



**TOURO COLLEGE**  
JACOB D. FUCHSBERG LAW CENTER  
*Where Knowledge and Values Meet*

Digital Commons @ Touro Law  
Center

---

Scholarly Works

Faculty Scholarship

---

1996

## Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective

Samuel J. Levine  
*Touro Law Center, [slevine@tourolaw.edu](mailto:slevine@tourolaw.edu)*

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Constitutional Law Commons](#), and the [Religion Law Commons](#)

---

### Recommended Citation

5 Wm. & Mary Bill Rts. J. 153 (1996).

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

# TOWARD A RELIGIOUS MINORITY VOICE: A LOOK AT FREE EXERCISE LAW THROUGH A RELIGIOUS MINORITY PERSPECTIVE

Samuel J. Levine\*

*Legal scholars have recently advanced theories emphasizing the importance of perspectives in the law. Perspective scholarship recognizes that laws are necessarily shaped by society's dominant forces, including its biases and preconceptions. Perspective scholars attempt to understand how these forces have shaped our laws, and they suggest changes to accommodate those affected by society's biases.*

*In this Article, Professor Levine introduces the concept of a religious minority perspective. He develops the concept of a religious minority perspective in the context of several, prominent Free Exercise cases. Professor Levine discusses these cases in his presentation of the central themes of a religious minority perspective, as he illuminates perspective theory in general.*

\* \* \*

## INTRODUCTION

In recent years, a vast area of scholarship has emerged discussing the importance of "perspectives" in legal thinking and education.<sup>1</sup> Legal theo-

---

\* Assistant Legal Writing Professor, St. John's University School of Law; B.A., Yeshiva University, 1990; J.D., Fordham University, 1994; Ordination, Yeshiva University, 1996; LL.M., Columbia University, 1996.

An earlier draft of this Article was written for Columbia Law School's Graduate Seminar in Legal Education. I thank the seminar instructors, Peter Strauss and Mary Zulack, as well as seminar participants Kathy Cerminara, Jennifer Elrod and Christine Farley for their helpful comments and general encouragement. I also thank Patricia Williams and Eugene Volokh for helpful discussions and Kent Greenawalt and Nathan Lewin for their thoughtful analysis of many of these cases.

<sup>1</sup> For a helpful description of perspective scholarship, see Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1, 10 (1992):

The term perspective scholarship encompasses an ever-growing body of work connected by the fact that it challenges the traditional notion that law is a neutral, objective, rational set of rules, unaffected in content and form by the passions and perspectives of those who possess and wield the power inherent in law and legal institutions.

rists have begun to recognize that because law does not develop independent of societal forces and prejudices, the law will, to varying degrees, reflect some of those forces and prejudices.

Some proponents of viewing the law through different perspectives have developed new disciplines of legal study, such as critical legal studies, feminist jurisprudence, and critical race theory. Scholarship in these areas is largely premised on the assertion that the law as it now stands is a construct of the dominant forces in society and that the law has been written by judges and legislators who, consciously or not, have shared the biases of society at large.<sup>2</sup> If these premises are true, according to some theorists, it follows that the law must be deconstructed and reformulated in a manner that takes into account perspectives that have been excluded.<sup>3</sup> In addition, a number of scholars have asserted that an effective way to understand the biases inherent in the law is to read the narratives of those groups that are disadvantaged as a result of these prejudices.

A central goal of perspective scholarship is to express the notion that because law is a reflection of broader sociological issues, these issues are by definition a part of the law.<sup>4</sup> The sociological issues themselves can be properly understood only through the different perspectives of those who are affected in unique ways by sociological forces. Therefore, it follows that in order to properly understand the law, scholars must understand various per-

---

<sup>2</sup> See *id.* at 11 (“Perspective scholarship is based on the premise that certain groups historically have been unrepresented in law and their exclusion has led to biases—an incompleteness or deficit in contemporary legal analysis and institutions.”).

<sup>3</sup> As Professor Fineman notes, “perspective scholars argue the corresponding contention that historically excluded groups have different, perhaps unique, views and experiences that are relevant to the issues and circumstances regulated and controlled by law.” *Id.*

Mari Matsuda similarly describes an “outsider’s jurisprudence,” characterized by a methodology “grounded in . . . social reality and experience . . . which rejects presentist, androcentric, Eurocentric, and false-universalist descriptions of social phenomena.” Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2323-24 (1989).

<sup>4</sup>

[Perspective scholars] look to the social, cultural, and political, in addition to the legal, to provide a context for understanding the operation and impact of law in our society. The perspective scholar’s definition of “law” is broad . . . . Law is not only something “out there”—an independent body of principles—but a product of society, acted upon and responsive to political and cultural forces. For this reason, it is as essential to understand societal and cultural forces as it is to decipher doctrine in order to understand “the law.” . . . [Perspective scholarship] makes more complete and more complex our consideration of the questions “what is law?” and “what are the roles and functions of law in our society?”

Fineman, *supra* note 1, at 11.

spectives.

This Article considers yet another voice in legal analysis, a religious minority perspective. A religious minority perspective not only provides a unique viewpoint but also helps illuminate other perspectives. This Article examines the religious minority perspective through a discussion of major issues in current free exercise jurisprudence. In so doing, this Article offers a further illustration of the effect of perspectives on the law and the importance of perspectives in legal thinking.

### I. PERSPECTIVES AND "THE LAW"

Some scholars argue that the use of perspectives is merely an attempt to bring unrelated and highly irrelevant disciplines, such as sociology, into the arena of legal analysis. As Cass Sunstein noted, however, "the judgments of victims (or of any other particular group) cannot by themselves be decisive. But they are highly relevant. In a system of free expression, exposure to multiple perspectives will offer a fuller picture of the consequences of social acts. This should help make for better law."<sup>5</sup>

Professor Sunstein observes that the perspectives of particular groups, such as victims, are "highly relevant."<sup>6</sup> Feminist theorists and critical race theorists, among others, have demonstrated that the perspectives of underrepresented groups, especially of those groups victimized by legal constructs, are highly relevant but have been ignored.<sup>7</sup> Religious minorities who are victims of laws restricting their free exercise rights can make a similar claim. Indeed, Martha Fineman has included religion among the "diverse and often divergent viewpoints based on . . . social and cultural experiences" introduced into legal discourse by perspective jurisprudence.<sup>8</sup> Sunstein similarly advocates exposure to "multiple perspectives" to provide a more complete picture of the consequences of acts within society. Moreover, as Sunstein notes, an increased understanding of society through perspectives "should help make for better law."<sup>9</sup>

Ironically, Sunstein has been criticized for not sufficiently taking perspectives into account in free speech law. Jack Balkin contends that Sunstein's writings reflect academics' failure to recognize "their status as members of a subculture whose elite values tend to shape and occasionally distort their perspectives."<sup>10</sup> Professor Balkin makes a convincing argument

---

<sup>5</sup> CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 243 (1993).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Fineman, *supra* note 1, at 11. Professor Fineman also lists other viewpoints, including race, gender, class, and sexual orientation.

<sup>9</sup> SUNSTEIN, *supra* note 5, at 243.

<sup>10</sup> J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 *YALE*

for the value of perspectives:

If critical race theory and feminism have taught us anything, it is that one cannot begin to understand the situation of others until one also understands one's differences from them and how this difference affects one's ways of seeing the world. If we do not investigate the relationship between our social situation and our perspectives, we may confuse our conception of what is reasonable with Reason itself. If we do not see how our reason is both enabled and limited by our position, we may think our judgments positionless and universal. We may find the perspectives of those differently situated unreasonable, bizarre, and even dangerous, or we may not even recognize the possibility of another way of looking at things.<sup>11</sup>

Balkin does not limit his argument to critical race theory or feminist theory. Extending his logic to the social and cultural status of academia, Balkin concludes that

[w]hat is true of race and gender is also true of professional training and social position. If legal academics are to learn something from populism, they must first try to understand the professional perspective from which they offer their judgments and the kinds of rhetoric they use to offer them.<sup>12</sup>

Similarly, one can apply the same rationale to acknowledge that we form our judgments on religious matters based largely on our own religious perspectives.

Though Balkin calls on legal academics to recognize their own perspectives, the same suggestion can be addressed to the entire legal community, and most importantly to judges.<sup>13</sup> In light of subsequent appreciation for

---

L.J. 1935, 1990 (1995) (reviewing CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993)).

<sup>11</sup> *Id.* at 1952.

<sup>12</sup> *Id.*

<sup>13</sup> Criticizing Ronald Dworkin's "conception of law," Frank Michelman wrote: What is lacking is dialogue. Hercules, Dworkin's mythic judge, is a loner. . . . His narrative constructions are monologues. He converses with no one, except through books. He has no encounters. He meets no otherness. . . . No interlocutor violates the inevitable insularity of his experience and outlook. Hercules is just a

the perspectives of various minority views, numerous judicial decisions appear not only wrongly decided but at times morally repugnant. Robert Cover's *Justice Accused*<sup>14</sup> powerfully portrays the morally disturbing choices made by many judges in slavery cases, based on a narrow view of which considerations are a part of "the law."<sup>15</sup> Cover notes that in an exemplary decision, Justice John McLean wrote: "It is argued that slavery had its origin in usurpation and injustice, and is continued in violation of man, as declared in our Declaration of Independence; but these are topics which this court will not discuss. We look to the law, and only to the law."<sup>16</sup> If judges refuse to include in their view of "the law" the continuing injustice of social institutions, it is unlikely that they will be able to produce the type of "better law" that Sunstein advocates.

