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Gilya G. Schmidt, Major Professor

We have read this thesis and recommend its acceptance:

Charles H. Reynolds, Rosalina I. J. Hackett

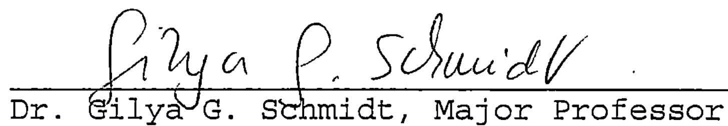
Accepted for the Council:
Carolyn R. Hodges

Vice Provost and Dean of the Graduate School

(Original signatures are on file with official student records.)

To the Graduate Council:

I am submitting a thesis written by Michael Manning Collier entitled "Synthesis and Separation: Theorizing Religious Dimensions of Law in the United States." I have examined the final copy of this thesis for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts with a major in Philosophy.



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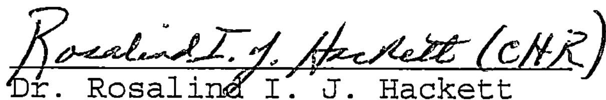

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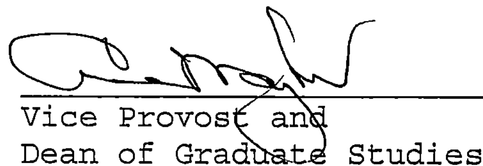

Vice Provost and
Dean of Graduate Studies

SYNTHESIS AND SEPARATION: THEORIZING RELIGIOUS DIMENSIONS OF LAW IN THE UNITED STATES

A Thesis
Presented for the
Master of Arts
Degree
The University of Tennessee, Knoxville

Michael Manning Collier
August 2001

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ABSTRACT

This thesis theorizes the interplay of religion and law in the United States. Employing language common to scholars of religion, a general theory of structure between religious worlds and legal worlds is postulated. Grounding this theory in the particulars of history, the predominant theologies and philosophies which informed the drafting of the United States Constitution are explored. Abstracts of five influential Supreme Court cases involving the free exercise of religion are offered to further historicize religious and legal contexts. It is then suggested that the opinions provided by Supreme Court Justices may be interpreted as a complex set of narratives. Viewed thus, they provide an incipient point-of-reference for scholarly examinations of the dynamics permeating religion and law in the United States.

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INTRODUCTION

If there is truth in the maxim that politics makes for strange bedfellows, perhaps no coupling of its cohorts spawns greater complexity than that between religion and law. Beneath a shifting political canopy girded by the Constitution, the United States for the past two centuries has continued to shelter and expose historically remarkable interactions between religion(s) and law(s). However, amidst this interplay, the collegiate disciplines of religious studies and legal studies rarely generate a common dialogue. Evidence of this will become rapidly apparent to a veteran scholar of either field who dares tread the boundary of the other's voluminous literature. The jargon and theories common to one discipline infrequently permeate both. Too often, this leads to a compartmentalizing disparity that separates the academic worlds of legal studies from that of the comparative study of religion. This is well illustrated by a recent project undertaken by the Emory University Committee on Law and Religion[1]. Coming to fruition in 1996, this project

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This mention of the Emory University Committee on Law and Religion is neither meant to serve as a base criticism towards the Committee itself, nor the aforementioned project of its undertaking. To the contrary, since the program is

yielded two companion volumes entitled, *Religious Human Rights in Global Perspective: Religious Perspectives*; and *Religious Human Rights in Global Perspective: Legal Perspectives.*[2] Is one to assume from titles such as these that the global perspective encapsulating religious perspectives is necessarily separate from the one which harbors legal perspectives? Such physical and cognitive divisions as this are common in academia, and bear closer examination. Although categorizations are characteristics required by all disciplines, it should be noted that the starkness between the academic boundaries dividing the study of law and the study of religion, especially in a United States context, threaten to become academic in the most trivial sense of the word. Should

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widely respected as one of the world's finest centers for studying the interaction of law and religion, highlighting it here reveals how even the leaders in the field are often unable to bridge the gap between the study of law and the study of religion.

2

Religious Human Rights in Global Perspective: Religious Perspectives. Eds., John Witte, Jr. and Johan D. van der Vyver. Martinus Nijhoff Publishers, Boston, 1996.

Religious Human Rights in Global Perspective: Legal Perspectives. Eds., John Witte, Jr. and Johan D. van der Vyver. Martinus Nijhoff Publishers, Boston, 1996.

Both of these volumes provide excellent articles concerning human rights, with the former being written for and by theologians and religious studies scholars, while the latter is primarily authored by and intended for legal scholars.

they become overly rigid, the integrity of both disciplines will suffer due to the limits placed by each on the level of complexity their respective fields are willing to accommodate.

The histories of enduring academic disciplines eventually become laden with revision--so too, the governance of enduring nations. In an effort to remain an active example of the latter, the United States adopted the first formal revision to its Constitution in 1791. The initial protection guaranteed by this amendment is the freedom of religion.[3] Around the middle of the twentieth century the Supreme Court began actively engaging this clause in cases regarding religion, thus altering the potential trajectory of religion throughout the land. Perhaps not coincidentally, it was during the same time period when the academic study of religion, then generally referred to as the History of Religions, began to gain autonomy as a collegiate discipline in this country. However, despite the similar time-frame of the modern Supreme Court's direct concern in matters regarding religion, and the

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The Constitution of the United States, Amendment I. Ratified 12/15/1791, the First Amendment reads: 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.

birth of religious studies as a discipline, it seems that the latter has often neglected the former as a subject for direct study. Since the decisions of the Supreme Court that involve religion undeniably continue to shape and reshape the definitions of religion and its legally acceptable instances of practice in the United States, the lack of notice afforded the Supreme Court by religious studies seems regrettable.

Fortunately, this is not the final word in the matter. Pioneering scholars in the realm of law and religion in the United States, such as Harold Berman,[4] along with his former colleagues and successors, such as John Witte, Jr., Winnifred Fallers Sullivan, Terry Eastland,[5] and a host of others, have carved paths through the academic valley separating religious studies from legal studies. Although these in-roads are well trod by a comparative few, they do indicate potential

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Supreme Court Justice Harry A. Blackmun provides an excellent Foreword that serves to highlight and exonerated the importance of Berman's *The Interaction of Law and Religion* for a range of professionals from scholars to judges. This foreword appears in *The Weightier Matters of Law: Essays on Law and Religion; A Tribute to Harold J. Berman*. Eds. John Witte, Jr. and Frank S. Alexander. Scholars Press, Atlanta, 1988.

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These particular scholars are listed because the work of each is actively, and often primarily, engaged in scholastic efforts spanning the gamut of religion and law. This will be demonstrated in later chapters.

directions in which the study of law and the study of religion may travel together for a time. Certainly, they will provide a point of entry for a great deal of this study. A brief exposition of the chapters in this study will help introduce how the work of the afore-mentioned scholars is here intended to be brought into greater contact with the realm of religious studies.

The main goal of Chapter One is to provide religious studies with a general theory of the structural relationship between religion and law, especially as the two function in the United States. In an effort to generate such a theory, Chapter 1 first offers suggestions as to why the religious dimensions of law in the United States are often overlooked. It then suggests a synthesis between religion and law that may offer scholars a gateway into the examination of the two. By revisiting the work of well-known scholars of religion whose studies have been integral to the discipline, existing theories of comparative religion offer familiar concepts and language which are necessary for constructing a workable, new theory. Exploring categories familiar to students of both religion and law (such as myth, symbol, ritual, authority, tradition, and universality) may generate an awareness of the similarity involved in the structure and establishment of both

institutions. Chapter One also explores the religious influence behind the modern Western perception of time as linear. As will be demonstrated, without this religious formulation of time, the United States legal tradition would have no progressive continuum on which to build its tradition or legitimate its authority. By grasping ways in which time is perceived by cultures, one may then begin to more easily decipher how cultures simultaneously apply understandings of time to formulate normative ideas embedded in both their legal and religious institutions.

Chapter 2 seeks to ground its theory in terms of United States history. More specifically, it examines historical instances of theology and political philosophy that led to the establishment of separation of church and state[6], and later to the First Amendment. In Chapter 1, religious and political systems are understood to shape and reshape one another through their constant interaction. The brief historical

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[6]Although the standard phraseology of "church and state" is used throughout this study, the reader should remain keenly aware of the Christocentricity involved in such wording. In this context, the word "church" adequately represents the *de facto* Christian majority while misrepresenting an array of other religions in the United States. So long as "church and state" remains the accepted system of referral, employing the more accurate terminology of "religion and state" overlooks a staggering array of issues facing religion and law in the United States today.

survey of Chapter 2 is designed to locate some particularly influential instances of these interactions as they occurred directly in space and time.

Continuing its concern with historical grounding, Chapter 2 also deals directly with five case histories that hold landmark doctrinal significance for the free exercise of religion as propounded by the modern Supreme Court. Reading through Supreme Court cases may not always be a practical application for scholars outside of legal studies, especially considering the nature of today's specialized academy. It may also be noted that--if one lacks tutelage in legal speak--the language of Supreme Court Justices does not in every case lend itself to easy interpretation. However, the importance that the bearing of these cases has on religion in the United States can hardly be overstated. The decisions they offer, as well as the opinions written about those decisions often expose the interplay of religious and political sentiments driving the country.

The case expositions are offered here in chronological order. The reason for this is to lend intelligibility to the commentary surrounding successive cases, thus explaining the accumulated significance of each. As mentioned previously, these cases deal almost wholly with the free exercise clause

as applied to religion. Although cases involving the establishment clause, such as prayer in public schools and the placing of religious icons in or around public property, may be familiar to a greater number of people, space prohibits the examination of such cases here. While the free exercise clause is currently employed less in cases pertaining to religion than the establishment clause, its tenuous position makes its conspicuous absence of force an extremely fertile area for study. Lobbying groups, often religious in orientation, such as the Baptist Joint Committee, the National Council of Churches, and the National Association of Evangelicals have formed unlikely alliances to combat the recent emasculation of free-exercise.[7]

A reminder should also be offered that the case histories discussed here are primarily written for students of religious studies, and by a student of religious studies. Tailored to the purposes of this study, they are here meant to be accessible to those who might otherwise tend to pass them by.

Chapter 3 returns to the realm of theory, but does so by applying it to the current religio-political landscape of the

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Redefining the First Freedom: The Supreme Court and the Consolidation of State Power. Gregg Ivers. Transaction Publishers, New Brunswick, 1993, p. 139.

United States. While the dated idea of universality is elaborated to a point in Chapter 1 in order to initiate theoretical language, Chapter 3 departs from that premise in order to examine the complexities of pluralism and majoritarianism as they currently exist. Utilizing the cases from Chapter 2 as examples, trends in today's Supreme Court will be dealt with at greater length. Speculation on what these trends mean for the free exercise of religion in the United States will be offered. What such trends may mean for minority religious groups in our democracy, and how technocracy may affect the legal structures of that democracy will also be mentioned.

The task, then, of this study as a whole is to enrich and foster a more common language between religious studies and legal studies in hopes that the two may converse with greater frequency and fluency. As will become clear in the following pages, the approach for this study germinates in the realm of religious studies where the author locates his previous training. The following theories and case histories are not meant to serve as ground-breaking legal inquiries, nor are they designed to essentialize a synthesis between law and religion. At best, this thesis suggests the ongoing possibility of occasions during which scholars of religion and

scholars of law may interact to enrich and preserve their respective fields; occasions not always unlike those provided for in the United States Constitution, during which religions and laws themselves meet.

CHAPTER ONE: STRUCTURING A THEORY OF STRUCTURE

Interactions between religion and law infuse a lion's share of what humanity has chosen to document as the record of itself. From the *Laws of Manu*, to the *Torah*, to the *Communist Manifesto*, religious laws and secular religions have shaped and reshaped the ways in which myriads of cultures negotiate their plights in the world. Yet, Winnifred Fallers Sullivan is able to assert correctly that "[v]ery little general academic theorizing has been done about the structural relationship of law and religion. Any explanation of that relationship has been left to the study of particular religious traditions-indeed, has been seen as a problem peculiar to or inherent in those religious religions."[1] It is certainly true that law is not a foreign concept for religious studies scholars, yet it usually finds its way into their work in terms of religious law. Dissertations focusing on the religious codes of every major world religion abound.

1

Sullivan, Winnifred Fallers. *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States*. Harvard University Press, Cambridge, 1994, p. 35. In this exceptional book Sullivan concerns herself with a task similar to the one of this text. However, she approaches it more from a standpoint of lawyers being able to talk about religion in the West, as opposed to scholars of religion being able to talk about law.

