reasoning leads to the conclusion that government regulation should always trump religion. Spinoza took just such a line. *See* SPINOZA, *supra* note 302, at 212 ("the sovereign power . . . should have supreme authority for making any laws about religion which it thinks fit.").

[437] DAVIES, PAULINE STUDIES, *supra* note 344, at 117.

[438] *See* United States v. Ballard, 322 U.S. 87 (1944), *cert. granted* , 327 U.S. 773 (1946), *rev'd*, 329 U.S. 187 (1946); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940); *cf.* Cover, *supra* note 9, at 68. *See generally* DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986).

According to some, Paul himself introduced radical intolerance into the Christian tradition. *See* Carl Schneider, *Ursprung und Ursachen der christlichen Intoleranz*, 30 ZEITSCHRIFT FUR RELIGIONS-UND GEISTESGESCHICHTE 203, 211 (1978) (cited in JEWETT, *supra* note 364, at 13) (*Galatians* is "an explicit document of religious intolerance"; "intolerance belongs not to the essence of Christianity but to the essence of Paul."); *but see* JEWETT, *supra* note 364, at 14 ("Paul is in fact an advocate of an active form of tolerance.").

[439] *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 879–81 (1990); McConnell, *supra* note 2, at 685 (referring to Court's doctrine of "formal neutrality"). For an interesting discussion of the differences between tolerance and

capacity to commune with the divine. Yet, even though the paradigm privileges Christian-like communion with the divine, traditional forms of Christianity should still have potential problems under this dualism given the widespread belief in the necessity of good works flowing out of faith.[440] That is the central message of Paul's postconversion paradigm, which binds faith and works together in an active dialectical relationship. Religions that find their vital life in conduct suffer when the two terms are paired as diametrically opposed terms and only belief is protected.[441] For example, for Peyotists, communication with the divine does not occur as it can for the Christian, through unspoken communication from the soul, but rather takes place through the activity of taking peyote.[442] Adherents are literally cut off from the divine when the heart of religion is envisioned solely as belief and not conduct. Similarly, the religious experience of Native Americans who find communion on sacred lands is whittled away when the government is permitted to destroy those sites on the theory that belief is not being affected. When it applies the belief/conduct paradigm, the Court is often forcing a square peg into a round hole.[443]

VI. RECOMMENDATION FOR CHANGE

It should come as no surprise that the Supreme Court has chosen decisionmaking structures in its free exercise jurisprudence that echo Christian structures of thought. The country was conquered by and colonized by Christians.[444] In fact, American courts have explicitly embraced in their opinions our Christian heritage and values and used them to support their judgments.[445] It also should come as no surprise that our central structures of

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neutrality, see Steven D. Smith, *The Restoration of Tolerance*, 78 CALIF. L. REV 305 (1990).

[440] *See* Pepper, *supra* note 2, at 306 ("religion *mandates* conduct in this world").

[441] *See, e.g., Smith*, 494 U.S. at 872; Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693, 706 (1986).

[442] HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM, *supra* note 201, at 18 ("Peyote . . . is the means through which God and humans can communicate.").

[443] The Court's use of what appears to be a Christian construct in its free exercise cases also raises an Establishment Clause problem. *See* Lupu, *supra* note 47, at 958 ("When narrow, ethnocentric models of religion are employed by decisionmakers, free exercise adjudication may readily become a vehicle for judicial violations of the establishment clause.").

[444] *See generally* GAUSTAD, *supra* note 281.

[445] *See* Zorach v. Clauson, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being."); United States v. Macintosh, 283 U.S. 605, 625 (1931) ("We are a Christian people . . . "); Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 49 (1890) (criticizing bigamy and polygamy because they are "contrary to the spirit of Christianity, and of the civilization

free exercise jurisprudence would be saturated with theological modes of thinking. "All the pregnant ideas and institutions of modern political thought are in essence secularized forms of theological doctrines and institutions."[446] Yet, neither the uniformity of the Court's essentially theological approach nor the distinctly Christian form of its free exercise jurisprudence has been apprehended heretofore. The Christian character of the Court's structures seem to have been frozen beneath our consciousness. They are now just beginning to thaw.