The list of unfortunate judicial decisions that have resulted from a lack of perspective may begin with the slavery cases. Arguably, "[o]pinions steeped in what we see as serious moral error" have continued at the rate of "at least one per generation."<sup>17</sup> Scholars have compiled a compelling list of cases, dating from 1856 to 1986, in which judicial opinions showed a lack of appreciation for the perspectives of various groups, including slaves, Native Americans, Chinese immigrants, Japanese Americans, women, mentally ill individuals, and homosexuals.<sup>18</sup> A supplemented list might well include religious minorities.

This history suggests that in cases relating to the interests of minorities and oppressed groups, judges are not neutral arbiters who decide the law based purely upon objective reason. It is disturbing, but not surprising, that judges who fail to consider the perspectives of disadvantaged groups may also fail to interpret the law in a way that will help combat some of society's institutional biases. Indeed, judges who erroneously believe that they present neutral interpretations of the law are particularly likely to have that belief if they are unaware of, or unwilling to acknowledge, the experiences of those whose perspectives are ignored.<sup>19</sup>

---

man, after all. He is not the whole community. No one man or woman could be that.

Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 76 (1986).

<sup>14</sup> ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

<sup>15</sup> *Id.* at 120.

<sup>16</sup> *Vaughn v. Williams*, 28 F. Cas. 332, 339 (C.C.C. Ohio 1853) (No. 9,583); see COVER, *supra* note 14, at 120 (citing *Vaughn* and other slavery cases).

<sup>17</sup> Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1929-30 (1991).

<sup>18</sup> See generally *id.*

<sup>19</sup> As Professors Delgado and Stefancic noted in documenting "embarrassingly inhu-

Although it is often difficult for judges to incorporate the perspectives of others into their legal analysis, one case stands out as a model for the use of perspectives to make better law: *Brown v. Board of Education*.<sup>20</sup> At the time of the *Brown* decision, many scholars contended that the Court's holding was based not on "the law" but on sociological theory that is alien to legal principles. Charles Black responded to these contentions in a landmark article, *The Lawfulness of the Segregation Decisions*.<sup>21</sup> Black's compelling arguments, which focused on the experiential realities of segregation, successfully combatted the question of whether *Brown* had been decided correctly, based on "the law."<sup>22</sup> Black refused to abide by an unrealistically narrow definition of what may be properly considered part of "the law."

---

mane decisions, . . . [o]ne obvious explanation for these mistakes is judicial inability to identify, imaginatively, with the persons whose fate is being decided. Because of the particularized stock of life experiences and understandings judges bring to the bench, these notorious opinions seemed to their authors unexceptionable, natural, 'the truth.'" *Id.* at 1930 (footnote omitted).

The willingness of judges to issue decisions that affect the lives of those whose positions they have not fully considered evokes the Talmudic warning: "Do not judge another until you are in that person's place." Talmud Bavli, Avoth 2:5. While the Talmud obviously recognizes the practical reality that forces judges to decide the cases of everyone who comes before them, the Talmudic ideal can at least be approached if a judge learns as much as possible about the perspectives of others.

In an attempt to counteract the troubling judicial decisions that ignore certain perspectives, Professor Kimberlé Crenshaw has tried to "empower students to critique the texts in their own voices" by learning "how to analyze an opinion that carries the air of authority but which may nevertheless deny a reality that its readers feel they know." Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 13 (1989). As a result, "the relevance of [students'] perspective[s is] not only affirmed, but given a role in their descriptive or normative analyses." *Id.* The students develop "specific arguments ranging from empirically- or experientially-based critiques of the accuracy of the claims being made, to criticism of the normative world view implicitly or explicitly adopted by the texts." Finally, the students acquire "a sense that positions [are] clarified, and that alternative possibilities [are] seriously debated, rather than presumed or overlooked." *Id.*

<sup>20</sup> 347 U.S. 483 (1954). Martha Minow observes that "[s]chool desegregation stands as the first and perhaps most memorable example of dramatic judicial action that altered established institutions on behalf of a group long considered different by others in society." MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 356 (1990).

<sup>21</sup> Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

<sup>22</sup> See, e.g., JACK GREENBERG, *CRUSADERS IN THE COURT* 161-62 (1994) ("When some scholars theorized abstractly about the constitutionality of segregation, arguing that though it treated blacks and whites separately, it treated them equally, [Charles Black] responded with a healthy dose of reality. He *knew* the purposes and effects of segregation firsthand.").

Significantly, Professor Black, a caucasian who grew up in the South, looked through the eyes of the victims of segregation to identify a number of inequities produced by that system. He eloquently declared his interest in perspectives to discover legal “*evidence* of what segregation means to the people who impose it and to the people who are subjected to it.”<sup>23</sup> Black argued that “[t]he Court that refused to see inequality in this cutting off [of blacks from society] would be making the only kind of law that can be warranted outrageous in advance—law based on self-induced blindness, on flagrant contradiction of known fact.”<sup>24</sup> Indeed, he found the facts of segregation to be “matters of common notoriety, matters not so much for judicial notice as for the background knowledge of educated men who live in the world.”<sup>25</sup> Looking at the actual effects of segregation, based on “the ground of history and of common knowledge about the facts of life in the times and places”<sup>26</sup> where it existed, Black concluded that the segregation judgments, “like all judgments, must rest on the rightness of their law and the truth of their fact.”<sup>27</sup>

In perhaps the most powerful passage of his Article, Black relied on common sense to answer the question, “[D]oes segregation offend against equality?”<sup>28</sup> After noting that “[e]quality, like all general concepts, has marginal areas where philosophic difficulties are encountered,”<sup>29</sup> Black looked to reality and perspective to conclude that there was no philosophic difficulty in deciding that segregation violated equality:

[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated “equally,” I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. The only question remaining (after we get our laughter under control) is whether the segregation system answers to this description.

Here I must confess to a tendency to start laughing all over again. I was raised in the South, in a Texas city where the pattern of segregation was firmly fixed. I am sure it never occurred to anyone, white or colored, to question its meaning. The fiction of “equality” is just about on a level

---

<sup>23</sup> Black, *supra* note 21, at 426.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 427.

<sup>27</sup> *Id.* at 429.

<sup>28</sup> *Id.* at 424.

<sup>29</sup> *Id.*



with the fiction of "finding" in the action of trover.<sup>30</sup>

Just as Professor Black refused to accept a theoretical conceptualization of law that ignored the reality of the effects of segregation, Professor Fineman has written that "feminist methodology is about making theory more concrete, bringing in stories and other ways of identifying and describing women's experiences as they exist and as they have been left out of the legal system."<sup>31</sup> Similarly, it is important for courts to reject legal analysis that ignores the reality of the effect of laws on other underrepresented groups, including religious minorities.

## II. RELIGIOUS PERSPECTIVES

The United States consists of people who represent an almost uncountable variety of perspectives. These perspectives may result from numerous factors, including but not limited to race, gender, ethnicity, sexual orientation, class, able-bodiedness, and religion. The new legal disciplines and theories mentioned earlier in this Article aim at recognizing the existence of many of these perspectives and at understanding the way in which they relate to and impact the development of law.

Religious perspectives deserve the attention of legal scholars. New religions are continuously introduced into American society both through the addition of religions never before practiced in the United States and through variations on previously established religions. There is little reason to doubt that this trend will continue.

The continuing increase in religious minorities suggests that more than ever courts must appreciate religious minority perspectives to ensure that the law evolves concurrently with our country's changing religious landscape. In the future, it will be increasingly important for judges and lawyers to have the capacity to understand the perspectives of religious minorities.

Perhaps the best way to see the legal effects of religious perspectives is to examine Supreme Court decisions. The United States Supreme Court has failed to acknowledge fully the rights of several religious minorities whose practices and attitudes do not conform to those of more established American religions.<sup>32</sup> Mari Matsuda notes that "[a]s feminist theorists have pointed out, everyone has a gender, but the hidden norm in law is male. As critical race theorists have pointed out, everyone has a race, but the hidden norm in law is white."<sup>33</sup> Similarly, everyone has a religious viewpoint, but

---

<sup>30</sup> *Id.*

<sup>31</sup> Fineman, *supra* note 1, at 23 n.51.

<sup>32</sup> See *infra* Parts II.A-B, D-F.

<sup>33</sup> Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Juris-*

the hidden norm in law has been based upon those viewpoints familiar to American religious sensibilities.<sup>34</sup> Because of this norm, the Court has often failed to produce law that incorporates an understanding of minority religions.<sup>35</sup>

---

*prudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1361 (1991); see Minow, *supra* note 20, at 212 (noting that “feminists challenge the presupposition that there is a neutral norm against which to judge experience, and the accompanying assumption that male experience and perceptions conform to that neutral norm”).

<sup>34</sup> Professor Minow writes of similar “[u]n stated points of reference” that “may express the experience of a majority or may express the perspective of those who have had greater access to the power used in naming and assessing others.” Minow, *supra* note 20, at 51. Specifically, she explains that

[w]omen are different in relation to the unstated male norm. Blacks, Mormons, Jews, and Arabs are different in relation to the unstated white Christian norm. Handicapped persons are different in relation to the unstated norm of able-bodiedness or, as some have described it, the vantage point of “Temporarily Able Persons.”

