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ABSTRACT

Using the metaphor of a constitutional conversation to compare the treatment of a relatively new and unpopular religion by the legal systems of the United States, Russia, and Spain, this Article examines the methodology by which laws affecting religion are made and enforced. It uses as a case study the interaction of the Jehovah's Witnesses with the legal system of the United States, comparing it with more recent interactions in Russia and Spain. The Authors argue that while the experience in the United States was profoundly influenced by a common-law methodology, the experience in two civil-law countries, Russia and Spain, even after the advent of

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constitutional courts, remains somewhat distinct. The more structured conversation in Russia and Spain may result in more predictable rules and efficient enforcement, but the complex and dynamic U.S. conversation may allow religious minorities greater voice.

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I. INTRODUCTION

This Article addresses the comparative legal treatment of new religious movements by examining the interaction between the Jehovah's Witnesses and the legal systems of the United States, Russia, and Spain. Its focus is not so much on the content of religion law in each country, but rather its methodology—that is, the sources and processes by which the law is developed and enforced. An underlying assumption is that the methods are inseparable from the law and integral to its significance.

Part II discusses a historical example of reciprocal effects on both the law and the religious movement, focusing on the United States in the period around the Second World War, when the Witnesses were a relatively new and unpopular movement. It uses the metaphor of a constitutional conversation to capture distinctive aspects of the interaction. Part III uses the metaphor to describe contemporary experiences of the Witnesses with the legal systems of Russia and Spain. Finally, Part IV draws comparisons between these European and the U.S. methods. This Part assesses each in terms of its ability to allow development of legal norms while maintaining the stability required for the rule of law, efficiency and fairness, and its potential to respond to minority religions.

Including new religious movements in a creative conversation about religious freedom and governmental regulation by giving them legal claims for protection has yielded positive results. The Witnesses' experience in the United States illustrates this in both the law's stable development and the movement's inclusion in larger society and legal institutions. It demonstrates that tension between new religious perspectives and established norms can be negotiated in an adversarial courtroom setting if the judicial decision is able to affect the governing legal standards. Russia and Spain, which are unlike the United States due to their civil-law traditions and histories of state-sponsored religions, appear to have successfully begun a similar approach. Their processes may result in greater predictability than the U.S. approach, but they may have greater difficulty responding to minority views.

II. THE UNITED STATES

A. *Introduction*

The experience of the Jehovah's Witnesses in the United States is a case study of interaction between a relatively new and unpopular religious movement and a legal system. This interaction had a

significant effect both on the system and the movement.[1] U.S. law was reformulated to allow restriction of socially harmful aspects of the group's behavior while protecting its religious activities from unnecessarily adverse regulation that would violate fundamental rights. The movement itself was reformed as well, from one scornful of civil authority and hostile toward organized religion to one that styled itself as a religion and obeyed court decrees. In addition, the movement gradually became less confrontational and provocative and adopted a more tactful and socially acceptable approach. Both the salutary and less desirable aspects of this interaction between the movement and the law are partially attributable to distinctive aspects of U.S. legal methodology.

The metaphor of a public conversation captures distinctive aspects of this legal method.[2] The text of the U.S. Constitution set the parameters and subject matter of the conversation; the legal disputes generated conversation on varied topics, with specified participants and rules, in the specific locale of the courtroom. The conversation would significantly change the meaning of the constitutional text, as well as the Jehovah's Witnesses' self-understanding and behavior.

The U.S. legal system was accessible to this new religious movement, and ultimately the Witnesses received discrete attention through full public hearings. This occurred because the system was flexible, allowing alternate recourse to another decision-maker if officials at one level of government were hostile, and providing for review and reconsideration of decisions and governing rules. The system was able to protect the Witnesses' beliefs and essential activities while allowing regulation of behavior necessarily opposed to legitimate governmental interests. These aspects of the conversation were partially due to the brief and broadly textured governing constitutional provisions being particularly suitable to judicial enforcement;[3] reliance on the gradual, case-by-case method of the

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1. SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES (2000), is a thorough description of Witness litigation in this period, including the litigants' stories, the lawyers' strategies and the results and reasoning in the courts. William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997 (1987), summarizes the effects of their cases on First Amendment doctrine. This paper covers only litigation on First Amendment issues during the period of 1937-53, the sixteen years in which the Jehovah's Witness cases were the most numerous, and addresses only First Amendment issues that reached the U.S. Supreme Court.

2. *See generally* JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 231-74 (1984). Laurence Tribe and Michael Dorf use the metaphor in LAURENCE TRIBE & MICHAEL DORF, ON READING THE CONSTITUTION 31 (1991).

3. The governing provisions were those of the U.S. Constitution; international human rights norms were not at issue. They were not even persuasive during most of this period, as the United States only signed the International Convention on Human Rights in 1948. In the United States, international treaties are the supreme law of the

common law and its avoidance of comprehensive regulation; and the pervasive effect of national constitutional law on the "ordinary law" of local administrative regulation.

This also explains the less desirable aspects of the interaction. The Witnesses did not encounter an easily accessible, understandable, or speedy system of comprehensive religious regulation. On the contrary, their success followed a slow and sometimes erratic path of enduring persecution at private and official hands; extensive periods of uncertainty as to their legal protection; and expenditure of large amounts of time, money, and energy.[4] The type of conversation described above meant that regulation was episodic rather than comprehensive; therefore, rule formulation and dispute resolution were gradual rather than immediate. Decision-making was neither directly democratically accountable nor transparent. Dispute resolution was inefficient because it was complicated by alternative fora and ultimately required a lengthy appellate process. At times, the conversation gave both the Witnesses and regulatory authorities uncertain and shifting guidance on the law's requirements.

B. *Interaction Between the Jehovah's Witnesses and the U.S. Legal System*

1. The Jehovah's Witnesses in the United States

The Jehovah's Witnesses movement is an indigenous American form of Protestant Christianity[5]—millennial, internationalist,

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land, equal in status to legislation if not contrary to the Constitution. *See* Reid v. Covert, 354 U.S. 1, 16 (1957).

4. Negative encounters with the U.S. legal system span from 1918 to at least 1953, or thirty-five years. In 1918, Witness President Joseph Rutherford was indicted for violating the Espionage Act of 1917 based on his publications against patriotism and warfare; his 1918 conviction was reversed in 1919. Rutherford v. United States, 258 F. 855, 855-56 (2d Cir. 1919). The first Witness was arrested for house-to-house preaching in 1928. McAninch, *supra* note 1, at 1013. The 1953 decision in *Poulos v. New Hampshire,* 345 U.S. 39 (1953), was the last of the U.S. Supreme Court cases concerning local ordinances applied against the Jehovah's Witnesses until the 2002 decision in *Watchtower v. Stratton*, 536 U.S. 150 (2002), although selective service cases continued until 1971. *See* Pryor v. United States, 404 U.S. 1242, 1242-43 (1971) (continuing bail pending disposition of a Jehovah's Witness' petition for certiorari).

5. PAUL K. CONKIN, AMERICAN ORIGINALS: HOMEMADE VARIETIES OF CHRISTIANITY 145-59 (1997), gives a well-documented, brief and comprehensive overview of the Jehovah's Witnesses. Its founder, Charles Taze Russell, was raised a Presbyterian, joined the Congregationalists, and refined his thinking with the Seventh Day Adventists. JAMES A. BECKFORD, THE TRUMPET OF PROPHECY 1-2 (1975). Theologically, Russell and present day Witnesses share with more conventional Christians belief in monotheism and in a god actively involved in human history and revealed in the Bible, whose son offers hope for humankind to be restored from an errant state, even though they are antitrinitarian and their doctrine of Christ differs

apolitical, authoritarian, and fundamentalist—that preaches the inerrancy of its version of the Bible.[6] Begun as a small group of Bible students in Pennsylvania in the 1870s, its official website says the movement now has "6.4 million practicing members organized into more than 95,000 congregations in some 230 lands."[7] Its members are ethnically or racially indistinct and represent a wide range of social classes, although generally they are not among the least or most privileged.[8] Nor have the Witnesses appeared to be especially inclined toward economic or political activism.[9] Nevertheless, their adherence to certain beliefs has caused friction with civil authorities in the United States and elsewhere.

One such belief is neutrality toward, or non-involvement in, government. Witnesses claim that "accelerating deterioration of human institutions and conditions of life" is proof that Christ has "already begun to prepare over the . . . imminent millennial paradise on earth."[10] Thus, Witnesses do not trust institutions such as governments. In fact, from 1929 until 1962, their doctrine required

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from that taught by most other Christians. *See id.* at 3-6, 106-07. Russell opposed modernist thought, to which Calvinistic Protestantism in the United States largely adapted with a democratic social ideology that emphasized the individual, appreciation of the scientific method, and concern for unsatisfactory social conditions. *Id.* at 3. The Witness faith insists on absolute and unitary truth, illustrated and played out in history and apparent upon rational, logical reflection, in urgent need of dissemination, and supervised and detailed in doctrine by the hierarchy of the organization, which is beyond criticism. *See id.* at 103-21.

6. Like other millennialists, Witnesses believe literally in Christian Biblical references to a thousand years during which holiness will prevail and Christ will reign on earth, but they read the Bible distinctively, with a specific and distinct chronology. They believe Christ already returned invisibly and began preparation. *See* BECKFORD, *supra* note 5, at 5. Present-day Witnesses, therefore, have the opportunity to display faith in Christ's redemptive power, survive the Battle of Armageddon for an imminent millennium in which they may live on earth in a paradise for a thousand years. *Id.* at 108. Conviction that God is drawing to a close the time in which one can heed the Witnesses' message adds urgency and mandates international witnessing to God's existence, loving nature, and plans for the world. *Id.* at 109. It also reduces the need to alleviate present social and economic conditions, makes governments largely irrelevant and the Witnesses apolitical, and encourages reliance on an authoritarian and elitist organization to accomplish the task. *Id.* at 103-21; *see* McAninch, *supra* note 1, at 1054-59.

7. Watch Tower Bible and Tract Society of Pennsylvania, *Membership and Publishing Statistics* (Aug. 2004), *available at* http://www.jw-media.org/people/statistics.htm. Disappointment in prophecy that Armageddon would begin in 1975 and a tightening of centralized control in 1977 appears to have led to only modest growth in the U.S. since 1975, according to a non-Witness academic source, although "[c]onverts, particularly in the third world, more than made up for defections." CONKIN, *supra* note 5, at 157.

8. BECKFORD, *supra* note 5, at 134, 158 (Sociological study of Witnesses in Great Britain refutes stereotypical notions that Witnesses display low or inconsistent social class profiles).

9. *Id.* at 134-59, 208-09.

10. *Id.* at 111; McAninch, *supra* note 1, at 1059.

Witnesses to obey the Watch Tower Society's leading officials, but not necessarily secular or governmental authorities.[11] Today, Witnesses do not vote, serve on juries, or join the armed forces.[12]

Another belief is their refusal to engage in patriotic exercises that involve "graven images," which appears to come from an interpretation of Exodus 20:3-5 in the Hebrew Scriptures incorporated into the Christian Bible.[13] In 1935, Witness President Joseph Rutherford publicly praised Witnesses in Nazi Germany who resisted offering the Hitler salute, a military style salute with the hand forward at eye level.[14] He noted its similarity to the flag salute many children in the United States performed as part of opening school exercises, and he claimed it was unfaithful "to ascribe salvation by saluting an earthly emblem."[15] Witnesses today, like those school children who generated litigation more than sixty years ago, refuse to salute the flag.

Yet another friction-producing belief is the commission to witness "to God's existence, loving nature and plans for the world."[16] Although this commission is shared by most Christians, when combined with the Witnesses' millennial belief, it can produce offensive behavior. For example, Witness doctrine teaches that only a limited number of preordained or elect people will serve with Christ in heaven. But others—the great company (including most Witnesses)—can survive the Battle of Armageddon and live on earth in bliss for a thousand years, if they learn the correct biblical teachings and choose God's offer of redemption.[17] Only those thus rescued from corrupt and false teaching (i.e., the teaching of all other

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11. "Let every soul be subject unto the higher power. For there is no power but of God; the powers that be are ordained of God." *Romans* 13:1, 2. Although Russell interpreted "higher powers" to mean secular or governmental authorities, his successor, Rutherford, interpreted this as a command to obey the Witness leadership. BECKFORD, *supra* note 5, at 114. The 1962 interpretation reverted to the earlier teaching. *Id.* James Beckford speculates that this may reflect governmental persecution in Rutherford's day and during the 1920s, 1930s, and 1940s, less so in the 1960s. *Id.*

12. McAninch, *supra* note 1, at 1058-59.

13. Thou shalt have no other gods before me. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. Thou shalt not bow down thyself to them, nor serve them: for I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me.

Exodus 20:3-5.

14. PETERS, *supra* note 1, at 24-25.

15. *Id.* at 25 (quoting Lillian Gobitis, one of the children represented by their parents as plaintiffs in *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

16. BECKFORD, *supra* note 5, at 109.

17. *See supra* note 6.

religions, particularly the Roman Catholic Church) will have this opportunity; others may be destroyed in Armageddon or may be denied entry into paradise.[18]

In the 1920s, Rutherford mandated rescue of the ignorant by proselytizing door-to-door and in public parks and street corners. He organized and systematized evangelism to provide Witnesses with "tracts, magazines, booklets, Bibles, records and record players, bookmarks, and 'sound cars,' capable of blaring prerecorded messages."[19] As opposed to the traditional Christian practice of Sunday morning worship services, some have characterized this mode of evangelism as the highest form of Witness worship.[20]

Because it is considered a condition of survival through Armageddon,[21] evangelism has had a sense of urgency that made it aggressive and even, at times, obnoxious. The Witnesses were encouraged to "rescue" or proselytize when churches were in worship on Sunday mornings.[22] Fervent and organized, they often overwhelmed small towns with groups of as many as 1,000 zealous evangelists at a time.[23] Although they asked for a donation to pay for printing their tracts, they would leave them for free. Convinced that the falsity of other religions' teachings needed to be demonstrated, they denigrated other faiths and clergy in general, causing hostile reactions and even brawls.[24]

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18. BECKFORD, *supra* note 5, at 110; PETERS, *supra* note 1, at 31-32. The Witnesses did not consider themselves a conventional church or religion; they had no creed, and all members were ministers. *See* BECKFORD, *supra* note 5, at 104, 108; CONKIN, *supra* note 5, at 153.

19. PETERS, *supra* note 1, at 32. Communication was crucial before Rutherford's urging. Active Jehovah's Witnesses are called "publishers." The stated purpose of the organization upon incorporation was "the dissemination of Bible truths in various languages by means of the publication of tracts, pamphlets, papers and other religious documents, and by the use of all other lawful means." McAninch, *supra* note 1, at 1005 (quoting art. II of the Charter of Zion's Watch Tower Tract Society in WATCH TOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA, JEHOVAH'S WITNESSES IN THE DIVINE PURPOSE 27 (1959)).

20. PETERS, *supra* note 1, at 32; *see also* Murdock v. Pennsylvania, 319 U.S. 105, 117 (1943) (holding license fee for distribution of literature and solicitation burdened religious exercise).

21. BECKFORD, *supra* note 5, at 203.

22. *Id.*

23. *Id.*

24. *Id.* at 33-34; *see also* Cantwell v. Connecticut, 310 U.S. 296, 301-03 (1940).

2. Effect on Constitutional Law

With remarkable persistence over a thirty-five year period,[25] the Jehovah's Witnesses vigorously protected themselves from the actions and regulations of local governments. The official hostility stemmed from public antipathy because the Witnesses abstained from patriotic exercises and civic duties in wartime, spoke disrespectfully of political and religious leaders, and insulted the religions of others in the course of incessant proselytizing.[26] Represented by private lawyers of their own religious persuasion, and aided by lawyers representing civic voluntary associations, such as the American Civil Liberties Union and the American Bar Association Committee on Civil Rights,[27] the Witnesses secured protection through the federal and state courts. A by-product of their struggle was a significant number of remarkably influential U.S. Supreme Court decisions that expanded the law of the First Amendment on freedom of speech, press, and religion.[28]

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25. In the 1930s and 1940s, the Jehovah's Witnesses appealed more than two dozen times to the U.S. Supreme Court, resulting in twenty-three Supreme Court opinions between 1938 and 1946. PETERS, *supra* note 1, at 185. When the U.S. Supreme Court dismissed the Witnesses first appeal in 1937, Coleman v. City of Griffith, 302 U.S. 636 (1937), the movement had been legally organized for only fifty-three years, and its most aggressive and provocative proselytizing activities had begun only fifteen years earlier. McAninch, *supra* note 1, at 1004. The Witnesses incorporated in the United States as the "Zion's Watch Tower Tract Society" in 1884. *Id.* The vigilante attacks and hostile governmental treatment that prompted their judicial appeals followed aggressive door-to-door and street corner proselytizing begun in the early 1920s. PETERS, *supra* note 1, at 30-32.