Perhaps this is so because the diversity of religious experience in the colonies, which called for the protection of free exercise, was almost exclusively a diversity of Christian sects.[447] The religious mixture has changed dramatically since then.[448] We can no longer be characterized as a singularly Christian nation.[449] That historical change has jostled our vision of the Free Exercise Clause so that what once appeared to be neutral now looks prejudicial. What once appeared unquestionable now reveals itself as unreflective.[450]

The Court has at least two options. Arguably, the Court could retain the distinction as it now operates but justify it on separate policy grounds. Or the Court could transform the belief/conduct paradigm by discarding the distinction between belief and conduct.

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which Christianity has produced in the western world"); *see also* Edwin B. Firmage, *Religion & the Law: The Mormon Experience in the Nineteenth Century*, 12 CARDOZO L. REV. 765, 766 (1991) (emphasizing Christian identity of American culture). One scholar has argued that nineteenth century courts often "assumed that America [was] a Christian country, and more particularly, a Protestant Christian country . . ." Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 783 (1986).

[446] CARL SCHMITT, POLITISCHE THEOLOGIE 49 (1934) (*translated from original*); *see also* 1 PAUL TILLICH, SYSTEMATIC THEOLOGY 39 (1951) (referring to work as "'theology of culture,' which is the attempt to analyze the theology behind all cultural expressions").

"[C]ourts [may] not [be] arbiters of scriptural interpretation," United States v. Lee, 455 U.S. 252, 257 (1982) (quoting Thomas v. Review Bd., 450 U.S. 707, 716 (1981)), but it turns out they may be purveyors of it.

[447] *See generally* GAUSTAD, *supra* note 281.

[448] Laycock, *Remnants*, *supra* note 2, at 68 ("scope of pluralism . . vastly greater"); Henry F May, *Intellectual History and Religious History*, *in* NEW DIRECTIONS, *supra* note 3, at 113 (describing recent trends in American religion).

[449] McConnell, *supra* note 2, at 741; *see also* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 888 (1990) (referring to multiplicity of sects). Ironically, the migrations that would so dramatically change our religious composition began during the *Reynolds* era. *See* GAUSTAD, *supra* note 281, at 178, 195 (Massive migration occurred between 1860 and 1890, and continued through 1914, bringing to America Hindus, Confucians, and Buddhists as well as Christians and Jews.).

[450] *See supra* note 4.

A. *Retaining the Distinction*

To retain the distinction, the Court could derive a policy justification divorced from the paradigm's inherently Protestant Christian presuppositions. The Court has offered one wholly unsatisfactory justification for the line it has drawn in the free exercise cases: law and order.[451] Anarchy is the evil redressed in the free exercise cases.[452] According to the modern Court, it is an evil that becomes more and more threatening as the country's religious composition becomes more diverse. Therefore, diversity should steel the Court in its resolve to ensure social cohesion.[453] As we know from the most elementary reading of the First Amendment and its history, however, the evil to be prevented by the Free Exercise Clause is the suppression of religion. More diversity requires more accommodation, not less.[454]

Justice Frankfurter was simply wrong when he said in *Gobitis* that "[t]he ultimate foundation of a free society is the binding tie of cohesive sentiment."[455] Justice Jackson's memorable words in response in *Barnette* are worth repeating verbatim:

> [We have] no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization . . . We can have

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[451] Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 885 (1990) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)); *see also* Austin Sarat, *Robert Cover on Law and Violence*, *in* NARRATIVE, VIOLENCE, AND THE LAW 257–58 (Martha Minow et al. eds., 1993) (Cover reveals how "easy [it is] for statist judges to become so intent on order, so insistent that only one law, the state's own, shall prevail, that the efforts and commitments of other rich sources of meaning, other normative enclaves, are needlessly limited or destroyed.").