*Id.*

<sup>35</sup> The importance of a court’s understanding the perspectives of minority religions applies to Establishment Clause cases as well. As Justice O’Connor wrote in response to Justice Kennedy’s criticism of the Court’s investigation into the religious meaning of the Chanukah menorah,

Surely, Justice Kennedy cannot mean that this Court must keep itself in ignorance of the symbol’s conventional use and decide the constitutional question knowing only what it knew before the case was filed. This prescription of ignorance obviously would bias this Court according to the religious and cultural backgrounds of its Members.

County of Allegheny v. ACLU, 492 U.S. 573, 614 n.60 (1989) (O’Connor, J., concurring in part and concurring in judgment).

Justice O’Connor thus advocated understanding the perspective of an adherent to a religion whose symbol is placed in public. In a dissenting opinion in the recent case Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995), however, Justice Stevens focused on the perspective of a non-adherent. Stevens noted the variety of responses that may accompany a freestanding wooden cross placed by the Ku Klux Klan in front of Ohio’s statehouse: “Some might have perceived it as a message of love, others as a message of hate, still others as a message of exclusion—a Statehouse sign calling powerfully to mind their outsider status.” *Id.* at 2457 (Stevens, J., dissenting). Stressing the importance of religious minority perspective jurisprudence in consideration of the Establishment Clause, Justice Stevens stated:

It is especially important to take into account the perspective of a reasonable observer who may not share the particular religious belief it expresses. A paramount purpose of the Establishment Clause is to protect such a person from being made to feel like an outsider in matters of faith, and like a stranger in the political community. If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display. No less stringent rule can adequately protect non-adherents from a well-grounded perception that their sovereign supports a

Dissenting Justices, however, have consistently criticized the Court's approach, often by expressing the perspective of the minority religion and by urging that this perspective be accorded the respect given to more established religions. These dissenting opinions, which have been particularly sensitive to religious differences, often serve as models for judges, lawyers, and scholars.<sup>36</sup>

#### A. *Claims of Jehovah's Witnesses*

In the early 1940s, the Supreme Court considered a number of cases relating to the free exercise rights of Jehovah's Witnesses. Two of these cases, including the landmark case *Board of Education v. Barnette*,<sup>37</sup> involved student refusal to participate in a school flag salute ceremony.<sup>38</sup>

faith to which they do not subscribe.  
*Id.* at 2466 (Stevens, J., dissenting).

For a discussion of the power of religious symbols to exclude outsiders, see generally Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503 (1992).

<sup>36</sup> This Article does not conclude that in each case examined the Court should have adopted the legal arguments presented by the religious minority. Rather, this Article suggests that a careful look at the various opinions often demonstrates the majority's inability or unwillingness to acknowledge realistically the needs of religious minorities. The failure to understand properly religious minorities' beliefs and practices will to a certain extent impede the possibility of properly protecting their rights.

Moreover, in some cases, the Court may have indeed considered a religious minority perspective without so indicating in the text of the opinion. Nevertheless, the Court's very failure to give adequate expression to religious minority perspectives in written opinions has the effect of improperly limiting the significance accorded these perspectives in legal thought. In part, this Article attempts to follow the approach of "a number of legal scholars who have come to reject [the] orthodox view of the relation between legal discourse and legal doctrine." Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1811 (1993). As Kendall Thomas notes,

Until quite recently, professional students of the Supreme Court have been conditioned to train their interpretive energies on the logic, rather than the language, of the Court's opinions. In short, they have viewed the rhetoric of the Supreme Court analysis and argument mainly as a tool for communicating rules of constitutional law, which are taken to be separate and distinct from that rhetoric itself. . . . In its most radical moments, . . . recent writing on the theory and practice of legal interpretation undermines the idea that the content of legal doctrine is separable (even in principle) from its discursive form . . . .

*Id.*

<sup>37</sup> 319 U.S. 624 (1943).

<sup>38</sup> *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

Although the flag salute cases have an important place in both free exercise and free speech jurisprudence, the cases dealing with the Witnesses' practices of public proselytizing are particularly illustrative of different approaches taken by Supreme Court justices towards an unfamiliar religious system.<sup>39</sup>

In the 1942 case *Jones v. Opelika*,<sup>40</sup> a number of Witnesses appealed their convictions pursuant to various city ordinances that imposed taxes on the sale of printed matter. Relying in part on a free exercise claim, the appellants challenged the constitutionality of the ordinances as applied to their practice of distributing booklets and pamphlets describing their religious beliefs.<sup>41</sup> The majority opinion acknowledged the "distinction between non-discriminatory regulation of operations which are incidental to the exercise of religion . . . and those which are imposed upon the religious rite itself."<sup>42</sup> The Court further recognized that "both teachers and preachers need to receive support for themselves as well as alms and benefactions for charity and the spread of knowledge."<sup>43</sup> Nevertheless, the Court upheld the convictions, concluding that it "view[s] these sales as partaking more of commercial than religious or educational transactions."<sup>44</sup>

In a dissenting opinion, Justice Murphy showed a sensitivity to the religious perspectives of the Witnesses and a concern for the rights of adherents of unfamiliar and unpopular religions. After analyzing the ordinances under both free speech and free press principles, Justice Murphy turned to "a right even more dear to many individuals—the right to worship their Maker according to their needs and the dictates of their souls and to carry their message or their gospel to every living creature."<sup>45</sup> He thus established a general framework recognizing the fundamental constitutional right to freedom in religious worship and in proselytizing. Next, Justice Murphy placed the activities of the Witnesses squarely within this framework, describing the appellants as "itinerant ministers going through the streets and from house to house in different communities, preaching the gospel by distributing booklets and pamphlets setting forth their views of the Bible and the tenets of their faith."<sup>46</sup> Rejecting the majority's categorization of this conduct as chiefly commercial, Justice Murphy concluded that "[i]t does not appear that their motives were commercial, but only that they were evangelizing their

---

<sup>39</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Murdock v. Pennsylvania*, 319 U.S. 1005 (1943); *Jones v. Opelika*, 316 U.S. 584 (1942).

<sup>40</sup> 316 U.S. 584 (1942).

<sup>41</sup> *Id.* at 587.

<sup>42</sup> *Id.* at 596.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 598.

<sup>45</sup> *Id.* at 621 (Murphy, J., dissenting).

<sup>46</sup> *Id.* (Murphy, J., dissenting).

faith as they saw it.”<sup>47</sup>

Recognizing that the Witnesses’ mode of preaching may appear unusual to those familiar with more popular and established religious systems, Justice Murphy further developed his argument by observing the underlying similarities between different religious practices.<sup>48</sup> Justice Murphy wrote that “[w]hile perhaps not so orthodox as the oral sermon, the use of religious books is an old, recognized and effective mode of worship and means of proselytizing. For this, petitioners were taxed.”<sup>49</sup> Having drawn the comparison between the Witnesses and more “orthodox” religions, Justice Murphy argued powerfully that “[t]he mind rebels at the thought that a minister of any of the old established churches could be made to pay fees to the community before entering the pulpit.”<sup>50</sup>

Finally, Justice Murphy declared the importance of protecting unpopular religion to be a fundamental value of the United States. Justice Murphy emphasized that “the protection of the Constitution must be extended to all, not only to those whose views accord with prevailing thought but also to dissident minorities.”<sup>51</sup> Addressing the plight of the Witnesses in particular, Justice Murphy stated that “[o]ne need only read the decisions of this and other courts in the past few years to see the unpopularity of Jehovah’s Witnesses and the difficulties put in their path because of their religious beliefs.”<sup>52</sup> He noted that “[a]n arresting parallel exists between the troubles of Jehovah’s Witnesses and the struggles of various dissentient groups in the American colonies for religious liberty.”<sup>53</sup> Returning to the ordinances, Justice Murphy concluded that “[l]iberty of conscience is too full of meaning for the individuals of this Nation to permit taxation to prohibit or substantially impair the spread of religious ideas, even though they are controversial and run counter to the established notions of a community.”<sup>54</sup>

Less than one year later, in *Murdock v. Pennsylvania*,<sup>55</sup> the Court declared unconstitutional a similar ordinance and vacated *Opelika*, with Justice Douglas writing for the majority. This time, the majority opinion carefully considered the Witnesses’ religious practices as viewed through the perspective of adherents. Justice Reed, who had written the majority opinion in *Opelika*, wrote for the dissent in *Murdock*. Justice Reed again argued that

---

<sup>47</sup> *Id.* at 612 (Murphy, J., dissenting).

<sup>48</sup> *Id.* at 621 (Murphy, J., dissenting).

<sup>49</sup> *Id.* (Murphy, J., dissenting).

<sup>50</sup> *Id.* (Murphy, J., dissenting).

<sup>51</sup> *Id.* at 611-12 (Murphy, J., dissenting).

<sup>52</sup> *Id.* at 621-22 (Murphy, J., dissenting).

<sup>53</sup> *Id.* at 622 (Murphy, J., dissenting).

<sup>54</sup> *Id.* at 623 (Murphy, J., dissenting).