26. Episodes of hostile and often violent public reaction are well-documented throughout PETERS, *supra* note 1. The Jehovah's Witnesses believed that "all other religion is 'a snare and a racket"; other clergy are tools of Satan, as are governments and politicians; "and everyone (except the Witnesses) is doomed to eternal nothingness." McAninch, *supra* note 1, at 1002. The conviction that all members are ministers and witnessing to their creed their worship, the felt urgency of the need to convert others, and their particularly venomous attacks on the Roman Catholic Church combined to make their proselytizing particularly incessant, aggressive, and confrontational. *See id.*

27. PETERS, *supra* note 1, at 48-49, 99-104, 249.

28. U.S. Supreme Court decisions made the Free Exercise Clause protect not only against actions of the national government, but also the state governments. *Cantwell*, 310 U.S. at 296, expanded on the prohibition against prior restraints on speech while expanding the right to speak in public places and developing the "strict scrutiny" standard still used today for judicial review of governmental action regulating the content of protected speech or targeting religion (*see, e.g.*, Niemotko v. Maryland, 340 U.S. 268 (1951)); it also articulated the freedom to refrain from speaking. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). While the reasons that the Supreme Court decided these particular cases the way it did are complex and certainly not confined to the actions and arguments of the Jehovah's Witnesses, *see* Neil M. Richards, *The "Good War," The Jehovah's Witnesses, and The First Amendment*, 87 VA. L. REV. 781 (2001), nevertheless, it is clear that their cases

a. Access to and Use of Public Property for Expressive Activities

Brawls led to arrests for disorderly conduct, trespassing, assault and battery,[29] or under ordinances seldom used, like using offensive words in public and riotous conspiracy.[30] Citizen complaints led to the passage of local ordinances that prohibited or required permission for leafleting, soliciting, or holding meetings in public places,[31] and others that required payment of a fee.[32] Witness reservations about civil authority combined with their mandate to evangelize in public (the last belief summarized above) meant Witnesses resisted such permit and fee requirements and continued to be arrested. The resulting litigation gave rise to landmark Supreme Court decisions outlining the law of access and use of public property for expressive activities.[33]

The change began with the Court's abandonment of the common-law doctrine that use of public streets and parks could be completely controlled by governmental owners. Two cases brought by Jehovah's Witnesses foreshadowed this change: the Court held that permit ordinances without clear standards to guide officials violated the First Amendment rights of free speech, press, and exercise of religion when applied to Witnesses going door-to-door on public streets and distributing literature.[34] From these early Witness cases to the most recent in 2002, a complex body of law on permissible permit

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were the "primary vehicle by which the Court . . . sketched the basic outlines of what became its modern rights jurisprudence." *Id.* at 800.

29. *See, e.g., Cantwell,* 310 U.S. at 301-03.

30. *See, e.g.,* Chaplinsky v. New Hampshire, 315 U.S. 568, 569-70 (1942).

31. *See, e.g., Niemotko,* 340 U.S. at 269-70; Martin v. City of Struthers, 319 U.S. 141, 141-42 (1943); Largent v. Texas, 318 U.S. 418, 418-20 (1943); Jamison v. Texas, 318 U.S. 413, 415 (1943); Schneider v. State, 308 U.S. 147, 148 (1939); Lovell v. City of Griffin, 303 U.S. 444, 447-48 (1938).

32. *See, e.g.,* Follet v. McCormick, 321 U.S. 573, 574 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 106 (1943); Jones v. Opelika, 316 U.S. 584, 585-86 (1942), *vacated by* 319 U.S. 103 (1943).

33. At times Witnesses would also seek injunctive relief against enforcement of ordinances. *See, e.g.,* Sellers v. Johnson, 163 F.2d 877, 880 (8th Cir. 1947) (directing injunction to restrain from enforcing municipal resolutions and ordinances requiring permits for park use and barring those without rightful business to enter town).

34. The doctrine of public ownership and control, *see* Davis v. Massachusetts, 167 U.S. 43, 47 (1897), was not followed in Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939), which was noted the same year in the Witness case of *Schneider,* 308 U.S. 147; both cases followed the Witness case of *Lovell,* 303 U.S. 444. The permit systems were unconstitutional because they (1) regulated public streets, which are "natural and proper places for the dissemination of information and opinion"; (2) were not confined to commercial canvassing; (3) did not specify the reasons for which permits could be denied as legitimate governmental concerns, such as prevention of fraud or limiting hours for privacy of homeowners; and (4) could not be justified to prevent possible litter, an insufficiently significant reason to limit exercise of First Amendment freedoms. *Schneider,* 308 U.S. at 163-65.

regulation evolved, including definition of which non-content-related restrictions could be placed on speech in public places.[35]

The Court ruled in these Witness opinions that the standardless permit requirements constituted invalid prior restraints upon speech and exercise of religion. This doctrine had particular force when the restraint applied to speech on public property, such as public streets. The idea that expressive activities had a type of easement on public property became a linchpin of what is now called the "public forum doctrine." As a starting point of speech analysis, the doctrine states that different rules—rules most protective of speech and most restrictive of government regulation—apply when the location in question is traditionally used or governmentally designated for assembly, debate, or communication of ideas among citizens.[36]

In a public forum, religiously and politically expressive activity cannot be regulated based upon its subject matter or the viewpoint expressed—the courts review such regulation with the utmost scrutiny, demanding that the regulation serve a compelling governmental purpose and be drafted in the manner least restrictive of expression.[37] Such expression cannot be regulated by a bureaucratic process so lax and imprecise that it is easily manipulated to suppress the expression of a particular viewpoint or subject matter.[38] On the other hand, regulation of the time, place, or manner of expression *is* permissible in a public forum, but only if it is reasonable: it must be specifically drafted to serve an important governmental interest (although not in the least restrictive manner) and leave open adequate alternative places for communication.[39] Finally, a licensing scheme must meet several strict criteria; a scheme that does not meet such standards may be ignored.[40]

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35. The most recent formulation of this law in a Witness case appears in *Watchtower v. Village of Stratton*, 536 U.S. 150 (2002).

36. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). The Witness cases of *Saia v. New York*, 334 U.S. 558 (1955), and *Lovell*, 303 U.S. 444, are cited as sources for the doctrine in *Neimotko*, 340 U.S. at 271, another Witness case.

37. *See, e.g.*, Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992). By contrast, other properties can be closed to expressive activity or restricted under more lenient criteria. *Id.* at 679. The regulation need only be reasonable and viewpoint neutral. *Id.* at 679.

38. *Schneider*, 308 U.S. at 164.

39. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

40. Permit systems are considered to be a form of prior restraint. To pass constitutional scrutiny, they must have (1) clear substantive standards limiting the administrator's discretion; (2) tightly confined, valid grounds for disallowing the permit under specified circumstances; and (3) a virtually costless opportunity for a party denied a permit to secure immediate review of any adverse administrative decision in a (4) regular adversary proceeding before a neutral party, in which proceeding (5) the burden rests with the state to sustain the denial of the permit, rather than with the private party to show why it should not be sustained. *See Niemotko*, 340 U.S. at 269-73; WILLIAM W. VAN ALSTYNE, THE AMERICAN FIRST AMENDMENT IN THE TWENTY-FIRST

All these principles are now foundational. The premise of judicial enforcement of First Amendment guarantees is that regulation of the content or viewpoint of expressive activity in public places is presumptively unconstitutional. Review requires exacting judicial attention to the purpose that the regulation serves and whether it is necessary to achieve that purpose. That permits are suspect as prior restraints on speech and must be tailored to meet specific criteria underlies local regulation of public demonstrations today. Two principles are also foundational: (1) that regulation for purposes not related to content in a public forum must also be justified and (2) that regulation in nonpublic fora is allowed when reasonable and viewpoint neutral. All these First Amendment principles are rooted in cases brought by the Jehovah's Witnesses.[41]

b. Freedom From Coerced Speech and of Religious Exercise

The combination of Witness indifference to civil authority and refusal to engage in patriotic exercises that involve "graven images" caused litigation resulting in another key First Amendment principle, known today as freedom from coerced speech. Assuming local school authorities had the power to require children to recite the pledge of allegiance and salute the national flag or be expelled, Justice Frankfurter wrote for the Supreme Court in the 1940 *Minersville School District v. Gobitis* opinion that the Free Exercise Clause of the First Amendment did not exempt Jehovah's Witness children from that requirement.[42] Three years later the Court reversed itself with Justice Frankfurter dissenting. In *West Virginia State Board of Education v. Barnette*, the Court ruled that the Free Speech Clause meant the local school board did *not* have the authority to expel Jehovah's Witness schoolchildren who refused to salute the flag and recite the pledge.[43]

CENTURY 377-78 n.61 (3d ed. 2002). When applicable to religious and political speech, they may not require and make public personal identification. *Watchtower*, 536 U.S. at 166-67. A permit system not complying with these standards need not be complied with and can be attacked as void on its face. *Lovell*, 303 U.S. at 452.

41. Time, place, and manner considerations can be traced to *Lovell*, 303 U.S. at 451, and *Schneider*, 308 U.S. at 161-62, and are articulated again in *Niemotko*, 340 U.S. at 271-72, another Witness case. Heightened judicial attention to regulation of speech in a public place goes back at least to *Schneider*, 308 U.S. 147, and is confirmed in modern public fora analysis, like that in *Int'l Soc'y*, 505 U.S. at 679-85. While *Rock Against Racism*, 491 U.S. 781, relaxed the least intrusive alternative part of the time, place, and manner analysis, and the public fora doctrine has become a historically set category that can prevent effective constitutional protection for expressive activity on government property, *see* Keith Werhan, *The Supreme Court's Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 335 (1986), these principles are still evident as foundational principles of First Amendment law.

42. 310 U.S. 586, 599-600 (1940).

43. 319 U.S. 624, 642 (1943).

c. Judicial Power

All the decisions discussed above were part of a period in which the Supreme Court expanded the reach of federal constitutional law and increased the intensity with which it reviewed the actions of other branches of government. Each decision relied upon the First Amendment to invalidate actions not of the federal government, but of state and local governments, and did so under the incorporation doctrine. During this period the Court established that the "liberty" that the Fourteenth Amendment protects incorporates most of the liberties protected by the Bill of Rights, making federal constitutional law reach the actions of state and local officials. Another Witness case, *Cantwell v. Connecticut*, was a component of this doctrinal development. In *Cantwell* the Court ruled for the first time that the Fourteenth Amendment incorporated the Free Exercise Clause.[44] It prevented the state of Connecticut from convicting Jehovah's Witnesses for proselytizing and soliciting without approval. Moreover, the Court overturned the conviction of a Witness for the common-law crime of inciting a breach of the peace by disturbing listeners with a recording of an attack on all organized religions (particularly the Roman Catholic Church) as instruments of Satan.[45]

All the cases above figured prominently in a decisive period in the development of constitutional law during the late 1930s to the 1960s in which the Court restricted its deferential constitutional review of the actions of the other branches to economic regulation. It began actively taking the role of a vigilant protector against governmental action affecting personal liberties—those in the Bill of Rights and in the post-Civil War Amendments. By putting the burden on the government to defend regulation of speech and religion,[46] the Court set a high standard for government regulators, a standard that the Court proved willing to enforce. Thus, the Witness cases not only formulated key doctrines of the law of expressive freedom, but were also part of a momentous shift in the judiciary's approach, which extended federal constitutional law to the states and expanded federal judicial power. In this sense, the cases played a part in laying the groundwork for the later expansion of civil liberties by the Court in the 1960s through the 1980s.

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44. 310 U.S. 296, 303-04 (1940).
45. *Id.* at 307-11.
46. *See, e.g., Niemotko*, 340 U.S. 268; *Schneider*, 308 U.S. 147; *Lovell*, 303 U.S. 444.

3. Effect on the Jehovah's Witnesses

Another effect of the interaction between the Witnesses and the U.S. legal system was on the behavior and ideology of the religious movement. From the time of their first arrests in the late 1920s, to their legal efforts in the 1960s, to their efforts to prevent nonconsensual blood transfusions and to oppose military conscription in the 1970s, the Witnesses changed tactics and doctrine. They steadily became less hostile and confrontational. The leadership deliberately used the Witnesses' hierarchy and teaching functions "to infuse the entire . . . organization with legal considerations."[47] After the Court opinions were published in the late 1930s and early 1940s, the Witnesses operated relatively freely for a time; during the 1960s and 1970s, their conduct became increasingly less provocative toward mainstream religions and the general public.[48] Religious doctrine changed to encourage greater obedience to civil authorities, and the Witnesses characterized their movement as a religion similar to more established ones, rather than as the opponent of any and all organized religion.[49] Today their meeting halls dot city and village streets, and although they proselytize door-to-door frequently and do not always receive a warm welcome, they seldom engender violent reaction or cause a public disturbance.[50]

Litigation in the 1930s to the 1950s affected the Witnesses so extensively that one sociological study has described it as a strategy of "disciplined litigation" that effected a "deformation" of the original norms and organization.[51] This deformation was due to a dramatic and pervasive combination of external pressures (from government, more established religions, and the public) and internal pressures (such as ideology and organization).[52] It has not been empirically established that the Witnesses' experience with the U.S. legal system was a cause of their transformation; nevertheless, the change that

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47. Pauline Côté & James T. Richardson, *Disciplined Litigation, Vigilant Litigation, and Deformation: Dramatic Organization Change in Jehovah's Witnesses*, 40 J. FOR SCI. STUD. RELIGION 11, 14 (2001). The period of intense litigation corresponded with the presidency of Joseph Rutherford, a lawyer who used the title of judge. He centralized control over individual members and organized the strategy of confrontation and litigation. CONKIN, *supra* note 5, at 151-54.

48. *See* BARBARA GRIZZUTI HARRISON, VISIONS OF GLORY 177 (1978); PETERS, *supra* note 1, at 291-95; McAninch, *supra* note 1, at 1059.

49. McAninch, *supra* note 1, at 1058-59; *see also* BECKFORD, *supra* note 5, at 210.

50. Nevertheless, they are not as close to the mainstream of U.S. Protestant Christianity as other wings of apocalyptic and Adventist Christianity, the Mormons, and the Seventh Day Adventists, seeming more sectarian and visible. *See* CONKIN, *supra* note 5, at 157.

51. *See* Côté & Richardson, *supra* note 47.

52. *See* Côté & Richardson, *supra* note 47, at 11.

followed the period in which the litigation commenced has been well documented. The legal protection gave the Witnesses freedom not only to exercise their religion but also to develop in ways not motivated by hostility to government. Indeed, certain aspects of the legal experience and the legal positions adopted suggest that the law may have encouraged behavior likely to increase their chances of success in court.

Successful litigation required and reinforced a tightly organized, hierarchical organization to hire and direct attorneys, select cases, decide ultimate questions of strategy, and publish results.[53] The Witnesses' hierarchical, centralized organizational structure continues today.[54] Litigation also yielded benefits for the movement: certain individuals were edified, and solidarity was built by providing legal, moral, and material assistance to litigants.[55] Periodicals reported courtroom "witnessing" to the superiority of Witness beliefs.

Court decisions did not condone the more extreme Witness behavior. Ruling against the Witnesses in 1942, the U.S. Supreme Court held that personally directed, provocative epithets were not protected speech.[56] Even in decisions reversing Witness convictions, the Court emphasized that the Witness had not been personally offensive or argumentative and that the locality had the power to regulate for the public peace, good order, convenience, and comfort.[57]

Also in 1942, under the leadership of a new president, Witness tracts became less hyperbolic and fiery, and more moderate in their scorn for other religions.[58] Witnesses abandoned many of their aggressive and confrontational techniques, such as transporting groups of Witnesses to a single town in proselytizing squads; and instead, they emphasized educating humankind about the divine truth by providing an example of the benefits of Witness lifestyle rather than by denunciation.[59]

Doctrine shifted as well. In 1962, the Watch Tower Society returned to its original biblical understanding that governments were established by God and should be accepted, rejecting the 1929 Rutherford teaching that only the Society's officials, and not the

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53. *Id. See generally* PETERS, *supra* note 1.

54. Côté & Richardson, *supra* note 47, at 16-18. From its origins, the movement was partly a "rational business enterprise for the production and dissemination of religious literature"; a sociologist has concluded that this "instrumental and pragmatic" character has shaped its organization, and that its centralized governance under an elite leadership invulnerable to most forms of internal and external attack or social pressure largely explains its conversion successes. BECKFORD, *supra* note 5, at 210.

55. BECKFORD, *supra* note 5, at 56-61.

56. Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).

57. *See* Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

58. CONKIN, *supra* note 5, at 156.

59. BECKFORD, *supra* note 5, at 46-48.

government, should be obeyed. [60] While not always obeying local draft board orders to report, Witnesses obeyed the courts in conscription cases. And they actively sought ministerial exemptions, which marked a change from their former hostility toward organized religion and clergy. They began building Kingdom Halls, which housed meetings that focused on studying Witness literature and came to resemble the Sunday worship of the Christian denominations they had earlier denounced.[61]

The U.S. legal system was accessible to this new and unpopular religious movement. Ultimately, the Witnesses received discrete attention at the highest levels through full judicial hearings, in a system flexible enough to allow alternative recourse when officials at one level of government were hostile. It allowed review and reconsideration not only of decisions, but also of governing rules. The system proved able to protect the Witnesses' essential activities, while allowing regulation of their behavior when it opposed legitimate and significant governmental interests. The interaction may have even allowed the movement to institutionalize into a religion more amenable to civil authority and encouraged it to adopt more socially and legally acceptable methods. Progress was slow and, at times, erratic; this religious minority endured persecution at private and official hands, extensive periods of uncertainty about their legal protection, and expenditure of large amounts of time, money, and energy.[62]

C. *The Interaction as a Distinctively American Constitutional Conversation*

The interaction between the Jehovah's Witnesses and the legal system occurred largely through the method of U.S. constitutional law.[63] The oldest written constitution currently in use, the U.S. Constitution is also the briefest.[64] Thinking of the Constitution as initiating a conversation about its own ongoing significance in the varied situations it addresses helps to explain its continued effectiveness over so long a period in such a legally active nation as the United States.[65]

According to this metaphor, the constitutional text sets the terms of the conversation; it "creates a set of speakers, defines the occasions

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60. BECKFORD, *supra* note 5, at 114; McAninch, *supra* note 1, at 1059 n.421.

61. McAninch, *supra* note 1, at 1059.

62. *See supra* note 4.

63. The Witnesses also litigated statutory issues, such as their members' status under the Selective Service Act (military conscription). *See, e.g.*, Estep v. United States, 327 U.S. 114, 115-16 (1946).

64. Effective in 1788, it contains 4,400 words.

65. *See generally* WHITE, *supra* note 2, at 231-74; TRIBE, *supra* note 2, at 31.

for and topics of their speech, and is itself a text that may be referred to as authoritative."[66] Among the speakers, for instance, the text identifies the Congress, the states, the Executive, the courts, and those who litigate constitutional claims, such as those who claim constitutional protection for their exercise of religion.[67] Fora and occasions for speech include legislative debates, presidential State of the Union addresses, and cases and controversies in the courts—above all, in the U.S. Supreme Court. The conversation confirms, maintains, and renews the political order that the Constitution was instrumental in creating. Through the conversation, the Constitution itself is confirmed, maintained, and renewed. Not only is it able to regulate as positive law, but also to change its meaning by interacting with speakers and audiences on several and varied occasions.