[452] *Smith*, 494 U.S. at 888 (indicating that adoption of strict scrutiny leads to "anarchy, [the danger of which] increases in direct proportion to the society's diversity of religious beliefs"); Bowen v. Roy, 476 U.S. 693, 707 n.17 (1986) ("[A]narchists will no doubt applaud" government being forced to justify every rule under strict scrutiny.); *see also supra* notes 331–35 and accompanying text; *cf.* McDaniel v. Paty, 435 U.S. 618, 627 n.7 (1978) ("The absolute protection afforded belief by the First Amendment suggests that a court should be cautious in expanding the scope of the protection since to do so might leave government powerless to vindicate compelling state interests.").

[453] *Smith*, 494 U.S. at 888. This is a throwback to the prerevolutionary assumption that "religious solidarity . . . was essential to social and political solidarity." Winfred E. Garrison, *Characteristics of American Organized Religion*, 256 ANNALS AM. ACAD. POL. & SOC. SCI. 14, 17 (1948).

[454] *See* McConnell, *supra* note 18, at 1515–16.

[455] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 596 (1940), *overruled by* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

> intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes . . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.[456]

As the author of the belief/conduct paradigm within its free exercise jurisprudence, the Court has placed itself in the role of ensuring order and efficiency within the society and lost sight of the individuals bringing their claims of religious suppression. "[I]t is fatally easy within a traditional legal system to descend into a game of rules, to don masks and to impose masks, so that the personal dimension of those involved in the law are ignored."[457] The Court's paternalistic protection of the social order and its failure to nurture religious diversity through the belief/conduct paradigm is a classic example. The fear of anarchy is not enough to justify the paradigm.

Perhaps the paradigm could be justified on the ground that it is tradition. It has, after all, been in place for 115 years. Those, like Justice Kennedy writing in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, who have been persuaded by the rhetoric of the free exercise cases believe the tradition has been exemplary [458] As a factual matter, close examination of the free exercise cases proves this conclusion wrong. Our free exercise record is a record of religious suppression—of the Mormons, Native Americans, and others. The most disturbing aspect of *Lukumi*, in fact, is the Court's confident affirmation of the status quo. "Habit, rather than analysis, makes [the belief/conduct paradigm] seem acceptable and natural."[459] It is a tradition that betrays the constitutional directive to protect the "free exercise of religion" and therefore should not be honored.

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[456] *Barnette*, 319 U.S. at 641–42.

[457] DAVIES, PAULINE STUDIES, *supra* note 344, at 120–21; *see also* John R. Snowden, *The Justification Story: Law as Integrity and Deviationist Doctrine*, 9 J.L. & RELIG. 49, 83 ("Reification disposes of untidy reality and masks personal responsibility."); Michael H. Davis, *Critical Jurisprudence: An Essay on the Legal Theory of Robert Burt's TAKING CARE OF STRANGERS*, 1981 WIS. L. REV. 419, 423 (Legal concepts "focus attention on a very few and arguably irrelevant artificial details.").

[458] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2222 (1993).

[459] Mathews v. Lucas, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting).

B. *Altering the Belief/Conduct Paradigm*

By now the belief/conduct paradigm's petrified form fulfills a perceived need for security in the face of formidable dilemmas.[460] Altering the paradigm would be threatening. "There is a fatalism in law, as part of a wider fatalism, which tends to paralyze the belief in the possibility of radical change."[461] Yet, the very crystallization of the belief/conduct paradigm warrants serious attempts to think anew about the Free Exercise Clause. As Professor Davies has pointed out, the trenchant core of Paul's message may be that the law deserves constant and searing scrutiny:

> [O]ne must ask whether [much] in inherited legal systems . . . has inevitably, but no less unfortunately and sometimes tragically, become ossified, depersonalized, encrusted, and corrupted by the interests of those who held power in the past and by their successors in the present . . Must not the Law itself . . . be in a state of permanent revolution? Is it not constantly necessary to subject "Law" to the burning, penetrating, simplifying light that Paul brought to the Torah of his world?[462]

If so, then the Court's Paulinization of the Free Exercise Clause will have to be overtaken by a new concept of the heart of religion. Or to put it in other terms, one dream will have to be swapped for another.[463]