<sup>55</sup> 319 U.S. 105 (1943).

the Witnesses' activities could not be considered "religious exercises."<sup>56</sup> Justice Douglas's majority opinion, however, cited passages in the New Testament that the Witnesses used to support their practices.<sup>57</sup> The majority noted that according to the Witnesses' own interpretation of the New Testament, they obeyed a divine command by distributing religious literature.<sup>58</sup>

Echoing Justice Murphy's dissent in *Opelika*, which Justice Douglas had joined, the majority opinion tried to universalize the seemingly unconventional nature of the Witnesses' religious practices. The Court observed that "[t]he hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses."<sup>59</sup> Additionally, the Court documented the method of distributing religious tracts "in various religious movements down through the years"<sup>60</sup> and noted that "[t]his form of evangelism is utilized today on a large scale by various religious sects."<sup>61</sup>

Justice Douglas also employed another technique that Justice Murphy had used in the *Opelika* dissent: drawing explicit comparisons to more familiar forms of religious practice. Comparing the Witnesses' practices to a revival meeting, the Court concluded that "[t]his form of religious activity 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."<sup>62</sup>

Finally, the majority showed a sensitivity to the special protections that must be afforded an unpopular and unfamiliar religious movement such as the Witnesses. Openly acknowledging the nature of the literature distributed by the Witnesses, the Court described "its provocative, abusive, and ill-mannered character and the assault which it makes on our established churches and the cherished faiths of many of us."<sup>63</sup> Yet the Court was just as forthright in its defense of the religious practices, stating that

those considerations are no justification for the license tax which the ordinance imposes. Plainly a community may not suppress, or a state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minori-

---

<sup>56</sup> *Id.* at 131 (Reed, J., dissenting).

<sup>57</sup> *Id.* at 108 (quoting *Acts* 20:20 and *Mark* 16:15).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 109.

<sup>63</sup> *Id.* at 115-16.

ty favors but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights.<sup>64</sup>

The Witnesses were not as successful a year later when the Court confronted yet "another episode in the conflict between Jehovah's Witnesses and state authority"<sup>65</sup> in *Prince v. Massachusetts*.<sup>66</sup> The appellants challenged the constitutionality of child labor laws as applied to the rights of Witness children to distribute religious literature. The Court found the labor laws constitutional, deferring to the state's power to effect prohibitions that it deems "necessary to accomplish its legitimate objectives."<sup>67</sup>

With the majority ruling against the Witnesses, Justice Murphy returned to the role of dissenter, defending the rights of the religious minority. Justice Murphy again asserted that the activities were religious in nature rather than commercial. Quoting the majority opinion in *Murdock*, Justice Murphy wrote that the child "was occupied, in other words, in 'an age-old form of missionary evangelism' with a purpose 'as evangelical as the revival meeting.'"<sup>68</sup>

Justice Murphy then criticized the majority's deference to the state's judgment, emphasizing that "[t]he burden . . . [was] on the state of Massachusetts to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of the type involved in this case."<sup>69</sup> Responding to the majority's reference to "possible harms arising from . . . the diverse influences of the street,"<sup>70</sup> Justice Murphy countered that "there is not the slightest indication in this record, or in sources subject to judicial notice, that children engaged in distributing literature pursuant to their religious beliefs have been or are likely to be subject to any" such harms.<sup>71</sup> Justice Murphy found that the fact that the children were engaged in religious activity indicated that "[t]he dangers are . . . exceedingly remote, to say the least."<sup>72</sup>

Justice Murphy concluded his dissenting opinion with an eloquent and urgent call for protection of the rights of the Witnesses and other religious minorities:

---

<sup>64</sup> *Id.* at 116.

<sup>65</sup> *Prince v. Massachusetts*, 321 U.S. 158, 159 (1944).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 170.

<sup>68</sup> *Id.* at 172 (Murphy, J., dissenting) (quoting *Murdock v. Pennsylvania*, 319 U.S. 105, 108, 109 (1943)).

<sup>69</sup> *Id.* at 173 (Murphy, J., dissenting).

<sup>70</sup> *Id.* at 168 (Murphy, J., dissenting).

<sup>71</sup> *Id.* at 175 (Murphy, J., dissenting).

<sup>72</sup> *Id.* (Murphy, J., dissenting).

From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah's Witnesses are living proof of the fact that even in this nation . . . the right to practice religion in unconventional ways is still far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes. To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom.<sup>73</sup>

#### B. *Braunfeld v. Brown: Orthodox Jewish Claims*

In 1961, the Court decided *Braunfeld v. Brown*,<sup>74</sup> a case involving the free exercise rights of Orthodox Jews. The appellants were merchants engaged in the retail sale of clothing and home furnishing.<sup>75</sup> Their religious beliefs required them to close their businesses on their Sabbath, which lasts from sundown on Friday until nightfall on Saturday.<sup>76</sup> To recover some of the resulting lost business, the appellants opened their businesses on Sundays.<sup>77</sup> A Pennsylvania criminal statute, however, proscribed the Sunday retail sale of a number of commodities, including those sold by the appellants.<sup>78</sup> The appellants claimed that the statute would cause them substantial economic loss unless they violated a basic tenet of their faith.<sup>79</sup>

In rejecting the appellants' claim, the Court stressed the need for a "weekly respite from all labor."<sup>80</sup> The Court likewise rejected the appellants' request for an exemption from the statute, citing "enforcement problems" and the potential of "economic advantage" for those granted such an exemption.<sup>81</sup> In particular, the Court speculated that an exemption

---

<sup>73</sup> *Id.* at 175-76 (Murphy, J., dissenting).

<sup>74</sup> 366 U.S. 599 (1961).

<sup>75</sup> *Id.* at 601.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 600.

<sup>79</sup> *Id.* at 602.

<sup>80</sup> *Id.* at 607.

<sup>81</sup> *Id.* at 608.



“might cause the Sunday-observers to complain that their religions are being discriminated against.”<sup>82</sup>

While the majority was concerned with the perspective of the majority of merchants, Justice Brennan’s partial focused instead on “the point of view of the individuals whose liberty is—concededly—curtailed by these enactments.”<sup>83</sup> Justice Brennan’s decision to “approach this case differently”<sup>84</sup> is an important example of effective religious perspective jurisprudence that makes a practical difference in resolving cases. Having crossed the conceptual boundary that would prevent someone who is an “outsider” to Orthodox Judaism from understanding such a religious perspective, Brennan opined that “the issue in this case . . . is whether a State may put an individual to a choice between his business and his religion. The Court holds that it may. But I dissent, believing that such a law prohibits the free exercise of religion.”<sup>85</sup>

Moreover, Justice Brennan rejected the formalistic approach by which the majority distinguished its holding from those decisions involving laws that directly prohibited a religious practice. The majority noted that the Pennsylvania statute did not state that the appellants had to work on Saturday.<sup>86</sup> In a passage reminiscent of Charles Black’s approach to the effects of segregation,<sup>87</sup> Brennan responded to the majority by looking at the situation through the eyes of an Orthodox Jewish merchant. Justice Brennan recognized the real effect of the law,

that appellants may not simultaneously practice their religion and their trade, without being hampered by a substantial competitive disadvantage . . . that no one may at one and the same time be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen. This clog upon the exercise of religion, this state-imposed burden on Orthodox Judaism, has exactly the same economic effect as a tax levied upon the sale of religious literature. And yet, such a tax . . . was held invalid.<sup>88</sup>

---

<sup>82</sup> *Id.* at 609.

<sup>83</sup> *Id.* at 610 (Brennan, J., concurring in part and dissenting in part).

<sup>84</sup> *Id.* (Brennan, J., concurring in part and dissenting in part).

<sup>85</sup> *Id.* at 611 (Brennan, J., concurring in part and dissenting in part).

<sup>86</sup> *Id.* at 612-13 (Brennan, J., concurring in part and dissenting in part).

<sup>87</sup> *See supra* text accompanying notes 21-30.

<sup>88</sup> *Id.* at 613 (Brennan, J., concurring in part and dissenting in part). In *Lee v. Weisman*, 505 U.S. 577 (1992), the Court used similar techniques of perspective jurisprudence to reject a formalistic approach. The Court in *Lee* considered a challenge to a prayer at a public school graduation. The majority looked at the prayer through the eyes of a nonbeliever and analyzed the effect of the prayer on the nonbeliever in the context

Justice Stewart, in a short dissenting opinion, asserted that

Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand . . . . I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of their religion.<sup>89</sup>

In a remarkable dissenting opinion, Justice Douglas provided a primer for the ways that a court can use religious perspective jurisprudence to appreciate fully the effect of laws on minority religions.<sup>90</sup> First, Justice Douglas redefined the issue in the case. Recognizing the majoritarian Christian perspective that was the essential basis of the laws prohibiting work on Sundays, he opined that “[t]he question is whether a State can impose criminal sanctions on those who, unlike the Christian majority that makes up our society, worship on a different day or do not share the religious scruples of the majority.”<sup>91</sup> Just as clearly, Justice Douglas answered, “I do not see

---

of a high school graduation. The Court found that “[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.” *Id.* at 592. The Court noted that the peer pressure that would exist on a nonbeliever at a high school graduation ceremony, “though subtle and indirect, can be as real as any overt compulsion.” *Id.* at 593.