Scholars of Islamic law and Canon law permeate Western universities. Why then should law and religion in the United States remain so neglected in religious studies departments? Perhaps the bureaucratic divisions and disciplinary specialization separating law schools from humanities departments are partially to blame. However, intra-university compartmentalization offers a poor excuse for academic stagnation.[2] Besides, there exists a more plausible and popular explanation which is steeped in the cultural foundations of the United States.

Any Jeffersonian scholar will likely be quick to postulate an answer as to why law and religion seldom mesh on the academic pages of the modern West. After all, did Jefferson not advocate the construction of a "wall" forever separating the two?[3] In the United States context, it seems

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Damrosch, David. *We Scholars: Changing the Culture of the University*. Harvard University Press, Cambridge, 1995. In this work, Damrosch criticizes the rampant trend of specialization in universities. He sees it, in part, as leading to the ossification of individual scholars as well as academic departments. This phenomenon, therefore, prohibits interdisciplinary studies, like the one suggested by this thesis.

3

In his famous 1802 Letter to the Danbury Baptist Association, Jefferson writes, "...I contemplate with sovereign reverence that the act of the whole American people which declared that their legislature should 'make no law respecting the establishment of religion, or prohibiting

quite plausible that this wall has divided study of the two as well. Enter any law library's section dealing with law and religion and note how easy it is to find separationist sentiments. For example, legal scholar Gregg Ivers writes, "[t]he separation of church and state is a necessary predicate for religious free exercise; and free exercise is the touchstone of individual and denominational religious freedom."[4] Such notions as these remain branded onto the collective conscious of America. They began to take root long before the political philosophizing of Jefferson and Madison, who are typically associated with their institutionalization.

Over a century before the birth of either founding father, persecution in Europe left many American colonists with deep scars--festering reminders of when they were forced to separate themselves from their homelands due to the combination of law and religion they had encountered there. And then, of course, there is the Enlightenment's propagation

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the free exercise thereof," *thus building a wall of separation between church and State* [emphasis added]," Quoted from Witte, p. 50

Jefferson borrows the image of a wall of separation from the previous writings of Roger Williams, which are cited later in this study.

[4]Ivers, p. 133.

of secular logic. Enlightenment division of the rational and the religious continues to stoke and fuel the intellectual separation of law and religion. Despite a history of religiously intolerant colonies, by the time the Constitution was drafted, physical, mental, and emotional roots were in place informing American sentiment that "[g]overnment was to be of law, not of men, not of gods."[5] Similar sentiment seems to have permeated academia. The separation of church and state often finds itself departmentalized in American universities, too frequently absenting the religious dimension of the United States legal system from the scholar's pale.

The categorical division of religion and law has a rich philosophical history that far outdates the Enlightenment thinkers who are often credited with its tenets. Long before the Enlightenment gained popularity in Europe, Plato labored in an effort to separate religious superstition from reason and law. Throughout his dialogues, especially in the *Republic*, he attacks the poets who insist on informing their readers' senses of cosmic justice with tales of irrational, appetite-motivated gods.[6] Yet, what became of Plato's call

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[5]Sullivan, p. 4.

[6]

Havelock, Eric A. *Preface to Plato*. Belknap Press, Cambridge, 1963. In this book Havelock provides what many

for the dismissal of religious gods in favor of reason? His symbolic cosmos, which met with Aristotle's revisions, was widely appropriated by Christians in the Hellenistic world.[7] These same Christians, although frequently persecuted by secular authorities such as the Romans, hardly subscribed to Plato's vision of driving a rift between Divine revelation and rational action. For them, Divine command superceded terrestrial law. Indeed, it unquestionably became their terrestrial law, regardless of whether it conflicted with the presiding law of the land. Berman explains, "Thus the first principle of Christian jurisprudence, established by historical experience, was the principle of civil disobedience: laws that conflict with the Christian faith are not binding in conscience."[8] This primary rule of Christian jurisprudence along with the trend to re-appropriate secular

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consider to be the finest explanation of Plato's call to ban the poets from utopia. Focusing on Book Ten of the *Republic*, Havelock reveals Plato's dislike of the poets to reflect his ideal that religious superstition should be kept wholly out of legal government.

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For a detailed explanation of the history and degree of this process, see: Louth, Andrew. *The Origins of the Christian Mystical Tradition From Plato to Denys*. Oxford University Press, New York, 1981.

8

Berman, Harold J. *The Interaction of Religion and Law*. Abingdon Press, Nashville, 1974, p. 52.

philosophy in religious terms flourished during colonial American times.

The purpose of citing Platonic influence on Christianity is to point out the multi-dimensional nature of the secular/religious ideologies that influenced cultural modicums which helped forge the United States's ideal of separation of church and state. By using Plato as an example, one is reminded that a version of secular reason, even if it was championed as a deification of reason at the time, influenced Christianity. Christianity, in turn, helped spawn the Canon laws, Puritanism, and Evangelicalism integral to the legislation that assured separation of church and state in the United States. The Enlightenment did not have the first word, and there is certainly little reason to believe it will have the last, on the cognitive character of categorical division as it is applied to church and state. Indeed, it was but one of several philosophies at work during the framing of the Constitution. These ideas will be dealt with at greater length in the next chapter. For now, they serve to reinforce the theme that will permeate the rest of this chapter, which is the structural synthesis between law and religion.

The remainder of this chapter stems largely from the work of Harold J. Berman's, *The Interaction of Law and Religion*.

Intended by Berman to be a germinal book rather than a comprehensive treatment of the subject, the text focuses on the commonality between religion and law in an attempt to reconcile the two academically as well as socially. Berman observes that "[t]he primary affirmation is that law and religion are two different but interrelated aspects, two dimensions of social experience-in all societies, but especially in Western society, and still more especially in American society today."[9] The nature of the interrelation between the two is here the point of contingency. When one comes across the grouping of law *and* religion, Sullivan notes that "the 'and' is loaded. It implies a separation between the two, but, more than that, an insistence on a separation, which by no means is obvious from the words."[10] With "the insistence on a separation" embedded in the cultural perception encircling the pairing of law and religion, the task of ferreting-out structural similarities is tenuous. Along these lines, Berman acknowledges, "There is, indeed, a danger of oversimplifying their reconciliation by failing to see that it is a dialectical synthesis, a synthesis of

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Berman, p. 11.

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Sullivan, p. 37.

opposites."[11]

Scholars may do well to heed the warning of this danger. However, some have followed it to the point of abdicating study that links church and state in structural terms. Ignoring the linkage between law and religion due to the apparent incongruencies and paradoxes (and there are many) is also dangerous. By so doing, religious studies scholars not only limit themselves, but the academic voice that may expand and inform the linguistic parameters required by lawyers and judges when dealing with complex cases surrounding religion. Obviously, this too poses a danger. If gender, race, and post-colonial studies have sent a general message to academia, it is surely for scholars to be wary of Enlightenment bifurcations. The division of religion and law in academic study may be such a bifurcation. Thus, proceeding with caution seems the most advisable approach when handling the loaded "and" between law and religion, and proceeding with caution is always a prudent approach for academics the world over. As Jonathan Smith put it, "When I see a scholar sweating, I don't worry so much."[12] In this case, Smith may

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Berman, p. 12.

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Smith, Jonathan Z. "The History of the History of Religions History." This was the title of his keynote address to the

rest at ease, as honing one's academic lens while straddling the wall separating law and religion affords ample opportunity for perspiration.

The approach employed here, therefore, advocates a greater look at the "dialectical synthesis" itself. Like Berman, I am "convinced that we have heard too much about the separation of law and religion and not enough about their fundamental unity."[13] This is neither to say that law and religion are fundamentally unified, nor indelibly separated. Most likely, their interplay occurs on a spectrum between the two said extremes. This study concentrates on the unity between religion and law due to the lack of previous academic scrutiny placed on that particular portion of the spectrum. The religious dimensions of this unity may prove particularly insightful. However, since the body of literature surrounding this sentiment is quite sparse, the question becomes how to begin carving out the space necessary for scholarly flourishing.

In an initial attempt to do so, it may be wise to take a step backwards. Theory, like culture and language, is not

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International Association of the History of Religions during the 2000 conference in Durban, South Africa.

13 Berman, p. 12.

conceived immaculately. Indeed, in order for it to be intelligible, new theory generally requires a measure of the culture and language inherent in prior theories. Therefore, the enterprise of establishing a general theory of structure between religion and law may best begin by re-visiting some of the more familiar theorists of comparative religion, both past and present. Scholars such as Mircea Eliade, Ninian Smart, Jonathan Z. Smith, and William E. Paden have grappled with how best to characterize and examine the multifarious facets of religions. Their conclusions and methods are re-examined and re-appropriated here in order for religious studies scholars to have an established space from which to begin theorizing religion and law in the United States.

As the Supreme Court entered what is considered its modern period (1940 or 1947), Mircea Eliade began postulating symbol, myth, and rite as tools of comparison that reveal "a complex system of coherent affirmations about the ultimate reality of things..."[14] Although Eliade's style of comparative interpretation has been shown to be flawed, the comparative lenses he propounded continue to be re-ground by an array of

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14 Eliade, Mircea. *The Myth of the Eternal Return: Or, Cosmos and History*. Trans. Willard R. Trask. Bollingen seriess XLVI, Princeton University Press, 1954, 9th ed., 1991, p. 3.

religious studies scholars. Perhaps the comparative study of religions' most notable example of one who re-thought such dimensions of comparison is Ninian Smart. Changing the face of religious studies, Smart championed a dimensional approach for analyzing and defining religions.[15] Smart proposed ritual, mythological, doctrinal, ethical, social, and experiential dimensions as intellectual categories within which religious (and sometimes secular) phenomena could be grouped in order to facilitate the study of religion(s) and its characteristics. Dimensions such as these may likewise facilitate the exploration of religious structures as they are embedded in legal systems.

Admittedly, proposing categories with universal purchase is, among other things, a political and potentially colonizing proposition. Recognized as such, it is hardly intended to be employed in this study as a means of defining either religion or law. Rather, these harbingers of comparison are to be taken in conjunction with the work of a more recent theorist of religion in order to serve as paths whose currency holds purchase on both sides of the wall between church and state.

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For a cogent summary of the dimensions Smart suggests for analyzing religions, see: Smart, Ninian. *The Religious Experience*. Macmillan Publishing Company, 1991, pp.6-12.

In his book, *Religious Worlds: The Comparative Study of Religion*, William E. Paden proposes that religious studies may benefit by conceptualizing religions and their respective expressions as constituting unique worlds. Here, I suggest that world as a category, as Paden uses it to refer to religious systems, may also be used to better understand legal systems. Also, it may be used to facilitate comparison of the two. Therefore, further explanation surrounding Paden's use of world, and expansion on the category in terms of religio-legal worlds is merited here.

Paden writes, "World is the comparative category par excellence. All religions inhabit worlds constructed by their own particular religious symbols."[16] Like religions, legal systems also inhabit worlds constructed by their own particular symbols. As this chapter progresses, it will be demonstrated that many of these symbols may be viewed in part as religious, but for now the focus remains on world as comparative category. In terms of both religious and legal worlds, "[w]*orld* here is a descriptive word for what a community or individual deems is the 'reality' it inhabits, not a term for some single system objectively 'out there' that

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Paden, William E. *Religious Worlds: The Comparative Study of Religion*. Beacon Press, Boston, 1994, 1998, p. 7.

we all somehow share."[17] For example, the Bible as text is interpreted by a number of denominations and religious groups. These acts of interpretation focused on a somewhat common text spawn numerous religious worlds which are peopled by their respective interpreters. As Paden suggests, one objective world simply does not exist. Similarly, the Constitution as text is interpreted by Supreme Court Justices, Constitutional lawyers, attorneys, and a host of others. Obviously, these interpreters often reach separate conclusions as to the document's meaning. As disparate interpretations of the Bible lead to an array of religious worlds, so too different readings of the Constitution yield multiple legal worlds. As is obvious by the voluminous history of dissenting opinions, even Supreme Court Justices rarely share identical interpretations. The Supreme Court itself may thus be seen as a legal world inhabited by as many as eight other legal worlds. The point is, that while the Constitution provides a basis for ongoing resolution of the interplay between these worlds, as a document it does not spawn an objective reality. Instead, its interpretation leads to an array of interactive legal worlds. Like religious worlds, these legal worlds are

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Paden, 1994, p. 7.

often permeated by common symbols, rituals, and myths.