1. An Authoritative Text Sets Parameters

The brief text of the First Amendment sets the parameters of the conversation and is its basic subject matter. Composed of forty-five words in one sentence, it states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[68] The Jehovah's Witnesses' World War II conversation about these words built upon conversations dating back more than a hundred years, at least to the Amendment's effective date, 1791.

Essentially a series of injunctions against the national government, the Amendment is negative and absolute. Indeed, the two clauses about religion have operated together to create, in effect, a presumption against comprehensive regulation of religion as such. This is apparent from the absence of sections dealing with religion in the federal and state codes. There is little room for legislative discrimination among religions because the Establishment Clause implies equality of treatment among religions.[69] Direct regulation of religious activity appears to be precluded by institutional autonomy inferred from the Free Exercise Clause[70] and non-entanglement

66. WHITE, *supra* note 2, at 245.

67. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

68. *Id.*

69. At the minimum, all the Justices appear to agree that the Establishment Clause forbids preferential support for one religious denomination. *See* Wallace v. Jaffree, 472 U.S. 38, 48-49 (1985).

70. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990), states that government may not "lend its power to one or the other side in controversies over religious authority and dogma" and cites decisions that establish institutional autonomy in many aspects of religious life. *See* Serbian E. Orthodox Diocese v.

inferred from the Establishment Clause.[71] Legislation does regulate religion, but it generally does so indirectly, in that legislation is neutral in regard to religion on its face, but applies to religious individuals and organizations among others. An example is taxation treatment of charitable or nonprofit organizations, which may include religious groups among others.

Historical context reinforced the presumption against direct regulation of religion. Historical immigration by religious groups to the country to avoid prosecution by authorities in England and continental Europe created a paradigm in which regulation of religion became associated with repressive regulation and was therefore suspect.

The presumption against national regulation is particularly strong. The First Amendment's negative injunction explicitly applies to Congress. And the Constitution, ratified by state governments that preexisted the national government, gave only limited powers to the national government and is otherwise silent about the power to regulate religion. The Tenth Amendment echoes the implications of this constitutional silence: states, not the national government, have plenary legislative powers. Only between the 1920s and 1940s, when the Court gradually incorporated most of the provisions of the first ten Amendments into the Due Process Clause of the Fourteenth Amendment, did the First Amendment apply to the states. The limited nature of the federal government and traditional assumptions about state and national governmental powers meant that local legislation affected religion more often than national legislation did. Therefore, the Court generally addressed the religion clauses in the context of disputes over state and local action: funding of religious schools, child-raising practices, door-to-door distribution of literature and solicitation, school exercises, and use of local parks.

Thus, the conversation about religious freedom concerned brief, negative injunctions and examination of discrete, religiously related but facially neutral actions of local government. As a result, the conversation addressed large questions of appropriate relations between government and religion without a great deal of guidance from enacted texts.

Milivojevich, 426 U.S. 696, 708-725 (1976); Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445-52 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 95-119 (1952).

71. *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979) (using significant risk of entanglement between church and state in statutory construction favoring religious autonomy from NLRB oversight); Lemon v. Kurtzman, 403 U.S. 602, 612-15 (1971).

2. Participants Initiate, Shape, and Publicize the Conversation

The Jehovah's Witnesses relied upon the Free Exercise Clause, an authoritative text that explicitly identifies the religiously observant as participants in the conversation. State or local governments usually opposed them. As plaintiffs or as defendants, the Witnesses were active participants, exploiting their ability to choose their forum, take appeals, and raise the topics they wanted addressed while spreading their religious message. Their conversation was not a private one; it included nonparties and an attentive public audience, and it affected the behavior of others. Indeed, the Court was not only their audience, but the Justices also engaged in conversation with one another prompted by the Witnesses.

The Free Exercise Clause entitled the Witnesses to a role in the constitutional conversation by giving them a claim. At the time of their greatest litigation effort, that claim was to a constitutional exemption from generally applicable governmental regulation. They based their claims on the grounds that the regulation prohibited or substantially burdened their religious exercise as well as violated free speech guarantees.[72]

The Witnesses organized themselves in a litigation effort, employed national counsel (also Witnesses) who employed local counsel as needed, and trained members to present a free exercise defense to local authorities if arrested.[73] To enable Witness counsel to raise the free exercise defense, members who became plaintiffs or defendants had to submit to arrest and detention and refuse to plead guilty, pay the fine, or serve the sentence. Counsel pursued claims in federal and state courts, but because of the cooperation of local officials and influential citizens in the persecution of the Witnesses, they often resorted to federal courts for protection.[74] In Supreme

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72. In *Smith*, 494 U.S. 872, the Supreme Court in effect overruled a line of precedents in the area, by multiple distinguishing techniques, and held that exemptions were unavailable and religious claimants were not entitled to the highest degree of judicial scrutiny of otherwise neutral and uniform laws disproportionately burdening them, although they are entitled to minimal equal treatment review and could gain close judicial scrutiny of regulation that targeted them unjustifiably. *See also* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531-32 (1993).

73. McAninch, *supra* note 1, at 1013 n.110 (citing WATCH TOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA, JEHOVAH'S WITNESSES IN THE DIVINE PURPOSE 132 (1959)); *see also* Côté & Richardson, *supra* note 47, at 14-15.

74. *See, e.g.*, Sellers v. Johnson, 163 F.2d 877, 883 (8th Cir. 1947) (Successful Witness recourse to federal court for injunctive relief to prevent Mayor and town officials, with cooperation of state Attorney General and Director of Pubic Safety, from barring Witnesses from entering the town). The Department of Justice, despite public comments of the Solicitor General condemning attacks on the Witnesses, was reluctant to sue on their behalf. PETERS, *supra* note 1, at 145-46.

Court oral argument, the Witnesses' counsel articulated the basic teachings of the faith, even sermonizing, convinced that they followed an example in the Bible of testifying to kings and rulers.[75] They consistently characterized their proselytizing as worship and challenged their regulation and arrest as violations of their religious free exercise rights. They were able to make free exercise of religion a topic of conversation at the highest court in the nation.[76]

The Witnesses example illustrates the active role of attorneys in shaping U.S. law and the law's responsiveness to individuals and minority groups through the court system. By selecting claims under federal or state law, whether constitutional or statutory, attorneys and litigants can select the area of law and the court in which to pursue their claim. By selecting cases to litigate, discovering evidence, and admitting or opposing it, litigants can influence trial court holdings. And as rules of procedure confine appellate courts to the record and issues addressed at trial, attorneys' strategies shape appellate decisions as well. When the conversation takes place in the courts, the legal system gives those participants very active, determinative roles in delineating the fora, precise subtopics, and the parameters of the conversation. The courts must listen to the parties,

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75. PETERS, *supra* note 1, at 127-30 (quoting Chief Counsel Hayden Covington).

76. Ultimately, however, the story is one of failure to develop free exercise doctrine as an independent guarantee of the rights and status of religion. The Court initially held that proselytizing cases raised free exercise claims as well as speech and press claims, *see, e.g.*, Tucker v. Texas, 326 U.S. 517 (1946); Follet v. McCormick, 321 U.S. 573 (1944); Jamison v. Texas, 318 U.S. 413 (1943); Largent v. Texas, 318 U.S. 418 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. Opelika, 316 U.S. 584 (1942); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. City of Griffin, 303 U.S. 444 (1938). *Cox v. New Hampshire*, 312 U.S. 569 (1941), and *Prince v. Massachusetts*, 321 U.S. 158 (1944), considered and rejected free exercise claims. The holding in *Minersville School District v. Gobitis*, 310 U.S. 586, 594-95 (1940), on coerced patriotic exercises, was a free exercise holding. *See supra* note 14. By the 1950s, however, it was clear that the public fora and time, place, and manner doctrines emerging from the proselytizing cases were speech doctrines primarily, encompassing religious expression incidentally as a form of speech entitled to equal treatment. *See, e.g.*, Niemetko v. Maryland, 340 U.S. 268 (1951). The holding in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943), avoided the Free Exercise Clause, relying on limitation of governmental ability to coerce speech.

This appears in retrospect to have foretold a change in doctrine announced in *Smith*, 494 U.S. at 876-77. Today, the Free Exercise Clause is largely drained of independent constitutional significance and retains significance often when combined with equality aspects of speech law. *See* Richards, *supra* note 28, at 796. The Court treated a present day Witness proselytizing claim in the former, mixed free exercise and speech manner in *Watchtower v. Village of Stratton*, 536 U.S. 150, 161-62 (2002). The ordinance appears to have been treated as an invalid prior restraint on religion as well as speech, over the dissent of Justice Scalia, author of the *Smith* opinion. *Id.* at 171 (Scalia, J., concurring).

largely on their own terms, and may only address the issues they raise for conversation.[77]

Opposing participants were usually local governments that prosecuted or defended their actions under general police power ordinances.[78] The First Amendment gave them this role. Explicitly forbidding Congress from actions regarding an establishment of religion, denying the free exercise of religion, or abridging freedom of speech, the text created an underlying assumption of U.S. religious regulation: it is largely local and there should be very little of it.[79]

Religious groups in the United States are justified in assuming that their activities are allowed unless there is explicit regulation prohibiting them and that such regulation is to be tested under federal constitutional standards. Thus, the conversation about the Witnesses' religious activities largely took place episodically, as topics arose in state and local rulemaking bodies and as disputes were brought before the courts, rather than more comprehensively and abstractly in national legislative bodies.

The conversation about regulation of Witness activities included more voices than just these parties. Other private, nongovernmental associations joined. By action of the courts allowing amicus curiae status, the American Civil Liberties Union (ACLU) and the American Bar Association (ABA) cooperated with the Witnesses in litigation, and the ACLU publicized their persecution in its reports. Opposing them was another group given amicus status, veterans organized under the American Legion.[80] A possible participant that joined only occasionally, the U.S. Department of Justice, did file against local officials under federal civil rights laws, but was successful only once.[81] Other participants, local grand juries, and juries impeded some federal efforts.[82]

Participants took on different roles in different episodes of the conversation. In a Department of Justice prosecution, the Witnesses

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77. Jurisdictional issues may always be raised by the Court independently of the parties, however, and may result in a would-be participant being denied.

78. The chief exception is the military conscription cases, in which the Witnesses faced more comprehensive federal regulation defended by the national government and its agencies. McAninch, *supra* note 1, at 1010-11.

79. After the 1940 Witness case of *Cantwell v. Connecticut*, it was made clear that state and local governments could not interfere with free exercise either. 310 U.S. at 303.

80. The American Civil Liberties Union (ACLU) was allowed to give substantive legal argument orally in the *Gobitis* case, as well as filing a brief in that case and in *Barnette*. PETERS, *supra* note 1, at 46, 249. Clergy of established mainstream Protestant churches endorsed the ACLU publications. *Id.* at 67. The American Bar Association filed a brief in both the *Gobitis* and *Barnette* cases, and the American Legion filed a brief opposing the Witness position in *Barnette*. *Id.* at 48-49, 248-49.

81. *Id.* at 120-21.

82. *Id.*

were victims whom the national government sought to protect under federal civil rights legislation in the federal courts. Generally, they were defendants in state court actions brought by state and local governments under local police power ordinances; the Witnesses' claimed that the federal constitutional law of speech and religion prevented their convictions. At times, they were plaintiffs in their own actions in federal courts, complaining that local governments violated federal speech and religion protections.[83] The number of possible participants, claims, courts, and positions made for a complex, dynamic conversation.

The participants had more than one audience. They not only spoke to judges and juries, but also to the public, initiating a national conversation about religious activity and the law. Newspapers and magazines commented on Witness litigation, especially the school flag salute cases.[84] While a few praised *Gobitis* for upholding the salute requirement, most condemned it.[85] Its overruling in *Barnette* was met with praise. Professional peers and scholars in legal periodicals published by law schools also commented on the cases, again condemning the cases.

Except for rare exceptions, court proceedings are open to the public and to the press. Court pleadings are public records at all levels; oral arguments before the Supreme Court and other appellate courts are open to the public (although seating is limited), and some state courts allow televised proceedings. By convention, judicial appellate opinions are published[86] and available to the public. They largely form the body of law studied in law schools and analyzed by scholars. They are criticized methodically in law journals, many of which are read by judges.

The public took heed of the Court's pronouncements. That is shown in part by increased persecution of the Witnesses following the *Gobitis* decision condoning punishment for their refusal to engage in patriotic exercises. For example, localities passed ordinances modeled on the opinion's reasoning.[87] A Department of Justice memorandum and ACLU reports demonstrate a striking coincidence between the *Gobitis* opinion and a clear increase in local prosecutions of Witnesses for various offenses.[88] In the year of the *Gobitis* decision, a

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83. *See, e.g.*, Douglas v. City of Jeanette, 319 U.S. 157, 159 (1943) (Witnesses seeking injunctive relief after repeated arrests for violations of the local ordinance); Sellers v. Johnson, 163 F.2d 877, 880 (8th Cir. 1947) (Witnesses seeking injunction after Mayor and town officials insisted on enforcing blockade of town).

84. PETERS, *supra* note 1, at 67-68, 232-33.

85. *Id.*

86. Some decisions have only cursory memorandum treatment because of judicial determination (court rules) of an absence of precedential value.

87. PETERS, *supra* note 1, at 249.

88. *Id.* at 100; McAninch, *supra* note 1, at 1020.

remarkable number of mob attacks on Witnesses proselytizing in numerous states were reported.[89]

The effect on the public was, in turn, noted by the Court in a conversation among the Justices carried on partially in public. Justice Murphy, dissenting, noted attacks on Witnesses in a subsequent Witness case.[90] And Justice Jackson discussed the post-*Gobitis* attacks in a draft of the *Barnette* opinion he circulated to other members of the Court.[91]

3. The Conversational Forum and Its Renewable Subject Matter

The conversation was a public, ongoing, episodic one about the meaning of the terse text of the First Amendment, in the context of concrete disputes with local officials and through the adversarial procedures of the courts. That conversation appears to have effected a change in the participants and in the meaning of the text under discussion.

a. A Concrete and Adversarial Conversation

One occasion for speech set by the Constitution is the resolution of disputes in the courts.[92] In the common-law tradition, this forum is an adversarial one, in which two opposing parties in an actual dispute present contrasting views of the law and how it applies to their factual situation in order to persuade a judge, a neutral decision-maker, in an open hearing. The constitutional text is held in common; the contest is between two ideas or narratives to determine what will constitute the authoritative meaning of the words in a given situation.

The Jehovah's Witnesses took advantage of this forum, its adversarial structure, and the large textual "gaps" to be filled by judges. Their particular faith put them in the position of telling a narrative, a biblical narrative, to others. It also put them in an oppositional stance and gave them passion to persuade. Their belief in the absolute truth of their teachings logically placed them in opposition—indeed an urgent opposition—to other powers and belief systems, whether religious or political. And they are remarkably rational in the sense that they believe that the truth of God's

89. PETERS, *supra* note 1, at 100.

90. "One 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." Jones v. Opelika, 316 U.S. 584, 622 (1942) (Murphy, J., dissenting) (upholding a license fee on Witness proselytizing).

91. PETERS, *supra* note 1, at 251.

92. U.S. CONST. art. III.

existence and his plan are apparent and logically deducible.[93] Indeed, the core of their faith is conversion of the unbeliever.

The nature of their beliefs also meant they had no long-term political goals to put into a legislative agenda. They simply sought the protection needed to go about exercising their faith.[94] This meant resorting to the courts, where they could both seek protection and propagandize their faith.

The adversarial structure of argument in a trial requires each party to characterize a set of facts differently, while arguing within the meaning of the shared text.[95] In doing so, the parties develop the tensions inherent in the central foundational text. The Jehovah's Witnesses' cases demonstrate this well.

When a local government described Witnesses' door-to-door literature distribution, preaching, and requests for donations as a nuisance, invasion of privacy, or commercial activity susceptible to fraud, the Witnesses described them as acts of worship.[96] When a government described a compulsory flag salute and pledge as a means to unify the citizenry and aid national security, the Witnesses described them as compelled disobedience to a divine injunction not to worship idols.[97] When the government described a Witness exemption from a licensing fee as a subsidy for religion, the Witnesses described it as a tax on the exercise of their religion.[98] When the government described a child distributing literature and asking for donations with her parent as a child abused for labor, the Witnesses described her as a child being raised in the faith of the parents.[99] And when the government described angry insults to arresting officers as "fighting words," the Witnesses described them as verbal self-defense by one abused by a mob and collusive officers.[100]

The Witnesses' narratives prevailed in several of the instances described above: the Court held that their activity was exercise of

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93. BECKFORD, *supra* note 5, at 201-04.

94. McAninch, *supra* note 1, at 1076.

95. The description of how judicial opinions interpret texts in cases is from James Boyd White, as is that about constitutional conversation generally. *See* James Boyd White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, *in* HERACLES' BOW 107, 114-117 (1985).

96. *See, e.g.*, Tucker v. Texas, 326 U.S. 517 (1946); Jamison v. Texas, 318 U.S. 413 (1943); Largent v. Texas, 318 U.S. 418 (1943); Martin v. City of Struthers, 319 U.S. 141 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. City of Griffin, 303 U.S. 444 (1938).

97. *See, e.g.*, Follett v. Town of McCormick, 321 U.S. 573 (1944); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Taylor v. Mississippi, 319 U.S. 583 (1943).

98. *See, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. Opelika, 316 U.S. 584 (1942).

99. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944).

100. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 569 (1942).

religion and speech, rather than littering, insubordination, or selling. Yet the opinions also recognized the government's legislative goals as legitimate, but of lesser importance. These cases illustrate an ideal: a judicial opinion that recognizes what is valid in each competing narrative and that incorporates those aspects into a coherent decision.[101]

Under the common-law method, judges not only decide the dispute before them, but in the process often adopt or modify a rule that will operate as law in future cases.[102] Narratives or understandings of facts can live beyond a present dispute and continue to be relevant as factors in (or limits on) a rule, becoming resources for future cases. This is true even if the court does not entirely accept a party's version of events. The Witnesses characterization of a Witness's insults to arresting officers as protected verbal self-defense in the face of religious persecution did not prevail. The rule that such "fighting words" can be punished, however, has since been narrowly interpreted to protect highly provocative speech, even when directed at police officers.[103] Similarly, when a judge gives reasons for rejecting a narrative, those reasons can become limiting factors for applying the rule or distinguishing it from others. A narrative rejected by the majority may be preserved in a dissenting opinion and take on new life if the dissent is cited in a later opinion. In these ways, competing viewpoints can be maintained in the conversation, to be called upon in the future.[104]

b. The Common-Law Judge as Audience and Participant

The courts in which the Jehovah's Witnesses conversed with local governments were profoundly influenced by common-law tradition. This meant the judiciary was not only an audience and referee for the parties, but also an active participant in the ongoing conversation about the meaning of the authoritative text.

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101. *See, e.g.*, White, *supra* note 95, at 116.

102. *See infra* note 106 and accompanying text.

103. Although *Prince* refused a free exercise of religion exemption from a child labor law for Witness children distributing literature and requesting donations with a parent, the constitutional law of personal privacy based in the substantive aspects of the Due Process Clause of the Fifth and Fourteenth Amendments includes the rights of parents to raise and educate their children, *see* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923), and another minority religion was able to secure a religious exemption from truancy laws for their practice of educating their children. *See* Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972). Although *Chaplinsky* refused to overturn the conviction of a Witness for offensive and annoying speech, the doctrine has been circumscribed and rarely used, eclipsed by the doctrine that even provocative and offensive speech enjoys First Amendment protection. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); Cohen v. California, 403 U.S. 15, 21 (1971); Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969)

104. See *infra* notes 123-27 and accompanying text.

The U.S. judge is more audience and referee than in the civil-law tradition, in which judges have a greater role in investigating and structuring a case. Because of reliance on the common-law method, the judge in the United States is also a conversational participant. In appellate argument, judges converse with the attorneys who investigate and shape the cases in the U.S. system. In a larger sense, however, the attorneys and the U.S. Supreme Court are in conversation with the authors of the Constitution, with earlier courts that have decided similar cases, and with the views of the present Court's members as expressed in their own earlier opinions. In addition, the Court is aware that attorneys preparing later cases and courts deciding them will be an audience for the decision being currently formulated.

Active judicial participation in the conversation is partially due to the power of independent, substantive judicial review of legislation for compliance with the Constitution. Also, the negative injunctive tone and the brief text of the First Amendment call for judicial enforcement and interpretation.[105] Judicial activism also arises from judicial use of the norms of common-law reasoning—even by judges not on common-law courts and not applying the common law.[106] The Court follows the doctrine of stare decisis, reasoning by analogy to earlier cases and to historical examples, and invokes general principles, cultural norms, and practical consequences as reasons for its decisions.

Judicial activism stems from the power to substantively review the constitutionality of the actions of other branches of government and relies on the independence of the judiciary among the branches.[107] This extensive power, which itself evolved through judicial elaboration on the meaning of the text,[108] not only gives the courts voice regarding the meaning of the Constitution, but the paramount voice.

In the common-law tradition of gradual judicial rule formulation, the Justices themselves have outlined their role. The Witness cases,

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105. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

106. Generally speaking, state courts are the common-law courts in the United States. The jurisdiction of the federal courts is restricted largely to enacted sources of law, the federal Constitution, statutes, regulations, and treaties. While they may apply state-court-created common law, federal courts generally defer to the state court system for articulation and interpretation of state common law. Certain subjects, such as admiralty, are largely of common-law origin, and a type of federal common law has evolved to address subjects necessary to the judicial function not addressed in enacted law.

107. U.S. CONST. art. III; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

108. *See Marbury*, 5 U.S. at 178.

particularly the flag salute cases, illustrate the conversation on this subject among the Justices. In the first case, *Gobitis*, the view prevailed that judicial restraint is appropriate in a democracy and that popular government is the best means to decide among competing views of proper regulation. In the last case, *Barnette*, a distinct view of judicial voice was adopted: judicial activism is appropriate in a democracy when the rights of individuals and minorities are at stake.

Court conversation may take place publicly in the oral argument of cases, as Justices make points through questioning. It may be in private, as the Justices meet in conference to discuss cases, vote preliminarily, and assign the opinion writing, or as they circulate memoranda and draft opinions among themselves. As the Witness cases above reveal, judicial conversation may also take place in footnotes, dissents, and concurrences outlining alternate, proposed, or rejected views and arguing for their propriety. The position on judicial review adopted in *Barnette* followed a proposal on appropriate judicial activism proposed in a footnote in a Supreme Court case decided in 1938,[109] as well as the reasoning in the *Gobitis* and *Jones I* dissents.[110]

The Court's method is that of traditional common-law reasoning. This is partially because most Justices have practiced law before being appointed judges, many in litigation, and thereby have become familiar with the large body of law that even today remains in the hands of the common-law (state) courts. Their U.S. legal education also shows the effect of the common law: appellate court opinions are still primary teaching materials, the skills and techniques of litigation are the subjects of many courses, and the scholarship focuses to a great degree on appellate court decisions. Thus, the Justices in constitutional decision-making tend to reason as common-law lawyers; they use the doctrine of precedent, and they openly use history and policy justifications for a decision often announced with an accompanying rule that may appear legislative in its detail.

As common-law rules derive from a line of previous cases, they tend to be complex and highly factual. This can be seen in the law of permits that came from the Jehovah's Witnesses cases. Seven discrete elements are necessary for a constitutionally valid permit ordinance.[111] Factual distinctions are the acceptable reasons for not following earlier precedent and become the basis for delineating the different requirements of and exceptions to a rule. For instance, while a permit system entirely within an administrator's discretion will fail,

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109. United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938).

110. *See* Ruth Bader Ginsburg, *Remarks On Writing Separately*, 65 WASH. L. REV. 133, 148 (1990).

111. *See supra* note 40.

one with neutral and specific standards is considered differently and may well be upheld, even against Jehovah Witnesses' religious objections.[112] But if the facts differ (e.g., if the permit standard is vague and simply relies on the discretion of a local official), the ordinance will not be upheld.

Often, common-law method allows extraction of a larger, overarching principle encompassing reasons for the rule that is applicable to cases not as factually analogous to the initial line of cases. As the authors of such principles, U.S. courts are often more open about their reliance on history, principle, and policy than are courts in other legal systems. For example, in the Witness cases, the justices drew upon U.S. history, analogizing the Witnesses to religious dissenters in the colonial period.[113] Among themselves they debated about the need for a more active judicial approach to disputes involving minority groups and individual rights.[114] As it adopted that approach, the Court also outlined the elements of a broad analytical approach to judicial review of governmental action alleged to infringe upon the First Amendment or other fundamental rights, i.e., strict or close scrutiny.[115]

The constitutional conversation on religious regulation in the United States then, is one largely dominated by a participant with paramount, final voice, who sets standards for other participants to meet, whose deliberations are only partially public, and whose institutional form is not democratically accountable. Changes in constitutional meaning through the conversation can result from changes in personnel (i.e., Justices), even relatively few personnel. The Justices are appointed by a politically accountable chief executive, and are subject to confirmation by a politically accountable Senate. Nevertheless, it is expected that the Supreme Court will speak with an independent voice on broad matters of policy in the course of deciding disputes.

The *Barnette* case, in which the Court reversed its prior decision on coerced patriotic exercises, is a famous example of an opinion in which the Court evokes broad constitutional principles to justify its

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112. Witness beliefs may prevent even applying for a license, *see* Watchtower Bible & Tract Society v. Village of Stratton, 536 U.S. 150, 167 (2002); it is offensive to Jehovah to require a permit for worship.

113. *See* Jones v. Opelika, 316 U.S. 584, 622 (1942) (Murphy, J., dissenting).

114. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (Stone, J., dissenting).

115. Strict scrutiny requires a holding of unconstitutionality unless the government demonstrates that its action is necessary to serve a compelling government interest. *Id.* Likewise, the means chosen must be necessary (i.e., the least restrictive alternative) to advance that interest. *See* Bernal v. Fainter, 467 U.S. 216, 219 (1984). As it relates to regulating proselytizing activities, governmental concerns over littering, though legitimate, were not sufficiently compelling to justify the denial of permits in *Schneider v. State*, 308 U.S. 147, 162 (1939).

decision and to govern subsequent, similar cases.[116] The following is illustrative: "If 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."[117] The subsequent statement is similarly characteristic of common-law reasoning: "If there are any circumstances which permit an exception, they do not now occur to us."[118] It is always possible that a subsequent conversation may change the law, in which case the rule will need to be modified in light of the facts of a later case.

c. Renewal of the Meaning of the Conversational Text

The role of the judiciary in the conversation is also key to the renewal of the meaning of the subject matter of the conversation, the constitutional text. The conversation explains in part the effectiveness of the brief written text over so many years of changing circumstances.

The U.S. courts, when interpreting enacted law, create a secondary jurisprudence that is necessary to the meaning of the enactment. This is evident in the Witness cases that established the law of use and access of public property, the complex law of permit systems, and the doctrine prohibiting coerced speech. The Witness decisions altered the meaning of the brief and absolute words of the First Amendment. Free speech came to be freer in a public forum and free from vague and standardless requirements, but not free in all places, at all times, and in any manner. Nor did "free" mean free to provoke violence with personally directed invective. But "free" did mean free from the threat of school expulsion for refusal to recite a patriotic exercise. Furthermore, "free" expanded to mean not only free from federal government restraint, but also free from state and local government restraint. The law changed from a public park or street being subject to all restrictions the government owner sees fit to impose, to being presumptively the place most open to speech. This vast change is certainly not to be deduced from the words of the constitutional text. Outright reversal of meaning—from allowing local government to coerce a patriotic exercise over religious objection to

116. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

117. *Id.* at 642.

118. *Id.* In the United States, the doctrine of precedent is more flexible than that of some other common-law countries, particularly in statutory matters. *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992), sets out considerations that guide the Supreme Court in a decision on overturning one of its own constitutional precedents. Such considerations include whether the rule has proved itself to defy practical workability, is subject to reliance that would make overruling inequitable, is a remnant of abandoned doctrine, or whether facts have so changed or come to be seen so differently that the rule lacks significant application or justification. *Id.*

not allowing it—is an obvious example of judicial construction of meaning.

The change in meaning is accomplished slowly, through the common-law reasoning process described above. Cases as components of common-law rulemaking refine the contours for subjects in later instances of conversation, similarly to the way the text of the Constitution sets the overall subject. The facts deemed material in a case holding will operate to include certain claims within the ambit of the rule that the case stands for and to exclude others. Thus, once the Court in *Schneider* focused on public streets as appropriate arenas for proselytizing,[119] arguments by local governments that they could ban proselytizing activities entirely because of their ownership of the streets were precluded. And once the Court ruled that specific and content-neutral standards to deny a permit for proselytizing activities were required,[120] it established a new subtopic of conversation. Local governments could then claim their ordinances were sufficiently narrow to be nondiscriminatory[121] or neutral because the same fee was required of everyone distributing literature for sale.[122]

Therefore, while one cannot say that the Jehovah's Witnesses changed the law of the First Amendment, one can say they played a role in the process by bringing speech, press, and free exercise of religion claims. The text, prior precedent, other participants in the conversation, including the Justices themselves, and the wartime context, also played a role. Nevertheless, the courtroom forum with the adversarial presentation of the Witness cases was integral to the change in meaning that occurred. Because of this evolutionary change in meaning, one cannot confidently know the meaning of a U.S. constitutional text without reading the most recent case interpretation.

This secondary jurisprudence changes the formal hierarchy of legal sources. While the Constitution is the supreme law, followed by statutes and common-law rules (to the extent they are not displaced by statute), cases interpreting the Constitution in effect are on the same level as the Constitution itself.

Because the Supreme Court's power of constitutional review extends to state and local legislation and court decisions, the Court is paramount in the national conversation—it unifies instances of conversation not only among the federal courts, but also among the various state court systems. Furthermore, because of the doctrine of

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119. *Schneider*, 308 U.S. at 160-61.

120. *See id.* at 163-64; *see also* Lovell v. City of Griffin, 303 U.S. 444, 451 (1938).

121. Cox v. New Hampshire, 312 U.S. 569, 577 (1941) (State prevailed on ground that the state court construed a parade ordinance to set nondiscriminatory standards for permits).

122. *See* Jones v. Opelika, 316 U.S. 584, 597-98 (1942), *vacated by* 319 U.S. 103 (1943).

precedent, the courts speak to one another, as well as to attorneys and the public, with the latest, highest voice having a ring of finality on a particular topic of conversation.

4. Varied Topics in a National Conversation

While the text of the Constitution supplies the subject of the conversation, multiple legal areas can be addressed simultaneously, affecting many areas of life and governmental action and resulting in a complex conversation.

Witness cases regarding public property affected the ordinary administrative law of local governments.[123] Rights of owners of real property were diminished by a Witness case in which the Court held that the First Amendment prevented a company town from restricting Witness proselytizing.[124] The coerced patriotic exercise cases modified local school law, and another Witness case modified the state law of unemployment insurance eligibility.[125] Parental rights, an aspect of family law that is usually a matter of state law, were also affected, as well as child labor.[126]

Occasionally the Court addressed religion in construction of national statutory law, in which case it conversed, in a sense, with the Congress. The Court discussed military conscription legislation in the context of constitutional challenge and upheld military induction laws that substantially limited the Witness draftees' opportunity to challenge their validity. But it sent a message to Congress about the relevance of the First Amendment to military conscription by suggesting that the First Amendment required that some opportunity to challenge the validity of draft classifications be provided to religious objectors. [127]

Thus the judicial forum and the role of judges as audience and participants in the constitutional conversation affect many other areas of law, adding complexity to the conversation. The power of the federal courts to impose their voice on matters of federal

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123. *See, e.g., Lovell*, 303 U.S. at 452. Similarly, the local administrative law of automotive licensing was restricted by the First Amendment in the Witness case of *Wooley v. Maynard*, 430 U.S. 705, 717 (1981).

124. Marsh v. Alabama, 326 U.S. 501, 502 (1946).

125. Thomas v. Review Bd., 450 U.S. 707, 719-20 (1981) (holding that a Witness unemployed because of his religiously based refusal to work on military hardware has a free exercise exemption from state law denying unemployment benefits to those discharged for misconduct).

126. Prince v. Massachusetts, 321 U.S. 158, 170-71 (1944) (holding that state child labor laws did not offend the Free Exercise Clause when applied to the time that children spent distributing Witness literature with their parents).

127. *See* Estep v. United States, 327 U.S. 114 (1946); Falbo v. United States, 320 U.S. 549, 553-55. In the former case, Justice Black stated he would have voided the action on constitutional grounds if the statutory ones had not sufficed.

constitutional law also means the conversation yields uniform standards, applicable over a diverse nation with quasi-sovereign state governments.

5. Instances of Conversation Differing in Time and Setting Create Repetition, Inconsistency, and Lapses

The constitutional conversation is constructed of repeated instances of conversation in differing times, factual settings, and court systems. Even the conversation constituting the meaning of an aspect of one amendment takes place in repeated episodes. On new occasions, participants revisit prior instances and may alter their views. As instances are separate, topics may be dropped or may be addressed again only several instances later—in new contexts, with new participants. Thus, conversation can lapse, or instances can be repetitive or inconsistent, and the meaning thereby constructed is similarly incomplete or inconsistent.

The Witness cases on access to and use of public property for First Amendment activities stretched over sixty-four years and built only gradually into the complex law of constitutional permitting systems. Cases were repetitive, as when the 1951 *Niemotko* case repeated the analysis under which a standardless licensing scheme was struck in *Martin v. City of Struthers* (1943), *Largent v. Texas* (1943), *Cantwell v. Connecticut* (1940), and *Schneider v. State* (1939).[128]

The Witnesses endured inconsistent, even contradictory instances of conversation. The most dramatic example of contradiction is the Court's reversal in *Barnette* of its 1940 *Gobitis* decision, which had upheld expulsion of Witness school children for refusing to engage in patriotic exercises.[129] The assumption behind stare decisis is that predictability is important in the law, and that change should happen only gradually and predictably. But the normal common-law method of distinguishing cases by facts and formulating additional rule requirements or exceptions does not explain the change from *Gobitis* to *Barnette*. The facts were virtually identical: in both, Jehovah Witness parents of minor children sued local school authorities that required school children to participate in school flag salute exercise, with threat of expulsion for noncompliance. The law upon which the Witnesses relied was largely the same. *Gobitis* had refused a free exercise of religion exemption, assuming the local authorities had the power to require the patriotic

128. *See* Niemotko v. Maryland, 340 U.S. 268 (1951); Martin v. City of Struthers, 319 U.S. 141 (1943); Largent v. Texas, 318 U.S. 418 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939).

129. W. Va. State Bd. of Educ. V. Barnette, 319 U.S. 624, 642 (1943); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 586 (1940).

exercise, and the Witnesses in *Barnette* relied on free exercise as well as on freedom of speech. In each case, the Witnesses were represented by the same attorney and aided by the ACLU and ABA Committee on the Bill of Rights. The federal courts were the common forum in each instance, and the wartime context remained the same.

Two factors differed, however. First, *Barnette* was decided in the context of increased persecution of the Jehovah's Witnesses, both in violent attacks and prosecutions for various offenses.[130] While the *Gobitis* opinion alone certainly did not cause the violence, there was a "striking coincidence" of timing between its publication and hardships endured by the Witnesses.[131]

Second, the Justices who participated in the conversation changed as well. Justice Stone, who had dissented in *Gobitis*, became Chief Justice after Chief Justice Charles Evans Hughes left the Court, and two new justices were appointed.[132] In addition, three justices who joined the *Gobitis* opinion changed their views,[133] making a majority of five against the earlier holding.