The majority based its opinion on a number of sources, including psychological studies of adolescent behavior, *see id.* at 593-94, as well as common sense, declaring that “[e]veryone knows that in our society and in our culture high school graduation is one of life’s most significant occasions.” *Id.* at 595. The majority was unpersuaded by approaches such as that of Justice Scalia, who criticized the majority’s reliance on “social engineering,” “philosophical predilections,” and “psychology practiced by amateurs” and who characterized the majority’s approach as going “beyond the realm where judges know what they are doing.” *Id.* at 632, 636 (Scalia, J., dissenting). The majority asserted that “[l]aw reaches past formalism,” *id.* at 595, and a legal argument must include the understanding of reality that can be accomplished through psychological studies and common sense. *Id.*

Despite his criticism of the majority’s use of perspective jurisprudence, Justice Scalia responded by looking at the case through the point of view of “the other side,” which, as he noted, is “not inconsequential.” *Id.* at 645 (Scalia, J., dissenting). As Justice Scalia reminds us, a sensitivity to the perspective of nonbelievers should not force us to ignore the perspectives of those who believe in prayer.

<sup>89</sup> *Braunfeld*, 366 U.S. at 616 (Stewart, J., dissenting).

<sup>90</sup> *Id.* at 561-81 (Douglas, J., dissenting).

<sup>91</sup> *Id.* at 561 (Douglas, J., dissenting).

how a State can make protesting citizens refrain from doing innocent acts on Sunday because the doing of those acts offends sentiments of their Christian neighbors."<sup>92</sup>

In order to help members of the Christian majority understand the point of view of minority religions, Justice Douglas used a technique effective in perspective jurisprudence: he asked members of the majority to place themselves in the shoes of members of minority religions. Justice Douglas presented hypothetical state legislatures, consisting of a majority of Orthodox Jews, Seventh Day Adventists, or Moslems, which would pass laws criminalizing opening a shop on their respective sabbaths.<sup>93</sup> He asked rhetorically whether "the rest of us [would] have to submit under the fear of criminal sanctions?"<sup>94</sup>

Justice Douglas then explained the effect of the Sunday laws on an individual with a minority religious perspective:

They force minorities to obey the majority's religious feelings of what is due and proper for a Christian community; they provide a coercive spur to the "weaker brethren," to those who are indifferent to the claims of a Sabbath through apathy or scruple. Can there be any doubt that Christians, now aligned vigorously in favor of these laws, would be as strongly opposed if they were prosecuted under a Moslem law that forbade them from engaging in secular activities on days that violated Moslem scruples?<sup>95</sup>

Recognizing the concerns of the Orthodox Jewish appellants in particular, Justice Douglas stated that "[w]hen . . . the State uses its coercive powers . . . to compel minorities to observe a second Sabbath, not their own, the State undertakes to aid and 'prefer one religion over another'—contrary to the command of the Constitution."<sup>96</sup>

Justice Douglas concluded his opinion through another technique useful in perspective jurisprudence—extensive citation of narrative. What makes this narrative so valuable is that unlike narratives in which a person with a minority perspective expresses feelings of oppression and alienation, Justice Douglas's narrative reflects the view of someone, like Justice Douglas, who is part of the majority yet appreciates the minority perspective. The

---

<sup>92</sup> *Id.* at 562 (Douglas, J., dissenting).

<sup>93</sup> *Id.* at 565 (Douglas, J., dissenting).

<sup>94</sup> *Id.* (Douglas, J., dissenting).

<sup>95</sup> *Id.* at 576 (Douglas, J., dissenting).

<sup>96</sup> *Id.* at 577 (Douglas, J., dissenting) (quoting *Everson v. Board of Ed.*, 330 U.S. 1, 15 (1947)).

narrative's speaker is a pastor of a Presbyterian church who speaks of the religious freedoms that should be available to his Jewish friend and to the members of a local Seventh Day Adventist church who close their businesses on Saturday.<sup>97</sup> The pastor concluded: "Why should my faith be favored by the State over any other man's faith?"<sup>98</sup> Justice Douglas shared the pastor's sensitivity and concluded that "none of the opinions filed today in support of the Sunday laws has answered that question."<sup>99</sup>

### C. *Wisconsin v. Yoder: Amish Claims*

In 1972, the Court decided *Wisconsin v. Yoder*,<sup>100</sup> which involved a free exercise claim by members of the Old Order Amish religion and the Conservative Amish Mennonite Church. Notably, the Court was sympathetic to the Amish and accepted the claim that their faith and way of life were inseparable and interdependent.<sup>101</sup>

Particularly interesting is the manner in which the Court demonstrated that the Amish way of life represents a comprehensive religious system. The Court twice compared Amish practices to Jewish religious practices. First, the Court described the Amish practice of adult baptism, "at which Amish young people voluntarily undertake heavy obligations, not unlike the Bar Mitzvah of the Jews, to abide by the rules of the church community."<sup>102</sup> Second, the Court made reference to the Amish religion's "Talmudic diet."<sup>103</sup>

Regardless of the accuracy of the comparisons,<sup>104</sup> it is noteworthy that by 1973, Jewish religious practice had apparently become so familiar that the Court used it as a basis of comparison to illustrate the religious nature of the Amish system. More generally, the Court showed a willingness to engage in a technique useful for perspective jurisprudence: the Court carefully looked to the familiar in an attempt to understand the perspective of the unfamiliar. Indeed, the precise nature of the comparison is not as important as the fact that the comparison allows a means for recognizing a minority perspective. More striking, and perhaps more satisfying, is the Court's apparent comfort with Judaism, a minority religion. This comfort enabled the

---

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 561, 581 (Douglas, J., dissenting).

<sup>99</sup> *Id.* (Douglas, J., dissenting).

<sup>100</sup> 406 U.S. 205 (1972).

<sup>101</sup> *Id.* at 216.

<sup>102</sup> *Id.* at 210.

<sup>103</sup> *Id.* at 216.

<sup>104</sup> It is not fully accurate to say that at a bar mitzvah an individual voluntarily undertakes the obligations of the Jewish community. Additionally, the Amish diet is not regulated by the Talmud.

Court to use Judaism as a religious point of reference. Finally, as a result of the Court's successful appreciation of the Amish religion in *Yoder*, when a free exercise claim based on Amish belief arose in 1982 in *United States v. Lee*,<sup>105</sup> the Court accepted the validity of the religious belief without extensive inquiry.<sup>106</sup>

#### D. *Goldman v. Weinberger: Orthodox Jewish Claims Revisited*

In light of the Court's apparent view in *Yoder* of Judaism as a familiar religion and of the Court's sensitivity to the Amish religion, one might expect that the Court's appreciation of the Orthodox Jewish perspective had increased since its 1961 decision in *Braunfeld v. Brown*.<sup>107</sup> Given such optimistic expectations, the Court's approach in the 1986 case *Goldman v. Weinberger*<sup>108</sup> is highly disappointing. *Goldman* is another example of the Court's failure to acknowledge fully the significance of a religious practice as understood from the perspective of an adherent.

Goldman, an Orthodox Jewish clinical psychologist, challenged Air Force regulations that prohibited him from wearing a yarmulke, as required by his religion.<sup>109</sup> In rejecting Goldman's claim, the brief majority opinion focused almost exclusively on the "considered professional judgment" of Air Force officials who claimed that allowing Goldman to wear a yarmulke would undermine the "sense of hierarchical unity" encouraged by uniforms.<sup>110</sup> The Court ignored the effect that compliance with the regulations would have on Goldman's religious life, calling it merely "objectionable."<sup>111</sup> The majority opinion prompted a number of dissents, and Justice Brennan, writing twenty-five years after *Braunfeld*, again eloquently rose to the defense of the free exercise rights of Orthodox Jews.<sup>112</sup>

One important aspect of Justice Brennan's extensive dissenting opinion

---

<sup>105</sup> 455 U.S. 252 (1982).

<sup>106</sup> In *Lee*, pursuant to religious beliefs, a member of the Old Order Amish failed to comply with social security laws. *Id.* at 254-55. The nearly unanimous majority opinion stated unequivocally that "[b]ecause the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." *Id.* at 257. Justice Stevens's concurring opinion likewise acknowledged an "irreconcilable . . . clash between appellee's religious obligation and his civic obligation." *Id.* at 261 (Stevens, J., concurring).

<sup>107</sup> 366 U.S. 599 (1961); see *supra* Part II.B.

<sup>108</sup> 475 U.S. 503 (1986).

<sup>109</sup> *Id.* at 506.

<sup>110</sup> *Id.* at 508.

<sup>111</sup> *Id.* at 509.

<sup>112</sup> *Id.* at 513 (Brennan, J., dissenting); see *Braunfeld*, 366 U.S. at 610-16 (Brennan, J., concurring in part and dissenting in part).

is his recognition of the Orthodox Jewish perspective and specifically Goldman's perspective regarding the military regulation. In contrast to the absence of a single reference in the majority opinion to the religious significance of a yarmulke, the first line of Justice Brennan's opinion acknowledges that "Simcha Goldman invokes this Court's protection of his First Amendment right to fulfill one of the traditional religious obligations of a male Orthodox Jew—to cover his head before an omnipresent God."<sup>113</sup>

Justice Brennan was unconvinced when the majority

attempt[ed], unsuccessfully to minimize the burden that was placed on Dr. Goldman's rights. The fact that "the regulations do not permit the wearing of . . . a yarmulke," does not simply render military life for observant Orthodox Jews "objectionable." It sets up an almost absolute bar to the fulfillment of a religious duty. Dr. Goldman spent most of his time in uniform indoors, where the dress code forbade him even to cover his head with his service cap. Consequently,

---

<sup>113</sup> *Id.* at 513 (Brennan, J., dissenting). Brennan's dissenting opinion, followed Justice Stevens's concurring opinion which, although ultimately favoring the upholding of the military regulation, explained that "[i]n addition to its religious significance for the wearer, the yarmulke may evoke the deepest respect and admiration—the symbol of a distinguished tradition and an eloquent rebuke to the ugliness of anti-Semitism." *Id.* at 510-11 (Stevens, J., concurring) (citation omitted).