In the colonies, the dream was to practice one's religion with one's neighbors without the tyrannical interference of the state. The hope was that parishes could live together without the intrusion of outsiders and without the fear of another Inquisition.[464] Despite the multiplicity of sects, it was generally accepted that the religion being practiced was Christianity [465] The formation of

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[460] I owe the use of "petrified" here to Professor W. D. Davies, who perceptively stated that "we are not justified in petrifying a metaphor into a dogma." DAVIES, RABBINIC JUDAISM, *supra* note 344, at 222. *See also* DAVIES, PAULINE STUDIES, *supra* note 344, at 121 ("[T]here are entrenched historical traditions and backgrounds and age-old developments in law, as in other spheres, which hold a dead staying hand over all things . . . .").

[461] DAVIES, PAULINE STUDIES, *supra* note 344, at 121.

[462] *Id.* at 120.

[463] RONALD DWORKIN, LAW'S EMPIRE 410 (1986).

[464] Cover, *supra* note 9, at 31 ("The constitutional visions of the Amish, the Mennonites, the utopian communities, the early Mormons, the Pilgrims, and the emigrant Puritans elevated the importance of associational autonomy.").

[465] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 579 (1890) ("Nor . . . are we always precluded from recognizing also, in the rules prescribed for the conduct of the citizen, the notorious fact that the prevailing religion in the States is Christian.").

a united nation was one of the essential projects of that era and the succeeding century that culminated in *Reynolds*. Anarchy was the enemy.

Our new dream turns the old dream inside out. We now hope to practice our religion while our next door neighbor practices a wholly different one. No longer can a colony be identified by its discrete sect or sects. In the new dream, there are no colonies, only a diverse people practicing a wide variety of religions. Religious experience is not adequately protected where only interior belief receives protection. The establishment of a national identity is no longer our most pressing concern. What is more imperative is the retention of a vital sense of freedom in the face of entrenched governmental structures. Out of that dream we must weave a new paradigm.

If there is to be tolerance in our diverse society, our government should be an example, not a hindrance to that goal. The belief/conduct paradigm which elevates the needs of the State above religious conduct sends the message that the government's day-to-day operations are more valuable than the individual's religious life. A vitalization of the Free Exercise Clause by discarding the belief/conduct paradigm could change that message.

What the whole of Protestant Pauline theology illustrates is that even Christian religious experience cannot be fully protected through the protection of belief alone. Conduct is central to religious experience. The belief/conduct paradigm fails to protect religious experience because it relates the two terms, belief and conduct, as antithetical opposites rather than as two poles in a dialectic. As discussed previously, the paradigm is a two-pronged approach. The Court has first identified the interest at issue as either belief or conduct and then assigned a level of scrutiny for weighing the burden on religious interests against the state's purported interest. Both prongs should be altered if the Free Exercise Clause is to be brought to life.

The Court's mutually exclusive distinction between belief and conduct carries within it the seeds for its own deconstruction. The Court maps out the so-called protection provided by the Free Exercise Clause through absolute protection of belief which presumably cannot be regulated and the subjugation of religious conduct to the state's law There is no protection of any religious interest in this construct. Yet, the Court has worked through the construct in *Barnette*, *Wooley*, *Ballard*, *Torcaso*, and *Yoder* to protect what it calls religious belief. Despite the Court's rhetoric of interiority, "belief" is a word used in these five cases that denotes a religious experience not wholly divorced from externalities.[466] As the Court examines a particular free exercise claim, turning it this way and that, what it examines is an amalgam of belief and conduct, the internal and the external. Depending upon which aspect of the amalgam it focuses, the result can go one way or the other. This is illustrated most

[466] *See supra* notes 257 and 303–10 and accompanying text.

graphically by the Court's switch in the description of the religious interest in the flag salute cases from unprotectable conduct in *Gobitis* to protectable belief in *Barnette*. The factual matrix before the Court in the two cases was identical. Yet it described the religious interest as conduct when it decided to uphold the regulation and as belief when it decided to strike it. In both cases, the Court was weighing the amalgam of belief and conduct against the validity of the state's asserted interest. When the Court believed the national unity demanded a flag salute, the amalgam lost and was labeled conduct. When it believed national unity would not be threatened by preventing the enforcement of a flag salute rule, the amalgam won and was labeled belief. The Court acknowledged this deconstruction of its distinction in *Yoder*.[467] If there is to be any distinction between belief and conduct, it should be a distinction between belief per se, understood as susceptible to external compulsion, and conduct permeated by belief, understood as an amalgam.