The three years between *Gobitis* and *Barnette* were a time of uncertainty, especially because growing dissension was indicated in an intervening decision on taxation, *Jones v. Opelika*.[134] *Jones* did not involve school patriotic exercises, but rather upheld imposition of a tax on selling printed matter. Yet under common-law reasoning, by which discrete factual cases resemble one another in terms of larger principles, there was a similarity. Both involved generally applicable regulations that, in effect, significantly burdened religious conduct. Three dissenting justices pointed out the similarity. With the new appointments to the Court, it appeared that a majority of the members of the Court had changed their views. Thus, for a period of time there was a lapse in the conversation: no instance of conversation articulated the change, and *Gobitis* stood as precedent.

Such a lapse is not unanticipated. Because judicial lawmaking relies on litigants to bring cases to the courts, and U.S. constitutional

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130. *See supra* notes 82 & 83 and accompanying text. In 1940, nearly 1,500 Witnesses endured 335 separate mob attacks in forty-four states. PETERS, *supra* note 1, at 100.

131. McAninch, *supra* note 1, at 1020.

132. As Stone was elevated, Justice Jackson took his seat, and Justice Rutledge took the seat of Justice McReynolds (after a brief period of service by Justice Byrnes). Both Hughes and McReynolds had joined the *Gobitis* majority opinion, which was a 9-1 decision.

133. In *Jones v. Opelika*, 316 U.S. 584, 597-98 (1942), *vacated by* 319 U.S. 103 (1943) (per curiam), the Court upheld imposition of a nondiscriminatory license tax on Jehovah's Witnesses distributing their tracts door-to-door in a 5-4 decision. Dissenting, Justices Black, Douglas, and Murphy noted that *Jones*' approval of a facially nondiscriminatory action that resulted in burdening a minority's religious exercise was consistent with the holding in *Gobitis*, which they now believed was wrongly decided. *Id.* at 623-24 (Black, J., dissenting).

134. *See supra* text accompanying note 133.

law forbids issuance of opinions in cases that are not live controversies between adverse parties, judges cannot write comprehensive and complete summaries of the law or correct prior mistakes on their own. They must await a case that will raise the issue needing attention. As a result, both the public and the lower courts may lack guidance.

The Witnesses' chief counsel saw the clues, anticipated a reversal of *Gobitis* and, in the tradition of active lawyering that characterizes the U.S. system, selected the *Barnette* case to pursue to the Supreme Court.[135] The lower federal court spoke as well in the conversation, also anticipating a reversal. It indicated in its opinion that after the *Jones I* dissent it felt free to use its own opinion on the governing rule of First Amendment law, rejecting *Gobitis*. The lower court did so even though *Gobitis* was binding, factually analogous precedent not yet overruled.[136]

D. *Assessment and Conclusion*

The historical interaction between this new and unpopular religious movement and the U.S. legal system in many respects worked well. The movement was protected from the imposition of the majority's hostile will. Likewise, while resistant to civil authority in the name of religious belief, the Witnesses ultimately obeyed limits imposed by the judiciary on their activities. The development of the law of the Constitution was affected in a manner most U.S. citizens and legal observers find positive, and the religious movement appears to have institutionalized into a religion that is less legally and socially disruptive.

The legal system was marked by a minimum of regulation of religious activities, most of it at the local level, with enforcement of brief and broadly termed national constitutional guarantees of religious freedom entrusted largely to the national judiciary. The judiciary operated in the common-law method, evolving principles and rules gradually through a series of cases.

The legal system proved responsive to the particular complaints of this minority religion, producing nationally binding court decisions that upheld the legitimacy of their core religious activities. The group was able to access the system, partly because of their constitutionally stated status, which they could exploit with claims for relief in the courts. They were able to narrate their religious version of the events leading to conflict with the law, and to have an audience in the courts and in the public at large for their interpretation of the Constitution.

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135. PETERS, *supra* note 1, at 245.

136. Barnette v. W. Va. State Bd. of Educ., 47 F. Supp. 251, 252 (S.D. W. Va. 1942), *aff'd*, 319 U.S. 624 (1943).

The system was flexible enough to allow them recourse to the courts when the immediate regulatory authorities were hostile or complicit in the persecution. It also gave the alternative of resort to federal courts when relief as defendants in state courts seemed unlikely.

On the other hand, the movement suffered persecution without clear and uniform relief for at least fifteen years, from 1928 to the early 1940s. Although they experienced victories in that period, the victories were episodic, addressing particular factual situations. At times, they were defeated and, at other times, left uncertain of the status of their religious actions. Their protection was secured largely through their own efforts, which required extraordinary organization, time, and money. The courts as decision-makers were not directly democratically accountable or completely transparent, and because the law was unclear and resolution of the disputes was complicated by alternative fora, claims, parties, and appeals, the process was inefficient from the viewpoint of the religious movement subject to regulation.

III. RUSSIA AND SPAIN: A DISTINCTLY EUROPEAN CONVERSATION

The metaphor of ongoing conversation with religious minorities and newcomers about the meaning of fundamental, enacted law with judges as audiences and participants holds for the regulatory systems of Russia and Spain as well as for the United States, albeit with some significant distinctions.

A. *The Role of the European Court of Human Rights in Russia and Spain*

One distinct aspect of the European conversation centers on international human rights agreements and the courts that enforce them. For example, both Russia and Spain are bound by Article Nine of the European Convention on Human Rights.[137] It contains a

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137. It provides that

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Sec. I, Art. 9, U.N.T.S 221 (as amended Nov. 1, 1998). Paragraph 2 is of particular relevance to Witness disputes with civil authorities and was the basis of a

guarantee of freedom of thought, conscience, and religion that is absolute until manifest in action, when the limitations may apply. To justify overriding the freedom, a limitation must pass the tests of paragraph two, the strictest of which is that it be "necessary in a democratic society." The European Court of Human Rights has said this necessarily presupposes religious pluralism,[138] necessitating a very strict scrutiny of limitations. Thus, while cultural difference in this area must be appreciated, this provision and the nondiscrimination provisions of the Convention require reasonable and objective criteria for differential treatment, avoidance of blatant or targeted discrimination, and full freedom for less favored religious groups to carry out their objectives and activities.[139]

B. *The Role of Constitutional Courts in Russia and Spain*

Another aspect of the conversation in both Russia and Spain is the specialized role of constitutional courts. In most of Europe, including Russia and Spain, "ordinary" judges (those not on the constitutional court) may only interpret the statute before them; they may not decide on the constitutionality of a statute.[140] Unlike in the United States, where any court, state or federal, can hold legislation unconstitutional, this task is left up to the Constitutional Court in Russia and Spain.[141]

These constitutional courts are a relatively recent phenomenon in Europe, with most countries establishing them after World War II.[142] The Constitutional Court in Russia was only established in 1991,[143] while the Constitutional Court in Spain dates back to

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decision finding Greek denial of a permit to Witnesses for a house of prayer objectionable. Manoussakis and Others v. Greece, 23 Eur. Ct. H.R. 387 (1996).

138. Cole Durham, *Freedom of Religion or Belief: Laws Affecting the Structuring of Religious Communities*, ODIHR Background Paper 1999/4, at 20 n.31 (Organization for Security and Co-operation in Europe Review Conference, September 1999) (citing *Manoussakis*, 23 Eur. Ct. H.R. ¶ 41).

139. *Id.* at 21 n.36 (relying on arts. 1, 14).

140. Victor Ferreres Comella, *The European Model of Constitutional Review of Legislation: Toward Decentralization*, 2 INT'L J. CONST. L. 461, 463 (2004). The constitutional court is an entirely separate court made up of judges who are subjected to an entirely different set of selection processes and standards. *Id.* at 468.

141. *Id.* at 463.

142. Bojan Bugaric, *Courts as Policy-Makers: Lesson From Transition*, 42 HARV. INT'L L.J. 247, 251 (2001). Austria and Czechoslovakia were the first to establish constitutional courts in 1920. *Id.*; *see also* Comella, *supra* note 140. Comella notes that this dualist system was particularly useful for newly emerging democracies, which were unable to replace judges appointed under the previous regime, but wanted to protect their constitutions under their new regimes. Thus, the separate role of the constitutional court worked well in this situation. *Id.* at 469.

143. Marina Thomas, *Russian Federation Constitutional Court Decisions on Russia's 1997 Law, "On Freedom of Conscience and Religious Association,"* 6 INT'L J.

1978.[144] This model of centralized constitutional review developed out of a concern that a judiciary with unlimited review powers, i.e., the power to hold legislation unconstitutional, would be countermajoritarian and undemocratic.[145] These concerns also underlie the expectation that ordinary judges will presume the constitutionality of the contested legislation. In fact, they should look for ways to find the legislation constitutional.[146]

Another feature of these centralized constitutional courts is the review of constitutional issues in the abstract. Unlike the U.S. case or controversy model, the European model allows consideration of the constitutionality of legislation in a procedure separate from an actual controversy among litigants affected by it. This is generally accomplished either through a constitutional challenge or constitutional question.[147] Constitutional challenges may be brought by a variety of official actors: the government, the prosecutor, or a member of parliament.[148] These challenges generally must be filed within a certain period of time following a statute's enactment. Constitutional questions, on the other hand, are referred by ordinary judges.[149] These questions are raised by a case that the ordinary

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NOT-FOR-PROFIT L. (Sept. 2003), *available at* http://www.icnl.org/JOURNAL/vo l6iss1/rel_ thomasprint.htm.

144. Article 159 of the 1978 Spanish Constitution established the Constitutional Court. *See* Sí, Spain, *The Constitutional Court*, *available at* http://www.sispain.org/ english/politics/court/court.html.

145. *See* Bugaric, *supra* note 142, at 253; Comella, *supra* note 140, at 468. "Constitutional courts are specialized judicial tribunals exclusively responsible for deciding constitutional questions. Whereas both state and federal courts in the United States can rule on constitutional questions, the judicial structure of many European and other civil-law countries limits judicial review to these specialized constitutional courts." *Id.* at 468.

146. Comella, *supra* note 140, at 472. Comella points out that some judges may be reluctant to refer constitutional questions to the constitutional courts because of the amount of time that it may take for the court to make a determination. Therefore, "interpretations" may be stretched at times. He also discusses a number of internal problems with the centralized constitutional court model. These include the problem of delays, the complexity of modern legislation, and the level of interpretation allowed ordinary judges. He argues that all of these problems point to the need for greater decentralization. In addition, external factors, such as an expansion of the ability of ordinary judges to apply the European Convention on Human Rights, also promote decentralization. Comella also suggests that ordinary judges should be empowered to "set aside a statute when the constitutional precedents set by the court make it relatively clear that this statute is invalid." *Id.* at 477-82.

147. *Id.* at 464.

148. *Id.*

149. *Id.* at 465; *see also* Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117 (2001). The authors provide the following helpful description of a hypothetical constitutional case in Russia:

> In Russia, our hypothetical litigant (who may be an ordinary citizen or a part of the government, including a member of the Parliament that passed the law or

judge is considering. The judge can refer the case to the constitutional court to decide the constitutional question, which can delay the case for years.[150] Ultimately, however, the constitutional court will decide only the constitutional issue, not the case as a whole. In addition, some countries, including Russia and Spain, allow individual citizens to bring a "constitutional complaint" to the constitutional court if they believe their fundamental rights have been violated.[151]

C. *Russia*

1. Introduction

Before the Bolshevik Revolution in 1917, Russia allowed for a state religion.[152] The Russian monarchy entrusted the Orthodox Church with several state functions, while other traditional Russian religious groups, like Muslims, Catholics, Lutherans, Jews, and Buddhists, were left with a substantially restricted set of rights and privileges.[153] The events of 1917, however, brought about significant changes in Russia, as the proclamation of a socialist state was accompanied by a separation of church and state.[154] The socialist state's supposed declaration of religious freedom, however, was really

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> even the President) needs not violate the law to mount a challenge to it, nor would he begin his case in a lower "ordinary" court. Because he is alleging that the act violates Russia's Constitution, because the ordinary courts do not decide constitutional cases, and because the only court that does decide constitutional cases—Russia's Constitutional Court—does not require concrete controversies to render decisions, our litigant could take his case directly to that court. The only similarity of note between his plight and that of his American counterpart lies in his chances of review: The Russian Constitutional Court is even more discretionary than the U.S. Supreme Court, deciding in recent years less than 0.3% of the petitions it receives for review.

Id. at 122.

On the other hand, the Russian Constitutional Court issues more informal "delimitations," responses to petitioners informing them why their case will not be formally decided. *See* Kim Lane Scheppele, *Constitutional Negotiations*, 18 (1) INT'L SOC. 219, 229-31 (2003). More than ten times as many delimitations finding the claim meritorious on the basis of a prior ruling were issued in 200 formal rulings. *Id.* at 230.

150. Comella, *supra*, note 140, at 471. Comella notes that the delay in Spain can be up to eight years. *Id.*

151. *Id.* at 465. In Spain, the litigant must exhaust all remedies available in ordinary courts before proceeding to the constitutional court, and the court may decide an issue of statutory validity in the abstract nevertheless. *Id.* Direct access appears greater in Russia. *See* Scheppele, *supra* note 149, at 228.

152. Lev Simkin, *Church and State in Russia, in* LAW AND RELIGION IN POST-COMMUNIST EUROPE 261, 261 (Silvio Ferrari & W. Cole Durham, Jr. eds., 2003).

153. *Id.*

154. *Id.*

the start of an attack on all religion, especially Orthodoxy, which lasted on and off for several decades.[155]

In the 1970s and 1980s, state policy regarding religious denominations controlled all aspects of church life in Russia.[156] As religious freedom became increasingly burdened by the mid-1980s, President Mikhail Gorbachev began the policy of *perestroika*, under which restrictions on the activities of religious groups were lifted.[157] The Russian Soviet Federative Socialist Republic (RSFSR) 1990 Law on Freedom of Religion normalized the state's relations with religious groups (hereinafter, the 1990 Law).[158] The 1990 Law not only guaranteed the religious liberty of individual citizens, but also of properly registered religious groups.[159] The Russian Constitution of 1993 subsequently confirmed these guarantees of religious freedom, helping establish what Gorbachev proclaimed to be "a golden age of religious liberty" in Russia.[160]

Since 1990, the denominational spectrum in Russia has become more diverse, and groups that were once banned have received the right to carry out their religious activities.[161] Similarly, there is data indicating a steady increase over the past two decades in the percentage of religious believers among Russian citizens.[162] And while determining the actual number of followers for each denomination would be difficult because of inaccuracies and conflicting information,[163] the Orthodox Church and Islam are the two largest faith groups, encompassing around seventy-five percent and fifteen percent of its people, respectively.[164] Other religious

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155. *Id.* at 261-62.

156. *Id.* at 262.

157. *Id.*; John Witte, Jr., *Introduction—Soul Wars: The Problem and Promise of Proselytism in Russia*, 12 EMORY INT'L L. REV. 1, 3-4 (1998)

158. Simkin, *supra* note 152, at 262. After this law's adoption in 1990, the number of religious organizations in Russia almost quadrupled to 20,200 by the year 2001. Half of these organizations were associated with the Orthodox Church, while the remainder was composed of roughly 3,000 Islamic, 2,000 Pentecostals, 563 Adventists, and 330 Jehovah's Witnesses associations, as well as 200 associations each of Lutherans, Jews, and Buddhists. *Id.*

159. Witte, *supra* note 157, at 5.

160. *Id.* at 6-7. Article 14 of the Russian Constitution states that "(1) [t]he Russian Federation is a secular state. No religion may be instituted as state-sponsored or mandatory religion. (2) Religious associations are separated from the state, and are equal before the law." RUSS. CONST. pt. I, art. 14. Article 28 further states that "[e]veryone is guaranteed the right to freedom of conscience, to freedom of religious worship, including the right to profess, individually or jointly with others, any religion, or to profess no religion, to freely choose, possess and disseminate religious or other beliefs, and to act in conformity with them." *Id.* at pt. I, art. 28.

161. Simkin, *supra* note 152, at 262.

162. *Id.* at 263.

163. *Id.* at 263-64.

164. T. Jeremy Gunn, Russian Federation 4 n.5 (Sept. 4, 2002) (unpublished manuscript, on file with author).

groups represented in Russia include: Protestants, Pentecostals, Adventists, Baptists, Lutherans, Catholics, Jews, Buddhists, Hare Krishnas, Latter-Day Saints, and Jehovah's Witnesses.[165]

2. The Interaction Between the Jehovah's Witnesses and the Russian Legal System

a. The Jehovah's Witnesses in Russia

The Jehovah's Witnesses organized in Russia in 1891.[166] Over time, the Witnesses have angered a succession of Russian governments because of their refusal to celebrate national holidays or perform military service, and their tough intracommunity discipline and assertive style of proselytizing new converts.[167] In fact, thousands of Jehovah's Witnesses were persecuted and killed in Soviet dictator Joseph Stalin's Gulag prison camps.[168] Moreover, it was not until the Soviet Union was collapsing in 1991 that the Jehovah's Witnesses were first legalized as a religious organization in Russia.[169] Today, conflict with local authorities persists, although the Jehovah's Witnesses claim roughly 130,000 members in Russia, of which more than 10,000 reside in Moscow.[170]

b. Russia's Religion Laws Generally

The principal law governing the relationship between church and state is the 1997 Law on Freedom of Conscience and Religious Associations, as amended on March 26, 2000 (hereinafter, the 1997 Law).[171] The 1997 Law replaced the earlier 1990 Law, which had made registration widely available to religious associations and had granted them legal entity status.[172] In particular, the 1997 Law requires all churches not associated with Russia's four "indigenous" faiths—Orthodoxy, Islam, Judaism, and Buddhism—to obtain

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165. *See id.* at 4; Simkin, *supra* note 152, at 264.