This illustration of the Supreme Court as a world that potentially incorporates and encapsulates other worlds indicates that world-as-category can be neither static, nor uni-dimensional in character. Within both religious and legal systems a number of worlds may exist. Both religious systems and legal systems alike exist due to the individuals that inhabit them. As Paden puts it, they "are not just cognitive, conceptual affairs, to be compared with our own ideas and theologies, but matrices of action, ways of *inhabiting* a world."[18] In fact, individuals and communities simultaneously inhabit a variety of worlds, especially in a pluralistic society. For example, members of one religion may encounter and interact with any number of members of another religion, thus bringing separate worlds into contact and influencing the citizens of both. Similarly, separationists and accommodationists may find themselves participating in the legislation or adjudication of the same issue. Worlds coexist. Worlds collide.

Worlds, however, are not limited to collision. As Paden's work demonstrates, worlds are in constant interaction

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18 Paden, 1994, p. 7.

with one another. Religious worlds meet, border, conflict, and define their counterparts. The same is true with legal worlds. What is more interesting in terms of this study is that religious worlds and legal worlds are also always interacting with one another. This is just as true amid the avowed separation of church and state one finds in the United States as it is in Islamic countries where the Sha'ria incorporates religion and law as one. In both instances, individuals inhabit and negotiate multiple worlds all of the time.

Employing the category of worlds, one may more easily begin to grasp how entities such as law and religion, even when they are observed to be separate on the surface, are actually immersed in the dialectical synthesis Berman suggests. Partially, this is due to the previous observation that worlds are multi-layered, thus religious and legal worlds may comprise one another through their complex interplay within a culture. Dialectical synthesis is also due in part to the border of one world defining the border of the other. Division, in this case, reveals itself to be a bifurcation that upon closer scrutiny becomes unintelligible if not viewed also and at once in terms of connection. This is not to suggest that the wall of separation does not exist in the

United States, just that each of its sides is always necessarily connected to the other.

If one accepts the potentiality, indeed the necessity, for this sort of interplay between religious and legal worlds within cultures, then the religion scholar's scrutiny as focused on the divisiveness and connectiveness of the two is justified. This remains true regardless of the secular or religious labels attached to particular legal systems. Applying this stance to religion and law within the United States, one may come to terms with Jonathan Z. Smith's assertion that "a prime object of study for the historian of religion ought to be theological tradition, taking the term in its widest sense, in particular, those elements of theological endeavor that are concerned with canon and its exegesis."[19] The task now becomes to demonstrate how law within the United States may be viewed as canon, and how theological endeavor serves to interpret and exegete that canon.

Regarding Smith's position "that canon is best seen as one form of a basic cultural process of limitation and of

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Smith, Jonathan Z. *Imagining Religion: From Babylon to Jonestown*. The University of Chicago Press, Chicago, 1982, p. 43.

overcoming that limitation through ingenuity,"[20] the conceptualization of Unites States law as canon becomes relatively obvious. Law certainly limits acceptable actions, but it also maintains an elasticity–a dimension of ingenuity–that allows the basic structure to endure even as its content shifts within. Berman reflects this idea while building on the notion that law as canon is, and must be, at times subjected to theological exegesis. He writes, "law through its stability limits the future; religion through its sense of the holy challenges all existing social structures. Yet each is also a dimension of the other. A society's beliefs in an ultimate transcendent purpose will certainly be manifested in its processes of social ordering."[21] While a good deal of westocentricism is reflected in these statements, their validity in terms of a United States context remains sound--metaphysical presuppositions inform physical actions and their practiced limits. This dynamic undeniably involves religion and law at once.

In another of his books, *Interpreting the Sacred: Ways of Viewing Religion*, Paden echoes a similar view to that of

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Smith, 1982, p. 52.

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Berman, p. 24.

Berman's. He writes, "religious language connects individuals with a moral order, offering stories, teachings, and images about the meaning or purpose of life, and giving guidelines for behavior that correspond to them. Religious language is not just an explanation of the world...but a way, for its adherents, of inhabiting the world."[22] The existential idea that the moral order of which Paden speaks may ever apply to religion alone, or to law alone, seems naive when given the multiplicity of actual, cultural realities. Far more plausible is the theory that religious language is utilized by individuals as a means of providing the moral order they require for inhabiting simultaneous religious and legal worlds. In Smith's terms, the application and appropriation of religious language as it (re)defines a moral order in contrast and cohesion with an existing legal canon may be viewed as a theological endeavor of exegesis. Thus, it may draw the historian of religions's attention. Understood in its broadest sense, the theological dimension of this endeavor exists regardless of whether it is exercised by members of the public at large, or by members of the Supreme Court. This is, of course, assuming that everyone employs a system of values

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Paden, William E. *Interpreting the Sacred: Ways of Viewing Religion*. Beacon Press, Boston, 1992, p. 71.

and meanings within their life; although that system need not be static, or even necessarily coherent, in order to apply.

Thus far, an attempt has been made to show that law and religion, especially in the United States, may coexist as mutually dependent, although not mutually exclusive, cultural forces. The religious language that informs religious worlds, at the same time, informs legal worlds. While the opposite is likely true, that is not the primary concern of this inquiry. The boundary of separation between church and state seals the dialectical synthesis between law and religion but that seal may be understood to be an agent of cohesion, as well as division. In fact, viewed as canon, law may be subject to theological exegesis due to the moral ordering of religious language as it is (re)interpreted in legal worlds. This leads Berman to assert that "Law has to be believed in or it will not work."[23] He understands the variable of belief that law requires to be most effective when it contains a religious dimension. This dimension is compatible with that which Paden views as providing moral order, and a way of inhabiting religious worlds. Understood thus, "law is not only an instrument of secular policy but also part of the ultimate

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23 Berman, p. 14.

purpose of life."[24]

How then does religious language and theological exegesis dynamically infuse the worlds of both religion and law? To observe this process at work, it may prove helpful to employ the dimensions of religion that were reviewed earlier in this chapter. Spanning religious worlds, these dimensions were said to inform their comparison. Since religious and legal worlds have been shown to simultaneously coexist, they may facilitate comparison between law and religion as well.

Religious dimensions postulated by Eliade and Smart were stated earlier in an effort to bring the language of familiar scholars of religion into dialogue with legal studies. The following paragraphs will focus on four particular dimensions outlined by Berman. Of these dimensions he writes:

> These four elements-ritual, tradition, authority, and universality-are present in all legal systems, just as they are present in all religious systems. They provide the context in which in every society (though in some, of course, to a lesser extent than in others) legal rules are enunciated and from which they derive their legitimacy.[25]

Individual examinations of ritual, tradition, authority, and universality within the legal system of the United States

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24 Berman, p. 29.

25 Berman, p. 31.

helps reveal how these dimensions infuse legal worlds with the language of religious worlds, thereby appropriating and sanctifying that language in a new, secularized context. The following examinations are meant to serve as examples of how religious dimensions may be discovered as they exist in legal contexts. They are hardly comprehensive catalogues of these instances.

Ritual has long been a familiar category to scholars of religion. In recent decades, Smith has provided what is possibly the most well-known and astute observation concerning this element. He writes:

> I would suggest that, among other things, *ritual represents the creation of a controlled environment* where the variables (i.e., the accidents) of ordinary life may be displaced *precisely* because they are felt to be so overwhelmingly present and powerful. *Ritual is a means of performing the way things ought to be in conscious tension to the way things are in such a way that this ritualized perfection is recollected in the ordinary, uncontrolled, course of things*. Ritual relies for its power on the fact that it is concerned with quite ordinary activities, that what it describes and displays is, in principle, possible for every occurrence of these acts. But, it relies, as well, for its power on the perceived fact that, in actuality, such possibilities cannot be realized.[26]

Applied to the scene in a United States courtroom, Smith's writings about ritual reveal the flourishing of that

26 Smith, 1982, p. 63.

dimension in such a setting. While recalling that the above quotation was penned by a scholar of religion as he wrote about a religious dimension, notice the ease with which the theory lends itself to an analysis of ritual in the courtroom. For example, a hearing in a courtroom unquestionably represents a controlled environment. The call to order; the rising and sitting of respective parties; the unambiguous seating of judges, lawyers, jury, bailiffs, plaintiffs, and defendants, are all prescripted, formalized acts. They are not left to chance, and they do not vary significantly from case to case. In this setting, there is no room for the "accidents" of which Smith writes. The accidents are obliterated by ritual prescription, and its enactment. During the hearing or trial, ritual serves to correct the disturbance and chaos that is "so overwhelmingly powerful" "in the ordinary uncontrolled course of things." Adjudication, which occurs during ritual time, reinstates order to what Emile Durkheim and Eliade refer to as profane time.[27] Again, as Smith suggests, this order is always theoretically possible outside the ritualized setting of the courtroom, while at once

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The division and nature of the sacred and the profane is a dominant theme in Emile Durkheim's *The Elementary Forms of the Religious Life*. It also appears in Eliade's *Myth of the Eternal Return*.

remaining practically impossible amid countless, unknown variables. Crucial is the impossibility of maintaining the order which courtroom ritual helps to reinstate. Due to this, courtroom ritual must, therefore, be reenacted (precisely) again and again to restore the stability and order it [re]presents.

As anyone who has beheld them may testify, courtroom rituals are rather dramatic. Berman understands this drama as necessary if ritual is to be effective in maintaining legal systems. He writes, "In both law and religion dramatization is needed not only to reflect those values, not only to make manifest the intellectual belief that they are values that are useful to society, but also to induce an emotional belief *in* them as a part of the ultimate meaning of life."[28] Again, Berman's language of ultimacy is questionable, but his point remains viable. The language that structures moral orders in one world must permeate the other worlds an individual inhabits if that order is to maintain any fluidity in life. Scholars of religion have long observed that ritualized dramatizations are commonly utilized in religious worlds to recreate and express the existence of a cosmic order. With

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Berman, p. 33.

religious and legal worlds overlapping, Berman's argument that rituals in legal worlds are most effective when they are believed in within both religious and legal terms is extremely convincing. If the dimension of ritual in law and in religion is used to manifest a sacred arena, then the ritual drama of both worlds is bound to be reinterpreted with respect to both. Of course, as the final chapter shall examine, the sacred order manifest by religious rituals does not always serve to reinforce the one that is manifest by legal rituals. Sometimes the two stand in opposition to one another, but this does not mean that their worlds in collision do not in turn shape one another.

Involved along with the ritual dimension of the courtroom are elements of authority and tradition. Clearly, these three dimensions, whether in the context of religion or law, are most effective when they work in conjunction with one another. A majority of Western religions appeal to a divine authority that is often understood to transcend the mundane world. Rudolph Otto classified the belief in a transcendent authority to be neither rational, nor irrational, but nonrational.[29] The

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Otto, Rudolph. *The Idea of the Holy: An Inquiry Into the Non-Rational Factor in the Idea of the Divine and Its Relation to the Rational.* Trns. John W. Harvey. Oxford University Press, New York, 1923.

nonrational characteristic that legitimates such authority is not easily confined to categorical separations. Instead, it seems to permeate each and every world that individual religious practitioners inhabit. Of course, religious adherents find themselves governed not only by divine authority, but by the laws established to regulate and order the human dynamics of the world at hand.

Religious and legal authority thus exist in tension. In order to assure a peaceable existence of both within the lives of individuals and nations, this tension must somehow be negotiated. As has been mentioned, the separation of church (religion) and state exists as a means of mediating this situation within the United States. However, understanding the law/state portion of this equation as deriving its authority solely from secular reason means ignoring the coexistence of religious and legal worlds in the United States. Doing so would require bracketing individual's actions as they are motivated by religious authority from his or her actions that are motivated by legal authority. As case studies in the next chapter will reveal, this mode of knowing is artificial and insufficient for addressing realities that arise in the courtroom. This is not to suggest that religious and legal authority in the United States should be studied as

the same thing. Even when blended, the two maintain their unique and peculiar separations. However, history reveals that the interplay of authority from one world, often influences the legitimacy of authority from another.

While authority and ritual are both dimensions that regularly draw the lens of those who study religious traditions, tradition itself constitutes an element common to both religion and law. Rituals are reenacted within traditions to help form them, while tradition is frequently referred to as the point of legitimacy for validating authority. One can almost hear Tevye from *Fiddler on the Roof*, belting out the word "tradition!" as a celebration of the Judaism he practices.[30] The indelible connection between tradition and authority--between tradition and law--in Judaism is evident. Indeed, such connections are apparent in a variety of religions. This is surely a reason why religious law is such a popular topic among religious studies scholars. However, the primary concern here resides in the connection--the linkage--between what is often perceived as the secular law of the United States and the religions practiced by those living under that law. For this, Judaism provides a

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Bock, Jerry. *Fiddler on the Roof*. Dir. Richard Altman. New York Times Music Corporation, New York, 1971.

particularly keen point of inquiry due to the manner in which it radically altered the perception of time in the West. A basic awareness and understanding of the religious nature of this alteration reveals yet another synthesis between religious and legal worlds in the West, especially when explored in terms of tradition.