One might argue that even if one rejects the belief/conduct *paradigm*, the distinction between belief and conduct need not be discarded in order to protect more religious liberty. Rather, we need simply to value religious conduct more heavily (*i.e.*, recognize it for the valuable aspect of religious life that it is) and institute strict scrutiny. After all, the religious adherent won in *Sherbert* as well as several other cases when the Court used the distinction between belief and conduct and announced a higher level of scrutiny. Examination of all of the cases following *Sherbert*, however, raises questions about such faith in strict scrutiny when it is paired with a belief-conduct distinction.[468] One would have to launder the belief-conduct distinction of its definitional history in the Court's cases which tends to reduce religious freedom by identifying interior belief as essential and exterior conduct as unnecessary Second, one would still have the problem that religious conduct is never divorced from religious belief, so that the term "conduct" in the distinction is linguistically inadequate to handle religious reality and therefore (perhaps inevitably) devalues the fullness of religious experience.

If the Court were to strip away its project of labeling each religious interest as either internal belief or external conduct, what would be left would be the weighing of religious interests against its perception of society's values. *Smith* purportedly "jettisoned balancing."[469] But that is simply because Justice Scalia proposed what he believed to be a bright-line rule which incorporated his own

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[467] Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) ("[B]elief and action cannot be neatly confined in logic-tight compartments . . . .").

[468] *See supra* notes 234–40 and accompanying text (discussing how the belief/conduct paradigm tends to reduce the protection afforded religious conduct even after *Sherbert* announces strict scrutiny).

[469] McConnell, *supra* note 2, at 685; *see also* Laycock, *Remnants*, *supra* note 2, at 10.

balancing of the relevant interests for every succeeding case.[470] A bright-line rule, after all, is nothing more than the conclusion reached after one has engaged in global balancing. Because belief's intrinsic and dialectical relationship to conduct opens the way to protection of religious lives which find vital expression in nonspeech activity, this alternative approach has the capacity to turn the intolerance created by the dualistic pairing of belief and conduct into tolerance for a larger realm of religions.[471]

The second prong would also have to be adjusted if religious interests are to be meaningfully protected. The Court has applied more than one level of scrutiny in the free exercise cases.[472] The problem with levels of scrutiny is that they require the Court to weigh the burden on the religious adherent against the interests of the state. The needs of the state machinery, be it in the exercise of war powers or tax bureaucracy, always seem compelling in the face of the one individual's need for accommodation. It is the classic problem of comparing a bushel of apples against an orange. The problem becomes somewhat less acute where that religious interest which is being weighed against the state's interest is not understood as empty conduct but rather conduct animated by belief.

Having engaged in my own weighing of the value of religious diversity against the potential for anarchy, and having determined that religious diversity is highly valuable while the fear of anarchy is without basis at this time in history, I would push the line to be drawn in these cases to the farthest extreme compatible with the viability of a living democracy, which is to say that the exercise of religion should trump most governmental regulation. Only those instances in which the integrity of the state would come into question should provide excuses for the failure to protect religious experience. Such a line was first envisioned in the United States by James Madison, who suggested a line

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[470] He has balanced the furthering of religious pluralism against the maintenance of an undisturbed majority-ruled bureaucracy and concluded that the latter side of the balance should prevail in every case (that does not present an equal protection problem).

"It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government 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." Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 , 890 (1990).

What he means, of course, is "each law against . . . each religious belief." He is the one who in one moment is "weighing the social importance of all laws against the centrality of all religious beliefs."

[471] See *supra* notes 438–43 and accompanying text (discussing intolerance of paradigm).