A dichotomy similar to that in *Goldman* existed between the approaches of the majority and dissenting opinions in the recent case *Rosenberger v. Rector of Univ. of Va.*, 115 S.Ct. 2510 (1995). The Court held that the University of Virginia would not violate the Establishment Clause by providing funds for a student-run Christian publication. The dissent argued that it was necessary to take "a closer look at [the publication] than the majority opinion affords." *Id.* at 2534 (Souter, J., dissenting). The dissent cited the publication extensively, revealing that it often contained "nothing other than the preaching of the word, which . . . is what most branches of Christianity offer those called to the religious life." *Id.* at 2535 (Souter, J., dissenting). The dissent decried the majority's "fail[ure] to confront the evidence," which resulted in the majority "referr[ing] uninformatively to [the publication's] 'Christian viewpoint' or its 'religious perspective.'" *Id.* at 2540 (Souter, J., dissenting) (citation omitted).

The dissent concluded that through its failure to acknowledge the actual contents of the magazine, the majority denied an obvious reality:

The Court does not quote the magazine's adoption of Saint Paul's exhortation to awaken to the nearness of salvation, or any of its articles enjoining readers to accept Jesus, . . . or the religious verses, or the religious textual analyses, or the suggested prayers. And so it is easy for the Court to lose sight of what the University students and the Court of Appeals found so obvious, and to blanch the patently and frankly evangelistic character of the magazine by unrevealing allusions to religious points of view.

*Id.* (Souter, J., dissenting).

he was asked to violate the tenets of his faith virtually every minute of every workday.<sup>114</sup>

Continuing his appreciation for the perspective of Orthodox Jews in the military, Justice Brennan observed that “[t]he Court and military services have presented patriotic Orthodox Jews with a painful dilemma—the choice between fulfilling a religious obligation and serving their country. Should the draft be reinstated, compulsion will replace choice . . . . [T]he pain the services inflict on Orthodox Jewish servicemen . . . is unworthy of our military.”<sup>115</sup>

Justice Brennan was even more stinging in his criticism of the majority’s “absolute, uncritical ‘deference to the professional judgment of military authorities.’”<sup>116</sup> Justice Brennan argued that under the majority’s approach, if military officials conclude that regulations are important enough to outweigh constitutional rights, “the Court will accept that conclusion, no matter how absurd or unsupported it may be.”<sup>117</sup> Even a deferential standard of review, Justice Brennan explained, “need not, and should not, mean that the Court must credit arguments that defy common sense.”<sup>118</sup> Justice Brennan’s call for common sense on the part of the Court once again is reminiscent of Charles Black’s argument that legal consideration of the desegregation cases required that they be viewed through the lens of common sense and reality, rather than through abstract theory.<sup>119</sup>

In his analysis of the Air Force’s assertion that its interests in discipline and uniformity would be undermined by allowing Orthodox Jewish males to wear yarmulkes, Justice Brennan skillfully and forcefully showed that the military’s argument indeed defied common sense. Justice Brennan stated categorically that “[t]he contention that the discipline of the Armed Forces will be subverted if Orthodox Jews are allowed to wear yarmulkes with their uniforms surpasses belief.”<sup>120</sup> Moreover, Brennan declared, “It cannot be seriously contended that a serviceman in a yarmulke presents so extreme, so unusual, or so faddish an image that public confidence in his ability to perform his duties will be destroyed.”<sup>121</sup> Justice Brennan found that “it is the lack of any reasoned basis for prohibiting yarmulkes that is so striking

---

<sup>114</sup> *Goldman*, 475 U.S. at 514 (Brennan, J., dissenting) (citation omitted).

<sup>115</sup> *Id.* at 524 (Brennan, J., dissenting).

<sup>116</sup> *Id.* at 515 (Brennan, J., dissenting) (quoting majority opinion at 509).

<sup>117</sup> *Id.* (Brennan, J., dissenting).

<sup>118</sup> *Id.* at 516 (Brennan, J., dissenting).

<sup>119</sup> See *supra* text accompanying notes 21-30 (discussing Black); *supra* text accompanying notes 87-88 (noting that Justice Brennan’s *Braunfeld* opinion is reminiscent of Black’s argument).

<sup>120</sup> *Goldman*, 475 U.S. at 517 (Brennan, J., dissenting).

<sup>121</sup> *Id.* at 518 (Brennan, J., dissenting).

here.”<sup>122</sup>

With a careful eye on reality, Brennan noted that the yarmulke worn by Goldman was “a dark-colored skullcap measuring approximately 5½ inches in diameter.”<sup>123</sup> As a result of a realistic understanding of the religious and symbolic significance of the yarmulke, Justice Brennan further found

totally implausible the suggestion that the overarching group identity of the Air Force would be threatened if Orthodox Jews were allowed to wear yarmulkes with their uniforms. To the contrary, a yarmulke worn with a United States military uniform is an eloquent reminder that the shared and proud identity of United States servicemen embraces and unites religious and ethnic pluralism.<sup>124</sup>

In short, Justice Brennan concluded, “The Air Force has failed utterly to furnish a credible explanation why an exception to the dress code permitting Orthodox Jews to wear neat and conservative yarmulkes while in uniform is likely to interfere with its interest in discipline and uniformity.”<sup>125</sup> Indeed, Justice Brennan’s passionate and outspoken demand for a realistic perspective reminds one of Charles Black’s argument that the most natural response to a court’s refusal to acknowledge reality may be laughter.<sup>126</sup> Although laughter regarding the *Goldman* decision may not be as strong as that regarding the segregationist contentions that Black addressed,<sup>127</sup> in Justice Brennan’s words, the argument propounded by the military and accepted by the Court “surpasses belief,” “cannot be seriously contended,” has no “credible explanation,” and “lack[s] any reasoned basis.”<sup>128</sup>

---

<sup>122</sup> *Id.* at 520 (Brennan, J., dissenting).

<sup>123</sup> *Id.* at 514 n.1 (Brennan, J., dissenting).

<sup>124</sup> *Id.* at 519 (Brennan, J., dissenting).

<sup>125</sup> *Id.* at 522 (Brennan, J., dissenting).

<sup>126</sup> See *supra* text accompanying note 30. This is not the first time that *Goldman* has been compared to *Plessy v. Ferguson* in terms of the Court’s inability to acknowledge reality. See Michelman, *supra* note 13, at 31 (“*Goldman v. Weinberger* suggests [the discriminatory potential of determinedly abstract law]. So too does *Plessy v. Ferguson*: only in sedulous abstraction from concrete experience could ‘separate’ have seemed ‘equal.’”) (citations omitted).

<sup>127</sup> See *supra* text accompanying note 21.

<sup>128</sup> *Goldman*, 475 U.S. at 516, 519 (Brennan, J., dissenting). Justice Blackmun likewise found that “the Air Force has failed to produce even a minimally credible explanation for its refusal to allow Goldman to keep his head covered indoors.” *Id.* at 526 (Blackmun, J., dissenting). Justice Stevens found that “Captain Goldman’s military duties are performed in a setting in which a modest departure from the uniform regulation creates almost no danger of impairment of the Air Force’s military mission.” *Id.* at 511



Significantly, Justice Brennan also acknowledged the danger that a formally neutral law, enacted from the perspective of a religious majority, will often lack substantive neutrality because it fails to recognize the perspective of religious minorities. In a statement that epitomizes successful legal utilization of religious minority perspective jurisprudence, Justice Brennan declared:

Definitions of necessity are influenced by decisionmakers' experiences and values. As a consequence, in pluralistic societies such as ours, institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities when these needs and values differ from those of the majority . . . . A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar. It is the constitutional role of this Court to ensure that this purpose of the First Amendment be realized.<sup>129</sup>

#### E. *O'Lone v. Shabazz: Muslim Claims*

Two years after *Goldman*, the Court again showed great deference to the judgment of a government agency confronted with a free exercise claim. In *O'Lone v. Shabazz*,<sup>130</sup> Islamic prison inmates challenged restrictions on their right to attend Jumu'ah, a weekly congregational service.<sup>131</sup> In denying the inmates' claims, the Court noted that the "evaluation of penological objectives is committed to the considered judgment of prison administrators."<sup>132</sup>

Dissenting, Justice Brennan again asserted the rights of a religious mi-

---

(Stevens, J., concurring). Justice O'Connor wrote that *Goldman* represented one of the "rare instances where the military has not consistently or plausibly justified its asserted need for rigidity of enforcement, and where the individual seeking the exemption establishes that the assertion by the military of a threat to discipline or esprit de corps is in his or her case completely unfounded." *Id.* at 532 (O'Connor, J., dissenting).