In formulating his well known theory of the "terror of history,"[31] Eliade outlines the shift from cyclical time to linear time. He discusses traditional societies[32] as understanding time in terms of a cycle. Under this model, time is periodically abolished and regenerated through "a repetition of the cosmogonic act."[33] The actions of traditional humans possess meaning only in as much as they recreate and repeat the archetypal gestures of their "mythic

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Eliade understands the "terror of history" to involve the impossibility of attaching meaning to events as they occur in linear time, unless, at the culmination of linear time, good is ultimately rewarded and evil is ultimately punished. Therefore, without a continued belief in some variation of the occurrence of this metaphysical justice, modern society finds itself floundering amid meaningless and futile actions. Religion, Eliade believed, was, therefore necessary for escaping the terror history would otherwise inflict on humanity once they began to measure time on a linear scale.

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Eliade refers to such societies as "archaic."

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Eliade, p. 52.

ancestors." However, with the rise of Judaism, the meaning-making of cyclical time meets with a radical alternative. As Yahweh's chosen people, the Jewish people begin to interpret particular historical situations as manifest at the behest of the Supreme Deity's will. Their actions in time both spawn and reflect an active dynamic of Divine consequence. Regarding this new perception of meaning as it is attached to unique individual and community actions, Eliade writes, "For the first time, we find affirmed, and increasingly accepted, the idea that historical events have a value in themselves, insofar as they are determined by the will of God."[34] He continues, "Historical facts thus become 'situations' of man in respect to God, and as such they acquire a religious value that nothing had previously been able to confer on them. It may, then, be said with truth that the Hebrews were the first to discover the meaning of history as the epiphany of God, and this conception, as we should expect, was taken up and amplified by Christianity."[35] Earthly situations hereby incur meaning on a progressive continuum–on a linear scale–as opposed to a repeating cycle.

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Eliade, p. 104.

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Eliade, p. 104.

An understanding of the inception of linear time is crucial for analyzing tradition in its modern, Western context. While some of Eliade's musings concerning the progression of linear time have rightfully received criticism among more recent scholars of religion,[36] they remain valuable for the task at hand. His observations serve to highlight the religious nature involved in the impetus and genesis of reckoning time on a linear scale. Legal traditions, especially Western legal traditions, rely immensely on their ability to establish "continuity with the past."[37] Legal decisions must not be random. Rather, they must rely on the former precedents that comprise their tradition, and that tradition must remain somewhat consistent with itself. Evidence of this may be traced to ancient traditions of

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While the current era of religious studies has been referred to as post-Eliadean, the criticism surrounding his understanding of cyclical and linear time has often stemmed from the Christocentric hypothesis he seemed to postulate in *The Myth of the Eternal Return*. Regardless of the popularity, or even the acceptability, of Eliade's speculations about the religious condition of humanity due to its linear conception of time, a variety of disciplines continue to utilize his ideas of how linear time gained acceptance, and how it proceeds in terms of religious meaning-making. Millennial studies offers a prime example of a discipline that continues to build on an array of Eliade's concepts regarding the religious nature of time. See www.millen.org for particular examples.

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Berman, p. 34.

religion and law. For example, Berman writes, "Even the Greek oracles were supposed to reflect a hidden consistency."[38]

In the United States legal system the consistency is not to be hidden. Its precedents are established through constitutional prescripts which are applied in specific cases. The decisions offered in these cases refer to one another, thus establishing and perpetuating the United States legal tradition. Without historical meaning as offered through linear time, legal tradition would make no sense–its integrity would crumble. Without the Judeo-Christian religious tradition, historical time would not be perceived as it is today. Thus, the temporal map on which United States legal tradition is charted is a map that traces its origins to religion. Berman touches on this point as he writes, "The traditional aspect of law, its sense of ongoingness, cannot be explained in purely secular and rational terms, since it embodies man's concept of time, which itself is bound up with the transrational and with religion."[39] The intertwined nature of the traditional dimension of both religion and law in the United States offers yet another convincing argument for the

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Berman, p. 34.

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Berman, p. 34.

study of their dialectical synthesis.

The fourth, and final element Berman identifies as being present in all religious and legal systems is that of universality. He understands the universal dimension of religion and law as lending an ontological undergirding to the ritual, authoritative, and traditional dimensions. "It is by a religious emotion, a leap of faith, that we attach to the ideals and principles of law the dimension of universality,"[40] he writes.

This notion of universality is likely to cause a shudder through the academic sensibility of religious studies scholars today. At the very least, it should serve as an alert to proceed with extreme skepticism. Within the United States and abroad, the current plurality of religions and cultures poses such diversity that universal theory falls far short of providing an adequate means with which to study them. While individuals inhabiting religious worlds and legal worlds may understand those worlds to possess a dimension of universality, the disparity between individuals' conceptions of universality catapults the dimension itself into the plural. To speak of universalities seems oxymoronic--the

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40 Berman, pp. 38-39.

language itself disintegrates around the concept. Berman seems to have sensed this as he observed the counter-culture movements of the late 1960's and early 1970's. He speaks of an "integrity crisis"[41] that faces both religion and law in the United States. According to Berman, this integrity crisis stems from the lack of a unified, universal faith in both religion and law. One suspects Berman would like to solve this integrity crisis, as he makes several suggestions for alleviating what he understands to be its negative effects. At this point, academics may be wise to learn from the folly of Eliade, and part company with Berman who seems to become more concerned with reading his vision of how religion and law should function, instead of understanding how they actually function. Still, it would not be wise to dispense with his theories altogether.

The United States has a rich history of fragmentation between the *de facto* Protestantism of the legal system and the abjuring minority religions that grappled with that system. As the theory of universalism breaks apart, and the actuality of its claims seems never to have existed, religious studies scholars are left with the task of theorizing the structure of

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Berman here uses the terminology of psychologist Eric Erikson.

division between church and state in the United States. Therefore, the point of departure from Berman's pioneering theories in religion and law serves as a point of embarcation for the formulation of a language that may grapple with the complex theological exegesis still permeating the dialectical synthesis between the two worlds.

Further inquiry along those lines will take place in Chapter Three. For now, this study turns its attention from general theory to more specific realities. Particular theories in the guise of both religion and law were actualized to inform the composition of the United States Constitution. To gain a more solid understanding of the forum to which the propounded general theory may be applied, historic instances of the interplay of religion and law as they occurred in the United States will now be examined. This will also entail a study of several Supreme Court cases concerning the free exercise of religion in the United States.

CHAPTER TWO: HISTORICIZING THE INTERPLAY OF RELIGION AND LAW

The previous chapter was concerned with tilling the unworked soil of law and religion in order to cultivate the basis for a general theory of structure between the two. The current chapter will focus on particular seeds that, when sewn within the newly established theoretical ground, may yield fruitful insights by scholars of religion. The study of these "particular seeds" will first be offered in terms of the primary religious and secular philosophies that informed the framing of the United States Constitution. Since historians and political scientists continue to document this situation extensively, it will here occupy only a brief review. The other feature of this chapter focuses on providing studies of selected Supreme Court cases that involve the free exercise clause as applied to religion. Through an accessible summary of landmark cases, religious studies students may begin to formulate a working picture of how the sometimes erratic Supreme Court has dealt with religion, especially over the past fifty years. Although challenging, such an understanding is integral for the deciphering of the interplay between religious and legal worlds in the United States.

Just before beginning the research for this study, I

found myself listening to a classroom conversation during which a student voiced her belief that the United States Constitution was, in large, a product of a Protestant world-view. The professor held fast to the argument that the founding fathers were governed primarily by Enlightenment logic which championed secular reason over religion. Religion, related the instructor, posed a point of skepticism for most Constitutional Convention goers. Members of the class were divided by this debate. Who was right, the student or the teacher? Both points-of-view appear valid.

Indeed, both points are valid. The parameters of division for this debate may be seen as yet another example of the cognitive bifurcations visited upon the American consciousness via the avowed separation between church and state. History reveals that a combination of religious sentiments and secular sentiments informed the fabric of the Constitution. As the general theory of Chapter One indicates, one dimension does not exclude the other. Perhaps the scholar of religion and law in the United States who has written most diligently on this historic interplay is Emory University law professor and legal historian John Witte, Jr. In his book, *Religion and the American Constitutional Experiment: Essential Rights and Liberties*, he observes, "[t]he American founders

revolutionized the Western tradition of religious liberty. But they also remained within this Western tradition, dependent on its enduring and evolving postulates about God and humanity, authority and liberty, church and state."[1] Witte recognizes the elements of ritual, authority, and tradition that span religion and law, thus noting that "[t]he eighteenth century American experiment in religious freedom was thus, at once, very old and very new."[2]

While assembling the Constitution, religious and secular agendas were (as they usually are) being influenced by the socio-economics of politics as well. Michael W. McConnell relates how James Madison was initially against adding the Bill of Rights to the Constitution. However, Baptists, then a denominational minority, threatened to withdraw their support for his congressional campaign if he did not reconsider. Madison heeded the Baptists' warning, and championed the Bill of Rights. Thus, the First Amendment

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Witte, John Jr. *Religion and the American Constitutional Experiment: Essential Rights and Liberties*. Westview Press, Boulder, Colorado, 2000, pp. 8-9. This work by Witte provides the most historically sensitive account of religious liberty in light of state constitutions and the United States Constitution that I have discovered.

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Witte, p. 21.

clauses protecting religion were added to the Constitution.[3] Ever since, Madison has almost always been touted as an innovator and supporter of the Constitutional protections surrounding religion. While this claim remains true, the previous example of how it came to be so illustrates the interlocking forces of reason, religious zeal, and political power that fueled the formulations of religious liberty in the United States.

As alluded to previously, both the general public and scholars have too often claimed that either the *de facto* influence of Protestantism, or the secular logic of the Enlightenment, independently drove the Constitutional endeavor. Witte, however, identifies two pairs of theologies and two pairs of political views as contemporaneously influencing this enterprise. Puritans and Evangelicals comprise the religious couple, while the two political philosophies are "those of Enlightenment thinkers and those of Civic Republicans."[4] The basic tenets of each group bear mentioning here. A general understanding of all four may

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"Taking Religious Freedom Seriously," Michael W. McConnell. *First Things*. The Institute of Religion and Public Life, May 1990.

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Witte, p. 24.

greatly facilitate the effort to uncover how America moved from provincial colonies, some with constitutions that prescribed the death-penalty for those who failed to observe the Sabbath,[5] to a nation that applauded the *Federalist Paper No. 51* which held that "in a free government, the security for civil rights must be the same as that for religious rights; it consists in the one case in the multiplicity of interests, and in the other, the multiplicity of sects."[6] From death penalties for Sabbath-breakers, to equal protection for civic rights and religious rights is an expansive leap.

Many seventeenth and early eighteenth-century Puritans probably found the leap too expansive for their tastes. A primary example of one such Puritan is found in the person of Cotton Mather.[7] Grandson to the Massachusetts Bay Colony's co-founder John Cotton, Mather's work, the *Magnalia Christi*

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Even Virginia, a state which by the mid-1700's showcased a constitution that heavily influenced several liberal facets of the United State Constitution, had a state ordinance in the 1600's that sentenced Sabbath-breakers to death.

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Federalist Paper No. 51 (1788) in *The Federalist Papers Reader and Historical Documents of Our American Heritage*. Ed. Frederick Quinn. Seven Locks Press, Santa Ana, CA, 1997.

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Mather had a vision when he was 16, thus becoming convinced that he was a member of God's elect.

Americana,[8] may provide the finest biography and history of the Puritan ethic that American literature has to offer. In this work, Mather regales Plymouth Colony governor William Bradford as an exemplary Puritan who sacrificed and struggled to fill the exonerated role to which God had called him. Of Bradford, he writes, "[t]he leader of a people in a wilderness had need be a Moses; and if a Moses had not led the people of Plymouth Colony, when this worthy person was their governour, the people had never with so much unanimity and importunity still called him to lead them."[9] Mather's depiction of Bradford as Moses illustrates the Puritan sentiment that God chooses His elect, and that they in turn must obediently fulfill their divinely appointed roles in the world. Such roles might fall in the realm of church or state, but the two were understood to be separate offices in the eyes of the Divine. Thus, they were separate in the eyes of Puritans as well. However, "[a]lthough church and state were not to be confounded, they were still to be 'close and compact.' For, to the Puritans, these two institutions were both inextricably

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8 Mather, Cotton. *Magnalia Christi Americana* (1702). in *The Harper American Literature*, Vol. 1, Ed. 2, Harper Collins College Publishers, New York, 1994

9 Mather in *The Harper American Literature*, p. 252.

linked in nature and in function. Each was an instrument of Godly authority."[10] And, as Jonathan Edwards famous sermon, "Sinner in the Hands of an Angry God," indicates, God reigned supreme. Edwards warns, "There is nothing between you and hell but the air; it is only the power and mere pleasure of God that holds you up."[11]

By the mid-1700's, even amid unabashed sermons like Edwards's, the rigidity of Puritan doctrine began to soften a bit. In flow with political developments in the colonies, many Puritans adopted a theology of greater tolerance. Indicative of this stance are the words of Puritan theologian Elisha Williams. In 1744, he wrote:

> Every man has an equal right to follow the dictates of his own conscience in the affairs of religion. Every one is under an indispensable obligation to search the Scriptures for himself...and to make the best use of it he can for his own information in the will of God, the nature and duties of Christianity. And as every Christian is so bound; so he has the unalienable right to judge of the sense and meaning of it, and to follow his judgement wherever it leads him; even an equal right with any rulers be they civil or ecclesiastical.[12]

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10 Witte, pp. 25-26.