[472] *See supra* note 240 and accompanying text.

that would be analogous to what has become the speech clause's clear and present danger standard.[473]

Under Madison's reasoning, religious belief and conduct should be protected in each case unless the "preservation of equal liberty and the existence of the State be manifestly endangered."[474] Just as the invocation of strict scrutiny in *Sherbert v. Verner*[475] did not guarantee that succeeding free exercise claims would receive consistently rigorous treatment by the Court,[476] this manifest danger test would be no magical solution to the Court's failure to protect religious conduct. Religious interests would still be at risk depending on how the test was defined, for every test can be deconstructed into its intended opposite. If the will of the judiciary is to cling to the belief/conduct paradigm, *i.e.* paternalistically to protect the society from itself through recognition of only the right to solitary belief, no standard will make any difference in the results of the cases. If the will to change were to exist, however, this test would offer more potential for protection than the belief/conduct paradigm can. The language is intentionally strong. There must be manifest, as opposed to imaginable, danger to the state directly caused by the religious exercise and it must be danger to the existence of the state, not just the convenience of its machinery. There was no manifest danger to the continuing existence of the state in the Peyotists' use of peyote in the *Smith* case. Certainly no argument advanced in *Reynolds* would constitute manifest danger to the state. Nor was there manifest danger in the awarding of unemployment benefits to an individual fired for her refusal to work on Saturday in *Sherbert*, or in the removal of Amish students from public school before they reached the age of sixteen in *Yoder*, or the wearing of a yarmulke with military garb in *Goldman*. There would be a manifest violation of equal liberty where the religious adherent engaged in sacrificing (or torturing) humans as part of its rituals, but that issue has never made it onto the Supreme Court's docket despite its invocation in the cases.[477]

None of which is to imply that no line should be drawn. As the history of religious conflict makes abundantly clear, individuals acting in the name of religion are perennially capable of more than even a just state can bear. Inevitably, some religious freedom must be limited. The only question is when.

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[473] Michael Malbin compares Madison's approach to the clear and present danger doctrine and notes that Madison's views did not prevail in the drafting of the First Amendment. *See* MICHAEL MALBIN, RELIGION AND POLITICS 21–22 (1978).

[474] *See id.* at 21–22 (citing G. Hunt, *Madison and Religious Liberty*, AM. HIST. ASS'N ANNUAL REP. 166–67 (1901)).

[475] 374 U.S. 398, 406–07 (1963).

[476] *See supra* notes 234–40 and accompanying text.

[477] *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990); Reynolds v. United States, 98 U.S. 145 (1878).

The belief/conduct paradigm responds, "Almost always." The manifest danger test responds: "Almost never." The former operates out of a fear of anarchy, the latter in faith that freedom to be different paradoxically binds individuals together more strongly than law.[478]

VII. CONCLUSION

Careful attention to the Court's use of the belief/conduct paradigm reveals much. It is pervasively present throughout the Court's free exercise jurisprudence. Whatever changes have occurred in free exercise doctrine have swirled around this fixed aspect. Even in *Wisconsin v. Yoder*, where the Court broke through to a new way to envision religious experience as an amalgam of belief and conduct, the belief/conduct paradigm retained a good deal of its force. It has survived and more recently thrived in 115 years of free exercise case law

The paradigm's force can have no small relationship to its strong resemblance to the Protestant Christian retrieval of Paul's preconversion paradigm which relates faith and works under the law as paired opposites. The Court has secularized an existing theological structure to determine the extent of the Free Exercise Clause's power. And in so doing, it has read the clause as a virtual nullity. If we are to nurture and protect the diversity of religious experience in this country, we must bring the Free Exercise Clause to life. That is unlikely to happen until the belief/conduct paradigm has been transcended.

[478] Difference, after all, is as important as sameness in creating the possibility of dialogue and community between individuals. *See* Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 369 (1986) ("[S]ameness and difference can be understood as two components of a dialogical relationship."); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 32 (1986) ("Difference is what we most fundamentally have in common. Moreover, difference is a relationship between or among persons.").