<sup>129</sup> *Id.* at 523-24 (Brennan, J., dissenting). Justice Blackmun was further concerned that even "allow[ing] noncombat military personnel to wear yarmulkes but not turbans or dreadlocks because the latter seemed more obtrusive . . . would be to discriminate in favor of this country's more established, mainstream religions, the practices [of] which are more familiar to the average observer." *Id.* at 526-27 (Blackmun, J., dissenting).

<sup>130</sup> 482 U.S. 342 (1987).

<sup>131</sup> *Id.* at 345.

<sup>132</sup> *Id.* at 349.

nority. Brennan questioned the wisdom of deferring to the judgment of prison administrators absent "at least minimal substantiation by prison officials that alternatives [permitting] participation in Jumu'ah are infeasible."<sup>133</sup> Similar to his call in *Goldman* for a realistic showing that yarmulkes would cause a security risk, Justice Brennan argued that "we must demand at least some evidence beyond mere assertion that the religious practice at issue cannot be accommodated."<sup>134</sup>

Justice Brennan again uncovered the majority's unwillingness, or inability, to understand properly the nature of an unfamiliar religious practice. Brennan cited the majority's view that although there were no alternative means of attending Jumu'ah, the prison restriction did not work a total deprivation of the inmates' rights because the inmates could participate in other religious activities.<sup>135</sup> Refusing to view Jumu'ah "as one of several essentially fungible religious practices,"<sup>136</sup> Justice Brennan looked at the deprivation from the perspective of Muslim inmates, who were "completely foreclosed from participating in the core ceremony that reflects their membership in a particular religious community."<sup>137</sup>

To illustrate this point, Justice Brennan again referred to similar practices of familiar religions. He noted the district court's finding that "Jumu'ah is the central religious ceremony of Muslims, 'comparable to the Saturday service of the Jewish faith and the Sunday service of the various Christian sects.'"<sup>138</sup> Finally, in an effort to help others understand the deprivation felt by the Muslim inmates, Justice Brennan employed a powerful comparison to Catholic practice:

If a Catholic prisoner were prevented from attending Mass on Sunday, few would regard that deprivation as anything but absolute, even if the prisoner were afforded other opportunities to pray, to discuss the Catholic faith with others, and even to avoid eating meat on Friday if that were a preference.<sup>139</sup>

Viewed in a similar light, the Muslim inmates' claim of total deprivation of their religious rights is more fully appreciated.

---

<sup>133</sup> *Id.* at 363 (Brennan, J., dissenting).

<sup>134</sup> *Id.* (Brennan, J., dissenting).

<sup>135</sup> *Id.* at 359-60 (Brennan, J., dissenting).

<sup>136</sup> *Id.* at 360 (Brennan, J., dissenting).

<sup>137</sup> *Id.* (Brennan, J., dissenting).

<sup>138</sup> *Id.* (Brennan, J., dissenting) (quoting *Shabazz v. O'Lone*, 595 F. Supp. 928, 930 (D.N.J. 1984), *vacated*, 782 F.2d 416 (3d. Cir. 1986), *rev'd*, 482 U.S. 342 (1987)).

<sup>139</sup> *Id.* (Brennan, J., dissenting).

## F. *Native American Claims*

Unfortunately, like Orthodox Jews and Muslims, Native Americans have not been as successful as the Amish in having the Court understand their unique religious perspective. In 1988, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,<sup>140</sup> Native Americans claimed that government construction of a road through a portion of a national forest that had traditionally been used for Indian religious practices would work an impermissible burden on their free exercise rights. The Native Americans argued that the nature of the burden on their religious practice distinguished their claim from that of the Native Americans whose claim the Court had denied in a prior case.<sup>141</sup> In that case, *Bowen v. Roy*,<sup>142</sup> the Court held that a federal statute requiring the claimants to obtain a social security number for their daughter in order to receive welfare benefits did not violate the Free Exercise Clause.<sup>143</sup> In *Lyng*, the Court refused to analyze the adverse effects of different laws on different religious practices, rejecting the argument that the claim was distinguishable from that in *Roy*.<sup>144</sup> In an outright refusal to engage in perspective jurisprudence, the majority stated that it was unwilling to “measur[e] the effects of a governmental action on a religious objector’s spiritual development.”<sup>145</sup>

Once again, Justice Brennan filed a dissenting opinion urging the protection of the free exercise rights of religious minorities. He characterized the majority opinion as “refus[ing] even to acknowledge the constitutional injury respondents will suffer.”<sup>146</sup> This refusal, Justice Brennan wrote, “essentially leaves Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices.”<sup>147</sup>

Justice Brennan attempted to explain the perspective of the members of the Indian religion.<sup>148</sup> His discussion included an extensive description of the Native American belief system.<sup>149</sup> For example, Brennan stressed that “[i]n marked contrast to traditional western religions, the belief systems of Native Americans do not rely on doctrines, creeds or dogmas. Established or universal truths—the mainstay of western religions—play no part in Indian

---

<sup>140</sup> 485 U.S. 439 (1988).

<sup>141</sup> *Id.* at 449 (discussing *Bowen v. Roy*, 476 U.S. 693 (1986)).

<sup>142</sup> 476 U.S. 693 (1986).

<sup>143</sup> *Roy*, 476 U.S. at 695.

<sup>144</sup> *Lyng*, 485 U.S. at 449-51.

<sup>145</sup> *Id.* at 451.

<sup>146</sup> *Id.* at 459 (Brennan, J., dissenting).

<sup>147</sup> *Id.* (Brennan, J., dissenting).

<sup>148</sup> *Id.* at 459-62 (Brennan, J., dissenting).

<sup>149</sup> *Id.* (Brennan, J., dissenting).

faith.”<sup>150</sup> He further explained that “[w]here dogma lies at the heart of western religions, Native American faith is inextricably bound to the use of the land.”<sup>151</sup> Although there may be no simple hypothetical to assist members of “traditional western religions” in picturing themselves in the Native Americans’ place, Justice Brennan’s explanations help portray the unique Native American perspective.

As he had done in *Braunfeld*, Justice Brennan rejected the majority view that “the form of the government’s restraint on religious practice, rather than its effect, controls our constitutional analysis.”<sup>152</sup> Brennan looked instead at the practical and realistic interests involved, writing that “today’s ruling sacrifices a religion at least as old as the Nation itself, along with the spiritual well-being of its approximately 5,000 adherents, so that the Forest Service can build a 6-mile segment of road that two lower courts found had only the most marginal and speculative utility.”<sup>153</sup>

Two years later in *Employment Division v. Smith*,<sup>154</sup> Native Americans again failed to receive adequate protection for their religious practices. In *Smith*, the Court held that an Oregon statute that prohibited peyote use did not violate the free exercise rights of Native Americans.<sup>155</sup> The Court reasoned that the law did not target Indian religious practice but was merely “a neutral, generally applicable regulatory law” that had an indirect effect of burdening the religious free exercise of Native Americans.<sup>156</sup> The majority conceded that Native Americans suffered specifically because of their minority status, and it acknowledged that the Court’s decision “will place at a relative disadvantage those religious practices that are not widely engaged in.”<sup>157</sup> The majority called this result “an unavoidable consequence of democratic government.”<sup>158</sup>

In a concurring opinion, Justice O’Connor stressed that

the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging

---

<sup>150</sup> *Id.* at 460 (Brennan, J., dissenting).

<sup>151</sup> *Id.* at 460-61 (Brennan, J., dissenting).

<sup>152</sup> *Id.* at 467 (Brennan, J., dissenting).

<sup>153</sup> *Id.* at 476 (Brennan, J., dissenting).

<sup>154</sup> 494 U.S. 872 (1990).

<sup>155</sup> *Id.* at 880.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 890.

<sup>158</sup> *Id.*

religious groups such as the . . . Amish.<sup>159</sup>

Justice O'Connor's reliance on the Amish is a noteworthy example of recent progress in religious perspective jurisprudence. Whereas the Court in *Yoder* had understood the Amish religious perspective through comparison to Judaism, eighteen years later Justice O'Connor used the Amish religion as a basis of comparison for the religious rights of Native Americans.

Justice O'Connor also focused on the particular perspective of Native Americans, who were faced with "choos[ing] between carrying out the ritual embodying their religious beliefs and avoidance of criminal prosecution."<sup>160</sup> Justice O'Connor rejected the majority's formalistic approach, stating that "the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly . . . or indirectly."<sup>161</sup>

In his dissenting opinion Justice Blackmun also made comparisons to familiar religious systems in order to illustrate the perspective of Native Americans. In addition to analogizing the Native Americans' claims to the Amish claims in *Yoder*,<sup>162</sup> Justice Blackmun drew an analogy to an even more familiar religious system: Roman Catholicism. Noting that during Prohibition the federal government exempted the sacramental use of wine by the Roman Catholic Church, Justice Blackmun opined that "[h]owever compelling the Government's then general interest in prohibiting the use of alcohol may have been, it could not plausibly have asserted an interest sufficiently compelling to outweigh Catholics' right to take communion."<sup>163</sup> Justice Blackmun's analogy attempted to prompt members of other faiths to better appreciate Native American practices.<sup>164</sup>

<sup>159</sup> *Id.* at 902 (O'Connor, J., concurring).

<sup>160</sup> *Id.* at 904 (O'Connor, J., concurring).

<sup>161</sup> *Id.* at 897 (O'Connor, J., concurring).

<sup>162</sup> *Id.* at 914 (Blackmun, J., dissenting).