11 Edwards, Jonath. "Sinners in the Hands of an Angry God" (1741). Quoted form *The Harper American Literature*, p. 349.

12 Williams, Elisha. *The Essential Rights and Liberties of*

The re-vamped Puritan ethic, as expressed by Williams, clearly incorporated greater denominational tolerance than that which resulted in the banning of Roger Williams from Massachusetts. However, this brand of tolerance obviously applied to practicing Christians alone. The supremacy of a Protestant Christian understanding of God over all earthly affairs, be they matters of church or state, remained as sovereign and solid as His angry hands.

Civic Republicans such as George Washington found natural counterparts in the guise of their Puritan brothers. Expressing a view indicative of Republicanism, Washington wrote, "Religion and Morality are the essential pillars of Civil society. Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."[13] Political understandings such as Washington's meshed well with Puritan sentiments that God must rule both church and state, even though the two exist as divided entities. Witte observes that "Republican writers

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Protestants : A Seasonable Plea for the Liberty of Conscience, and the Right of Private Judgement in Matters of Religion, Without Any Controul from Human Authority. Boston, 1744, pp. 7-8, cited in Witte, p. 27.

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These lines are from George Washington's farewell address, as cited by Witte, p. 35.

sought to imbue the public square with a common religious ethic and ethos," and that this agenda was consistent with that of the Puritans.[14] While the specifics of their visions may have differed, both Puritans and Republicans envisioned a common American religion that would support the pillars of government and unify the plurality of religions within the new country.

Like Puritans and Civic Republicans, Evangelicals had also suffered from tyranny propagated by the joint governance of church and state. Thus, they too favored separating the formal countenance of the two entities. However, their basic take on the matter differed somewhat from the more conservative views of the two previously mentioned groups. This is not surprising when one considers that Evangelicals were often punished and sometimes baned from colonies that were under Puritan control. Previously mentioned, Roger Williams represents the most noteworthy example of such persecution. Precursor to the Evangelical spirit that would flourish during and after the Great Awakening, Williams was baned from Massachusetts when John Cotton and William Bradford were unable to sway him from what Bradford called his "strange

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Witte, p 34.

opinions."[15] Williams understood religious liberty to be the God-given right of every individual and would not accept any intermingling of worldly and spiritual affairs. Of course, this uncompromising separatism undermined the prerogative of Puritan leaders "to invoke God's scriptural word as the source of their political and civil authority," thereby undercutting Puritan power of state government altogether.[16] Thus banned, Williams started Rhode Island in 1635. It was to be the most successful experiment in religious tolerance and human rights yet witnessed in colonial America.[17]

Forced to found havens such as Rhode Island as an umbrella sheltering a number of denominations, Evangelicals, then as now, hardly constituted a single, cohesive religious group. However, they shared a common desire to practice their own forms of denominationalism as they wished, free from government interference. As Witte notes, "[e]arly Evangelicals were largely united in their insistence on

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The Harper American Literature, p. 170.

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Ibid, p. 170.

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For a more in depth picture of Williams's fight for freedom of religious conscience, the disestablishment of religion, and Indian rights, see: *Roger Williams Complete Writings*. Vols. 1-7, Russell and Russell, New York, 1963.

liberty of conscience, disestablishment of religion, and separation of church and state." He continues, "[t]he Evangelicals sought to protect the liberty of conscience of every individual and the freedom of association of every religious group. Their preferred method for achieving these ends was to prohibit all legal establishments of religious and, indeed, all mixtures of religion and politics."[18] One may notice the representation of each of these ideas in the first Amendment, and recall the account provided at the onset of this chapter about how it was James Madison's Baptist constituents who were largely responsible for such additions to the Constitution.

If Puritans and Civic Republicans agreed that the United States should be braced throughout by a common religion, then Evangelicals and proponents of Enlightenment views were joined by their mistrust of such an assertion. The Enlightenment is hardly a holistic philosophical movement, and its main ideas are far too expansive to adequately summarize here. For the task at hand, it will serve here to note that Enlightenment views that were offered in philosophical terms on European soil were forged into legal and political doctrine in the

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Witte, pp. 28-29.

newly formed union of the United States. While Evangelicals supplied the theology behind freedom of conscience for individuals and the disestablishment of religion, Enlightenment thinkers provided the secular basis for institutionalizing these religious liberties. Building on the ideas of Voltaire, John Locke, and a host of other, the likes of Thomas Jefferson held that the state "should not give special aid, support, privilege, or protection to religious doctrines or groups...."[19] Obviously, this ran counter to the political agenda of Civic Republicans who did wish to provide incentives such as tax-aid for religious groups. Taxes regarding religion are but one issue the visions of each group sought to influence during the framing of the Constitution. The interplay was constant and comprehensive.

This brief overview of the dominant political and religious forces at work in eighteenth century America provides a basic historic grounding for understanding the multi-dimensionality of religious and political agendas as they acted as allies and adversaries with one another in an effort to define religious liberty through the Constitution. Bearing in mind the chief positions of each of these groups

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19 Witte, p. 32.

will aid in understanding many of the Supreme Court decisions regarding religion. While there were certainly other influential religious and political groups in America during the days of the Constitutional Convention, their voices were often drowned-out by the dominant groups mentioned here. It is wise to note that each of these dominant forces understood the United States to be a Christian nation. Regardless of how they interpreted separation of church and state, freedom of religious conscience, and disestablishment of religion, their predispositions toward Christianity informed their actions throughout. This will become obvious in the first case mentioned in the following studies. *Reynolds v. The United States*, clearly reflects each group's Christocentricism as it was expressed in the early Supreme Court. As will be demonstrated, the Court's decision in that case clearly asserts that *de facto* Protestantism remained the law of the land in 1879. The case studies, with a brief introduction, will now be offered.

STUDYING THE CASES

Studying the cases is often, if not always, an affair of greater complexity than the language indicates. As a majority

of religious studies scholars are without an education in law, complications surrounding case study often preempt the study itself. Since law, like religious studies, possesses its unique linguistics, and most law libraries are entities unto themselves, becoming familiar with Supreme Court cases can be a daunting task. Without access to somewhat elitist legal databases which now stream-line the search for particular cases,[20] merely locating a case can be something of a challenge. Of course, one need not begin such a search prior to isolating the body of cases pertinent to his or her occasion of inquiry. This too requires the navigation of unfamiliar academic terrain.

A number of works residing in law libraries may aid in the general endeavor of learning which cases are applicable to what subjects, but once one has located such books, it is wise to proceed with caution. Of these works, Sullivan relates, "I was surprised at the polemical nature of almost everything I read. Even books of serious academic pretension had an ax to grind. They were briefs, not academic texts."[21] After reading through a number of such "briefs," it becomes clear that even

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The Lexis-Nexis Congressional Universe is a primary example of such a database.

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Sullivan, p. xxii.

the author's selection of cases often reflects a legal or political bias.

Additionally, one must confront what is potentially the most challenging issue engulfing the study of Supreme Court cases. That is what Mary Ann Glendon classifies as the "erratic path" the Supreme Court is taking with regard to religion.[22] Many scholars of religion may sense that Supreme Court rulings concerning religion remain undeniably erratic. Even experts such as judges and professors of law often share this opinion. Thus, the lack of cohesion between Supreme Court decisions provides yet another obstacle for religious studies scholars to surmount in their efforts to integrate religious dimensions of law into the discipline.

Confronted by the combination of these formidable variables, those engaged in religious studies may find themselves in a situation similar to that of a Melvillean character. In Melville's *The Confidence-Man*, an old man is doggedly confused and confounded as he tries to decipher whether a particular document is legitimate or counterfeit. The more he studies the note, the more confused he becomes. "I don't know, I don't know,....there's so many marks of all

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"Religion and the Court: A New Beginning?" *First Things*, The Free Press, March 1992.

sorts to go by, it makes it a kind of uncertain," says the old man.[23] Amid voluminous dissenting opinions and disparate decisions, it would be difficult, indeed, to find words that more fittingly characterize the predicament of a newcomer to Supreme Court case study.

Perhaps what is needed for both the old man and the scholar of religion to proceed with prudence is not so different after all. A map, or a key to provide access and orientation seems to be what is missing. Taken alone, a basic structural theory of the interplay between religion and law in the United States will not steer most religious studies scholars through the actual case studies to which the theory may apply. While a number of works which contain selected summaries of cases regarding religion and the Supreme Court exist,[24] the following case studies are intended to be easily accessible for scholars of religion. They may serve to highlight the religious dimension of law, and how adjudication of cases regarding the free exercise clause affects religion

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Melville, Herman. *The Confidence-Man: His Masquerade*. Holt, Rinehart, and Winston, New York, 1964, p. 1.

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An excellent example of a such a book is *Religious Liberty in the Supreme Court: The Cases that Define the Debate Over Church and State*. Ed. Terry Eastland. William B. Eerdmans Publishing Company, Grand Rapids, MI, 1993.

in the United States.

While reading through the cases it may prove helpful to conceptualize the opinion of each Supreme Court Justice as constituting an individual narrative that competes with and builds upon other narratives in an effort to reach a single decision-the decision of the court. Once formulated, this decision then becomes a multi-faceted narrative in itself. In this manner, narratives continue to build upon one another via the legal process which they help constitute. The idea of Supreme Court decisions as narratives will be expanded in greater detail in the next chapter. It is mentioned here because religious studies scholars may be familiar with understanding individual narratives as constituting religious worlds. Therefore, this concept, which may apply to legal worlds as well, can act as a point of entry and orientation to the cases at hand.

REYNOLDS v. UNITED STATES[25]

In the late 1870's George Reynolds was convicted on the federal charge of bigamy. Reynolds, then secretary to Brigham

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25 *Reynolds v. United States*, 98 U.S. 145 (1879).

Young, was a practicing member of the Church of Jesus Christ of Latter-Day Saints. As such, Reynolds adhered to the Mormon belief that polygamy was an acceptable and legitimate form of marriage in the eyes of God. As indicated by his conviction, this belief fell into direct conflict with a federal statute outlawing bigamy in the territory of Utah where Reynolds lived. Therefore, in 1879, Reynolds appealed to the United States Supreme Court in an attempt to have the statute, and the ruling on his case, overturned. An appeal was made on the grounds that the federal statute used to convict Reynolds stood in violation of his First Amendment right of religious free exercise. A landmark case, *Reynolds v. United States* constitutes the Supreme Court's first application of the First Amendment's religion clauses. From this historical occurrence, the Supreme Court established a precedent regarding the free-exercise of religion that would stand for another sixty-one years.

Circumstances leading to *Reynolds* illustrate the rising tension between Protestantism and minority religions in the United States at the time. Like several other religious minorities, by the late 1800's, the Mormon Church was no stranger to the persecution that their religious practices sometimes elicited. After fleeing the Eastern States in an

effort to escape religious intolerance,[26] the Mormons settled into the territory of Utah only to find the expanse of the frontier too small to keep religious persecution at bay.[27] When George Reynolds was convicted because of a religious practice that his faith endorsed, the Church of Christ of Latter-Day Saints turned to the First Amendment's protection of religion in an effort to reestablish and preserve their religious freedom. Before *Reynolds*, the Supreme Court had never found itself confronted with the occasion to rule directly on Constitutional guarantees of religious liberty. Previously, the task of adjudicating cases regarding religion had been left to the individual states, each of which had a constitution providing for such instances. Faced with the opportunity to interpret the First Amendment, thus offering a federal decision regarding religious liberty, the Supreme Court decisively opted to uphold the federal statute in

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Mormons made a strong attempt to settle near Chicago, Illinois, but were virtually "run out of town" due to their religious beliefs and practices.

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Witte believes that the United States relied on the frontier "as a release valve for the tension between..private religious freedom and public religious patronage." As the frontier's boundaries solidified, the tension between the two no longer had a means of release. This is when the federal court was actively brought into matters of religious liberty. Witte, p. 96-100.

question.