166. *Court Upholds, Enacts Jehovah's Witnesses Ban*, MOSNEWS.COM, June 16, 2004, *available at* http://www.stetson.edu/~psteeves.relnews/0406a.html.

167. Fred Weir, *Moscow Ruling Vexes Religious Minorities*, CHRISTIAN SCI. MONITOR, June 22, 2004, *available at* http://www.stetson.edu/~psteeves.relnews/0406c.html.

168. *Id.*

169. *Id.* Currently, the activity of Jehovah's Witnesses is legally recognized in every European country, including the twenty-five Member States of the European Union and those republics of the former Soviet Union geographically located in Europe. Press Release, Administrative Center of Jehovah's Witnesses in Russia, Statement (June 16, 2004), *available at* http://www.jw-media.org/newsroom/index.htm?content=russia.htm.

170. *Court Upholds, Enacts Jehovah's Witnesses Ban, supra* note 166.

171. Gunn, *supra* note 164, at 8; Simkin, *supra* note 152, at 265.

172. Simkin, *supra* note 152, at 265.

registration and to accept strict state regulation.[173] But while the majority of the 1997 Law pertains to state registration of religious associations, it was not principally designed to create a system of registration, because this already existed under the 1990 Law.[174] Instead, the 1997 Law was principally designed to mandate re-registration of previously recognized religious groups in order to make it more difficult for certain groups to retain their recognized legal status.[175]

Not surprisingly, the adoption of the 1997 Law resulted in growing concerns from the international community, which sought more protection for religious minorities in Russia.[176] President Boris Yeltsin vetoed the 1997 Law as originally enacted, resulting in the adoption of the so-called compromise version of the 1997 Law.[177] Like its predecessor, this revised version of the 1997 Law was adopted by the Russian Parliament under the stated purpose of limiting the influx of foreign denominations into Russia.[178] A more significant motive of the revised 1997 Law, however, was to protect the Russian Orthodox Church.[179] The 1997 Law encroaches on the rights of those not belonging to the Russian Orthodox Church by means of various discriminatory measures, such as terminating a religious group's lease on a building used for worship.[180] Repressive components of the law, which stress the supremacy of federal law in the area of religious freedom, have led many local governmental administrations to conclude that they are free to deal with religious minorities on a local level.[181] As a result, it is likely that regional laws will continue to create challenges for Jehovah's Witnesses' activities in Russia.[182]

c. Registration of Jehovah's Witnesses Under the 1997 Law

Perhaps the most important, yet controversial, provisions of the 1997 Law are those that govern the re-registration of religious organizations.[183] The 1997 Law required all religious groups to re-register before 2000 (which was later extended by amendment to

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173. Weir, *supra* note 167. "It has been reported that there are currently around 21,000 local congregations belonging to 59 different faiths registered by the federal authorities in Russia." *Id.*

174. Gunn, *supra* note 164, at 9.

175. *Id.*

176. Simkin, *supra* note 152, at 265.

177. *Id.* at 265-66.

178. *Id.* at 266.

179. *Id.*

180. *Id.* at 267.

181. *Id.*

182. *Id.*

183. Gunn, *supra* note 164, at 8, 20.

2001).[184] Such provisions have resulted in court decisions that have effectively eliminated some of the re-registration obstacles.[185]

One major re-registration obstacle was the 1997 Law's requirement that all previously recognized religious groups supply written documentation proving their existence in Russia for at least fifteen years (i.e., from before 1982).[186] Those groups that were unable to provide this documentation, like the Jehovah's Witnesses (which was legalized around 1991), would be required to re-register each year for fifteen years.[187] The Jehovah's Witnesses brought suit, and in November 1999, Russia's Constitutional Court effectively voided this re-registration obstacle.[188] Although the Court upheld the clause in the 1997 Law that required religions applying for registration to show documentation of their presence in Russia for at least fifteen years, it ruled in favor of the Jehovah's Witnesses bringing the case when it held, *inter alia*, that the proof of existence requirement does not apply to groups that were recognized before the 1997 Law took effect.[189] Thus, while this ruling is of little help to religious groups not recognized in Russia before 1997, it does eliminate one of the most onerous provisions of the 1997 Law for those who were.[190]

d. Jehovah's Witnesses in Moscow Under the 1997 Law

Although the Jehovah's Witnesses have obtained federal registration pursuant to the 1997 Law in nearly 400 communities throughout Russia, they have experienced trouble in trying to legalize

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184. *Id.* at 20.

185. *Id.*

186. *Id.*; Simkin, *supra* note 152, at 265.

187. Gunn, *supra* note 164, at 20. The reason for this fifteen-year requirement was that Gorbachev's *perestroika*, which had begun lifting restrictions on religious groups in the mid-1980s, occurred less than fifteen years before the original re-registration deadline of 2000. As a result, all new religious groups that arose during *perestroika* would not qualify for re-registration and, therefore, would have trouble retaining their recognized legal status. Simkin, *supra* note 162, at 265.

188. Gunn, *supra* note 164, at 21.

189. *Id.*; Press Release, Jehovah's Witnesses' Public Affairs Office, Jehovah's Witnesses Win Russian Constitutional Case, but Court Upholds 15-year Rule in 1997 Religion Law (Nov. 22, 1999) (on file with author).

190. Gunn, *supra* note 164, at 21. In a 2000 decision, the Constitutional Court preserved the status of another religious association registered before the 1997 law as a foreign religious organization, the Russian branch of the Roman Catholic Society of Jesus, holding it would not lose any privileges it had before the 1997 law took effect. *Id.* And in a similarly reasoned decision, the Court held in 2002 that the Salvation Army's Moscow organization could not be liquidated without finding illegal action, as it had been registered before 1997 but had not re-registered because of technicalities. *Id.*

their Moscow chapter.[191] It was originally alleged that the activities of the Jehovah's Witnesses in Moscow posed a threat to Russian society.[192] After conducting an inquiry, prosecutors ultimately charged the Moscow congregation in May 1998 with provoking religious strife, dividing families, infringing on individual rights, encouraging suicide by enjoining members to refuse medical assistance (e.g., rejecting blood transfusions), and urging citizens to ignore civic obligations (e.g., military service).[193] Under Article 14 of the 1997 Law, such actions may result in the loss of a religious organization's legal status and a ban on all its activities even if it has legally registered.[194]

Court hearings into this case began in September 1998.[195] On February 23, 2001, a lower court dismissed the charges against the Jehovah's Witnesses, but prosecutors successfully appealed this verdict in May 2001, after which a retrial was ordered.[196] On March 26, 2004, the Golovinsky Intermunicipal District Court ruled in favor of the prosecution and declared a ban on all organized activities of the Jehovah's Witnesses chapter in Moscow.[197] This holding marked the first outright banning of a religious organization under the 1997 Law.[198] In turn, the Jehovah's Witnesses appealed, arguing both that the prosecution lacked sufficient evidence of any wrongdoing and that the District Court's ruling violated the European Convention on Human Rights, to which Russia is a signatory.[199] In particular, attorneys for the group contended that the ban breaches the

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191. Steven Lee Myers, *Moscow Court Keeps Ban on Jehovah's Witnesses*, N.Y. TIMES, June 17, 2004, at A6; Weir, *supra* note 167; *see also* Geraldine Fagan, *Russia: Court Bans Jehovah's Witnesses*, FORUM 18 NEWS SERVICE, Mar. 29, 2004, *available at* http://www.forum18.org. The Moscow chapter was initially registered as a religious group in December 1993, but it has been refused re-registration under the 1997 Law on five separate occasions. *Id.*

192. Myers, *supra* note 191.

193. *Lawyers Challenge Resolution Banning Jehovah's Witnesses*, ITAR-TASS, June 16, 2004, *available at* http://www.stetson.edu/~psteeves.relnews/0406a.html; Weir, *supra* note 167; *see also* Fagan, *Russia: Court Bans Jehovah's Witnesses*, *supra* note 191. The origins of this trial date back to June 1995 when the Committee for the Salvation of Youth from Totalitarian Sects (a social organization with no formal connection to the Moscow Patriarchate of the Russian Orthodox Church) filed a complaint requesting that a criminal prosecution be launched into the Moscow chapter. *Id.*

194. Geraldine Fagan, *Russia: Jehovah's Witnesses Ban Comes Into Effect*, FORUM 18 NEWS SERVICE, June 17, 2004, *available at* http://www.forum18.org.

195. *Lawyers Challenge Resolution Banning Jehovah's Witnesses*, *supra* note 194.

196. Fagan, *Russia: Court Bans Jehovah's Witnesses*, *supra* note 191.

197. *Id.*; *see also* Fagan, *Russia: Jehovah's Witnesses Ban Comes Into Effect*, *supra* note 194. While this ruling was to have no legal force or effect until after the appeals process had concluded, many Jehovah's Witnesses in and around Moscow reported immediate adverse consequences as a result of the holding. *Id.*

198. Fagan, *Russia: Jehovah's Witnesses Ban Comes Into Effect*, *supra* note 194.

199. *Id.*

Convention's specific guarantees of religious freedom, freedom of association, and nondiscrimination on religious grounds.[200] Nevertheless, on June 16, 2004, after a four-hour hearing, a three-judge panel of the Moscow City Appeal Court adjourned for only five minutes before upholding the district court's decision.[201]

Because it is new precedent, it is still uncertain exactly how this ban will be enforced.[202] Even so, it is likely that the 10,000 plus Jehovah's Witnesses in Moscow will be forbidden from renting premises for their religious services, from distributing literature, and from officially assembling to profess their faith.[203] Furthermore, while prosecutors suggested that the Moscow branch could still function without registration, the court resolution clearly states that, in addition to losing its status as a legal entity, the group must cease all its activities.[204]

Unless the Kremlin steps in to suspend the ban, the Jehovah's Witnesses recourse is in the courts.[205] While they had—and still have—the option of appealing the decision within the Russian judicial system,[206] they have, instead, decided to seek recourse from the European Court of Human Rights.[207] That Court has the authority to annul legal holdings in Russia at any level,[208] and it has repeatedly declared the Jehovah's Witnesses to be a "known religion" entitled to protection under international conventions that Russia has signed.[209]

The greatest potential fallout of this legal ruling is that it has the likelihood of extending not only to Jehovah's Witnesses in other

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200. *Id.*

201. Myers, *supra* note 191.

202. Fagan, *Russia: Jehovah's Witnesses Ban Comes Into Effect*, *supra* note 194.

203. Myers, *supra* note 191; Weir, supra note 167.

204. Fagan, *Russia: Jehovah's Witnesses Ban Comes Into Effect*, *supra* note 194.

205. Weir, *supra* note 167.

206. Myers, *supra* note 191.

207. *Court Upholds, Enacts Jehovah's Witnesses Ban*, *supra* note 166; Fagan, *Russia: Jehovah's Witnesses Ban Comes Into Effect*, *supra* note 194. The Jehovah's Witnesses filed an application with the European Court of Human Rights pertaining to the instant case (and the refusal of Moscow authorities to re-register the religious group) in December 2001; in June 2003, the European Court submitted questions to the Russian government regarding its treatment of Jehovah's Witnesses in Moscow. Press Release, Jehovah's Witnesses' Office of Public Information, Moscow Appeal Court Outlaws 11,000 Jehovah's Witnesses Who Brace for Return to Soviet Era (June 16, 2004), *available at* http://www.jw-media.org/newsroom/index.htm?content=russia.htm. The right of registered faith communities to meet in modern-day Russia will also be addressed by the European Court in *Kuznetsov and Others v. Russian Federation* (hearing set for Sept. 9, 2004), in which a religious meeting of 150 deaf or partially deaf Jehovah's Witnesses in Chelyabinsk was illegally terminated by governmental authorities. Press Release, Jehovah's Witnesses' Office of Public Information, Deaf Russian Citizens Take Fight For Religious Freedom to the European Court (Sept. 6, 2004), *available at* http://www.jw-media.org/newsroom/index.htm? content=russia.htm.

208. Fagan, *Russia: Court Bans Jehovah's Witnesses*, *supra* note 191.

209. Weir, *supra* note 167.

Russian cities, but to other religious minorities in Russia as well.[210] This possibility is supported by several recent examples of official and unofficial harassment of Jehovah's Witnesses and other minority religious faiths in Russia.[211] The ban may be evidence of Russian authorities seeking greater control over religious affairs than a reaction to wrongdoing on the part of the Jehovah's Witnesses in Moscow.[212]

3. Conclusion

In Russia, the Witnesses have encountered a more comprehensive and complete system of religious regulation than in the United States, although on examination it proved more episodic and mutable than it might initially appear. That system initially excluded or repressed the Witnesses, leaving them without legal status under both the monarchy and the socialist state. Finally gaining some legal status as a religious group after 1990, they were subject to restrictions on their activities under the registration requirements of the 1997 statute, restrictions that gave them a subordinate or ambiguous status vis-à-vis the more established religions.

Their challenge to the 1997 law resulted in the 1999 Russian Constitutional Court decision that not only applied the re-registration limitations of the law, but also so broadly interpreted them that one could safely say it changed their content. The Jehovah's Witnesses thus had an effect on the law, changing their legal status from one of subordination and ambiguity to one of equality and clarity. The decision lessened the ability of local or national governments to restrict their activities. And the change was not merely in *their* status; as it enlarged the category of those not subject to the proof of existence requirement, it changed the status of all religious groups recognized at the time the 1997 law was enacted.

Nevertheless, the 1999 decision was limited. The Court did not settle the validity of the 1997 law's registration restrictions under the Russian Constitution or under the equality provisions of the European Convention on Human Rights. Nor did it settle the Witnesses' ongoing dispute under other provisions of the 1997 law

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210. Myers, *supra* note 191; *see also* Weir, *supra* note 167 (stating that, in 2003, 1,900 warnings were issued to various religious groups, resulting in the filing of 246 court applications to close down specific local religious communities).

211. Myers, *supra* note 191; *see also* Geraldine Fagan, *Russia: Jehovah's Witness Rental Contracts Cancelled*, FORUM 18 NEWS SERVICE, Apr. 13, 2004, *available at* http://www.forum18.org; Geraldine Fagan, *Russia: Sacked For Being Jehovah's Witnesses*, FORUM 18 NEWS SERVICE, May 4, 2004, *available at* http://www.forum18.org.

212. *Court Upholds, Enacts Jehovah's Witnesses Ban*, *supra* note 166.

with local authorities in Moscow, the city in which they are most numerous and were banned in 2004. The Witnesses have appealed that action under the European Convention on Human Rights to the European Court of Human Rights, bypassing appeals available in the Russian court system.

D. *Spain*

1. Introduction

Medieval Spain was known for its dramatic examples of religious tolerance[213] and intolerance.[214] But since at least 1492—when Catholic monarchs Ferdinand and Isabella united Spain by defeating the last Muslim holdouts of the Moors' reign, thereby ending the several-hundred year conflict known as the *reconquista*—the most prominent and lasting feature of the church-and-state relationship in Spain has been the status given to the Roman Catholic Church.[215] Particularly during the authoritarian dictatorship of General Francisco Franco from 1939 to 1975, Roman Catholicism enjoyed many rights and privileges not afforded other religions in Spain.[216] In fact, in accordance with the 1945 Law of the Spanish People, the 1953 Concordat with the Holy See, and various state laws and practices, Catholicism was identified as the state religion of Spain, while all other religions were given no legal status whatsoever.[217] Around the mid-1960s, however, Spain began liberalizing its laws and, in 1967 non-Catholic religions were legalized.[218]

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213. For instance, during the Middle Ages, the Spanish town of Cordoba was considered one of the world's eminent centers of learning, where Islamic, Jewish, and Christian scholars were all allowed to gather. T. Jeremy Gunn, The Kingdom of Spain 5, 9 (May 20, 2004) (unpublished manuscript, on file with author); *see also* Dionisio Llamazares Fernández, *Religious Minorities in Spain. A New Model of Relationships?*, Center for Studies on New Religions (CESNUR) International Conference on Minority Religions, Social Change, and Freedom of Conscience (June 2002), *available at* http://www.cesnur.org/ 2002/slc/llamazares.htm.

214. Perhaps the most famous example of religious intolerance in Spain is the notorious Spanish Inquisition, during which heretics were often imprisoned or burned alive. Gunn, *supra* note 164, at 5, 9-10.

215. *Id.* at 5-7, 9-10. The religious homogeneity of modern-day Spain is said to be a direct result of the fifteenth-century promulgation of Catholicism as the state religion, the forced deportation of Jews and Muslims, and the establishment of the Inquisition. *Id.* at 10; *see also* Fernández *supra* note 213.

216. Gunn, *supra* note 164, at 3, 6. For example, the state paid the salaries of Catholic priests, financed the building projects of the Church, outlawed divorce and contraception, and endorsed Catholic religious education in public schools. *Id.* at 3. Only briefly, in the revolutionary years of the 1870s and 1930s, was this privileged status interrupted. *Id.* at 3 n.2, 11.

217. *Id.* at 3, 7-8.

218. *Id.* at 4, 12.

Following Franco's death in 1975, Spain was confronted with the difficult problem of defining the relationship between church and state.[219] In 1978, this problem was addressed through the adoption of a new Constitution, which created a legal regime for religion and law.[220] The Spanish Constitution of 1978 guaranteed the freedom of religion for individuals and communities, and it did away with the notion of a state religion.[221] While the overwhelming majority of the Spanish population is still Catholic,[222] minority religious groups are now generally free to practice their respective faiths.[223] With the exception of the formerly Communist countries in Europe, Spain is the one European country that has made the most dramatic and democratic changes in its religion laws.[224]

2. Interaction Between the Jehovah's Witnesses and the Spanish Legal System

a. Spain's Religion Laws Generally

Since Franco's death in 1975 and the adoption of the new Constitution in 1978, Spain's political system has been that of a parliamentary monarchy.[225] Within this political system, the King is symbolically the head of state, a democratically elected bicameral parliament constitutes the legislature, and an elected President is the head of government.[226] The judicial power of the Spanish government

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219. *Id.* at 12.