<sup>163</sup> *Id.* at 913 n.6 (Blackmun, J., dissenting).

<sup>164</sup> Justice Souter's concurring opinion in *Lee v. Weisman* is another example of the effective use of religious minority perspective jurisprudence to recognize the religious interests of Native Americans. Justice Souter showed a familiarity with, and appreciation for, many minority religions:

A Christian inviting an Orthodox Jew to lunch might take pains to choose a kosher restaurant; an atheist in a hurry might yield the right of way to an Amish man steering a horse-drawn carriage. In so acting, we express a respect for . . . the fundamental values of others . . . . By definition, secular rules of general application are drawn from the nonadherent's vantage and, consequently, fail to take [the adherent's] practices into account. Yet when enforcement of such rules cuts across religious sensibilities, as it often does, it puts those affected to the choice of taking sides between God and government. In such circumstances, accommodating religion reveals nothing beyond a recognition that general rules can

Justice Blackmun found the Oregon statute disturbing and noted that "Oregon's attitude towards respondents' religious peyote use harkens back to the repressive federal practices pursued a century ago."<sup>165</sup> He cited official government documents from the early part of this century that contained crude depictions of Indian life, including negative references to Indian morality and health practices.<sup>166</sup> In light of the historical treatment of Native Americans, Justice Blackmun's insistence that "this Court must scrupulously apply its free exercise analysis to the religious claims of Native Americans, however unorthodox they may be,"<sup>167</sup> is a compelling call to improve the law through perspective jurisprudence.

#### G. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah: *Santeria Claims*

Perhaps partially as a result of the increasing sensitivity of some Justices to religious minority perspectives, in 1993, the Court unanimously agreed to protect the rights of adherents to the Santeria religion to practice animal sacrifice. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>168</sup> members of the Santeria faith challenged a city ordinance that prohibited them from engaging in the religious practice of animal sacrifice.<sup>169</sup> The Court sympathetically noted the unfamiliar character of the Santéria religion.<sup>170</sup>

The Court used numerous methods to illustrate the religious perspective of members of the Santéria faith. In particular, in its discussion of the Santéria religion, the Court compared many of the practices to those of more familiar religions. The majority explained that Santéria's origins included "significant elements of Roman Catholicism" and some practitioners "express their devotion . . . through the iconography of Catholic saints, Catholic symbols are often present at Santéria rites, and Santéria devotees

---

unnecessarily offend the religious conscience when they offend the conscience of secular society not at all. Thus, in freeing the Native American Church from federal laws forbidding peyote use . . . the government . . . simply respects the centrality of peyote to the lives of certain Americans.

505 U.S. 577, 628-29 (1992) (Souter, J., concurring) (citations omitted).

<sup>165</sup> *Smith*, 494 U.S. at 920 n.10 (Blackmun, J., dissenting).

<sup>166</sup> *Id.* (Blackmun, J., dissenting).

<sup>167</sup> *Id.* at 921 (Blackmun, J., dissenting).

<sup>168</sup> 508 U.S. 520 (1993).

<sup>169</sup> *Id.* at 527.

<sup>170</sup> *Id.* at 524 (noting that "adherents faced widespread persecution in Cuba, so the religion and its rituals were practiced in secret. The open practice of Santéria and its rites remains infrequent.").

attend the Catholic sacraments."<sup>171</sup>

More significantly for the members' free exercise claims, the Court made accessible the decidedly unfamiliar ritual of animal sacrifice. First, the majority explained some of Santéria's central theological teachings that motivated animal sacrifice.<sup>172</sup> The Court then compared Santéria to Judaism and Islam, which the Court now considered to be more familiar religions. The Court noted that "[a]nimal sacrifice . . . played an important role in the practice of Judaism before destruction of the second Temple in Jerusalem" and "[i]n modern Islam there is an annual sacrifice."<sup>173</sup> Having supplied a religious perspective, the Court continued its technical analysis of the constitutional issues in the case.

The Court's legal analysis showed a refreshing willingness to look beyond formal guidelines to the actual effect of the challenged law. The majority rejected the city's claim that the law should be declared valid based on the text of the ordinance.<sup>174</sup> In contrast to the majority's emphasis on formal neutrality in *Smith*, the Court in *Lukumi Babalu Aye* noted that "[f]acial neutrality is not determinative . . . [because t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt."<sup>175</sup> The Court carefully analyzed the circumstances of the law's enactment, and by utilizing the practical realization that "the effect of a law in its real operation is strong evidence of its object,"<sup>176</sup> the Court concluded that the laws were designed "to target petitioners and their religious practices."<sup>177</sup>

In his concurrence, Justice Souter extended the Court's approach another step. He criticized the very use of the principle of "neutrality" articulated in *Smith*, arguing that it "plainly assumes that free-exercise neutrality is of the formal sort."<sup>178</sup> Instead, Justice Souter advocated the use of "substantive neutrality."<sup>179</sup> Echoing Justice Brennan's dissent in *Goldman*,<sup>180</sup> Souter observed that the very notion of formal neutrality betrays a bias towards a

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 524-25.

<sup>174</sup> *Id.* at 533-34.

<sup>175</sup> *Id.* at 534.

<sup>176</sup> *Id.* at 535. The Court's analysis echoes the question Charles Black asked rhetorically after considering the "very clear character" of the inequities caused by segregation: "Can a system which, in all that can be measured, has practiced the grossest inequality, actually have been 'equal' in intent, in total social meaning and impact?" Black, *supra* note 21, at 426.

<sup>177</sup> *Church of the Lukumi Babalu Aye*, 508 U.S. at 534.

<sup>178</sup> *Id.* at 562 (Souter, J., concurring in part and concurring in the judgment).

<sup>179</sup> *Id.* (Souter, J., concurring in part and concurring in the judgment).

<sup>180</sup> See *Goldman v. Weinberger*, 475 U.S. 503, 513-24 (1986) (Brennan, J., dissenting); *supra* text accompanying note 128.

majoritarian perspective. Souter wrote that “[n]eutral, generally applicable’ laws, drafted as they are from the perspective of the non-adherent, have the unavoidable potential of putting the believer to a choice between God and government.”<sup>181</sup> Finally, indicating his sensitivity to the Santéria perspective, Souter employed the analogy that Justice Blackmun had used in *Smith* regarding a secular, generally applicable law prohibiting alcohol consumption. Souter noted that such a law would disproportionately burden the practice of Catholicism or Judaism and, absent an exemption for sacramental wine, could be unconstitutional.<sup>182</sup> Similarly, the Santéria religion deserves protection equal to that granted to Catholicism or Judaism.

#### CONCLUSION

In his brilliant dissenting opinion in *McGowan v. Maryland*, Justice Douglas erroneously predicted that “[f]or the foreseeable future, it seems, the United States is going to be a three-religion nation [of the Protestant, Catholic and Jewish religions].”<sup>183</sup> Since *McGowan*, Supreme Court decisions have involved numerous religions and have included cases of important free exercise claims made by the Amish, Muslims, Native Americans, and Santeros. Additionally, the Court has considered the claims of Orthodox Jews that have not fit Justice Douglas’s characterization of the “flavorless[]” practice of Judaism, which is resigned to a focus on “suburban togetherness.”<sup>184</sup>

Unfortunately, although Justice Douglas erred in his prediction of the religious makeup of the United States and the free exercise claims that would emerge, the Supreme Court has not completely overcome the attitude that the prediction seems to have captured. Justice Douglas and the other dissenters have emphasized the danger to the free exercise of minority religions that could result from the failure to appreciate religious minority perspectives. This danger is evident in the Court’s failure to appreciate the religious burden placed on the Orthodox Jewish businessman whom the State proscribes from working on Sunday, the Court’s ignoring of the impact on Native American religious worship due to government destruction of sacred Indian land and its prohibition on peyote use, and the Court’s approval of a regulation that prevented Muslim inmates from attending Jumu’ah. Moreover, in considering the wearing of yarmulkes by servicemen, the Court ignored not only the Orthodox Jewish perspective but also com-

---

<sup>181</sup> *Lukumi Babalu Aye*, 508 U.S. at 577 (Souter, J., concurring in part and concurring in the judgment).

<sup>182</sup> *Id.* at 561 (Souter, J., concurring in part and concurring in the judgment).

<sup>183</sup> 366 U.S. 420, 565 (1961) (Douglas, J., dissenting) (citation omitted).

<sup>184</sup> *Id.* at 566 (Douglas, J., dissenting).



mon sense.

The dissenters in these cases demonstrated that the Court's rejection of the free exercise claims at issue resulted in large part from an overly formalistic view of the law. That view has prevented the Court from appreciating the practical effect of certain laws on those whose religious rights have been curtailed. Yet even the majority of the Court occasionally has recognized a religious minority perspective. The Court's attitude towards the Santéria faith, in particular, represents progress toward improving the law through incorporation of religious minority perspectives. It remains to be seen, however, whether the Court will continue to utilize and expand the type of religious minority perspective jurisprudence that is vital to ensuring protection of the free exercise rights of all religious minorities.

Legal scholars face a similar challenge. Although scholars have demonstrated the importance of considering diverse perspectives in analyzing the development and effects of the law, they have not focused on the perspectives of religious minorities. Hopefully, both the Court and legal scholars will progress in their appreciation of religious minority perspectives, thereby allowing the development of a free exercise jurisprudence that embraces the claims of all religious adherents.