Offering the opinion of the Court, Chief Justice Waite cited Thomas Jefferson as a paragon whose sentiments symbolized the free-exercise of religion in the United States. Within his opinion, Waite then quoted the following from Jefferson's letter to the Danbury Baptist Association:

> Believing with you that religion is a matter of which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions-I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.

Taking Jefferson's belief that humans have "no natural right in opposition to [their] social duties," Waite then concluded that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive to good order...."[28] Thus, in its ruling, the Supreme Court understood the action

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Reynolds v. United States, 98 U.S. 145 (1879).

of polygamy to be in violation of social duties and subversive to good order. This, they concluded, was a "rational" reason to prohibit the free-exercise of religion, if that free-exercise involved practicing polygamy.

The decision offered in *Reynolds* clearly reflects the *de facto* Protestantism of the United States during this period. By basing a precedent regarding religious liberty on *de facto* Protestant ethics, the Supreme Court provides a clear example of religious influence on "secular" justice. Mormons were forced to alter practices prescribed by their religion in order to conform to state and federal laws. This narrow reading of the free-exercise clause remained a precedent until the next case in our study was heard in 1940.

CANTWELL v. CONNECTICUT[29]

In 1937, Newton Cantwell and his two sons were convicted by a Connecticut court because they did not apply for and receive a city licence that would grant them rights of solicition in public areas. Jesse Cantwell was also convicted for disturbing the peace. Jehovah's Witnesses, the Cantwells were proselytizing on the streets of a busy New Haven,

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29 *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Connecticut neighborhood with pamphlets and books that endorsed their religion. Jesse Cantwell had a victrola record player. Asking people he met for permission to play them a record that mirrored the theme of a book, he would then try to sell the book to the listener(s), and/or give them pamphlets under the condition that the literature would be read. Operating in a predominantly Roman Catholic district, the Jehovah's Witnesses enraged two Catholic men who had agreed to listen to a record which characterized the Holy Roman Church as an enemy of true religion. After mild threats from one of the incited men, the Jehovah's Witnesses packed up and moved about their business with no ensuing confrontation. Charges were then brought against the three Jehovah's Witnesses. Afterwards, the Cantwells appealed to the Supreme Court on grounds that the statute concerning their conviction violated their free exercise of religion. They argued that being required to obtain a permit to proselytize in public places put a prior restraint on the religious practice of proselytization. They also felt it unconstitutional to be forced to subject their religious intentions to an official who would then review those intentions and determine the legitimacy of them. The Supreme Court agreed with the Cantwells, acquitting them on all charges.

Cantwell v. Connecticut remains one of the most significant Supreme Court cases regarding religion to date. In part, this is because the Court unanimously determined that the Fourteenth Amendment's "due process" clause[30] imbued the Supreme Court with the power to overturn state decisions if those decisions conflicted with First Amendment freedoms. Delivering the only opinion offered by the Court, Justice Roberts wrote, "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."[31] This is the first time the Supreme Court had ever expressed or exercised such power over state-determined decisions regarding religion. The linkage of the Fourteenth Amendment to the First Amendment due to the protection of liberty offered by the former

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Section 1 of the Fourteenth Amendment provides the "due process" clause. It reads: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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

"elevated the right to religious free exercise to preferred constitutional status."[32] It did so because it "opened the door to federal litigation over religion-clause claims against the states, and most of the religion-clause cases decided by the Supreme Court since 1940 have involved such claims."[33]

Cantwell is highly significant for another reason as well. It established a new Supreme Court precedent regarding the safeguard of religious free-exercise. As opposed to *Reynolds*, a case in which the Court used the rational basis test for determining whether government had the right to infringe on religious liberty, *Cantwell* propounded a compelling state interest test.[34] Under the new compelling interest test, "government could not unduly burden or prohibit religious practices unless it could demonstrate a compelling

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Ivers, p. 135.

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Eastland, p. 15.

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Constitutional scholars disagree on whether *Cantwell* actually started the compelling state interest test, or whether it marked an intermediate interest test that provided the impetus for the compelling state interest test. The language offered by Justice Roberts in the Courts opinion makes it difficult to determine which test was used in *Cantwell*. For a summary of the basic foundations of each test, see Appendix I.

state interest, or an objective of the highest order."[35] While the rational basis test held that any rational reason would suffice to legitimate government infringement of religious practice, the state compelling interest test required proof "of the highest order" before such infringements were justified. This removed a great deal of the "burden of proof" from religious claimants, placing it on state or federal government. Still, Justice Roberts noted that the First Amendment "embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[36] This is similar to what Justice Waite had written in *Reynolds*, the difference lies in the type of test the Court chose to utilize to determine the boundaries of acceptable religious actions.

Due to the application of the Fourteenth Amendment and the establishment of the compelling state interest test, through *Cantwell* the Supreme Court offered its first noteworthy protection of religious minorities as those minorities were challenged by majoritarian sentiments. The

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Ivers, p. 135.

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

concluding remarks of Justice Roberts express this new priority well. He writes:

> In the realm of religious faith, and in that of political belief, sharp differences may arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
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> The essential characteristic of these liberties is, that under this shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is the shield more necessary than in our own country for a people composed of many races and of many creeds....[37]

In his conclusion, Justice Roberts captures the Supreme Court's departure from former precedents that had been established via *de facto* Protestantism to a new era of precedent--one intended to protect religious free exercise for a plurality of religions despite their particular traditions or beliefs. That tradition is upheld and expanded in the next case in our study.

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37 *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

SHERBERT v. VERNER[38]

Adell Sherbert was fired from her job in South Carolina because she refused to work on Saturdays. A Seventh Day Adventist, Sherbert informed her employers that Saturday was the Sabbath as recognized by her religion. This held little to no sway over Sherbert's employers, and she was forced to search for work elsewhere. Unable to find a comparable job that did not require working on Saturdays, Sherbert then filed for unemployment. South Carolina declined Sherbert's request for job-compensation because Sherbert had been fired for what they interpreted as a legitimate reason. Her unwillingness to work on Saturdays provided appropriate grounds for her dismissal; therefore, according to a South Carolina statute, she did not qualify for job compensation. Sherbert then appealed this decision in the Supreme Court, "arguing that the disqualifying provisions of the statute 'abridged her right to free exercise of her religion.' If she exercised her religious right to Saturday sabbatarianism, she would lose her civil right to a state benefit. If she was to receive her civil right to a state benefit, she would have to forgo her

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Sherbert v. Werner, 374 U.S. 398 (1963).

religious right to Saturday sabbatarianism."[39] In a 7-2 decision, the Supreme Court agreed with Sherbert and granted her the unemployment compensation she had formerly been denied.

Sherbert is a landmark case for the free exercise of religion in the United States because it honed and refined the compelling state interest test first employed in *Cantwell v. Connecticut*. Writing for the Court, Justice Brennan offered the opinion that South Carolina's:

> ruling forces [Sherbert] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[40]

Through this opinion, the protection offered to the free exercise of religion was carried to a new extreme.

For the first time, the Court understood a law that was generally applicable as capable of placing a burden on an individual's freedom to exercise her religion. In *Cantwell*, the Court overturned a Connecticut statute because it was

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Witte, p. 132.

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Sherbert v. Werner, 374 U.S. 398 (1963).

found to directly burden the free exercise of religion. In *Cantwell* and *Sherbert*, the court applied the compelling state interest test, and sought to determine if the least intrusion on an individual's freedom had been met. However, in *Sherbert*, the Court formally recognized that laws which were generally applicable-laws that did not necessarily burden religious free exercise-might, indeed, burden religious free exercise when applied to certain individuals and religions. Reaching this decision, the court boosted the religious liberty afforded minority religions to a new level. Justice Warren's opinion clearly recognizes that minority religions may be victimized by laws that the Protestant majority considers normative and acceptable. For the next twenty seven years, the precedent set by *Sherbert* remained the standard for adjudicating cases involving the free exercise of religion. It was broken by the surprise ruling of the next case in our study.

EMPLOYMENT DIVISION v. SMITH[41]

Alfred Smith and Gaylen Black were fired from their jobs

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41 *Employment Division v. Smith*, 485 U.S. 660 (1990).

at a drug-counseling center in Oregon because the two men ingested peyote at a ritual gathering of the Native American Church. Both men applied for unemployment benefits and both were denied because Oregon state law cites illegal drug use as a legitimate cause for dismissal from one's job. After a string of cases involving Oregon state courts and an initial hearing in the Supreme Court, which sent the case back to Oregon for further deliberation, Smith and Black finally got their appeal tried decisively in the Supreme Court.[42] The two men argued that peyote was an essential element in a longstanding religious ritual prescribed by the faith they practiced. Much as Sherbert had done, they argued that disqualification from a civil benefit due to a religious practice infringed on their Constitutional right to religious free exercise. In a shocking decision that sent ripples throughout religious and legal worlds, the Supreme Court did not agree with Smith and Black, and did not uphold their appeal.

Employment Division v. Smith is certainly the most controversial case concerning the free exercise of religion that the Supreme Court has tried to date. Offering the

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Eastland, p. 396.

Court's opinion, Justice Scalia virtually overturned the free-exercise precedents of *Cantwell* and *Sherbert* progeny, returning to the 1879 case of *Reynolds* in order to justify a new precedent. Referring to the Court's opinion as it was offered in *Reynolds*, Scalia wrote:

> "Laws," we said, "'are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices....Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[43]

Resurrecting the Court's opinion from *Reynolds*, Scalia proceeded to dismiss the compelling state interest test as an adequate means for scrutinizing religious free exercise claims if those claims involved generally applicable laws. Instead, he advocated a return to the precedent of the rational basis test where generally applicable laws conflict with religious free exercise. Elucidating this new precedent he writes:

> If a law is neutral and generally applicable, it is constitutional, even if it burdens a central aspect of the claimant's religion. But if a law is not neutral or not generally applicable, it must be justified by a compelling governmental interest and narrowly tailored to achieve that interest."[44]

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Employment Division v. Smith, 485 U.S. 660 (1990).

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Witte, p. 124.

When it comes to normative laws that were often informed and established at the behest of *de facto* Protestantism, removing the compelling interest test from laws that are generally applicable leaves minority religions as unprotected as they were before the days of the modern Supreme Court. Scalia himself somewhat acknowledged this danger as he wrote:

> ....to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political processes will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of one's religious beliefs.[45]

The Court's willingness to forgo the free exercise protection it had offered religious minorities since 1940 drew massive criticism. In lieu of *Smith*, legal scholars such as Ivers suggest that "[l]egislatures will not have to explain the burden or restrictions that formally neutral state statutes have on religious conduct. Political bodies will be able to do what they please, whether out of negligence, through evil designs, or for no reason at all, so long as the statute does

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45 *Employment Division v. Smith*, 485 U.S. 660 (1990).

not single out religion for discriminatory treatment."[46]

Justice O'Connor seemed to agree somewhat with opinions similar to that of Ivers. She offered an opinion concurring with the decision reached in *Smith*, but dissenting substantially with the jurisprudence employed to reach that decision. She wrote that, "[*Smith*'s] holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty."[47]

Justice Blackmun was also compelled to offer his opinion regarding *Smith*, but unlike O'Connor, he dissented vehemently with both the Court's decision, and the opinion written by Justice Scalia. In his opinion, Justice Blackmun carefully placed the use of peyote in its ritual context, and provided a careful evaluation of that context in regards to religious liberty. After doing so, he concluded that the religious liberties of Smith and Black had been blatantly violated, as had the former Supreme Court precedents designed to protect such liberties. In his dissenting opinion Blackmun writes:

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Ivers, p. 138.

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Employment Division v. Smith, 485 U.S. 660 (1990).

> The distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a "luxury" that a well-ordered society cannot afford and that the repression of minority religions is an "unavoidable consequence of democratic government." I do not believe the Founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty-and they could not have thought religious intolerance "unavoidable," for they drafted the Religion Clauses precisely in order to avoid that intolerance.[48]

Blackmun's words echo the sentiments of an unlikely conglomeration of religious, academic, and political groups that sought to combat the effects which *Smith* had on the protection of religious free exercise. In an effort to achieve this goal, the Religious Freedom Restoration Act, which is discussed in our next case study, came into being.

RELIGIOUS FREEDOM RESTORATION ACT OF 1993[49] AND *CITY OF BOERNE V. FLORES*[50]

The Supreme Court's ruling in *Employment Division v. Smith* received criticism from groups whose views surrounding

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48 *Employment Division v. Smith*, 485 U.S. 660 (1990).

49 *Religious Freedom Restoration Act of 1993*. For a complete rendering of this act, see Appendix II.