220. *Id.* at 4.

221. *Id.* The text of the Spanish Constitution includes the following language concerning the freedom of religion:

> Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law. No one may be compelled to make statements regarding his or her ideology, religion or beliefs. No religion shall have a state character. The public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions.

SPAIN CONST. pt. I, ch. 2, div. 1, § 16.

222. Augustin Motilla, *Religious Pluralism in Spain: Striking the Balance Between Religious Freedom and Constitutional Rights*, 2004 BYU L. REV. 575; *see also* Gunn, *supra* note 164, at 4, 6-7 (estimating that between 90 percent and 99 percent of the Spanish population in 2001 was Roman Catholic).

223. Gunn, *supra* note 164, at 4.

224. *Id.*

225. Alejandro Torres Gutiérrez, *Religious Minorities in Spain: A New Model of Relationships?*, Center for Studies on New Religions (CESNUR) International Conference on Minority Religions, Social Change, and Freedom of Conscience (2002), *available at* http://www.cesnur.org/2002/slc/torres.htm.

226. Gunn, *supra* note 164, at 13.

is vested in an independent judiciary, whose highest court is the Supreme Court of Justice.[227] Spain is a civil-law system and, unlike common-law systems, the case law of its courts acts as a complementary source of law and not necessarily as precedent.[228]

The laws governing religion in Spain are primarily derived from five sources.[229] First, the Constitution of 1978 contains numerous provisions that directly pertain to religious rights in Spain.[230] Specifically, the Spanish Constitution recognizes the fundamental rights of religious liberty and freedom of worship for both individuals and groups. It purports to accord equal treatment under the law with no discrimination on the basis of religion.[231]

Second, Spain is subject to the treaties and decisions of various international human rights instruments.[232] For example, as a member of the European Union, Spain is subject to the decisions of the European Court of Human Rights and the European Court of Justice. Third, the 1980 Organic Law of Religious Freedom serves as the country's primary law on religion, insofar as it discusses in detail the right of religious freedom in Spain and establishes the procedures for religious organizations to become legally recognized (these procedures do not apply to the Catholic Church, however).[233] Fourth, Spain's religion laws are derived from the bilateral agreements negotiated between religious groups and the Spanish state (discussed below).[234] And finally, the laws governing religion in Spain come from other laws that have either a direct or indirect effect on religious matters (e.g., Spain's Penal Code).[235]

One concern with the various sources of Spain's religion laws is the lack of precision and uniformity with which terms like "religion" and "religious purpose" are defined.[236] Also problematic is the fact that Spain does not have a uniform ecclesiastical law that is applied equally to all religions.[237] Instead, Spain has three legal regimes that govern the rights and privileges of the various religious denominations in the country.[238] While Spanish law asserts that all individuals and groups are entitled to basic constitutional protections

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227. *Id.*
228. *Id.* at 13-14.
229. *Id.* at 14.
230. *Id.* at 14-15.
231. *Id.*
232. *Id.* at 15-16.
233. *Id.* at 16.
234. *Id.* at 16-17.
235. *Id.* at 17.
236. *Id.* at 18-20.
237. *Id.* at 4.
238. *Id.*

for freedom of religion, these three legal regimes provide different benefits to religious entities depending on their legal status.[239]

The first legal regime consists of a series of agreements from 1976 to 1979 between the Spanish state and the Holy See on behalf of the Roman Catholic Church.[240] The rules that govern the legal status of the Catholic Church in Spain are derived from these agreements.[241] This arrangement affords many benefits for the Catholic Church. For instance, the Spanish state provides direct financing (via taxation) almost exclusively to the Catholic Church. The state funds Catholic religious education in public schools and pays for Catholic clergy in the military.

The second legal regime is the 1980 Organic Law, which is the most far-reaching religion law in Spain and which primarily applies to non-Catholic religions.[242] Most notably, non-Catholic religions are governed by the Organic Law's provisions regarding the registration of religious groups. A religious group that seeks legal recognition must register with the Ministry of Justice and provide documentation to support its claim that it is a religion. Groups that have not successfully registered—most notably the Scientologists—are treated as cultural associations and they may appeal to the courts. [243]

The third legal regime consists of agreements between the Spanish state and the different non-Catholic religions, and they require ratification by the Spanish Parliament.[244] Under this third regime, however, non-Catholic religions may enter into an agreement only if the Spanish state decides that it wants to do so (i.e., non-Catholic groups have no legal right or entitlement to enter into agreements).[245] This unique "agreement" approach of the Spanish

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239. *Id.* at 30. Religious groups in Spain are not required to register with the state in order to receive the constitutional guarantee of religious freedom; however, such groups must register if they wish to become legally recognized and receive the accompanying benefits. *Id.* at 23.

240. *Id.* at 4, 16, 24-25. For the most part, the Roman Catholic Church in Spain is governed by a legal regime that is separate from the regime governing minority religions.

241. *Id.* at 24.

242. *Id.* at 4, 16, 25-27.

243. *Id.* at 4, 25-27.

244. *Id.* at 4-5, 16-17, 27-29. So far, these bilateral agreements of the third legal regime have successfully been entered into with the Spanish state by three well-established religious federations in Spain: the Federation of Evangelical Religious Entities (which includes many, but not all, [non-Catholic] Christian churches); the Federation of Israelite Communities of Spain (on behalf of Jewish groups); and the Islamic Commission of Spain (on behalf of Muslim groups). *Id.* at 5, 27. But note that even though Protestants, Jews, and Muslims have official status in Spain, each group is seeking changes to its respective agreements with the state that would, in turn, give them privileges similar to those enjoyed by the Roman Catholic Church. Peter Juviler, *Freedom and Religious Tolerance in Europe*, 24 MICH. J. INT'L L. 855, 865 (2003) (book review).

245. Gunn, *supra* note 164, at 5.

model lacks the equal application of neutral laws to all religions, with those in the third regime being excluded from the benefits (e.g., tax exemptions) of the agreement system because they lack the political support to induce the Spanish state to enter into negotiations.[246]

Although regional legislatures have some autonomy over regional matters, the main religion laws in Spain are decided and enforced at the national level.[247] To this end, the Ministry of Justice is mainly responsible for regulating religion in Spain (e.g., overseeing the registration of religious organizations).[248] Ultimately, the Spanish state claims to be committed to the equality of all religious groups, regardless of a group's beliefs.[249] The Catholic Church, however, still receives many benefits from the state that are largely unavailable to other religions in Spain.[250]

b. Treatment of Jehovah's Witnesses Under Spain's Religion Laws

There are reported to be more than 100,000 Jehovah's Witnesses residing in Spain.[251] In fact, there are said to be more Jehovah's Witnesses in Spain than Jews or Muslims.[252] Even so, it was not until recently that the Jehovah's Witnesses movement was registered as a "Religious Entity" with Spain's Ministry of Justice.[253] Despite their legal status, however, the Jehovah's Witnesses have been unable to negotiate agreements with the Spanish state and, therefore, they do not receive tax exemptions and other benefits given to those religious groups with which the state has an agreement (e.g., Jews, Protestant Christians, and Muslims).[254] For instance, in 1994, the Jehovah's

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246. *Id.* at 5, 16-17.

247. *Id.* at 14.

248. *Id.* at 17.

249. Juviler, *supra* note 244, at 864-65.

250. Gunn, *supra* note 164, at 20-22. For instance, the Spanish state provides direct financing (via taxation) for religion, yet does so almost exclusively to the Catholic Church. *Id.* Similarly, the state funds Catholic religious education in public schools and pays for Catholic clergy in the military. *Id.* at 21-22.

251. *See, e.g.*, Watchtower, *Statistics: 2004 Report of Jehovah's Witnesses Worldwide*, *available at* http://www.watchtower.org/statistics/worldwide_report.htm (reporting around 108,000 Jehovah's Witnesses and over 1300 congregations in Spain for the year 2003); *Jehovah's Witness Statistics*, *available at* http://www.prayextremadura.info/id382.htm (reporting close to 104,000 Jehovah's Witnesses in Spain, or about 0.26 percent of the country's population, for the year 2000, but noting that the number of members in Spain has been on the decline since 1997, following many years of rapid growth).

252. Rafael Palomino, *The Fundamental Agreement Between the Holy See and the State of Israel: A Third Anniversary Perspective—Church-State Agreements in Spain*, 47 CATH. U. L. REV. 477, 489 (1998).

253. Motilla, *supra* note 222, at 575, 584; *see also* Gunn, *supra* note 164, at 22-23 (noting that many new religious groups in Spain have been unable to successfully register as a Religious Entity).

254. Gunn, *supra* note 164, at 22; Javier Martinez-Torron, *Freedom of Religion in the Case Law of the Spanish Constitutional Court*, 2001 BYU L. REV. 711, 753.

Witnesses asked the Spanish state to enter into an agreement, but were rejected on account of the group's conscientious objections to participating in civic obligations, such as military service and receiving blood transfusions.[255]

The Witnesses' rejection of blood transfusions, particularly with respect to their children, has often resulted in hostility among Spaniards, who believe such decisions are inconsistent with traditional Spanish family values.[256] As the number of Jehovah's Witnesses has increased in Spain, so too has the number of deaths of children because of parental decisions regarding medical treatment.[257] Spain's Constitutional Court addressed the issue of Jehovah's Witnesses' rejection of blood transfusions for their children in July 2002.[258] In that case, Witness parents were charged with homicide after they refused to convince their ill thirteen-year-old son that he needed to receive a blood transfusion.[259] A Spanish court had ordered the blood transfusion to save the minor's life, but the boy refused to receive the transfusion.[260] Basing its decision on the Spanish Constitution's religion clauses, the Court held that requiring parents to convince their child of something radically opposed to their religious beliefs goes beyond their duty as parents and violates their right to freedom of religion.[261] The Court reasoned that while parents may not disobey a court order mandating a blood transfusion, they are not obligated to convince their child to do something that contradicts their religious beliefs. Thus, this case marked a significant legal victory for Jehovah's Witnesses.[262]

3. Conclusion

As in Russia, the Witnesses in Spain encountered a more comprehensive and nationally uniform system of religious regulation than in the United States, although on examination it has recently proved more episodic and mutable than is immediately apparent. While it has not given the Witnesses equal voice with other religions,

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255. S.T.C. , July 18, 2002 (No. 154); *see also* Jose de Sousa e Brito, *Political Minorities and the Right To Tolerance: The Development of a Right To Conscientious Objection in Constitutional Law*, 1999 BYU L. REV. 607, 631-33 (discussing Jehovah's Witnesses' conscientious objection to military service).

256. *Jehovah's Witness Statistics*, *supra* note 251.

257. *Id.*

258. S.T.C., July 18, 2002 (No. 154).

259. The lower court found that the child's parents had not taken all necessary measures to prevent their son's death. *See id.*

260. *Id.*

261. *Id.*

262. *Id.* Compare this case's holding with that of S.T.C., Oct. 28, 1996 (No. 166), in which Spain's Constitutional Court ruled that a Jehovah's Witness did not have a right to reimbursement from the state for medical expenses resulting from his conscientious objection to blood transfusions. Martinez-Torron, *supra* note 254, at 752.

it has been flexible in response their particular claim for protection from uniform and otherwise religiously neutral criminal laws applicable to specific religiously motivated conduct.

Like the Russian system, the Spanish system only gave the Witnesses and other new or minority religious groups legal status relatively recently, in 1967. Like that of Russia in 1993, the Constitution of 1978 included them in substantive guarantees of freedom of belief, religion, and worship, defining permissible limitations. The Spanish Constitution, however, did not include the word "equality." While it prohibited a "state character" for any religion, it directed "cooperation relations" between the state and religion. By making "the religious beliefs of Spanish society" relevant to this task, and explicitly naming only the Catholic Church, it allows disparate treatment for the Catholic Church.[263]

In another parallel with Russia, subsequent legislation gave the Witnesses and other minority religions subordinate status and benefits. Following the 1978 constitutional mandate, the 1980 law outlined a regime that gives the Catholic Church a status and benefits superior to those of the Witnesses and other minority religious groups. State conduct allowed under the law further subordinated the Witnesses, refusing them agreements while giving benefits to other non-Catholic religious minorities.

The Witnesses do not appear to have challenged their subordinate status under either the European Convention on Human Rights or under the Spanish Constitution, but they did base their blood transfusion defense on the Spanish Constitution. The 2002 decision of the Constitutional Court not only protected Witness parents in a blood transfusion controversy from criminal prosecution, but acts as a complementary source of law that may affect later court decisions under the Constitution.

IV. DISTINCT AND COMMON ASPECTS OF THE U.S. AND EUROPEAN CONVERSATIONS

The metaphor of a constitutional conversation describes the contemporary experience of the Jehovah's Witnesses with constitutional adjudication in Russia and Spain and their earlier experience in the United States, and it allows some comparisons. Relatively new constitutions in Russia and Spain set the terms of an ongoing public conversation about religious freedom in which minority religions have voice and no other religion speaks with state authority, in a judicial forum with power to compel government to speak on the same terms. Although the conversations are relatively

263. SPAIN CONST. pt. I, ch. 2, div. 1, § 16(3).

recent, over a period of time they can alter the meaning of the enacted texts that are their subject matter.

The U.S. conversation and the ones taking place in these European countries are significantly different. The European conversation cannot alter its subject matter as profoundly as the U.S. conversation has proved capable of doing. The United States conversation is more complex and dynamic, as is the resulting law of free speech and religion, while the European conversation is structured to result in more predictable rules and yield more fair and efficient enforcement. The structure of the U.S. conversation may allow greater responsiveness to minority religions, however.

A. *Common Conversations About Religious Freedom*

The opinions of the Spanish and Russian constitutional courts examined here demonstrate instances of courtroom conversation about the meaning of religious freedom in each country. The Witnesses are a minority religion in both, at one time not legally permitted in regimes that sanctioned certain state religions (and one that suppressed all religious activity for a long period). In each country, relatively new constitutions guarantee religious freedom and prohibit a state religion, allowing "cooperation agreements" with the state in the case of Spain, "equality" in the case of Russia. Comprehensive legislation implements each. Newly created constitutional courts are empowered to hear claims initiated by members of minority religions under these enactments and to set aside legislation violating religious freedom. The constitutional courts publish opinions following public, adversarial hearings. And each constitutional court has heard claims stated by the Witnesses under the constitutional and statutory texts and ruled in their favor.

These opinions also reveal that the instances of courtroom conversation are part of an ongoing conversation, with the potential to influence the meaning of the constitutional and statutory texts being applied. The opinions of constitutional courts in Russia and in Spain refer to prior cases. The 1999 Russian Constitutional Court opinion introduced a new distinction into the challenged legislation that protected the Jehovah's Witnesses from re-registration burdens. In later cases under the statute, the Court applied the distinction as though it were part of the law, protecting the Society of Jesus and the Salvation Army as religious associations recognized by the state before the 1997 law. By modifying the statute's application, the opinion altered the parameters of later conversations. In this sense, a conversation with the Witnesses in a court case is part of a conversation that will continue between religious groups and future judges of the Russian Constitutional Court. This conversation has altered the meaning of a statutory text in a constitutional challenge

and has the potential to alter the meaning of the constitutional texts themselves.

Thus, the metaphor of conversation describes legal treatment of new religious movements and religious minorities in these European countries as it does in the United States. The European conversations, however, are significantly distinct from the conversation in the United States.

B. *The Russian and Spanish Conversations Are Unlikely to Alter Their Subject Matters as Profoundly as Has the Conversation in the United States*

Several distinctions in the parameters of the conversations explain the profound impact the Jehovah Witnesses' litigation had on the constitutional law of the United States. These distinctions affect the ability of the conversation to alter the meaning of the authoritative texts that define its terms, and the ability of a religious group to negotiate legal meaning in the courts. They also provide a basis to predict that the effect of religious minorities on the fundamental human rights law in these European countries may be less profound.

1. Length of the Conversations

New and minority religions became participants in conversations about the meaning of religious freedom in both European countries by new constitutions adopted in the last third of the twentieth century. The onset of conversation about the meaning of those guarantees in courts with relative political independence and entrusted with the task of reviewing legislation for compliance with the constitutions is quite recent, twenty-six years ago in Spain and only eleven years ago in Russia.

Judicial conversation about the meaning of religious freedom as protected by the First Amendment of the U.S. Constitution has been much longer. Ratified in 1791, the First Amendment has been discussed with greater frequency in the courts since it was made applicable to the actions of the states over a half-century ago.[264]

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264. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1 (1947) (incorporating the Establishment Clause into the Due Process Clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause into the Due Process Clause); De Jonge v. Oregon, 299 U.S. 353 (1937) (incorporating the Freedom to Assemble Clause into the Due Process Clause); Near v. Minnesota, 283 U.S. 697 (1931) (incorporating the Free Press Clause into the Due Process Clause); Gitlow v. New York, 268 U.S. 652 (1925) (incorporating the Free Speech Clause into the Due Process Clause).

2. Density of the Authoritative Texts and Corresponding "Gaps" for Judicial Conversation

Penned more recently, the European constitutional texts "embed a denser political compact at the outset."[265] They are longer and more specific than the one sentence of brief, negative injunctions that comprises the First Amendment of the U.S. Constitution. The relevant provisions of these European constitutions are several paragraphs. They prohibit a state religion; specify that cooperative relationships with the state are possible for at least some religions in Spain, and require equality in Russia; moreover, they include freedom both individual and with others, extending to ideology or no belief, and specify permissible limitations on the freedoms granted.