50 *City of Boerne v. Flores*, 95 U.S. 2074 (1997).

religious liberty have not traditionally aligned. Liberals and conservatives in religious, legal, and academic worlds vocally protested Scalia's opinion in *Smith*. The National Council of Churches, the American Jewish Committee, the American Jewish Congress, the American Civil Liberties Union, People for the American Way, the American Humanist Association, and a band of others were joined by Bill Clinton in an effort to restore the protection the free exercise clause had once afforded religion.[51] An array of voices called for the reinstatement of the compelling state interest test in all cases involving religious free exercise. "In reaction, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA)."[52]

Within the act, Congrèss declared that neutral laws might unduly burden individuals' rights to religious free exercise, and that by removing the compelling state interest test as it applied to neutral and generally compelling laws, *Smith* had, therefore, potentially allowed the unconstitutional burdening of religious free exercise to be legitimated by the Court.[53]

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Eastland, p. 396.

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Witte, p. 124.

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RFRA.

Stating clearly that RFRA pertained only to the free-exercise clause concerning religion, and not to the disestablishment clause, Congress then proposed the purposes of the act. RFRA was: "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)[54] and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[55] From 1993 to 1997, RFRA accomplished its stated goals.

In 1997, via the case of *City of Boerne v. Flores*, the Supreme Court declared RFRA unconstitutional at the state level. In the case of *Boerne*, the Archbishop of San Antonio appealed a denial by Boerne's city zoning board regarding the Archbishop's request to enlarge a church. His appeal was based on the precedents reestablished by RFRA. The details of the case are not as consequential here as the effect that

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In *Wisconsin v. Yoder*, the Supreme Court upheld the precedent it set with *Sherbert v. Verner*, by again ruling that an individual could be exempted from a neutral and generally applicable law if that law burdened his or her free exercise of religion.

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RFRA.

Boerne had on RFRA.

Critics had already charged that, through RFRA, "Congress had overstepped its authority in violation of both federalism and separation of powers principles, that it had created something of an individual religious veto of general laws in violation of the disestablishment clause, that it had inflicted on the courts endless and expensive litigation, among many other charges."[56] A divided Court found that Congress exceeded the scope of its enforcement power under Section 5 of the Fourteenth Amendment, thereby declaring RFRA unconstitutional at the state level.[57] However, on the federal level RFRA remains intact.

With *Smith* acting as the religious free exercise precedent for state courts and RFRA providing the religious free exercise precedent for federal courts, this portion of the First Amendment's religion clauses is surrounded by a new extreme of tension and complexity. Religious minorities are no more officially protected on the state level than they were in 1879. However, on the federal level, religious minorities are formally granted as much protection as they ever have

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Witte, p. 124.

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City of Boerne v. Flores, 95 U.S. 2074 (1997).

been. This unsteady balancing act between state and federal courts seems indicative of the divided sentiments expressed by today's Supreme Court Justices as they rule on cases regarding the free exercise of religion. The next chapter will grapple with the ramifications of this situation.

CHAPTER THREE: ONE NATION UNDER MANY NARRATIVES WITH LIBERTY AND JUSTICE FOR WHOM?

With Chapter One providing the groundwork for a general theory that establishes the at onceness of interplay between religious and legal worlds, and Chapter Two grounding that interplay through an historical examination of particular philosophies, theologies, and Supreme Court cases, Chapter Three now seeks to "cast down the bucket where we stand" by examining the current complexities of religion and law in the United States. Such complexities were alluded to earlier in this study with the introduction of Berman's theory that both religious and legal worlds in the United States are experiencing an "integrity crisis." According to Berman, the symptoms of this crisis began to manifest themselves in the 1920's and 1930's.[1] As these were the decades preceding both the modern era of Supreme Court, and the break-down of universalist theory, the integrity crisis that was born during this time period may provide an opportune point of theoretical scrutiny for fostering an understanding of the often messy worlds of religion and law in the United States.

1 Berman, p. 22.

Initial symptoms of an integrity crisis began to manifest in cultural expressions such as art and literature. Evidence of this can be seen through the artistic innovations of "men like Picasso and Joyce-whose work revealed that traditional conceptions of space and time and even of language itself were disintegrating, cracking up."[2] With space and time and language being subjected to relativism, especially intra-cultural relativism, the continuity of a formal standard--of a formal tradition, religious or legal--fell into question. As people lost confidence in the existence of an objective standard by which value and meaning could be generated and gauged, they also lost confidence in institutions which had previously claimed to utilize an objective dimension. Religion and law are prime examples of such institutions. Explaining this, Berman writes:

> Our disillusionment with formal religion and with formal law is thus symptomatic of a deeper loss of confidence in fundamental religious and legal values, a decline of belief in and commitment to any kind of transcendent reality that gives life meaning, and a decline of belief in and commitment to any structures and processes that provide social order and social justice.[3]

With the destabilizing loss of a transcendent signifier, it

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Berman, p. 22.

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Berman, p. 23.

became obvious that a plural cultural offers a plurality of answers to similar questions. As a consequence of this fragmentation, the avowed goal of "liberty and justice for all," became an impossible paradox (that is to say it became impossible to formally realize, or formally dismiss). Confronted with this situation, the logocentric religious and legal systems of the United States were, indeed, faced with a crisis.

Berman was hardly the only one to anticipate, or notice this crisis. By the late 1960's, an array of scholars, artists, and politicians were diagnosing an integrity crisis. For example, psychologist Robert Jay Lifton began to theorize proteanism as the predominant condition of modern humans. That is to say that modern life requires individuals to "shape-shift" so constantly that an autonomous self can no longer exist.[4] In 1976, Norman Mailer seems to have touched the heart of the matter as he wrote, "[p]art of the crisis of the Twentieth Century is that nothing like a coherent view of personality seems able to exist. We live in every concept of

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Lifton, Robert Jay. *The protean self : human resilience in an age of fragmentation.* BasicBooks, New York, 1993.

human motivation, and they are all at odds."[5] He went on to note the cognitive dissonance caused by this condition, and the need many feel to overcome this dissonance by reasserting (falsely) that a universal coherency is still possible. Or, in Mailer's words, "In chaos, sugar us up."[6]

It seems, however, that no amount of "sugar" would stave-off the effects of an integrity crisis for long. With observations such as Mailer's being offered in growing abundance, how long could Justice Jackson's 1955 assertion that "[t]he people have seemed to feel that the Supreme Court, whatever its defects, is still the most detached, dispassionate, and trustworthy custodian that our system affords for the translation of abstract into constitutional commands,"[7] retain its integrity? If the Supreme Court is charged with upholding the impossible paradox of liberty and justice for all, how does one interpret the Supreme Court and its decisions in the midst of an integrity crisis? With *de*

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Mailer, Norman. *Genius and Lust: A Journey Through the Major Writings of Henry Miller.* Grove Press Inc., New York, 1976, p. 11.

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Mailer, p. 12.

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Jackson, Robert, Supreme Court Justice. *The Supreme Court in the American System of Government.* Harvard University Press, Cambridge, 1955, p. 23.

facto Protestantism no longer providing a universal, normative canopy under which the Court might function, questions such as these multiply exponentially. This phenomena furthers an integrity crisis, because it reveals the innate incoherence within systems that have derived their legitimating authority through reference to traditions which were previously understood to cohere. Understanding the importance of a coherence regarding authority and tradition, Berman believed that religion and law functioned most efficiently and effectively when each was perceived to be governed by a similar cosmic order. This is why he longed to maintain what he identified as the universal dimension of religion and law in the United States. "And, as always, coherence in contradiction expresses the force of a desire."[8]

What becomes interesting for the current examination of religion and law in the United States are the terms in which Berman postulates his desire to preserve a universal, normalizing order. As he decries the loss of a universal dimension encompassing religion and law, he inadvertently elucidates major premises of postmodern and post-structural

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Derrida, Jacques. "Structure, Sign, and Play in the Discourse of the Human Sciences," in *Twentieth Century Literary Theory*. Ed. K. M. Newton. St. Martin's Press, New York, 1988, p. 150.

theory as necessary consequences that must be associated with this loss. The fragmentation of time, space, and language; the concern that symbols will refer to nothing outside of themselves; and the dilemmas associated with reconciling competing narratives are all seen by Berman as tragedies of an ongoing integrity crisis. In terms of quality, whether these occurrences are tragic or otherwise is not the concern of this study. What is of central import is that the disintegration of what Berman identified as the universal dimension of religion and law, leads to elemental tenets of postmodern and post-structural critique. This paradigm shift in the understanding of religion and law may, then, provide a transitional gateway through which disparities and incongruencies such as those revealed by the previous case studies may be theorized.

The United States Constitution may provide an appropriate focus for the next phase of theoretical inquiry. Whatever else the Constitution is, it is a text that came into being at a particular point in history. As text, the Constitution centers and structures the national enterprise of the United States. This has been so for over two-hundred years. Although not speaking of the Constitution directly, Jacques Derrida's words illumine this role. He writes:

> The function of this center was not only to orient, balance, and organize the structure–one cannot in fact conceive of an unorganized structure–but above all to make sure that the organizing principles of the structure would limit what we might call the *freeplay* of the structure.[9]

Obviously, the Constitution is, indeed, intended to limit "freeplay" within the nation, as it sets the acceptable boundaries within which this freeplay may occur. Of the centering structure Derrida goes on to write:

> The concept of centered structure is in fact the concept of freeplay based on a fundamental ground, a freeplay which is constituted upon fundamental immobility and a reassuring certitude, which is itself beyond the reach of freeplay. With this certitude anxiety can be mastered, for anxiety is invariably the result of a certain mode of being implicated in the game, of being caught by the game, of being as it were from the very beginning at stake in the game....[10]

Apparently, until some time around the modern age of the Supreme Court, the Constitution as a centered structure was able to provide the certitude necessary for keeping anxiety at bay--of course, this was predominantly true only for members of the Protestant majority who understood their "universal" ethic to be beyond the reach of freeplay.

With certitude intact, the Preamble's declaration that

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Derrida, p. 150.

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Derrida, p. 150.

"We hold these truths to be self-evident...."[11] was able to maintain a requisite amount of integrity. However, as Derrida notes that, "[t]he concept of a centered structure...is contradictorily coherent."[12] As has been shown, with the onslaught of Berman's projected integrity crisis, the contradictorily coherent nature of *the* center collapses. Of this moment of collapse Derrida writes:

> This moment was that in which language invaded the universal problematic; that in which, in the absence of a center or origin, everything became discourse–provided we can agree on this word–that is to say, when everything became a system where the central signified, the original or transcendental signified, is never absolutely present outside a system of differences. The absence of the transcendental signified extends the domain and the interplay of signification *ad infinitum*.[13]

Definite repercussions are involved with supplanting the centering mechanism of a transcendent signifier with the de-centering interplay of infinite signification. Among them is the discrediting of the previous certitude which surrounded the statement that "We hold these truths to be self-evident." Realizing this fragmentation, Eric Michael Mazur writes:

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11 *The United States Constitution, Preamble.*

12 Derrida, p. 150.

13 Derrida, p. 151.

> Who is the 'we' of the statement, and which 'truths' are held to be self-evident? It has become increasingly apparent that whatever truths are held by whichever group, they are not held by all, they may be truths to one community and not another, and they are certainly *not* self-evident.[14]

As Mazur indicates, it seems that the Constitution, from its very opening lines, has ceased to cohere. Deconstructive analysis thus reveals the logocentrism of the Constitution as text. Meaning can no longer be construed as maintaining an existence independent from the language in which it is communicated. As it was drafted, the Constitution relied on a transcendent signified in order to infuse it with fixed meaning. In the absence of a transcendent signified, the fixity of this meaning diffuses.

Now it seems we have once again arrived at the integrity crisis mentioned in Chapter One and at the beginning of this Chapter. However, we have now theorized it in a post-structural context by suggesting a rudimentary deconstruction of the Constitution. Establishing this theoretical context constitutes an important step in accessing current theories of religious and legal worlds. The reason for this is that through a post-structural lens, the Constitution as text is

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14 Mazur, Eric Michael. *The Americanization of Religious Minorities: Confronting the Constituional Order*. The Johns Hopkins University Press, Baltimore, 1999, p. 122.

removed from the synchronic dimension in which Berman sought to keep it, and re-positioned in a diachronic dimension where complexity and plurality do not have to be studied merely as crisis. That is to say, by moving the text of the Constitution from a static temporal plain (where the meaning of language must be understood to remain fixed), to a dynamic temporal plain (where meaning is constantly shaped and reshaped through the ongoing interplay of language) we can now begin to analyze various interpretations of the Constitution in a disciplined fashion.

Constructing, as it were, upon the conclusions of Derridaen deconstruction, I suggest that the critical theory of Stanley Fish is particularly useful for understanding the Constitution as text, and the Supreme Court as its primary interpreters. Before beginning a direct application of Fish's theory, a general outline of its primary components as they are to be accorded within this study will be offered.

A proponent of reader-response theory, Fish focuses primarily on the reader as opposed to the text. In fact, for Fish, texts are created by their readers. As he or she encounters the text the reader employs interpretive strategies which do not reveal, but create, the meanings of the text, thus creating the text itself. Explaining this phenomenon,

Fish writes, "[i]nterpretation is not the art of construing but the art of constructing. Interpreters do not decode [texts]; they make them."[15] Every time a reader encounters a text, he or she rewrites that text by bringing to bear interpretive strategies to which they are necessarily predisposed. Thus, the text maintains no autonomous meaning outside of its readers, or more specifically, outside of the interpretive strategies employed by its reader. Regarding this phenomenon, Fish writes:

> I am suggesting that formal units are always a function of the interpretive model one brings to bear; they are not 'in' the text and I would make the same argument for intentions. That is, intention is no more embodied 'in' the text than are formal units; rather an intention, like a formal unit, is made when perceptual or interpretive closure is hazarded; it is verified by an interpretive act, and I would add, it is not verifiable any other way.[16]

According to Fish, texts are always vanishing. Every time a text is read it vanishes and is rewritten through whichever interpretive strategy the reader employs. Employing an interpretive strategy necessitates the vanishing of the

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Fish, Stanley. "Is There a Text in This Class?" in *Falling Into Theory: Conflicting Views of Reading Literature*. Ed. David H. Richter. Bedford Books, Boston, 1994, p. 238.

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Fish, Stanley. "Interpreting the *Variorum*," in *Twentieth Century Literary Theory*. Ed. K. M. Newton. St. Martin's Press, New York, 1988, p. 235.

text. In fact, in a diachronic frame, a text must vanish in order to realize an occasion for the employment of an interpretive strategy. And, without the occasion for an interpretive strategy, the possibility of meaning is absent.

In order to be assured that the possibility of meaning is not absent when interpreting the Constitution, one need only glance at the previous case studies. In fact, the plethora of meanings generated through Constitutional interpretation lends credence to the post-structural notion that texts exist within a diachronic frame and the reader-response notion that readers create meaning as they interpret texts. While some continue to employ literal interpretations of the Constitution in order to extract the meaning they believe to be imbedded within the text, it seems revealing to note that this interpretive strategy continues to yield an array of disparate meanings. Fish's theory allows for, indeed, guarantees an accommodation of disparate meanings. This seems integral when attempting to understand the complexity of religion and law. Therefore, this study turns to the Constitution as vanishing text.

If the Constitution vanishes, it must vanish from somewhere. As has already been implicitly revealed, situating the Constitution diachronically de-centers the text, thus allowing it to disappear from any location at any time.

However, in order to disappear, it must do so from a particular location at a particular time. This is so because the agent responsible for the disappearance of a text is the reader. Readers must read texts at certain places at certain times. In other words, the reader is always located somewhere. In terms of Supreme Court Justices, these certain places and certain times are well-documented.

As readers, Supreme Court Justices are responsible for making the Constitution as text disappear--they are responsible for interpreting it. However, if every reader rewrites every text every time he or she reads it, how does the Supreme Court ever reach a decision regarding Constitutional meaning? Might nine different readers interpret a text in nine different ways? If Derridaen theory is correct in understanding the interplay of signification to be extended ad infinitum, how do a majority of Justices arrive at a consensus opinion?

The answer to all of the questions posited above lies in understanding the Supreme Court as an *interpretive community*. Fish explains:

> Interpretive communities are made up of those who share interpretive strategies not for reading (in the conventional sense) but for writing texts, for constituting their properties and assigning their intentions. In other words these strategies exist

> prior to the act of reading and therefore determine the shape of what is read rather than, as is usually assumed, the other way around.[17]

In Chapter One, it was demonstrated how some people may inhabit the same religious and legal worlds as others. Similarly, they may also inhabit the same interpretive communities.

As members of the interpretive community that is the Supreme Court, each Justice brings his or her own interpretive strategies to bear on the Constitution. Justices may interpret the Constitution in similar fashions precisely because they belong to the same interpretive community. They are located, if you will, in that community. The range of meanings that are generated as Justices interpret the Constitution is never without boundaries. Due to interpretive communities, the potential for infinite meanings is always already impossible. This is so because "interpretive strategies are not natural or universal, but *learned*."[18] Interpretive strategies are a dynamic products of cultures. As such, they only accommodate meanings that "make sense" within the culture from which they are employed, and they must

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Fish, "Interpreting the *Varorium*." p. 238.

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Fish, "Interpreting the *Varorium*." p. 239.

always be employed from somewhere. Thomas A. Tweed calls this method of understanding interpretive strategies, "the locative approach." Of this approach, he writes:

> ....all interpreters are situated and all interpretations emerge from within categorical schemes and social contexts. It only makes sense to talk about reality-for-us, and questions about what's real or true make sense only *within* a socially constructed cluster of categories and an always-contested set of criteria for assessment."[19]

As Tweed's statement indicates, the Constitutional interpretations of Supreme Court Justices necessarily occur from a common context--a common location. The intelligibility of such interpretations depends on the "common ground" provided by interpretive communities (in the case the Supreme Court).

However, as the cases in Chapter Two illustrate, Justices often disagree with one another. Regardless of their inhabiting the same interpretive community, the interpretive strategies they employ may yield disparate meanings. Once again the reason for this is to be found within interpretive communities. Just as people simultaneously inhabit a variety of worlds, so too do they occupy a variety of interpretive

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Tweed, Thomas A. "On Moving Across: Diaspora, Religion, and the Interpreter's Position." Presented as The Third Annual Robert C. Lester Lecture on the Study of Religion. University of Colorado Boulder Press, Boulder, 2001, p. 10.

communities. While every Justice is certainly situated in the interpretive community of the Supreme Court, every Justice may also (and at once) exist as a member of other interpretive communities. Since interpretive strategies are learned instead of universal, and since an array of interpretive communities may exist within a larger community or culture, individuals may acquire a number of various interpretive strategies. This....

> explains why there are disagreements and why they can be explained in a principled way; not because of a stability in texts, but because of a stability in the makeup of interpretive communities and therefore in the opposing positions they make possible.[20]

The Constitution as text, then, is not itself the agent of stability and structure for the United States legal system. Instead, the Supreme Court as interpretive community is the agent. The Court, however, is not an isolated community, but one which is influenced by and influences other communities through the interpretive strategies its Justices employ.

As former members of the Supreme Court retire and new members are appointed the available store of learned interpretive strategies changes. These changes partially account for the seemingly erratic shifts in precedents

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Fish, "Interpreting the *Varorium*." p. 239.

employed by the Supreme Court when adjudicating matters concerning the free exercise of religion. The stability provided by the Supreme Court as interpretive community is integral for the maintenance of the United States legal tradition. However,

> This stability is always temporary (unlike the longed for and timeless stability of the text). Interpretive communities grow larger and decline, and individuals move from one to another; thus while the alignments are not permanent, they are always there, providing just enough stability for the interpretive battles to go on, and just enough shift and slippage to assure that they will never be settled.[21]

As the protection now afforded religious free exercise teeters between state and federal authority, it seems obvious that the textual interpretations of the First Amendment are no closer to being settled than they ever were. However, with an increased focus on their religious dimensions, these interpretations may be more thoroughly understood than ever before.

Through this study, I am suggesting that scholars of religion may expand the range of their own discipline while introducing valuable new insights into the realm of United State legal studies. By theorizing Supreme Court Justices'

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21 Fish, "Interpreting the *Varorium.*" p. 239.

opinions as a set of complex narratives, religious studies scholars may begin to explore the complex play of religious dimensions that permeate this country's legal system. Admittedly, this is no small task, nor can it reach a set of ultimate conclusions. As the interpretive strategies of Justices change, so must the lenses used to study them.

As Supreme Court Justices employ interpretive strategies for reading the Constitution, they also enact such strategies upon former opinions of the Court. Therefore, the narratives (which are recorded as a products of textual interpretations) are themselves in the constant process of being rewritten. The United States legal system, like religions since the inception of linear time, is constantly unfolding. As vanishing texts, the opinions (narratives) recorded by Justices never exist in stasis. However, these narratives offer the scholar of religion an excellent opportunity to scrutinize texts in context. Since religion does not operate independently from a variety of other cultural forces, the opportunity to focus on a context as continually well documented as the Supreme Court seems quite fortuitous.

The narratives of Justices are, however, only an excellent point of beginning for understanding the interplay of religion and law in the United States. As the Supreme

Court utters its narratives of decision, they in turn spawn other narratives that are not so easily tracked, and not so well documented. Of this occurrence Fish notes, "what utterers do is give hearers and readers the opportunity to make meanings (and texts) by inviting them to put into execution a set of strategies."[22] Thus, hearers and readers make meanings based on Supreme Court decisions, and Supreme Court decisions are, in turn, affected by those meanings. As the case studies indicate, religious and legal worlds are in constant negotiations with one another. At stake in these negotiations are the very boundaries of worlds themselves. Through a complex interplay between narratives and their habitual interpretations, religion and law--separate and synthesized--exist in the United States. Given this phenomenon, the scholar of religious studies has much work to do.

22 Fish, "Interpreting the *Variorum*." p. 240.

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APPENDICES

APPENDIX I - GUIDELINES FOR THE RATIONAL BASIS TEST, THE COMPELLING STATE INTEREST TEST, AND THE INTERMEDIATE INTEREST TEST[1]

1. Under low level scrutiny, the Court will uphold the challenged law so long as:

A. it is in pursuit of a *legitimate* governmental interest; and

B. it is *reasonably related* to that interest.

This test, often called the *rational basis test,* involves high judicial deference to the legislature. It provides a loose safety net to protect parties against governmental caprice and abuse by allowing a Court to strike down patently discriminatory laws.

2. Under high-level scrutiny, a Court will uphold the challenged law only if:

A: it is in pursuit of a *compelling* or overriding *governmental interest;* and

B: it is *narrowly tailored* to achieve that interest, not intruding on the claimant's rights any more than is absolutely necessary.

This test, often called the *compelling state interest test,* involves close judicial inquiry into the purposes and provisions of the law. It empowers a Court to strike down the law altogether or to tailor it in a manner that will cause less harm to the claimant.

3. Between these forms of review, the Court had developed a category of "heightened" scrutiny. Under this standard, the Court will uphold the challenged law if:

A. it is in pursuit of an *important* or significant *governmental interest;* and

B. it is *substantially related* to that interest.

This test, often called the *intermediate scrutiny test,* is neither as deferential to the legislature as the rational basis test nor as penetrating in its scrutiny as the compelling state interest test.

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These guidelines are reprinted from Witte, p. 119-120.

APPENDIX II - R.F.R.A.[1]

Religious Freedom Restoration Act of 1993
Enrolled Bill (Sent to the President)

H.R. 1308

One Hundred Third Congress of the United States of America AT THE FIRST SESSION Begun and held at the City of Washington on Tuesday, the fifth day of January, one thousand nine hundred and ninety-three An Act

TITLE: To protect the free exercise of religion.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Religious Freedom Restoration Act of 1993'.

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) Findings: The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
(2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
(3) governments should not substantially burden religious exercise without compelling justification;
(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing

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The full text of R.F.R.A. is reprinted here from http://www.welcomehome.org/rainbow/nfs-regs/rfra-act.html.

prior governmental interests.

(b) Purposes: The purposes of this Act are--

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) In General: Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial Relief: A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

(a) Judicial Proceedings: Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting 'the Religious Freedom Restoration Act of 1993,' before 'or title VI of the Civil Rights Act of 1964'.

(b) Administrative Proceedings: Section 504(b)(1)(C) of title 5, United States Code, is amended--

(1) by striking 'and' at the end of clause (ii);
(2) by striking the semicolon at the end of clause (iii) and inserting ', and'; and
(3) by inserting '(iv) the Religious Freedom Restoration Act of 1993;' after clause (iii).

SEC. 5. DEFINITIONS.

As used in this Act --

(1) the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;
(2) the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;
(3) the term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term 'exercise of religion' means the exercise of religion under the First Amendment to the Constitution.

SEC. 6. APPLICABILITY.

(a) In General.--This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) Rule of Construction.--Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) Religious Belief Unaffected.--Nothing in this Act shall be construed to authorize any government to burden any religious belief.

SEC. 7. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion

(referred to in this section as the 'Establishment Clause'). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act . As used in this section, the term 'granting', used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Speaker of the House of Representatives. Vice President of the United States and President of the Senate.

VITA

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