The concrete instruction that public authorities "maintain appropriate cooperation relations with the Catholic church and other confessions" in the Spanish Constitution contrasts sharply with the silence in the U.S. Constitution. The First Amendment says nothing about what prohibitions on laws "respecting an establishment of religion" or prohibiting the free exercise thereof might mean for relations between governments and religions. Specificity and concrete instruction reflect the assumption in both Russia and Spain that comprehensive legislation should and would regulate religion. The civil-law tradition in each country also presumes that legislation imparts legitimacy and that it will be "sufficiently clear, coherent and complete to make it unnecessary for courts to create precedent."[266]

In contrast, the absolute, negative tone of the U.S. text reflects the original assumption that the national government should not legislate on matters regarding religion. Even after application to state governments, the two religion clauses seemed to imply that legislation regulating religion was suspect, especially if not religiously neutral.[267] The presumption against religious regulation was reinforced by an administrative law system that assumes activities not regulated to be legitimate. In addition, the common-law tradition, in contrast to the civil law tradition, assumes judicial interpretation will clarify and complete legislation.

Accordingly, the constitutional texts that outline the terms of the conversation in Russia and Spain leave less room for judicial

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265. Scheppele, *supra* note 149, at 236.

266. Comella, *supra* note 140, at 466.

267. Until the 1940s, the religion clauses did not operate against state but only against federal regulation. The presumption is evident in the strict scrutiny applied to laws targeting religion, Employment Div. v. Smith, 494 U.S. 872, 877 (1990), and in the absence of sections of the federal or state codes dealing with religion. Religion is incidentally regulated by comprehensive national legislation that addresses other subjects, such as taxation. *See e.g.*, I.R.C. § 501 (providing exemption from federal corporate taxes to charitable organizations including explicitly religions and apostolic associations and corporations).

conversation. They give that conversation a more detailed structure, reducing and refining its topics. And the legislatures have a greater voice in the conversation and greater opportunity to define its topics because the conversation is in light of challenge to and interpretation of comprehensive national legislation.

In the United States, by contrast, the constitutional silences are greater, granting the courts greater leeway to structure the conversation. In addition, the conversation about religious freedom has largely been occasioned by local, discrete, and brief administrative regulation that does not explicitly address religion as such.[268] Therefore, room for judicial construction of constitutional meaning in an ongoing conversation about religious freedom is greater in the United States. Courts may accordingly speak in a voice of constitutional magnitude more often, addressing more and broader issues and formulating rules to guide lower courts.

The challenge to the re-registration requirements in Russia was relatively narrow. Much more open is the question of whether in the United States a local requirement that one obtain a permit from the Mayor before distributing literature violates the First Amendment. And in such a case, the U.S. Supreme Court would also decide what standards should generally apply to a permit system. In other words, the "gaps" that judges fill are less numerous and more narrow in the religious regulatory schemes of Russia and Spain, as is the traditional role of the judge. The "gaps" are larger in the United States, and so is the traditional role of the judge.

3. Opportunities for Courtroom Conversations and Conversations Among Courts

Different court systems and differing structures for judicial review affect opportunities for religious minorities to engage in courtroom conversation and for courts to converse among themselves.

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268. *See* Poulos v. New Hampshire, 345 U.S. 395 (1953) (considering a local ordinance restricting use of public park); Fowler v. Rhode Island, 345 U.S. 67 (1953) (considering a local ordinance restricting use of public park); Kovacs v. Cooper, 336 U.S. 77 (1949) (involving a municipal penal ordinance on the use of sound amplification without police chief approval); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (involving challenges to local school board requirements to salute the flag); Cox v. New Hampshire, 312 U.S. 569 (1941) (challenging a local parade licensing ordinance); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (involving challenges to local school board requirements to salute the flag). There were also numerous cases involving challenges to municipal licensing ordinances that required written permits before handbills could be distributed. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Largent v. Texas, 318 U.S. 418 (1943); Jones v. Opelika, 316 U.S. 584 (1942); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. City of Griffin, 303 U.S. 444 (1938).

Centralized constitutional judicial review in Russia and Spain restricts opportunities for conversation more than in the United States. The Constitutional Court is the only court in the Russian and Spanish court systems that can consider whether legislation complies with substantive constitutional requirements. Ordinary courts influence the topics presented to the constitutional court by their decisions whether to refer a question of statutory invalidity, to interpret a statute to be constitutional, or both. But opportunity for a full and public hearing and a ruling on constitutional questions is in a single court.

Decentralized judicial review in the United States means that courtroom conversations on the constitutional validity of religious regulation can occur in trial and appellate courts as well as in the U.S. Supreme Court. Moreover, not only federal courts but also all levels of courts in the state systems can decide such questions. Opportunities for constitutional conversation in the courtroom are therefore far more numerous in the United States.

The greater number of courtroom conversations also increases the conversation among courts in the United States. During and preceding the time of the most intense Witness litigation in the U.S. Supreme Court, other state and federal courts were also hearing Witness claims under the First Amendment. Particularly when an issue was not yet decided by the Supreme Court, the courts were reading and citing each other's opinions. And when the Supreme Court ultimately ruled, it had the advantage of prior consideration of the issue by multiple courts.

This type of constitutional conversation within the national court system does not appear to occur in Russia or Spain. Other instances of conversation involving other texts and other participants may enlarge these conversations, however. Conversation among constitutional courts of various nations appears to be increasing, as these courts read and cite the opinions of other constitutional courts.[269] In Russia, this larger dimension to the conversation is illustrated in the Witnesses' appeal of the 2004 Moscow court decision under other aspects of the 1997 law to the European Court of Human Rights, challenging it on the basis of the European Convention. Even if it cannot invalidate national legislation, when this Court speaks on an issue decided by a Russian court, it has a powerful voice that could alter the conversation not only in Russia, but throughout Europe and the world.

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269. *See* Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L J. CONST. L. 91 (2004) (arguing that constitutional courts around the world are confronting similar legal questions on issues in regard to freedom of expression and social-welfare-related rights).

Use of common-law reasoning by the U.S. Supreme Court also creates a conversation. This conversation is among the present and past Justices through the use of case precedent. The constitutional courts of Russia and Spain also refer to past opinions and create a "case law." The 1999 Russian Constitutional Court decision appears to have modified the text under consideration in a manner that has structured the analysis of future cases.

Discussion of precedent, however, is not as binding a constraint on the conversations as it is in the United States. The horizontal aspect of stare decisis requires the U.S. Supreme Court to abide by its own prior decisions or give reasons to depart from them. The topic of precedent is a compulsory one in the United States.

4. Altering the Subject Matter of the Conversation

As the Jehovah's Witnesses cases in the United States illustrate, religious minorities can alter the meaning of enacted law by having a voice in constitutional conversations. A particular instance of courtroom conversation becomes a term of subsequent conversations construing the same or a closely related constitutional text. Gradual development of constitutional law through this ongoing conversation alters the meaning of the text. While technically judicial precedents are not on the same level as the enacted Constitution, by structuring subsequent conversations they modify its meaning and in effect operate similarly to the language of the text as the conversation continues.

The U.S. constitutional conversation has greater capacity to change the meaning of its foundational text than do the Russian and Spanish conversations. Yet as these European conversations continue and include conversations among constitutional and international human rights courts, their ability to alter the meaning of their foundational texts should grow as well.

C. *The Russian and Spanish Conversations Appear Less Complex Than in the United States, and More Predictable*

The differences summarized above make the conversation in the United States more complex than those in Russia and Spain. More occasions to converse, greater constitutional silence to fill, more and weightier precedents to discuss, and more participants to include make the United States conversation complex. This could well impede access and make essential the use of lawyers able to discern and synthesize the emerging meaning in the varied strands of the conversation. Complexity should also delay formulation of standards to apply and render them less certain at any particular stage in the conversation. Law that is uncertain and difficult to understand is not predictably applied. Those who are regulated, in this case new

religious movements and minority religions, have less notice and opportunity to conform their behavior to the law.

For all the reasons above, the methods in Russia and Spain seem more fair and efficient. On the other hand, these traditional civil-law values may not be as apparent in constitutional adjudication today. The creation of constitutional courts adds uncertainty, as judicial decision-making is inherently more uncertain than enacted law. The presence of a supranational court and text, in the European Court of Justice and the European Convention on Human Rights, is not directly relevant to decision-making in the constitutional courts. But to the extent that ordinary courts apply the Convention and read the European Court's case law, they widen the human rights conversation in the nation generally, which must have an indirect influence on the conversation.[270] In addition, if ordinary courts can expand judicial review through statutory interpretation and referrals, a greater number of courts participate in the conversation than is at first apparent.

The treatment of the Jehovah's Witnesses by the Russian legal system is an example. The effect of the Russian 1997 law was uncertain. Religious groups had standing under the Constitution and the legislation to raise claims, and a constitutional court in which to challenge the legislative provisions and their application by the authorities. In addition, Russia's participation in the European Convention on Human Rights meant the 1997 re-registration requirements were in tension with its non-discrimination provisions and subject to challenge on that basis as well. Pending resolution of the court challenge, the Witnesses suffered persecution by local authorities and still are. The Court did not make a categorical ruling: it construed only certain provisions of the law and by interpretation seems to have avoided the underlying question of its validity. Consequently, a series of decisions, and quite possibly decisions of the European Court of Human Rights, will be necessary to test the law before its effect on the Witnesses is made clear and certain.

D. *The U.S. Conversation May Be More Responsive to Minority Religions*

The flipside of complexity and uncertainty is greater responsiveness to new circumstances and new litigants. While the earlier experience of the Jehovah's Witnesses does not demonstrate necessarily that the same is true today, the structure of the U.S.

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270. Indeed, Comella argues that the European Convention creates a force that undermines centralized judicial review, because ordinary courts that cannot invalidate legislation under the national constitution of Spain can do so under the European Convention, and the constitutional court has stated it does not apply the Convention. *See* Comella, *supra* note 140, at 463.

conversation makes it potentially more responsive to minority religions. This is due to the greater number of courtroom conversations, greater ability to alter legal meaning, and the absence of a history of a state-sponsored church.

New religious movements appear to have less of a voice in the conversations in Spain and Russia than in the United States. The authoritative texts for these European conversations do not preclude distinctive or privileged voice for certain religious groups. The non-discrimination provisions of the European Convention on Human Rights and the limitations on religious freedom it allows—those "necessary in a democratic society"—imply religious pluralism and tolerance, but they do not preclude different treatment for culturally traditional or dominant religious groups.[271]

The Russian provisions do not appear to do so either. Restrictions on the freedoms of belief, religion, and association that are necessary to the legitimate grounds for restriction specified in Articles 55 and 56 are allowed. Equality would limit such restrictions, and religious associations are guaranteed equality under article 14(2).[272] The 1999 decision of the Russian Constitutional Court presumes the constitutionality of legislative distinctions based on the length of time a religion existed in Russia, however. While this is an objective criterion, it is one that clearly discriminates against new religious movements.

The Spanish constitutional provisions certainly do not exceed the minimum European Convention standards on religious pluralism and nondiscrimination. By confining limitations on religious freedom to those "necessary to maintain public order as protected by law,"[273] Spain's Constitution appears similar to Russia's. Also, its denial of "state character" to any religion ensures some equality of voice among religions in Spain. Nevertheless, its provisions do not anticipate religiously neutral legislation. This is evident in its distinctive mandate of further conversation between the state and religious groups: "[t]he public authorities shall take into account the religious beliefs of Spanish society and shall consequently maintain appropriate cooperation relations with the Catholic Church and other confessions."[274] By giving discretion to public authorities to take into account societal beliefs and by naming only the Catholic Church in the mandate for cooperation relations, this provision lays a foundation for regulation that discriminates against new and minority religions.

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271. *See* Durham, *supra* note 138, at 31.
272. RUSS. CONST. pt. I, art. 14(2).
273. SPAIN CONST. pt. I, ch. 2, div. 1, § 16.
274. *Id.*

Texts are written and conversations take place in a context, and the histories of each country partially explain the privileging of certain religious voices. Russia's Constitution was written in a break from a period in which religious activity was repressed and the appropriateness of pervasive state regulation of all private associations was presumed. It followed a time in which a dominant religion—the Russian Orthodox Church—enjoyed state sanction and privilege. That denomination emerged from the socialist period as the dominant voice of religion in the culture, a prominence later protected by legislation.

The 1978 Spanish Constitution was similarly written after a break from a prior period, one in which the voice of only one religion, Roman Catholicism, was allowed and supported by the state. Catholicism emerged from the Franco years as the dominant voice of religion in Spanish culture, and the 1978 Constitution and the 1980 Organic Act give it privileged voice in the constitutional conversation.

Against these textual and historical backgrounds, legislatures in each country created national regulatory systems implementing the new legal status of religions, including the Witnesses. In each system the dominant and traditional religion received superior status and benefits to those of the Witnesses, other minority religions, and new religious movements.

The Russian Parliament spoke through comprehensive national religious regulation in 1990, recognizing that the Witnesses and other new and minority religious groups with constitutional voice, legal status. In 1997, however, it restricted their status and sphere of activities. The Spanish Parliament also spoke comprehensively and with national effect in the 1980 Organic Law of Religious Freedom, giving the Witnesses the ability to register and be recognized as a religious entity. The law also gave the Catholic Church superior status and benefits, however, and denied benefits such as tax exemptions to the Witnesses and other non-Catholic religions unable to secure agreements with the State.

While in the United States a de facto establishment of Protestant Christianity generally prevailed, there has been no formally state-sanctioned and state-supported church for most of its history.[275] In 1947, as the Establishment Clause was applied to the states, its absolute, negative tone and placement in the same phrase with the

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275. The colonies had varieties of "establishments." *See* Thomas J. Curry, THE FIRST FREEDOMS ch. 5 (1986). Although the Establishment Clause was only made applicable to the states in 1947, *see* Everson v. Bd. of Educ., 330 U.S. 1 (1947), its text constrained conversation after enactment of the federal constitution: "[C]ongress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. That it prohibits secondary status arrangements has never been in doubt, although majoritarian rule means majority religion can enjoy preferred status because of inadvertent or unchallenged legislative action.

Free Exercise Clause prompted the Supreme Court to hold that both religion clauses required neutrality not only toward religion, but also among religions.[276] Later judicial decisions enforced free exercise doctrine on behalf of religious minorities substantially burdened by otherwise legitimate government action. Since 1990,[277] doctrine has required a claimant to show that her religion was targeted before government action harming her will be strictly reviewed, which has lessened the Constitution's responsiveness to minority religions.[278] Nevertheless, it still requires at least formal equality among religions.[279]

The civil law's presumption that legislation is complete without judicial interpretation reinforces the privileged voice of majority religions evident in the text of the Spanish Constitution, the Russian Law on Freedom of Conscious and Religious Association, and the 1999 decision of the Russian Constitutional Court. So may the more abstract nature of constitutional review in many of the cases decided by the Constitutional Courts in Russia and Spain. The actual situation of minority claimants and the extent of the harm they suffer may be less of a topic of conversation than if the constitutional courts considered the concrete controversy. There seem to be fewer opportunities to characterize facts and present a narrative that competes with that of the state and includes one's case within the language of the authoritative text, which the Witnesses used so well in the United States.

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276. Everson, 330 U.S. at 18; Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

277. In 1990, *Employment Div. v. Smith*, 494 U.S. 872 (1990), declared that the Free Exercise Clause did not mandate exemptions for religious conduct from regulation pursuant to otherwise neutral and generally applicable laws. The 5-4 opinion characterized those exemptions granted to Seventh Day Adventists in *Sherbert v. Verner*, 374 U.S. 398 (1963), as incidental to individualized administrative hearings used in unemployment compensation determinations, and those granted the Amish in *Yoder v. Wisconsin*, 406 U.S. 205 (1972), as because of a "hybrid" conjunction of free exercise and parental privacy rights. *Smith*, 494 U.S. at 882. Therefore, minority religious voice through the Free Exercise Clause is no longer as forceful, and those religions with the greatest political power can impose burdens on religious minorities, as long as the governmental action is not blatantly discriminatory on religious grounds.

Even when the Free Exercise Clause was given greater independent force by the Supreme Court, some scholars have noted that even though others had claims and were heard, only Protestant groups inoffensive to more established Christian denominations obtained relief (Seventh Day Adventists, Jehovah's Witnesses, Amish). *See* Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222 (2003); Mark Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373, 380-81; Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117, 1384-85.

278. Simkin, *supra* note 152.

279. Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993); *Smith*, 494 U.S. at 877.

Fewer occasions for courtroom conversation and constitutional conversation among courts seem to reduce the ability of conversations in Russia and Spain to alter the meaning of their foundational texts. And the Witnesses' experience in the United States indicates that multiple fora increase the impact of a religious minority's voice. While the Supreme Court is unreachable for most religious claimants, there are many courts available and even an alternate system when one is unresponsive.

Examination of the experiences of the Jehovah's Witnesses demonstrates responsiveness to minority religions in the constitutional courts of Russia and Spain. And the example of the Witnesses in the United States is an older one, which does not reflect the change in free exercise doctrine in the 1990s. Nevertheless, the experience of the Witnesses in the United States demonstrates a constitutional conversation that can be responsive to new religious movements and religious minorities. Distinctive aspects of that conversation also indicate that it could be more responsive than those in Russia and Spain.

V. CONCLUSION

Textual brevity and ambiguity that entails greater judicial "constitution making" can yield benefits for countries struggling with integration of new religions or religious minorities. At the cost of greater uncertainty in constitutional meaning, and on the condition of an independent judiciary, it can give opportunity for public conversation about religious freedom and equality as well as a means for such religious groups to grow attached to the constitutional order.

The Jehovah's Witnesses in the United States, a relatively new religious movement facing hostility, publicly discussed the meaning of the brief constitutional words concerning freedom of speech and religion in many and varied courts over thirty-five years. This benefited the legal order because it resulted in gradual expansion of constitutional protection for speech and expressive activities. It also benefited the Witnesses, who were ultimately, if not quickly, able to defend themselves from governmental action that appeared to condone and at times facilitate private persecution. It appears also to have contributed to social stability, by fostering the Witnesses' attachment to the Constitution and to the legal system. Constitutional voice, the ability to argue that their actions were within the meaning of the text, seems to have affected the Witnesses' self-understanding. Participation in the conversation appears to have furthered their integration into the larger society, rather than solidifying their antagonistic posture toward it.